STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 174, Complainant,	)	CASE 14452-U-99-3580
vs.	)	DECISION 7221-A - PECB
KING COUNTY, Respondent.	)	DECISION OF COMMISSION

Schwerin Campbell Barnard, by *Dmitri Iglitzin*, Attorney at Law, for the union.

Kimberley M. Lew, Labor Relations Analyst, for the employer.

This case comes before the Commission on an appeal by Teamsters Local 174, (union) seeking to overturn the order of dismissal issued by Examiner Kenneth J. Latsch.[1] The Commission affirms.

BACKGROUND

On March 15, 1999, the union filed a complaint charging unfair labor practices under Chapter 391-45 WAC alleging that King County (employer) interfered with employee rights and refused to bargain. The complaint form listed Ricardo Cruz, who was then the director of the King County Office of Human Resources Management (OHRM), as the employer's representative. The Commission issued

[1] *King County*, Decision 7221 (PECB, 2000).

a notice of case filing on March 18, 1999, listing Cruz as the employer's representative. That notice was mailed to all of the parties and representatives then listed on the docket record for the case.[2]

The union filed a letter addressed to Executive Director Marvin L. Schurke on March 18, 1999, together with a copy of a National Labor Relations Board decision that it claimed was pertinent to this case. On its face, that letter indicated that copies were sent to union officials Bob Hasegawa and Joel Ogden, but there was no indication that a copy was served upon any employer official.

On June 16, 1999, the Commission staff issued a record of appearance form listing both Cruz and Labor Relations Analyst Kimberley M. Lew, as the employer's representatives.

On July 2, 1999, the Executive Director issued a deficiency notice addressed to Cruz and the union's attorney.[3] That letter indicated several reasons why the original complaint did not state a cause of action. The union was given a period of time to file an amended complaint or face dismissal of the case.

On July 14, 1999, the union filed a cover letter addressed to the Executive Director and an amended complaint listing Cruz as contact person for the employer. On its face, the cover letter indicated copies were provided to Hasegawa and Ogden, but did not indicate the employer was provided with a copy.

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[2] The Commission's computerized case docketing system routinely prints mailing labels, on demand, for all listed parties and representatives.

[3] The Examiner's decision more fully explains the substantive issues contained in the case; we have omitted them here because the appeal deals with different issues.

On January 13, 2000, the Executive Director issued a second deficiency notice, stating that the amended complaint did not state a cause of action as to several allegations. As before, the letter was addressed to Cruz and the union's attorney.

On January 18, 2000, the union filed a cover letter addressed to the Executive Director and a second amended complaint listing Cruz as the contact person for the employer. Again, the cover letter only indicated that copies were provided to Hasegawa and Ogden.

After the filing of the second amended complaint, a preliminary ruling was issued by the Executive Director on January 25, 2000, finding a cause of action to exist. That letter was addressed to Cruz and the union's attorney.

On March 17, 2000, Examiner Latsch sent a letter to Cruz and the union's attorney, setting a date for a telephone conference with the parties to make hearing arrangements.

On March 23, 2000, the Commission staff issued a record of appearances listing Kerry H. Delaney as an employer representative, replacing Cruz.

Examiner Latsch conducted a telephone conference on March 29, 2000. At that time, the employer asserted that the union had not served it with the two amended complaints, and the union argued that it had served those documents. The parties agreed to address the service of process issue before addressing the substantive claims.

On April 5, 2000, the employer filed a motion for dismissal, supported by declarations of both Kimberley Lew and Director Robert S. Derrick of King County OHRM.

- In her declaration, Lew stated that she received a notice of case filing from the Commission on or about April 15, 1999, and received a record of appearances from the Commission on or about June 16, 1999, both listing her as a representative of the employer.[4] Lew asserted that the deficiency notice issued on July 2, 1999, was the last document the employer received concerning this case for many months. Lew claimed that, on March 23, 2000, she was forwarded a letter dated March 17, 2000, in which Examiner Latsch scheduled the telephone conference for March 29, 2000. Lew declared that she had not been served by the union with any documents for this case since the original complaint was filed.

- In his declaration, Derrick stated that he was the Interim OHRM Director from July 1999 until November 1999 when his appointment became permanent. He asserted that he has no recollection of receiving from the union, by any means, an amended complaint in July 1999 or a second amended complaint in January 2000. He also asserted there exists no documentation of any kind that would indicate the employer was served by the union with a copy of its amended complaint, second amended complaint, or any similar documents while he was Interim Director or Director of OHRM.

