

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

WASHINGTON ASSOCIATION OF FISH  
& WILDLIFE PROFESSIONALS

Involving certain employees of:

STATE – FISH AND WILDLIFE

CASE 25530-E-13-3773

DECISION 11748 - PSRA

ORDER OF DISMISSAL

Fenrich & Gallagher, P.C., by *Rhonda Fenrich*, Attorney at Law, for the petitioner,  
Washington Association of Fish & Wildlife Professionals.

*Morgan Damerow*, Labor Negotiator, for the employer.

Younglove & Coker, P.L.L.C., by *Edward E. Younglove III*, Attorney at Law, for  
the intervenor, Washington Federation of State Employees.

On March 12, 2013, the Washington Association of Fish & Wildlife Professionals (WAFWP) filed a petition to represent the Wildlife Area Managers employed by the Washington State Department of Fish and Wildlife (employer). The petitioned-for employees are currently represented by the Washington Federation of State Employees (WFSE) in a bargaining unit described as follows:

All employees of the Department of Fish and Wildlife who perform wildlife area manager and wildlife area assistant manager duties on Department of Fish and Wildlife owned, leased and managed lands, excluding supervisors, confidential employees, and all other employees.

*State – Fish and Wildlife*, Decision 11387 (PSRA, 2012). Consistent with normal case handling processes, agency staff mailed a courtesy copy of the petition to all parties of record on March 13, 2013. That notice specifically stated that the agency's mailing did not relieve any party of its obligation to serve the other parties to the proceeding as required by WAC 391-08-120.

On March 14, 2013, Representation Case Administrator Dario de la Rosa sent a letter to the employer requesting a list of names and addresses of the petitioned-for employees. The WAFWP and the WFSE were sent copies of this letter. On March 27, 2013, Cindy Lerch, the employer's Labor Relations Manager, e-mailed a copy of the employee list to the Commission. Lerch's filing indicates that she also sent this list to Rhonda Fenrich, the attorney for the WAFWP, and Gladys Burbank, WFSE's Director of PERC Activities. On March 28, 2013, the Representation Case Administrator mailed all parties an Investigation Conference letter informing them that the WAFWP's petition had the support of at least 30% of the employees in the petitioned-for bargaining unit and that the WAC 391-25-220 Investigation Conference would be held on April 12, 2013. The WFSE intervened on April 2, 2013.

On April 3, 2013, the WFSE filed a motion to dismiss the petition alleging that the WAFWP failed to properly serve the WFSE with a copy of the petition. On April 8, 2013, the WAFWP responded to the WFSE's motion. In response, the WAFWP stated that it "believed" that the WFSE had been served a copy of the petition, but admitted that it failed to create a proof of service as required by WAC 391-08-120(4). The WAFWP also asserted that regardless of service, the WFSE could not reasonably demonstrate material harm. The scheduled Investigation Conference was cancelled pending a determination on the WFSE's motion. On April 12, 2013, the parties were invited to formally brief the issue of whether WAFWP's petition should be dismissed for lack of service.

The WAFWP again stated that it "believed" it served the WFSE, but again admitted it did not prepare a certificate of service as required by the rules. The WAFWP argues that its failure to serve the WFSE in conformance with the rules is not a fatal deficiency. The WAFWP argues that it was not given the opportunity to cure the service defect because the WFSE did not raise the issue until after the close of the RCW 41.80.080(4)(b) window period. The WAFWP asserts that the WFSE received notice of the petition by virtue of this agency's mailing of the petition to all parties one day after filing. The WAFWP argues that this agency should invoke the waiver provision of WAC 391-08-003 because it substantially complied with the rule and the WFSE has not been prejudiced. In support of its argument, the WAFWP cites to *Snohomish School District No. 201*, Decision 750 (PECB, 1979) and *Mabton School District*, Decision 2419 (PECB, 1986). In those

two cases, the failure to serve did not result in dismissal because the nature of the proceedings were deemed to be investigatory not adversarial and the incumbent union was not prejudiced by the service defect.

The WFSE argues that the service rule is mandatory and has been generally strictly applied. The WFSE also notes that WAC 391-08-120(3) and (4) are different and clearer than what existed at the time of the *Snohomish School District* and *Mabton School District* decisions. The WFSE also asserts that this agency has routinely dismissed cases for failing to comply with the service requirements of WAC 391-08-120(3) and (4). The WFSE argues that this agency applies the waiver provisions of WAC 391-08-003 only in extraordinary cases, such as reliance upon erroneous advice by this agency or when there has been substantial compliance with an unclear rule. The WFSE contends that application of the waiver provision of WAC 391-08-003 is unwarranted because there has not even been substantial compliance in this matter. Finally, the WFSE asserts that it filed its motion to dismiss only after filing its motion to intervene.<sup>1</sup>

### ISSUES

1. Did the WAFWP comply with WAC 391-25-050, 391-08-120(3) and (4) and properly serve the WFSE the decertification petition?
2. If the WAFWP failed to properly serve the decertification petition upon the WFSE, should the petition be dismissed?

WAFWP did not comply with WAC 391-25-050 and WAC 391-08-120(3) and (4). There is no evidence that the WAFWP served the decertification petition upon the WFSE. The WAFWP did not provide same day proof of service as required by WAC 391-08-120(4).

The petition must be dismissed. This agency has routinely dismissed matters for failure to comply with the agency service rules. Moreover, there is no evidence that the WAFWP even

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<sup>1</sup> In its response, the WFSE cites to the 2006 PERC Staff Manual in support of its motion. This manual was compiled by a former Executive Director for internal agency use. The manual has no precedential value and is not a basis for the decision on the WFSE's motion.

substantially complied with the service requirements of WAC 391-25-050 and WAC 391-08-120(3) and (4). The waiver provision of WAC 391-08-003 is generally applied only when a party has relied upon erroneous agency advice or has substantially complied with a rule that is unclear.

## DISCUSSION

### Applicable Legal Standard

The service requirements for cases before this agency are clear and unambiguous. Petitioners filing a representation petition must serve a copy of that petition on the employer and each employee organization named in the petition as having an interest in the petition. WAC 391-25-050; *Community College District 17*, Decision 8920 (PSRA, 2005). Service under WAC 391-25-050 is accomplished through the methods set forth in WAC 391-08-120(3) and (4). WAC 391-08-120(3) provides as follows:

(3) A party which files any papers with the agency *shall* serve a copy of the papers upon all counsel and representatives of record and upon unrepresented parties or upon their agents designated by them or by the law. Service shall be completed no later than the day of the filing, by one of the following methods:

(a) Service may be made personally, and shall be regarded as completed when delivered in the manner provided in RCW 4.28.080;

(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 commercial parcel delivery company, and shall be regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(d) Service may be made by fax, and shall be regarded as completed upon production by the fax machine of confirmation of transmission, together with the same day mailing of a copy of the papers, postage prepaid and properly addressed, to the person being served.

(e) Service may be made by e-mail attachment, and shall be regarded as completed upon transmission, together with same day mailing of a copy of the papers, postage prepaid and properly addressed, to the person being served.

(emphasis added). WAC 391-08-120(4) requires a filing party to prove service as follows:

## PROOF OF SERVICE

(4) On the same day that service of any papers is completed under subsection (3) of this section, the person who completed the service *shall*:

(a) Obtain an acknowledgment of service from the person who accepted personal service; or

(b) make a certificate stating that the person signing the certificate personally served the papers by delivering a copy at a date, time and place specified on the certificate to a person named in the certificate; or

(c) Make a certificate stating that the person signing the certificate completed service of the papers by:

(i) Mailing a copy under subsection (3)(b) of this section; or

(ii) Depositing a copy under subsection (3)(c) of this section with a commercial parcel delivery company named in the certificate; or

(iii) Transmitting and mailing a copy under subsection (3)(d) or (e) of this section.

(emphasis added). When service is contested, the petitioner has the burden to demonstrate that the papers were served according to WAC 391-08-120. *See City of Kalama*, Decision 6276 (PECB, 1988). An acknowledgment of service obtained under WAC 391-08-120(4)(b) or (c) constitutes proof of service. *Id.* All parties, including individuals appearing on their own behalf, comply with service requirements to effect communications between the parties. *State – Ecology*, Decision 9243-A (PSRA, 2006).

WAC 391-08-120(3) and (4) were rewritten in 1996 and 1998. Among the changes was to clearly specify that a certificate of service shall be created on the same day service is completed. *Blaine School District*, Decision 7439 (PECB, 2001). The purpose of these amendments was to give greater visibility to the requirement for the same day certificate of service. *Id.*

Following these changes, this agency has regularly and consistently dismissed representation cases for failure to comply with the service requirements of WAC 391-08-120(3) and (4). *See, e.g., Kitsap County*, Decision 6425 (PECB, 1998); *Kitsap County*, Decision 6930 (PECB, 2000); *Blaine School District*, Decision 7439; *Community College District 17*, Decision 8920 (PSRA, 2005); *State - Agriculture*, Decision 8921 (PSRA, 2005); *Spokane County*, Decision 10058 (PECB, 2008). Compliance, as is often noted, “is a small imposition on parties to formal adjudicative proceedings under the Administrative Procedures Act, Chapter 34.05 RCW. The Commission’s rule avoids the need for hearings and decisions on ‘substantial compliance’

claims.” *Blaine School District*, Decision 7439; *Community College District 17*, Decision 8920; *Spokane County*, Decision 10058.

On occasion, this agency has waived the requirements of its rules pursuant to WAC 391-08-003. WAC 391-08-003 provides as follows:

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.

