STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77, Complainant, vs. SNOHOMISH COUNTY PUBLIC UTILITY DISTRICT 1, Respondent.	)	CASE 12372-U-96-2933 DECISION 5781 - PECB ORDER OF DISMISSAL

The complaint charging unfair labor practices in the above-captioned matter was filed with the Public Employment Relations Commission on March 7, 1996. The complaint, which was signed by Sylvia Hanson under the title of "Shop Steward", alleged that Snohomish County Public Utility District 1 (employer) had violated the rights of employees represented by International Brotherhood of Electrical Workers, Local 77 (union). The complaint did not indicate, on its face, that service was being effected upon any employer official or attorney.

The case was the subject of preliminary processing under Chapter 391-45 WAC. A letter issued on April 23, 1996, pursuant to WAC 391-45-110,[1] found a cause of action to exist on "refusal to provide information" allegations, and set a deadline for the filing of an answer. The employer's written response, filed on May 16,

[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

1996, indicated that it had not been served with a copy of the complaint. On July 8, 1996, Examiner Kathleen O. Erskine was designated to conduct further proceedings in the matter under Chapter 391-45 WAC. The Examiner contacted the parties about setting a hearing date, but there was indication of a possible settlement of the dispute. By October 1, 1996, the union was requesting a hearing and the employer was requesting a pre-hearing conference to identify the matter(s) in dispute.

In a notice filed with the Commission on November 15, 1996, Rex D. Barry announced his appearance as counsel for the employer. On the same date, the employer filed a motion for dismissal, asserting that the complaint had not been served on the employer.

By letter dated November 22, 1996, the Examiner directed the union to furnish proof of service of the complaint upon the respondent. The union was given a period of 14 days following the date of that letter (i.e., until December 6, 1996) to show cause why the motion for dismissal should not be granted.

Nothing was heard or received from the union by December 6, 1996. Seven days after the return date established in the "show cause" directive, on December 13, 1996,[2] Hanson filed a letter with the Examiner. Hanson did not dispute the employer's claim that it had not been served with a copy of the complaint. Instead, she stated that she had "misunderstood the process by which the employer was to be notified" of an unfair labor practice charge, and she asserted various reasons for the Commission to go forward with the processing of the complaint.

---

[2] No extension of the time for response was requested or granted. The letter filed on December 13, 1996 does not provide any explanation for the tardy response.

DISCUSSION

Unfair labor practice proceedings are formal, adjudicatory proceedings in which the Public Employment Relations Commission and its staff serve in an impartial, quasi-judicial capacity. The parties to a dispute are entirely responsible for the prosecution and defense of unfair labor practice claims. WAC 391-45-270. Reinforcing definitions set forth in the Administrative Procedure Act (APA), Chapter 34.05 RCW, WAC 391-08-120 provides:

> WAC 391-08-120 Filing and service of papers.
>
> FILING OF PAPERS FOR ADJUDICATIVE PROCEEDINGS
>
> (1) Filing of documents 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 upon actual receipt of the original document and any required copies during office hours at the agency office designated in this rule. Electronic telefacsimile transmissions shall not be accepted as filing for such documents, unless RCW 34.05.010(6) or WAC 10-08-110 is amended to permit filings by electronic telefacsimile transmission.
>
> (a) Petitions or complaints to initiate adjudicative proceedings shall be filed in the Olympia office;
>
> (b) Documents to be filed with the executive director or with the agency generally shall be filed in the Olympia office;
>
> (c) Documents to be filed with a presiding officer can be filed in the Olympia office or in the office of the presiding officer;
>
> (d) Documents to be filed with the Commission, including any petitions for review or objections, shall be filed in the Olympia office.
>
> ...
>
> SERVICE ON OTHER PARTIES
>
> (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 service.
>
> PROOF OF SERVICE
>
> (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 acknowledgement 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 proceedings 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.

The employer has clearly contested the sufficiency of service in this case. WAC 391-08-120(3). Once the employer raised a claim of defective service, the burden was on the union to prove (in conformity with WAC 391-08-120(4)) that it had served a copy of the

complaint on the employer. Thurston County, Decision 5633 (PECB, 1996).

Contemporary Service of Process Required

In her letter filed on December 13, 1996, Hanson contends that a state statute (which mentions only "filing" of a complaint) should be distinguished from the National Labor Relations Act (which requires both "filing" and "service"), and that the requirement for service contemporary with the filing of a complaint should be considered "advisory" only. These arguments are incorrect.

The union's reliance on "RCW 41.56.170" is misplaced. That section of the Public Employees' Collective Bargaining Act was repealed in 1994, when obsolete procedural sections were consolidated into a substantially-revised RCW 41.56.160 in light of the APA enacted in 1988.[3]

RCW 41.56.160 only mentions "filing", but it must be read in conjunction with the APA and the Commission's rules. In addition to the general procedural rules set forth in the APA and WAC 391-08-120, the requirement for "service" of complaints on opposing parties is clearly set forth in Chapter 391-45 WAC, the Commission's rules for unfair labor practice cases:

> WAC 391-45-030 Form--Number of copies--Filing--Service. Charges shall be in writing, in the form of a complaint charging unfair labor practices. The original and one copy shall be filed with the agency at its Olympia office. **The party filing the complaint shall serve a copy on each party named as a respondent.**

[Emphasis by **bold** supplied.]

---

[3] 1994 c 58. RCW 41.56.180 and 41.56.190 were also repealed at that time.

The Commission has repeatedly emphasized the importance of good communication to healthy labor relations. In Mason County, Decision 3108-B (PECB, 1991), the Commission wrote:

> 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.

Reiterating that principle recently in City of Puyallup, Decision 5460-A (PECB, 1996), the Commission stated, "Because of this process of communication embodied in the collective bargaining statutes, the Commission interprets the rules to require service contemporaneous to filing."

Misdirection by Agency Staff

In her letter filed on December 13, 1996, Hanson states that she spoke with a member of the Commission staff "to get guidance on the proper procedures to follow", and that she had referred to "PERC filing instructions".[4] The Commission has excused procedural errors where a party has relied on erroneous agency advice, as in

---

[4] This can be interpreted as a reference to instructions printed on the back side of the complaint forms promulgated by the agency. The instructions on the form used by Hanson in this case include:

> D. SERVICE: The party who submits the case to PERC must give or send a copy of the complaint form, together with all attachments, to the other party or parties to the dispute.

City of Tukwila, Decision 2434-A (PECB, 1987). In Island County, Decision 5147-C (PECB, 1996), the Commission excused a procedural error, in part because the rules in effect at that time were not particularly clear on their face, and in part because there was substantial compliance with the rule.

Importantly, Hanson does not claim that her failure to effect timely service was attributable to erroneous advice given by the agency staff member she contacted. Instead, Hanson acknowledged:

> Unfortunately, **I misunderstood the process** by which the employer was to be notified. **After reading the PERC filing instructions, I was under the impression that I was to give a copy of the completed form to the employer after I received it back from your office.**

[Emphasis by underline in original; emphasis by **bold** supplied.]

Nor is it likely that a member of the Commission staff would lead a caller to believe the procedure was as described by Hanson. The requirement for a complainant to serve a complaint on opposing parties has been in place in Chapter 391-45 WAC since 1980.

The Commission has routinely dismissed petitions for review for failure to effect proper service on other parties, particularly where the only "cause" of the untimely service was a lack of due diligence. The service requirements of Chapters 391-08 and 391-45 WAC, as well as the underlying policy of orderly dispute resolution, would be completely undermined if untimely service due to lack of due diligence were to be excused. See: City of Puyallup, supra; Mason County, supra; Clover Park School District, Decision 377-A (PECB, 1978); Spokane School District, Decision 5151-A and 5152-A (PECB, 1995); and Spokane School District, Decision 5647-B (EDUC, 1996).

Request for Waiver

In her letter filed on December 13, 1996, Hanson asserts that the employer's motion to dismiss is "based on a technicality", and that it fails to demonstrate any prejudice by lack of contemporaneous service. Under WAC 391-08-003, the Commission retains the authority to waive requirements of rules when a party is not prejudiced by such action.

This argument suffers from that fact that it is premised, at least in part, on the already-rejected claim that the requirement for contemporaneous service is "only advisory".

Under Mason County, supra, the exercise of the Commission's authority to waive rules is based on whether such a waiver will effectuate the purposes and provisions of the applicable collective bargaining statute. In City of Puyallup, supra, and previous cases, the Commission has ruled that inadvertent error is not a justification for waiver.

Under RCW 41.56.160, parties have a right to put actions occurring more than six months ago behind them.[5] In this case, where the request for information at issue was made on or about February 2, 1996, the employer may not have been aware of the existence of a complaint against it until the preliminary ruling letter issued on April 23, 1996 (more than two months after the alleged violation).

---

[5] That section includes: "[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." The only exceptions to that "statute of limitations" have been made in cases where the offending party's unlawful conduct was concealed from the injured party. See, for example, City of Pasco, Decision 4197-A (PECB, 1994), where a union neither knew nor had reason to know of an unlawful circumvention until long after the event.

Its answer filed on May 16, 1996 (more than three months after the alleged violation) asserts: "[W]e have received no "Complaint" setting forth factual allegations." It can be inferred that the complaint was served, if at all, only after the motion for dismissal was filed on November 15, 1996 (more than nine months after the alleged violation). The employer would be prejudiced by having to defend against an untimely complaint.

Conclusions

International Brotherhood of Electrical Workers, Local 77, has not provided "proof of service" in the manner required by WAC 391-08-120(4), and has not even alleged that it made proper service of its unfair labor practice complaint on Snohomish County Public Utility District 1. The complaint charging unfair labor practices filed in this case must be dismissed under Commission precedent.

NOW, THEREFORE, it is

ORDERED

The complaint charging unfair labor practices filed in the above-entitled matter is hereby DISMISSED.

ISSUED at Olympia, Washington, this 23rd day of December, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kathleen O. Erskine

KATHLEEN O. ERSKINE, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.