On April 28, 2000, the union's attorneys filed a reply to the employer's motion for dismissal.

In an order of dismissal issued on November 13, 2000, the Examiner ruled that the union failed to provide proof of service. The

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[4] Accompanying Lew's declaration, the employer provided a copy of a document issued from the Commission's computerized case docketing system on April 15, 1999, in which Lew was listed as an employer representative.

Examiner found the employer was entitled to timely service of the amended complaint and second amended complaint, and that it had filed a timely motion for dismissal questioning the sufficiency of service of those documents.

The union appealed the order of dismissal to the Commission on November 28, 2000. In support of its appeal, the union filed a declaration of Leas J. Corpuz, a legal secretary at the law firm which represents the union. In her declaration, dated April 27, 2000, Corpuz stated that she often files unfair labor practice charges and amendments with the Commission, and that her "invariable practice is to mail to the employer in every instance a copy of anything filed" with the Commission. She added that she *does not prepare a contemporaneous certificate of service for employer copies*, unless requested to do so by an attorney. Corpuz declared that she filed the amended complaint and second amended complaint in this case with the Commission, and, as per her practice, she also sent copies of those documents to the employer, in this case Cruz. Corpuz stated that the union's attorney "asked me to send a courtesy copy of the cover letter to our client. I do not 'cc' the Employer on cover letters since I regularly mail copies of the [Commission] filings to the Employer. The cover letter reflects the cover letter was also sent to our client." Finally, Corpuz stated that she sent the employer copies of the amended complaint and second amended complaint via United States first-class mail on the same day that those documents were sent to the Commission.

POSITIONS OF THE PARTIES

On appeal, the union argues that it served all three complaints via first-class United States mail addressed to Cruz. It argues that the employer has presented no evidence indicating that Cruz

did not receive a copy of any of those complaints. The union asserts that service on Cruz satisfied the jurisdictional requirement that the employer be served. The union assigned error to the Examiner's assertion that the amended complaint and second amended complaint were not properly served on the employer; the union states that the apparent basis for the Examiner's conclusion was simply that the union failed to provide proof of service in any of the manners set forth in WAC 391-08-120(4). The union contends there is no jurisdictional question here because the act of service, rather than proof of service, is jurisdictional. The union maintains that WAC 391-08-120(5) does not specify the only methods through which proof of service can be established and that the key question before the Commission is whether WAC 391-08-120(5) excludes all other methods of proving service or whether alternative methods may be acceptable, if they are sufficient to persuade the Examiner, as a factual matter, that service was made. It argues that the uncontested declaration of Leas Corpuz provides proof that the two amended complaints were served on the employer. The union argues that, while the Commission has held that while actual service is a jurisdictional requirement, prior Commission decisions have held that the method by which actual service is proven is not. It contends the requirements of WAC 391-08-120(4) may be substantially complied with, such as through a declaration.

Although it did not respond to the appeal, the employer had earlier moved for dismissal of this case. It had asserted that the union's amended complaint and second amended complaint were never served on the employer and that this failure to serve was a fatal jurisdictional defect that precluded further proceedings. The employer also noted that the back side of the complaint form requires service on other parties and that this instruction put the union on notice that contemporaneous service of process on all parties is required. The employer acknowledged that Cruz received a copy of

the original complaint on or about March 17, 1999, and that Lew's department received a copy of the original complaint on March 22, 1999. The employer claimed that Lew has clearly been listed on the Commission's docket records for the case since April 15, 1999. The employer professed that the deficiency notice issued on July 2, 1999, was the last document it received concerning this case for many months. The employer asserted that no employer representative had ever seen the union's amended complaint and second amended complaint until copies were obtained from the Commission on March 24, 2000, at the request of Lew.

DISCUSSION

Applicable Standards

This unfair labor practice case arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, but it is also an adjudicative proceeding regulated by the Administrative Procedure Act, Chapter 34.05 RCW. Thus, the Model Rules of Procedure promulgated by the Chief Administrative Law Judge in Chapter 10-08 WAC and the Rules of Procedure promulgated by the Commission in Chapter 391-08 WAC are applicable to this case, as well as Chapter 391-45 WAC. The parties to an unfair labor practice case are each responsible for the presentation of their side of the controversy and the Commission is not responsible for either transmitting documents or building a record for either party.

Contemporaneous Service Requirement -

WAC 391-45-030 requires complainants to serve any complaint charging unfair labor practices, stating in part: "The party filing the complaint shall serve a copy on each party named as a respondent, as required by WAC 391-08-120(3) and (4)."

