

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE SCHOOL DISTRICT,)	
)	
Employer.)	
-----)	
MICHAEL RUST,)	
)	
Complainant,)	CASE 11198-U-94-2608
)	
vs.)	DECISION 5151-A - PECB
)	
SPOKANE EDUCATION ASSOCIATION/ WEA/NEA,)	
)	
Respondent.)	
)	
-----)	
MICHAEL RUST,)	
)	
Complainant,)	CASE 11199-U-94-2609
)	
vs.)	DECISION 5152-A - PECB
)	
SPOKANE SCHOOL DISTRICT,)	
)	
Respondent.)	DECISION OF COMMISSION
)	
-----)	

W. R. Van Camp, P.C., by W. Russell Van Camp, Attorney at Law, represented the complainant.

Winston, Stevens & Clay, P.S., by Paul E. Clay, Attorney at Law, represented the Spokane School District.

Kathy O'Toole, Attorney at Law, represented the Spokane Education Association.

This case comes before the Commission on a petition for review filed by Michael Rust, seeking to overturn orders of dismissal issued by Executive Director Marvin L. Schurke on June 8, 1995.¹

¹ Spokane School District, Decisions 5151 and 5152 (PECB, 1995).

BACKGROUND

On June 21, 1994, Michael Rust filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The complaint itself did not identify the respondents, but an attached letter dated June 17, 1994, named the Spokane School District (employer) and the Spokane Education Association (union) as the respondents. The letter mentioned enclosures "too numerous to list", and five packages of materials enclosed with the complaint included a substantial number of documents.² The complaint alleged, generally, that the employer and union discriminated and retaliated against the complainant for filing and processing a grievance concerning the assignment of overtime.

In a preliminary ruling letter of February 2, 1995, the Executive Director found that a cause of action existed for unfair labor practices. By letter of February 21, 1995, the Executive Director advised the parties that J. Martin Smith was designated as Examiner to conduct further proceedings in the matter pursuant to Chapter 391-45 WAC.

On March 6, 1995, the union filed a motion to dismiss the complaint on the basis that it was not properly served. The union stated that the first time any union agent, employee or officer received a copy of the complaint was when it was faxed to them from the Commission office on February 22, 1995. Attached to the union's

² A package marked "Read 1st" contained documentation of events back to 1989, written correspondence, a copy of the collective bargaining agreement, and organization charts. A package marked "Read 2nd" included letters related to a grievance involving overtime, and another package included logs and accounts of the assignment of overtime. A package marked "Read 3rd" contained materials relating to a sexual harassment claim against Rust, a grievance concerning medical leave, and a transfer to other schools in the district. A package marked "Read 4th" contained records and letters related to Rust's family medical leave in 1994.

letter were affidavits from the union's president, executive director, and two field assistants, stating that they did not see or receive complaint allegations against the union until the documents were faxed to the Spokane Education Association on March 1, 1995 from the Washington Education Association.

On March 20, 1995, Examiner Smith advised the parties that the case would be held open for 14 days to permit the filing and service of a "proof of service" conforming to WAC 391-08-120(5) to establish that the complaint and its attachments were properly served.

On March 31, 1995, the complainant supplied an affidavit stating that he gave a copy of his June 17, 1994 letter to Mr. Kostecka on June 23, 1994, and that Mr. Kostecka told him he would see that Mr. Paulson received a duplicate of the copy.³

Also on March 31, 1995, the employer moved for dismissal of the case on the grounds that the complaint was not properly served on the employer. The employer claimed that the statute of limitations precludes the complaint from now being served in a timely manner. Attached to its request was a declaration of the employer's attorney stating he was never served or given a copy of the complaint charging unfair labor practice or the letter dated June 17, 1994, and that the first time he saw the two documents was when they were provided to his legal assistant via fax from the Commission on July 21, 1994. Also attached to the employer's request were declarations from the assistant superintendent of human resources and the employee relations director, stating that they were never served or given a copy of the complaint charging unfair labor practice or the letter dated June 17, 1994. They asserted that the only time they have seen the two documents was when shown to them by the employer's legal counsel.

³ Mr. John Kostecka and Mr. Steve Paulson are both shown as union representatives in Rust's letter of June 17, 1994, which was attached to his complaint.

On May 12, 1995, Examiner Smith wrote to the complainant, advising him that there is no indication on the face of the complaint or the attached June 17, 1995 letter that copies of those documents were served on either the employer or the union. Mr. Smith advised the complainant that the case would be held open for 14 days, to permit the filing and service of a "proof of service" conforming to WAC 391-08-120(5), to establish that the complaint charging unfair labor practices and its attachments were properly served.

On May 22, 1995, the complainant's attorney filed a response, which included an affidavit from a student who may have been a witness to some of the incidents involved in the complaints. Attached was a friend's affidavit referencing a meeting which she, Rust, and representatives of the employer and union attended on June 30, 1994. Also enclosed were two affidavits of the complainant, one stating in part:

That during the afternoon of June 23, 1994, after a meeting with Delores Humiston at the School District Bldg, I took a copy of the letter to the office of Mr. Kostecka who I had to go see that afternoon, and while there gave it to him. This was in his office, near the close of the business day and **what I gave to him was a copy of my June 17, 1994 letter to Public Employment Relations Commission.** The copy I gave him was of the copy I'd received from the Commission showing on the upper right corner of the front page that it had received the letter on June 21, 1994. It wasn't attached or stapled to the letter, but **I also gave him a copy of the complaint form I'd filed with the P.E.R.C.**

I not only gave them to him but asked if he'd wanted an extra copy of both items for Mr. Steve Paulson. **Mr. Kostecka said** that wasn't necessary and that **he would see to it that Mr. Paulson received a duplicate** of the one he had; holding out his hand with the copy in it.

[Emphasis by **bold** supplied.]

The complainant's other affidavit states, in part, as follows:

Three days later, June 23, 1994 at a meeting between myself and the Spokane School District Nr. 81, at which Delores Humiston was representing the school District, **I did give to Ms Humiston a copy of the Complaint.** At the time it was morning, we were meeting at the District Administration Bldg, 200 North Bernard street, Spokane WA, a conference room on one of the upper floors. The meeting was attended by John Kostecka and Cheryl Perez, myself and Marilyn A. Pitner, as well as Ms Humiston.

At that meeting I gave Ms Humiston a copy of a letter from Dr. Vanderbosch, a copy of the Complaint to the P.E.R.C. I also gave her a copy of my letter dated 6/17/94 to the Public Employment Relations Commission. The copy I gave her of the last item was dated by me on June 17, 1994 when I wrote it. I'd mailed it to the P.E.R.C. June 20, 1994 by overnight mail. I'd received back a copy on which the Commission had stamped their receipt (sic) indication showing June 21, 1994. The copy I gave Ms Humiston showed the receipt stamp of the Commission showing June 21, 1994. I gave these papers directly to Ms Humiston. She took them and put them in a file in front of her. There was no discussion of or about them. I just handed them to her, she took them and she slid them into a file in front of her on the desk.

[Emphasis by **bold** supplied.]

On June 8, 1995, Marvin L. Schurke dismissed the unfair labor practices for failure to effect timely service of the complaints on the union and the employer.

On June 26, 1995, the complainant filed a petition for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The complainant asserts that he was not properly served with a copy of the order of dismissal, since the copy received from the Public Employment Relations Commission contained only the odd-numbered pages of the order.

The employer and union moved for dismissal of the case prior to the order of dismissal and did not respond to the petition for review.

DISCUSSIONThe Legal Standard

This dispute arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The conduct of adjudicative proceedings before Washington administrative agencies is regulated by the Administrative Procedure Act, Chapter 34.05 RCW, and by the Model Rules of Procedure promulgated by the Chief Administrative Law Judge in Chapter 10-08 WAC. The Commission has adopted specific rules for processing unfair labor practice cases in Chapter 391-45 WAC.

WAC 391-45-030 requires complainants alleging unfair labor practices to serve the parties to the complaint, and provides, specifically:

WAC 391-45-030 FORM--NUMBER OF COPIES--
FILING--SERVICE. Charges shall be in writing, in the form of a complaint of unfair labor practices. The original and three copies 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.]

WAC 10-08-110 provides for the filing and service of papers with the Commission in the following manner:

WAC 10-08-110 ADJUDICATIVE PROCEEDINGS--FILING AND SERVICE OF PAPERS.

(1) All notices, pleadings, and other papers filed with the presiding officer shall be served upon all counsel and representatives of record and upon unrepresented parties or upon their agents designated by them or by law.

(2) Service shall be made personally or, unless otherwise provided by law, by first-class, registered, or certified mail, by telegraph; by electronic telefacsimile transmission and same-day mailing of copies; or by commercial parcel delivery company.

(3) Service by mail shall be regarded as completed upon deposit in the United States mail properly stamped and addressed. Service by telegraph shall be regarded as completed when deposited with a telegraph company properly addressed and with charges prepaid. Service by electronic telefacsimile transmission shall be regarded as completed upon production by the telefacsimile device of confirmation of transmission. Service by commercial parcel delivery shall be regarded as completed upon delivery to the parcel delivery company with charges prepaid.

(5) Where proof of service is required by statute or rule, filing the papers with the presiding officer, together with one of the following, shall constitute proof of service:

(a) An acknowledgement of service.

(b) A certificate that the person signing the certificate did on the date of the certificate serve the papers upon all parties of record in the proceeding by delivering a copy thereof in person to (names.)

(c) A certificate that the person signing the certificate did on the date of the certificate serve 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) Telegraphing a copy thereof, properly addressed with charges prepaid, to

each party to the proceeding or 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; or

(iv) Depositing a copy thereof, properly addressed with charges prepaid, with a commercial parcel delivery company.

[Emphasis by **bold** supplied.]

Inadequate Service

Although proof of service for petitions for review is not specifically required by statute or rule, as to technically trigger WAC 391-08-120(5), parties take a chance in not following procedures set forth in the rules. When issues arise, we look to the procedural rules for guidance. The Commission has adapted the rules regarding proof of service for its own use and includes the requirement on applicable forms, so that the parties are fully aware of the requirements. The instructions for unfair labor practice cases shown on the Commission's complaint form states:

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

[Emphasis by **bold** supplied.]

This instruction was on the complaint form submitted by Rust.

The rule and instructions are written for important legal reasons. Unfair labor practice complaints have been routinely dismissed upon a record showing inadequate service. See, King County Fire District, Decision 4116-A (PECB, 1993); Morton General Hospital, Decision 3836 (PECB, 1991); and City of Pasco, Decision 2450 (PECB, 1986).

Proof of service can be required in cases coming before the Commission, and it is important to document the proof contemporaneous to the service. In a case like this one, where the sufficiency of service is contested, we must have a showing the complainant complied at the time.

The petition for review and its attached documents filed with the Commission do not indicate, on their face, that copies were provided to either the union or the employer. No affidavits of service were included with the complaint. We are asked to credit affidavits signed by the complainant on March 28, 1995, April 4, 1995, and May 18, 1995, regarding events that took place in June of 1994. It is often not possible to reconstruct occurrences with any degree of certainty so far from the actual event, particularly regarding a matter unrelated to the main issue of the complaint. 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 affidavits which the complainant supplied refer only to the letter. We find no assertion that all the enclosures which were part of the complaint were provided to the employer and the union, as required. Even if we credit the complainant's contention that he did supply the employer and the union a copy of the letter, we would still lack substantiation that the large stack of enclosures was provided to them as well, which would be necessary to effect proper service.

There is no contemporaneous documentation of service of the unfair labor practice pleadings, and the record is insufficient to infer that the union and employer had the documents in a timely manner. The fact the union and employer subsequently became aware of the filing does not satisfy procedural requirements. The requirement for service of process is well defined. Lacking sufficient

evidence that the complainant fulfilled his obligation to serve a copy of the complaint, along with all the attachments and enclosures, we are unwilling to conclude that service was properly effected.

NOW, THEREFORE, it is

ORDERED

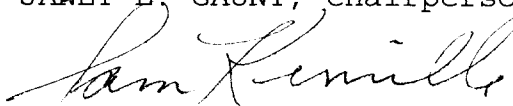
The order of dismissal issued by the Executive Director in the above-captioned matter is AFFIRMED.

Issued at Olympia, Washington, the 27th day of September, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



SAM KINVILLE, Commissioner



JOSEPH W. DUFFY, Commissioner