The WAFWP cites to two instances where the failure to serve the incumbent union did not result in dismissal. In *Snohomish School District*, the Executive Director rejected the incumbent union’s motion to dismiss for failure to properly serve the petition. *Snohomish School District*, Decision 750. The Executive Director stated that the representation proceedings are investigatory rather than adversarial and that the service requirements were directory rather than mandatory. *Id.* Finally, the Executive Director found that the incumbent union was not prejudiced by the failure to serve.<sup>2</sup> *Id.*

In *Mabton School District*, the Executive Director similarly rejected a motion to dismiss for failure to serve in a representation case. *Mabton School District*, Decision 2419. The Executive Director indicated that WAC 391-08-003 allowed the agency to waive the requirements of its rules in the absence of prejudice. *Id.* In that case, he found that the incumbent union was not prejudiced because it became aware of the petition one week after filing.<sup>3</sup>

As the cases following the 1996 and 1998 rule changes indicate, this agency has more consistently dismissed cases upon a failure to comply with the service rules. In those cases, the agency has

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<sup>2</sup> The petition was dismissed on other grounds.

<sup>3</sup> Likewise, this petition was dismissed on other grounds.

refused to apply the waiver provisions of WAC 391-08-003. WAC 391-08-003 is applied “infrequently and under limited circumstances.” *City of Kirkland*, Decision 8882-A and Decision 8883-A (PECB, 2005). For example, the Commission applied the waiver of its filing and service rules where the non-compliance resulted from erroneous advice from agency staff. *City of Tukwila*, Decision 2434-A (PECB, 1988). The Commission waived the filing provisions when a party substantially complied with a rule that was unclear on its face. *Island County*, Decision 5147-C (PECB, 1996). Finally, the Commission waived the same day certificate of service requirement when the petitioner was able to affirmatively demonstrate same day service by producing a certificate of mailing receipt from the U.S. Postal Service that showed the incumbent union signed for receipt of the petition on the same day it was served. *Pierce County*, Decision 10225 (PECB, 2008).

#### Application of Legal Standards

There is no dispute that the WAFWP failed to comply with WAC 391-08-120(3) and (4). There is no evidence that the WAFWP served the WFSE with the decertification petition. Dismissal of the petition is appropriate in this case.

The WAFWP’s reliance on *Snohomish School District*, Decision 750 and *Mabton School District*, Decision 2419 is misplaced. Subsequent to those two cases, the Commission revised its rules regarding service. The purpose of those revisions was to make clearer the requirement for the same day certificate of service. In so doing, the Commission wanted to avoid the need for hearings and decisions on substantial compliance claims. *Community College District 17*, Decision 8920.

The cases following these rule changes reflect that desire as the agency has routinely dismissed cases for failing to comply with WAC 391-08-120(3) and (4). Those cases also reflect that the Commission will invoke the waiver provisions of WAC 391-08-003 in only extraordinary and limited circumstances. *City of Kirkland*, Decision 8882-A and 8883-A.

None of the circumstances like those where WAC 391-08-003 have been invoked apply to this case. This case does not involve an issue of reliance on erroneous agency advice like in *City of Tukwila*, Decision 2434-A. This case does not involve substantial compliance towards a rule that is unclear on its face like in *Island County*, Decision 5147-C. In fact the opposite is true. The rule regarding service and the same day certificate of service is clear and unambiguous and we have no evidence of any compliance, substantial or otherwise, by the WAWFP. Finally, there is no evidence showing that the WFSE was served by the WAFWP like in *Pierce County*, Decision 10225. Waiver of the service requirements of WAC 391-08-120(3) and (4) is not appropriate in this case. Accordingly, the WFSE's motion to dismiss the WAFWP petition is granted.

### Conclusion

Because WAFWP has not complied with WAC 391-08-120 and WAC 391-25-050 by serving WFSE with a copy of its petition as required by those rules, the WFSE's motion to dismiss must be granted.

NOW, THEREFORE, it is

### ORDERED

The petition filed by the Washington Association of Fish & Wildlife Professionals in the above-caption case is DISMISSED.

DATED at Olympia, Washington, this 13<sup>th</sup> day of May, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless an appeal is filed with the Commission under WAC 391-25-660.





## PUBLIC EMPLOYMENT RELATIONS COMMISSION

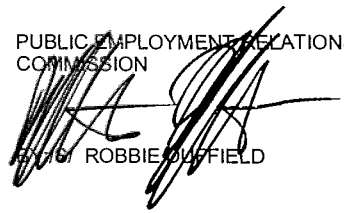
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PUBLIC EMPLOYMENT RELATIONS  
COMMISSION

  
ROBBIE DUFFIELD

CASE NUMBER: 25530-E-13-03773 FILED: 03/12/2013 FILED BY: PARTY 2  
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COMMENTS:

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