The Commission has adopted a rule that specifically governs service of process. WAC 391-08-120 provided,[5] in relevant part:

> WAC 391-08-120 FILING AND SERVICE OF PAPERS.
>
> FILING OF PAPERS FOR ADJUDICATIVE PROCEEDINGS
>
> (1) Filing of papers with the agency for adjudicative proceedings under the Administrative Procedure Act (cases under Chapters 391-25, 391-35, 391-45 and 391-95 WAC) shall be deemed complete only upon actual receipt of the original paper and any required copies during office hours at the agency office designated in this rule . . . .
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> . . .
>
> SERVICE ON OTHER PARTIES
>
> (3) A party which *files or submits any papers* to the agency *shall serve a copy of the papers upon all counsel and representatives of record*, and upon all parties not represented by counsel or upon their agents designated by them or by law. *Service shall be completed no later than the day of filing or submission* under subsection (1) or (2) of this section, by one of the following methods:
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> (a) Service may be made personally . . . .
>
> (b) *Service may be made by first class, registered, or certified mail, and shall be regarded as completed upon deposit in the United States mail properly stamped and addressed.*
>
> (c) Service may be made by telegraph or by commercial parcel delivery company . . . .
>
> (d) Service may be made by electronic telefacsimile transmission . . . .
>
> PROOF OF SERVICE
>
> (4) *On the same day that service of any papers is completed* under subsection (3) of

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[5] The rule is set forth here as it existed at the time relevant to this case. It has since been amended, but the changes have no effect on this case.

> this section, *the person who completed the service shall*: . . . .
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> . . .
>
> (c) *Make a certificate* stating that the person signing the certificate completed service of the papers by:
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> (i) *Mailing a copy under subsection (3)(b)* of this section; or
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> (ii) Depositing a copy under subsection (3)(c) of this section with a telegraph or parcel delivery company named in the certificate; or
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> (iii) Transmitting and mailing a copy under subsection (3)(d) of this section.
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> (5) *Where the sufficiency of service is contested*, an acknowledgment of service obtained under subsection (4)(a) of this section or *a certificate of service made under subsection (4)(b)* or (c) of this section *shall constitute proof of service*.

(emphasis added).

The Examiner correctly noted that the Commission rewrote WAC 391-08-120(5) in 1996 and 1998, to make the pre-existing requirement for a *contemporaneous* record of service more visible to agency clientele. We retained that requirement in 2000.

Proof of service can be required in cases coming before the Commission, and it is important for the parties to preserve a contemporaneous documentation of service. *Spokane School District*, Decision 5151-A (PECB, 1995). Although contemporaneous proof of service need not be provided unless the sufficiency of service is contested, parties take a risk if they do not follow the procedure set forth in WAC 391-08-120(5). *Spokane School District, supra*. Where a party raises a claim of defective service, the burden is on the party that filed the document to prove that it served the other party or parties. *King County*, Decision 6329 (PECB, 1998); *Thurston County*, Decision 5633 (PECB, 1996).

The requirement for service of process is well-defined, and subsequent awareness of a filing does not satisfy the procedural requirement. *See King County*, Decision 6329, *supra*; *Tacoma School District*, Decision 5337-B (PECB, 1995); *Spokane School District, supra.* Unfair labor practice complaints have been routinely dismissed upon a showing of inadequate service of process. *Seattle School District, supra* (citing *King County Fire District 16*, Decision 4116-A (PECB, 1993); *Morton General Hospital*, Decision 3836 (PECB, 1991); *City of Pasco*, Decision 2450 (PECB, 1986)).

Communication Between Parties -

Healthy labor relations depend upon communications between the parties. In *Mason County*, Decision 3108-B (PECB, 1991), the Commission stated that the collective bargaining statutes administered by the Commission embody a legislative policy requiring employers and unions to communicate with one another. *See also* RCW 41.56.030(4); RCW 41.56.100; RCW 41.58.040. In *City of Puyallup*, Decision 5460-A (PECB, 1996), the Commission wrote:

> Because of this process of communication embodied in the collective bargaining statutes, *the Commission interprets the rules to require service contemporaneous to filing.*
>
> . . .
>
> To further the statutory policies of communication between the parties, we expect the parties to be vigilant in closely monitoring their own compliance with the rules. If there is a failure of a party to do so, we have an obligation to apply the rule in fairness to the other party.

(emphasis added).

It would be patently unfair for a party to supply information to the Commission and not give the other party the same information.

Thus, the Commission's rules on service of process effectuate the purposes of the collective bargaining statutes. In *Mason County, supra*, and in countless others, appeals have been dismissed when employers or unions failed to serve papers as required by the rules.

Courts interpret agency rules so as to give effect to every word and phrase and so that no part is rendered meaningless or superfluous. *City of Spokane ex rel. Wastewater Management Dept. v. Washington State Dept. of Revenue*, 104 Wn. App. 253 (2001). Additionally, there is a legal presumption that expression of one thing means the exclusion of another. *See Washington State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245 (2000); *Seattle v. Parker*, 2 Wn. App. 331 (1970).

Application of Standards

The issue before the Commission is whether this case should be dismissed for insufficient service of process, where the employer insists that it was not served with the amended complaint or second amended complaint and the union's response to the demand for proof of service was a declaration made long after service was due. We affirm the dismissal, because the union failed to provide proof of service conforming to the requirements of WAC 391-08-120(5).

Contemporaneous Proof of Service Required -
In its motion for dismissal, the employer contested the sufficiency of service of the amended complaint and second amended complaint. That was sufficient to invoke WAC 391-08-120(5).

When the sufficiency of service was contested, WAC 391-08-120(5) required the union to prove that it served the documents on the

employer. In this case, no certificates of service were included with the documents filed with the Commission, nor were any acknowledgments of service ever provided to the Commission. *See Spokane School District, supra*. The union claims, however, that it served the documents on Cruz, who was an employer representative,[6] on the same days the documents were sent to the Commission through United States first-class mail.

Because Corpuz claimed to have sent the employer copies of the amended complaint and second amended complaint via United States first-class mail, the likely form of proof of service would have been a certificate of service made on the same day that service was completed. Corpuz admitted in her declaration, however, that she did not prepare contemporaneous certificates of service for the copies of the amended complaint and second amended complaint she claims to have sent to the employer. Thus, the union did not meet its burden because it did not provide proof of service in conformity with WAC 391-08-120(5)(c)(i).

We are asked to credit a declaration signed in April 2000, regarding events alleged to have taken place in July 1999 and January 2000. It is often impossible to reconstruct occurrences with any degree of certainty when the effort is made long after the actual events. In a similar situation, the Commission wrote in *Spokane School District, supra*: "It is too easy for a party to

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[6] We need not consider, and do not base our decision on, the "who within the employer" issue raised in this case. The employer asserted the amended complaints should have been served on Lew, its representative of record as indicated on notices issued by the Commission staff. The union responded that its service of Cruz was sufficient, and appears to concede that it did not serve Lew. We merely note that, under WAC 391-08-120(3), any papers submitted to the agency must be served on *all counsel and representatives of record*.

resort to contrivance in order to gain favor for their position. The requirement to document contemporaneous service prevents the problems that arise when people attempt to rely on memory alone." Thus, the rules are written for important legal reasons.

The union mistakenly argues that WAC 391-08-120(5) does not specify the only methods through which proof of service can be established. WAC 391-08-120(5) clearly and plainly lists the specific methods by which a party may prove service through WAC 391-08-120(4), all of which require an acknowledgment or contemporaneous documentation. In order to give effect to every word and phrase in our rule, and applying the legal presumption that expression of certain methods means other methods are excluded, the declaration made in 2000 does not constitute proof of service made in 1999.

The union's contention that the act of service is jurisdictional, rather than proof of service, is unsound: If contested, the act of service must be proven under the Commission's rules by providing an acknowledgment or contemporaneous certificate of service. There is a jurisdictional question in this case because the union did not provide the required proof of service; the Commission does not have jurisdiction absent such proof.

Conclusion -

Where the sufficiency of service of any papers is contested, WAC 391-08-120(5) unambiguously requires that an acknowledgment of service or a contemporaneously-made certificate of service be provided as proof of service. The union has not provided the proof of service required by the rules, and the amended complaint and second amended complaint must be rejected on that basis. Because the original complaint was insufficient to state a cause of action and because the finding of a cause of action was based on the

second amended complaint alone, the case must be dismissed under Commission precedent. *See King County*, Decision 6329, *supra*.

NOW, THEREFORE, it is

ORDERED

The order of dismissal issued by Examiner Kenneth J. Latsch in the above-captioned matter is AFFIRMED and adopted by the Commission.

Issued at Olympia, Washington, on the 11th day of July, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner