

City of Seattle, Decisions 5852-A and 5853-A(PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANDREW APOSTOLIS,)	
)	CASE 12854-U-96-3096
Complainant,)	
)	
vs.)	DECISION 5852-A - PECB
)	
CITY OF SEATTLE,)	
)	DECISION OF COMMISSION
Respondent.)	
)	
<hr/>		
ROBERT BOLING,)	
)	
Complainant,)	CASE 12855-U-96-3097
)	
vs.)	
)	DECISION 5853-A - PECB
CITY OF SEATTLE,)	
)	
Respondent.)	DECISION OF COMMISSION
)	
<hr/>		

Paul H. King, Attorney at Law, appeared on behalf of the complainants.

Mark H. Sidran, Seattle City Attorney, by Marilyn F. Sherron, Assistant City Attorney, and by Janet K. May, Attorney at Law, appeared on behalf of the employer.

These cases are before the Commission at this time on the sole issue of whether the petitions for review should be dismissed for lack of proper service upon the employer.

BACKGROUND

On December 3, 1996, Andrew Apostolis filed a complaint charging unfair labor practices, alleging he was discharged for advocating

the removal of crew chiefs from a bargaining unit and for his complaints about unfair discipline. In an amended complaint filed February 4, 1997, Apostolis additionally alleged that he was disciplined in reprisal for insisting on union representation during an investigatory interview. In an order of partial dismissal issued on February 27, 1997,¹ the Executive Director dismissed all of the allegations except the claim of discipline in reprisal for insisting on union representation, which was referred to an Examiner for further processing.

Also on December 3, 1996, Robert Boling filed a complaint charging unfair labor practices, alleging he was discharged and denied out-of-class pay assignments because of his advocacy of removing crew chiefs from the bargaining unit, his standing as union shop steward, and his attempts to file grievances on behalf of fellow employees. On February 4, 1997, in response to a deficiency notice, Boling filed an amended complaint which outlined his allegations in greater detail. The Executive Director dismissed Boling's complaint on February 27, 1997, for failure to state a cause of action.²

The two cases were processed together, and the complainants filed companion petitions for review on March 19, 1997. By letters to the parties dated March 19, 1997, the Executive Director acknowledged the filing of the petitions for review and set due dates for the employer's briefs.

¹ City of Seattle, Decision 5852 (PECB, 1997).

² City of Seattle, Decision 5853 (PECB, 1997).

By letter filed April 2, 1997, the employer advised that it had not been served with copies of the petitions for review. It moved for dismissal of the petitions for review on that basis.

On April 3, 1997, the Executive Director informed the complainants' attorney that the employer had contested the sufficiency of service of the petitions for review, and that under WAC 391-08-120(4), proof of service must be filed within seven days following the date of that letter.

On April 7, 1997, the complainants' attorney filed additional copies of the petitions for review. Those documents appeared to be photocopies of the law office's "file copies" of the documents. At the top of each document was a "Certificate of Service" stating,

I certify that I mailed a copy of this document to Marilyn Sherron at 10th Floor Municipal Bldg. 600 4th Ave Seattle, Wash postage prepaid on 3-18-97.

The portions underlined in italics were handwritten in ink. The certificate of service was signed by John Scannell, without date of signature. Both documents were stamped as having been received by the Seattle City Attorney on April 4, 1997.

POSITIONS OF THE PARTIES

The employer claims that it was never properly served with the petitions for review, and that therefore, under WAC 391-45-350, dismissal of the complainants' petitions is appropriate.

The complainants claim that their submittal of proof of service filed on April 7, 1997 meets the requirements of WAC 391-08-120, and oppose dismissal of the petitions.

DISCUSSION

The filing and service of a petition for review is governed by WAC 391-45-350, which states:

WAC 391-45-350 Petition for review of examiner decision. The examiner's findings of fact, conclusions of law and order shall be subject to review by the commission on its own motion, or at the request of any party made within twenty days following the date of the order issued by the examiner. **The original and three copies of the petition for review shall be filed with the commission at its Olympia office and the party filing the petition shall serve a copy on each of the other parties to the proceeding.** Such petition for review shall contain, in separate numbered paragraphs, statements of the specific findings, conclusions, orders or rulings on which the party filing the petition seeks review by the commission. A petition for review shall have attached to it any appeal brief or written argument which the party filing the petition for review desires to have considered by the commission. Other parties to the proceeding shall have fourteen days following the date on which they are served with a copy of such petition for review and accompanying brief or written argument to file a responsive brief or written argument. The commission, the executive director or his designee may, for good cause, grant any party an extension of the time for filing of its brief or written argument. If a party presents an issue which requires study of a statute, rule, regulation, or finding of fact, the party should set out the material portions of the text verbatim or include them by facsimile copy in the text or in an appendix to the brief. In the event no timely petition for review is filed, and no action is taken by the commission on its own motion within thirty days following the examiner's final order, the findings of fact, conclusions of law and order of the examiner shall automatically become the findings of fact, conclusions of law and order of the commission and shall have the same force and effect as if issued by the commission.

