

April 17, 1996, showed the union was entitled to certification as exclusive bargaining representative.

The employer filed its objections to the tally and direction of cross-check with the Commission on April 24, 1996. The employer did not serve the union with copies of its objections until April 29, 1996.

On May 14, 1996, the union moved for dismissal of the employer's objections, on the basis of lack of timely service on the union. The employer's attorney responded to the motion for dismissal on May 15, 1996, acknowledging that it inadvertently failed to serve the objections until April 29, 1996, at which time the firm's messenger personally served the documents.

POSITIONS OF THE PARTIES

The union argues that service of the employer's objections five days after the deadline for filing and serving objections is not timely, and therefore the objections should be dismissed.

The employer argues that it immediately served the union upon discovering that service had inadvertently not been made. It contends that the delay was short and did not prejudice the union. It asks the Commission to exercise its discretion and waive its rules to allow the late service.

DISCUSSION

Service of Objections

The filing and service of objections is regulated by WAC 391-25-590, which states, in part:

WAC 391-25-590 Filing and service of objections. **Objections must be filed within seven days** after the tally has been served under WAC 391-25-410 or under WAC 391-25-550.

...

(4) The original and three copies of the objections shall be filed with the commission at its Olympia office, and **the party filing the objections shall serve a copy on each of the other parties** to the proceedings. Objections must be timely filed, whether or not challenged ballots are sufficient in number to affect the results of the election.

[Emphasis by **bold** supplied.]

WAC 391-08-120(3) describes the alternative methods for effecting "service", stating, in part:

(3) **All notices, pleadings, and other papers filed with the agency or the presiding officer shall be served upon all counsel and representatives of record** and upon parties not represented by counsel or upon their agents designated by them or by law. Service shall be by one of the following methods:

(a) Service **may be made personally**, in the manner provided in RCW 4.28.080;

(b) **Service by first class, registered, or certified mail shall be regarded as completed upon deposit in the United States mail properly stamped and addressed.**

[Emphasis by **bold** supplied.]

These rules, codified on April 21, 1996, changed wording from previous rules slightly, but did not change the longstanding meaning as to requirements for serving objections. WAC 391-08-120 is based on the Administrative Procedure Act, Chapter 34.05 RCW, which distinguishes between "filing" and "service":

RCW 34.05.010. DEFINITIONS.

...

(6) **"Filing"** of a document that is required to be filed with an agency means **delivery of the document to a place designated**

by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

... (18) "**Service**," except as otherwise provided in this chapter, means **posting in the United States mail**, properly addressed, postage prepaid, or **personal service**. **Service by mail is complete upon deposit in the United States mail**. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

[Emphasis by **bold** supplied.]

While the rules distinguish "filing" from "service" and give a party more leeway in effecting "service", the rules have been interpreted and applied to require that service be effected in a timely manner. Forks Community Hospital, Decision 4187-A (PECB, 1993). The employer argues filing and service do not need to be accomplished on the same day under Forks. On the contrary, we read that case to indicate only that the materials need not be **in the hands of the other party** on the day it is due to be filed with the Commission. "Service" refers to the date of mailing, and not to the date of receipt.

Healthy employer-union relations depend upon communication between the parties. In Mason County, Decision 3108-B (PECB, 1991), the Commission said:

The collective bargaining statutes administered by the Commission embody a legislative policy requiring employers and unions to communicate to one another. RCW 41.56.030(4); RCW 41.56.100; RCW 41.58.040. The same statutes also establish administrative procedures for bringing an orderly resolution to disputes. RCW 41.56.050 through .080; 41.56.160 through .190; 41.58.020. In this case and in countless others, appeals have been dismissed when employers or unions fail to process their disputes in accordance with those statutes.

Because of this process of communication embodied in the collective bargaining statutes, the Commission interprets the rules to require service contemporaneous to filing.

Waiver of Rules

Under WAC 391-08-003 and Mason County, supra, the Commission has the authority to waive the 20-day filing requirement of WAC 391-35-210, when a party is not prejudiced by such action.² The exercise of the Commission's authority to waive rules under WAC 391-08-003 should be based on whether such a waiver effectuates the purposes and provisions of the applicable collective bargaining statute.

The Commission has waived its rules in cases where a party's procedural error has resulted from reliance on erroneous agency advice, as in City of Tukwila, Decision 2434-A (PECB, 1987). In Island County, Decision 5147-C (PECB, 1996), the Commission waived its rules, in part because the rules themselves were not particularly clear on their face, and in part because there was substantial compliance with the rule. Here, we have no erroneous agency advice or substantial compliance, just an inadvertent error which the Commission has found in the past as no justification for waiver.

In this case, the employer made no effort to mail or present a copy of the petition for review to the union until five days after it was filed. Attached to the employer's response to the motion to dismiss was an affidavit of a secretary at the law firm, stating in part:

3. On Wednesday, April 24, 1996, I inadvertently failed to serve a copy of the Objections on Mr. Lawrence Schwerin of Schwerin,

² See, also, Central Kitsap School District, Decision 3671-A (PECB, 1991); and Forks Community Hospital, supra.

Burns, Campbell & French, 2505 Third Avenue, Suite 309, Seattle, Washington 98104. On Monday, April 29, 1996, Michael Reynvaan asked me to confirm that we had filed and served our Objections in this case. I checked the file and determined that service had not been completed on opposing counsel. I therefore had our messengers hand-deliver a copy of the Objections to Mr. Lawrence Schwerin's office that same day.

4. It is our practice to serve copies the same day documents are filed. I inadvertently failed to do so in this particular situation.

The Commission has routinely dismissed petitions for review for failure to effect proper service, particularly where the only "cause" of the untimely service was a lack of due diligence. If untimely service were to be excused for such a reason, service requirements of WAC 391-45-350 and the underlying policy of orderly dispute resolution would be completely undermined. Mason County, supra.³

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. Under the circumstances in this case, where there is clear noncompliance, we find waiver of the service requirements would not effectuate the purposes of Chapter 41.56 RCW, even though the noncompliance was unintentional. Such a waiver would neither further the statutory policies of "communication" and "orderly dispute resolution", nor promote peace in labor relations.

³ See, also, Clover Park School District 400, Decision 377-A (PECB, 1978); and Spokane School District, Decision 5151-A and 5152-A (PECB, 1995).


NOW, THEREFORE, it is


ORDERED

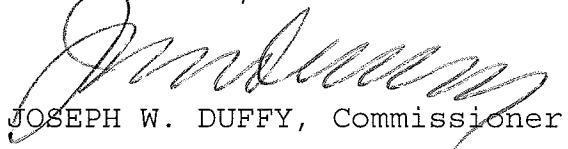
1. The objections filed by the employer in this matter on April 24, 1996, are DISMISSED, due to the failure of the employer to effect timely service of its objections on the union.
2. The matter is remanded to the Executive Director for issuance of a certification.

Issued at Olympia, Washington, the 19th day of July, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner