STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petitions of:	)	
	)	CASE 13517-E-97-2262
	)	DECISION 6291 - PECB
TECHNICAL EMPLOYEES' ASSOCIATION	)	
	)	CASE 13518-E-97-2263
	)	DECISION 6292 - PECB
	)	
Involving certain employees of:	)	CASE 13519-E-97-2264
	)	DECISION 6293 - PECB
	)	
	)	CASE 13520-E-97-2265
KING COUNTY	)	DECISION 6294 - PECB
	)	
	)	ORDER OF DISMISSAL
	)	

On November 3, 1997, the Technical Employees' Association (TEA) filed five petitions with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking to raise questions concerning representation in overlapping configurations of employees of King County (employer). Among those:

- In Case 13517-E-97-2262, the TEA sought a bargaining unit of supervisory engineers, and it specifically acknowledged that International Federation of Professional and Technical Engineers, Local 17, is the incumbent exclusive bargaining representative of at least some employees in that unit.

- In Case 13518-E-97-2263, the TEA sought a "catch-all" bargaining unit of engineering and engineering-support personnel, excluding supervisors, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that unit.

- In Case 13519-E-97-2264, the TEA sought a bargaining unit of professional engineers, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that unit.

- In Case 13520-E-97-2265, the TEA sought a bargaining unit limited to certain designers, and it specifically acknowledged that IFPTE Local 17 is the incumbent exclusive bargaining representative of at least some employees in that unit.

The fifth petition in this set, Case 13521-E-97-2266, is for a unit of clerical employees supporting engineering functions. While it listed IFPTE Local 17 as incumbent exclusive bargaining representative of at least some of the petitioned-for employees, and stated "some of the employees have never been covered by a collective bargaining agreement and some of the employees have been", that case is being processed separately at this time, due to a dispute about whether Teamsters Local 117 is entitled to intervene.

Routine letters were sent to the employer, requesting lists of the petitioned-for employees. The employer supplied lists on December 18, 1997. When the showings of interest furnished in support of these petitions were administratively evaluated for sufficiency under RCW 41.56.070 and the Commission's rules at WAC 391-25-110, various petitions appeared to be insufficiently supported. There was, however, a substantial difference, in each case, between the numbers of employees estimated by the TEA and the number of names provided by the employer.

A meeting was conducted on February 13, 1998, with representatives of the TEA and the employer present, to obtain further information about the showing of interest problem. Based on the information

provided at that meeting,[1] the employer submitted new lists of employees on March 5, 1998. Further administrative evaluation of the showings of interest then resulted in a conclusion that the petitions were sufficiently supported.

IFPTE Local 17 has been granted intervention in each of the above-captioned cases, on the basis of its status as the incumbent exclusive bargaining representatives of at least some of the petitioned-for employees. Discussions at the February 13, 1998 meeting had confirmed that the TEA is seeking to supplant IFPTE Local 17 as exclusive bargaining representative in each of the four above-captioned cases.

The employer and IFPTE were parties to collective bargaining agreements with expiration dates on or after December 31, 1997. It thus appeared that at least the petitions filed in the four above-captioned cases on November 3, 1997 were untimely under RCW 41.56.070 and WAC 391-25-030.[2] A letter was sent to the parties on April 17, 1998, giving the TEA a period of time in which to show cause why the petition should not be dismissed as untimely. Responses filed by the parties have been considered.

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[1] The TEA was not given access to the employer's lists, but was afforded an opportunity to clarify its intentions regarding the petitioned-for unit.

[2] Teamsters Local 117 has also moved for intervention in Case 13518-E-97-2263 (the catch-all unit) and Case 13521-E-97-2666 (the clerical unit), claiming status as the incumbent exclusive bargaining representatives of at least some of the petitioned-for employees. While the TEA has disputed that claim, no ruling on that motion is necessary in Case 13518-E-97-2263, if the petition must be dismissed for other reasons. A hearing may be needed to obtain an evidentiary basis for any ruling on the intervention and timeliness issues in Case 13521-E-97-2666.

BACKGROUND

The TEA previously filed two representation petitions seeking supervisory and non-supervisory bargaining units based on an organizational structure which had existed at the former Municipality of Metropolitan Seattle (METRO), and which had existed for a time in a Technical Services Division of the former King County Department of Metropolitan Services.[3] The Executive Director dismissed those first two petitions, on the basis that they sought inappropriate bargaining units based on a table of organization which was no longer in existence, and the Commission affirmed.[4]

The TEA next filed both: (1) A petition for judicial review of the first set of dismissals; and (2) four more representation petitions in which it sought to represent only former METRO employees in two pairs of supervisor/non-supervisory units touching the King County divisions to which the former METRO employees were now assigned. The parties have been notified that the petitions in that second set are being held in abeyance pending the outcome of the judicial review process on the first set of petitions, in order to avoid the

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[3] A federal court had ruled the structure of METRO was unconstitutional. In November of 1992, the electorate of King County approved a ballot measure calling for King County to assume the rights, powers, functions, and obligations of METRO, with an integration of the two entities to be implemented over a two-year transition period. METRO ceased to exist as a separate entity on January 1, 1994, and became the Department of Metropolitan Services within King County. The engineering employees at METRO were not organized for the purposes of collective bargaining, and the TEA did not file any petition until after the King County Council had concluded amending its ordinance effecting a reorganization and integration of personnel and functions.

[4] See, King County, Decision 5910 (PECB, 1997), affirmed, Decision 5910-A (PECB, 1997).

possibility that any proceedings conducted or certifications issued in the second set would have to be modified or vacated on the basis of a court decision finding either or both of the petitions in the first set to be viable.

The TEA next filed the five representation petitions constituting the third set, which are distinguished from all of the prior cases by seeking to include already-represented positions which were part of the King County workforce prior to the METRO merger, along with former METRO employees. Four of the petitions in that third set are the subject of this decision.

POSITIONS OF THE PARTIES

The TEA interprets the Commission's decision dismissing its first set of petitions as ruling that the reorganization of King County warranted the creation of "wall-to-wall" units of all engineering employees, so that the existing bargaining units represented by IFPTE Local 17 are inappropriate, and so that no contract bar can exist. While it acknowledges that its petitions were delivered to the Commission's office after 5:00 p.m. on Friday, October 31, 1997, it provided an affidavit stating that was due to a freeway blockage which prevented its courier from reaching the Commission's office earlier that day, and urges that extraordinary circumstances constitute good cause to waive the deadline. Finally, the TEA argues that the window period should be computed as ending on Monday, November 3, 1997, based on the fact that the 60th day before contract expiration was Sunday, November 2, 1997.

IFPTE Local 17 asserts that the TEA misstates the Commission's holdings on the TEA's first set of representation cases, and that

the Commission merely ruled that those TEA petitions sought inappropriate bargaining units. IFPTE Local 17 points out that the Commission never ruled that "wall-to-wall" units would be the ***only*** appropriate units, or that the existing units with their long histories of collective bargaining were inappropriate. IFPTE Local 17 also opposes the TEA's claim that a traffic jam on Interstate 5 should be cause for the Commission to "waive" the deadline. IFPTE Local 17 asserts that the Commission does not have the authority to waive or modify the contract bar rule set forth in RCW 41.56.070. It also urges that the TEA misreads the rule on computation of time, and that the 60-day "window" period prescribed by RCW 41.56.070 must be computed ***backward*** from December 30, 1997 (because December 31st was the day from which "the designated period of time begins to run" and, therefore, may not be included in the computation) so that the 60-day window period ended on Saturday, November 1, 1997. IFPTE Local 17 then argues that the regulation requires that the window period must be further extended backward "until the end of the next day which is neither a Saturday, Sunday or a holiday", which was Friday, October 31, 1997.

The employer agrees that these petitions were untimely filed after the close of the window period, and therefore should be dismissed.

DISCUSSION

A major emphasis of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is on securing the right of employees to organize and select representatives of their own choosing for the purposes of collective bargaining. Statutory procedures calling for secret ballot elections or confidential cross-checks protect the right of employees to select a union, change unions, or

decertify their union. Another major emphasis of Chapter 41.56 RCW is, however, on a stability in labor relations which is ultimately to the benefit of the general public and the users of public services. Thus, set against the right of employees to select and change union representatives are certain time limitations affecting the exercise of that right.

The "certification bar" operates in much the same way as fixed terms of elective office, except that the one-year certification bar period is much shorter than the four year terms of many elective offices. It is set forth in RCW 41.56.070, as follows:

> No question concerning representation may be raised within one year of a certification or attempted certification.

The "contract bar" principle is also set forth in RCW 41.56.070:

> Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than 90 or less than 60 days prior to the expiration day of the agreement. ...

The Commission's implementing rule is WAC 391-25-030, which restates the statutory time limits, as follows:

> WAC 391-25-030 PETITION--TIME FOR FILING. In order to be timely filed:
>
> (1) Where there is a valid written and signed collective bargaining agreement in effect covering an appropriate bargaining unit which includes any or all of the employees to be affected by the petition, a petition must be filed **during the period not more than ninety nor less than sixty days prior to the expiration date of the collective bargaining agreement**, or after the expiration thereof.

> (2) Where a certification has been issued by the agency covering an appropriate bargaining unit which includes any or all of the employees to be affected by the petition, a petition must be filed:
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> (a) Not less than twelve months following the date of the certification of an exclusive bargaining representative; or
>
> (b) Not less than twelve months following the date of the latest election or cross-check in which the employees failed to select an exclusive bargaining representative.
>
> (3) Where neither subsections (1) nor (2) of this section are applicable, a petition may be filed at any time.

[Emphasis by **bold** supplied.]

The "bar" limitations found within RCW 41.56.070 and WAC 391-25-030 reflect policies and precedents which are well-established under the National Labor Relations Act (NLRA). Based on the TEA's admissions in its written response to the show cause directive, the contract bar principle is applicable in this case.

Computation of the "Insulated" Period

Not surprisingly, the focus of the TEA is on the "window" period for it to file a petition under the contract bar principle. It relies upon WAC 391-08-100, which provides:

> WAC 391-08-100 SERVICE OF PROCESS--COMPUTATION OF TIME. In computing any period of time prescribed or allowed by any applicable statue or rule, the day of the act, event, or default after which the designated period of time begins to run is not to be included. **The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.** When the

> period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

Thus, the TEA's computation of the "window" period would infringe on the negotiations period "insulated" by the contract bar.

The approach supported by the TEA conflicts with the principal objective of the contract bar, which (in the context of its underlying purpose of providing stability in labor-management relations) is to avoid disruptions of collective bargaining during the critical period immediately preceding contract expiration:

- In the private sector, the NLRB policy allowing petitions during the period "not more than 90 or less than 60 days" prior to contract expiration establishes a 60-day period of un-interrupted negotiations conforming to the notice provisions found in Section 8(d) of the NLRA.[5]

- The Commission has also stressed the importance of the collective bargaining which is to occur in the period immedi-

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[5] The NLRA, as amended, contains the following:

> [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification -
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification; ...

ately preceding contract expiration, and has gone so far as to authorize the Attorney General to seek temporary relief, in the form of an injunction, to compel a union to make itself available for negotiations during the two months before contract expiration.[6]

- In Yelm School District, Decision 704-A (PECB, 1979) and subsequent cases, the Commission has uniformly held to the policy that bargaining must cease between an employer and the incumbent exclusive bargaining representative of its employees when a representation petition is filed, in order to avoid controversial involvement by the employer in a process that fundamentally belongs to the employees.

There are thus both strong policy reasons and substantial legal precedent which contradict any foreshortening of the 60-day period protected by the "less than 60 days" language found within RCW 41.56.070 and the implementing rule.

IFPTE Local 17 properly puts its focus on the 60-day "insulated" period which must follow the "window" period. Although its

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[6] In Highline School District, Decisions 1054, 1054-A (EDUC, 1981), the Examiner and Commission quoted from minutes of a previous meeting where the Commission ruled:

> A bargaining agent undertakes, voluntarily, the obligation of bargaining. That is what it is in business to do. When a bargaining agent selects its negotiating team, it has a **duty to select people that will be available to carry out the statutory bargaining scheme of meetings at reasonable times and places** in good faith effort to reach agreement.
>
> [Emphasis by **bold** supplied.]

The Commission had authorized and obtained injunctive relief in the case referred to in those minutes.

argument contains a minor technical error,[7] that does not diminish that the language of the statute requires computation of the "insulated" period ***backwards*** from the expiration of the existing collective bargaining agreement.

In this case, all 31 days of December and the last 29 days of November constituted the period "insulated" for un-interrupted negotiations between IFPTE Local 17 and King County. That would normally have meant that November 1, 1997 was the last day for filing of a representation petition. Since November 1, 1997 fell on a Saturday, a question arises as to whether the last day for filing a petition moved to the close of business on the previous Friday or to the close of business on the following Monday. There are two possible results:

- Acceptance of a petition filed on Monday, November 3, 1997, as urged by the TEA looking forward from the "window" period, would conform to the forward-looking terms of WAC 391-08-100. It would do so, however, at a cost of shortening the "protected" period to only 58 days, in contravention of the contract bar statute.

- Requiring that the petition be filed Friday, October 31, 1997, as urged by IFPTE Local 17 and King County looking backward from contract expiration to compute the "insulated" period, would conform to the backward-looking language of the contract bar statute, at a cost of contradicting WAC 391-08-100. Such an approach would, however, guarantee the employer and IFPTE Local 17 their full 60 days for negotiations.

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[7] In this case, the applicable contract is understood as having remained in effect through December 31, 1997, so it was not really expired until January 1, 1998.

Given a collision between a statute adopted by the Legislature and a rule adopted by an agency, the statute must prevail. That is true even where the cited rule is part of the Model Rules of Procedure adopted by the Chief Administrative Law Judge of the State of Washington in Chapter 10-08 WAC, or where, as here, the cited rule adopted by an agency is a verbatim copy of a provision of the Model Rules.[8] Accordingly, it is concluded that the petitions filed in these matters after the close of business on Friday, October 31, 1997, were untimely.

The statutory language defining the "window" period adds support to this result. Literal application of the "not more than 90 or less than 60 days" language of RCW 41.56.070 could produce a "window" period of only 26 calendar days and even fewer business days:

SUN	MON	TUE	WED	THU	FRI	SAT
					91(X)	[90(X)
89(X)	**88**(*1*)	**87**(*2*)	**86**(*3*)	**85**(*4*)	**84**(*5*)	83(6)
82(7)	**81**(*8*)	**80**(*9*)	**79**(*10*)	**78**(*11*)	**77**(*12*)	76(*13*)
75(*14*)	**74**(*15*)	**73**(*16*)	**72**(*17*)	**71**(*18*)	**70**(*19*)	69(*20*)
68(*21*)	**67**(*22*)	**66**(*23*)	**65**(*24*)	**64**(*25*)	**63**(*26*)	62(X)
61(X)]	60(X)					

The period could be even shorter if the 63rd day (and possibly the 64th day on Thanksgiving weekends) falls on a holiday. Thus, although simple arithmetic suggests the "window" period is to be 30 days in length, the statute does not expressly establish or guarantee a 30-day "window" period. The calendar must be carefully examined in each case.

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[8] The text of WAC 391-08-100 duplicates the text of WAC 10-08-080.

The Request for Waiver of the Rule

The TEA contends that the Commission has the power to waive the deadline for the filing of its petitions, because an accident on Interstate 5 prevented the TEA courier from reaching the Commission's office before the close of business on October 31, 1997. WAC 391-08-003 does provide:

> WAC 391-08-003 POLICY--CONSTRUCTION--WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

That does not guarantee that Commission rules will be waived in every case, and the Commission has applied the rule on the basis of whether a waiver will effectuate the purposes of the applicable collective bargaining statute. Mason County, Decision 3108-B (PECB, 1991).

The TEA didn't have to wait until the afternoon of the last day of the "window" period to file its petitions, but it did so. It then assumed the risk of a traffic jam on a notoriously crowded highway. This situation is distinguished from Island County, Decision 5147-C (PECB, 1996), where a telefacsimile transmission sent under color of compliance with a then-ambiguous rule was found to constitute substantial compliance, and is more comparable to City of Richland, Decision 6120-C (PECB, 1998), where a "substantial compliance"

argument was rejected because the party waited until the afternoon of the last day of the appeal period to mail a petition for review.

A waiver of the rule in this case cannot be characterized as being without prejudice to the other parties. At a minimum, it would prolong the interruption of negotiations between IFPTE Local 17 and King County for successor contracts in the existing bargaining units. Moreover, it would subject both the employer and IFPTE Local 17 to the risks and expense inherent in a hearing and decision process.

Finally, even if waiver of WAC 391-25-030 were possible, WAC 391-08-003 does not guarantee waivers of statutory requirements. IFPTE, Local 17 aptly cites Monroe School District, Decision 2017-A (PECB, 1984), where the Commission stated:

> [W]hile the federal contract bar rule is a product of decisional law of the National Labor Relations Board, **the contract bar rule in this state is statutory. This Commission has no power to waive or modify it in any respect.** Highline School District, Decision 1507 (PECB, 1982).

[Emphasis by **bold** supplied.]

In City of Tacoma, Decision 5634-B (PECB, 1996), the Commission noted that it does not allow parties to bend the rules for their own convenience, whether it be to accommodate a mistake in counting days, or other error.

Misinterpretation of the Earlier Decisions

The TEA's argument that the Commission's decision on its first set of petitions rendered the existing units inappropriate puts more

weight on selected statements than they can bear in the overall context of those decisions. The TEA, the employer, IFPTE Local 17 as an intervenor, and Teamsters Local 117 as an intervenor, all participated in a complex, multi-day hearing in which extensive arguments were advanced about whether the former METRO employees should be accreted to existing King County bargaining units represented by IFPTE Local 17 and Teamsters Local 117. The Executive Director declined to rule on many of those issues, expressly stating under a "Rulings on Other Issues Unnecessary" heading that those cases did not,

> [C]onstitute a proper forum for the design or implementation of a wholesale reformation of the labor relations process at King County, or even a perfected configuration of bargaining units which include office-clerical, technical or engineering employees.

Thus, neither the accretion claims nor the propriety of the existing bargaining units was even before the Commission when it ruled on the TEA's appeal. Had the Commission concluded that the dismissals on the basis of "inappropriate unit" should be reversed, it would have been necessary to remand that first set of cases to the Hearing Officer and Executive Director for rulings on the issues which had been set aside. Thus, the Commission's decision on the first set of cases stands only for the proposition that those petitioned-for units, which crossed departmental lines and were described in terms of a table of organization that no longer existed, were not appropriate bargaining units under RCW 41.56.060.

Restoration of the "Insulated" Period

In Kitsap County, Decision 2116 (PECB, 1984) and King County, Decision 2644 (PECB, 1987), provision was made to re-create

contract bar "insulated" periods (and to thereby make incumbent exclusive bargaining representatives and employees whole for the prejudice to their rights) where it was ascertained that procedural defects were fatal to representation petitions. In Kitsap County, the petition had been filed by a supervisor of the bargaining unit employees involved, and that defect could not be cured. In King County, the petition was dismissed upon later discovery that the superficially valid showing of interest filed in support of the petition was actually insufficient. In both cases, the filing of a new representation petition was barred for a period of 60 days. A similar order is appropriate in these cases.

FINDINGS OF FACT

1. King County is a "public employer" with the meaning of RCW 41.56.030(1).

2. The Technical Employees' Association, a bargaining representative with the meaning of RCW 41.56.030(3), filed petitions in each of the above-captioned cases on November 3, 1997, seeking to raise questions concerning representation in four bargaining units currently represented by International Federation of Professional and Technical Engineers, Local 17.

3. IFPTE Local 17 was granted intervention in these proceedings, based on its acknowledged status as the incumbent exclusive bargaining representative of the petitioned-for employees.

4. When the petitions were filed to initiate the above-captioned proceedings, King County and IFPTE Local 17 were parties to

collective bargaining agreements which were to remain in effect until at least December 31, 1997.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.

2. The petitions filed in the above-captioned matters on November 3, 1997 were untimely, under the contract bar principle established by RCW 41.56.070 and WAC 391-25-030.

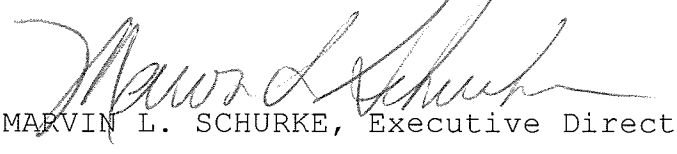
ORDER

1. The petitions filed in each of the above-captioned matters is DISMISSED as untimely.

2. Filing of a petition for investigation of a question concerning representation affecting employees involved in these proceedings shall be barred for 60 days following the date on which this order of dismissal becomes final.

Issued at Olympia, Washington, on the 18th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-25-390(2).