[Emphasis by **bold** supplied.]

WAC 391-08-120 (3) describes the alternative methods for effective "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.

(c) Service by telegraph or by commercial parcel delivery company shall be regarded as completed when deposited with a telegraph company or parcel delivery company properly addressed and with charges prepaid.

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

[Emphasis by **bold** supplied.]

The rules have been interpreted and applied to require that service be effected in a timely manner.³ Because of the statutory mandate to promote the continual improvement of the employer-employee relationship, and healthy employer-union relations depend upon communication between the parties, the Commission interprets the rules to require service contemporaneous to filing. See, Mason County, Decision 3108-B (PECB, 1991).

Proof of service can be required in cases coming before the Commission. WAC 391-08-120(4) outlines what constitutes proof of service when the sufficiency of service is contested, and reads as follows:

³ See, City of Puyallup, Decision 5460-A (PECB, 1996); and Forks Community Hospital, Decision 4187-A (PECB, 1993).

(4) **Where the sufficiency of service is contested, the timely filing of the papers under this section, together with one of the following shall constitute proof of service:**

(a) **An acknowledgment of service by the person who accepted service.**

(b) **A certificate signed on the date of service,** stating that the person signing the certificate personally served the papers upon all parties of record in the proceeding by delivering a copy thereof in person to (names) at dates, times and places specified in the certificate.

(c) **A certificate signed on the date of service,** stating that the person signing the certificate completed service of the papers upon all parties of record in the proceeding by:

(I) Mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent; or

(ii) Depositing a copy thereof with a telegraph or parcel delivery company named in the certificate, properly addressed with charges prepaid, to each party to the proceeding or to his or her attorney or authorized agent; or

(iii) Transmitting a copy thereof by electronic telefacsimile device, and on the same day mailing a copy, to each party to the proceeding or his or her attorney or authorized agent.

[Emphasis by **bold** supplied.]

It is important to document the proof contemporaneous to the service. In cases like this, where the sufficiency of service is contested, we must have a showing the complainants complied at the time. We expect the parties to closely monitor their own compliance with the rules. If a party fails to do so, we have an obligation to apply the rule in fairness to the other party. City of Puyallup, Decision 5460-A (PECB, 1996). The Commission has thus dismissed petitions for review where the petition did not indicate,

on its face, that copies were provided to either the union or the employer, and no affidavits of service were included. See, Spokane School District, Decision 5151-A and 5152-A (PECB, 1995); Tacoma School District, Decision 5337-B (PECB, 1996); and King County, Decision 5595-A (PECB, 1996).⁴

The petitions for review filed with the Commission in these cases do not indicate, on their face, that copies were provided to the employer. No affidavits of service were included with the petition for review. We are asked to credit affidavits of service signed by law office staff on an unknown date. As the Commission said in Spokane School District, Decision 5151-A (PECB, 1995),

It is too easy for a party to 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.

The certificates of service filed in these cases do not meet the requirements of WAC 391-08-120(4), as (1) the acknowledgment of service "by the person who accepted service" shows a copy received on April 4, 1997, 16 days after the filing of the petition for review, which is not contemporaneous as required, and (2) there is

⁴

The Commission has the authority to waive rules under WAC 391-08-003 and Mason County, *supra*, but waiver is normally based on whether the purposes of the applicable collective bargaining statute is effectuated. In those few instances where the Commission has waived its rules, it has been where a party relied on erroneous agency advice, (City of Tukwila, Decision 2434-A (PECB, 1987)), or where the rules were unclear on their face and there was substantial compliance with the rule (Island County, Decision 5147-C (PECB, 1996)). In this instance, no basis to waive the rules has been suggested or shown.

no showing that the certificate of service was signed on the claimed date of service.

NOW, THEREFORE, it is

ORDERED

1. The petitions for review filed in the above-captioned matter are dismissed.
2. The order of partial dismissal issued in Case 12854-U-96-3096 and the order of dismissal issued in Case 12855-U-96-3097 will stand as issued.

Issued at Olympia, Washington, the 6th day of May, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner