

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 280,)	
)	
Complainant,)	CASE 12860-U-96-3099
)	
vs.)	DECISION 6120-B - PECB
)	
CITY OF RICHLAND,)	
)	
Respondent.)	DECISION OF COMMISSION
)	
)	

Davies, Roberts & Reid, LLP, by Michael R. McCarthy, Attorney at Law, appeared on behalf of the complainant.

Menke, Jackson, Beyer & Elofson, LLP, by Rocky L. Jackson, Attorney at Law, appeared on behalf of the respondent.

Examiner Walter M. Stuteville held a hearing in the above-captioned matter and found that the employer committed unfair labor practices in violation of RCW 41.56.140. His findings of fact, conclusions of law and remedial order were issued on December 4, 1997, as Decision 6120 - PECB. The deadline for filing a petition for review in this case was thus December 24, 1997.¹

¹ WAC 391-45-350 states, in pertinent part:

The examiner's findings of fact, conclusions of law and order shall be subject to review by the commission in its own motion, or at the request of any party **made within twenty days** following the date of the order issued by the examiner.

[Emphasis by **bold** supplied.]

On December 9, 1997, the employer filed a motion with the Examiner, requesting clarification and a stay of parts of the remedial order, reconsideration of the remedies ordered, and a stay of the period for filing a petition for review. While the employer made it clear that it did not like the remedies ordered, it did not identify any alleged "mistake" in the Examiner's decision.

The Examiner ruled on those motions in an order issued on December 15, 1997, as Decision 6120-A - PECB. Examiner Stuteville indicated that the employer's motions had been considered under WAC 391-45-330,² because "no other rule permits an Examiner to 'reconsider' a decision after it is issued"; he denied the motions for clarification and reconsideration of the remedial order on the basis that no mistake was alleged or shown; he denied the motion for a stay of part of the remedial order on the basis no provision of Chapter 391-45 WAC was cited or found that permits an Examiner to stay an order; and he specifically stated that he had no authority to extend the period for filing a petition for review.

On December 24, 1997 at 2:00 p.m., the employer attempted to file a petition for review by telefacsimile transmission to the Commission's office. That transmission included a motion for an extension of the time for filing the employer's brief, and an affidavit of the employer's attorney supporting the latter motion.

² WAC 391-45-330 states, in pertinent part:

On the examiner's own motion or on the motion of any party, the examiner may set aside, modify, change, or reverse any findings of fact, conclusions of law or order at any time within ten days following the issuance thereof, **if any mistake is discovered therein** . . .

[Emphasis by **bold** supplied.]

The Commission's clerk left a message for the employer's attorney at 2:28 p.m. on December 24, 1997, pointing out that a petition for review cannot be filed by telefacsimile.³

The employer's original petition for review and required copies were not filed with the Commission until December 26, 1997. That filing was two days late.

DISCUSSION:

Under WAC 391-08-003, the Commission has reserved the authority to waive the application of its rules. The exercise of that authority has historically been conditioned on such a waiver effectuating the purposes and provisions of the applicable collective bargaining statute. While "lack of prejudice" is the only condition explicitly stated in WAC 391-08-003, the rule does not make waivers automatic when there is no prejudice.

The Commission has been strict in its enforcement of the time limits for filing election objections and petitions for review, and

³ WAC 391-08-120 states, in pertinent part:

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, . . .**

[Emphasis by **bold** supplied.]

has dismissed untimely appeals in numerous cases. See, for example, Puget Sound Educational Service District, Decision 5126-A (PECB, 1996), and cases cited therein; City of Tacoma, Decision 5634-B (PECB, 1996) and cases cited therein; and King County, Decision 5720-A (PECB, 1997).

Inadvertent errors have been found insufficient justification for waivers in several past cases. Spokane School District, Decision 5647-B (PECB, 1996); City of Puyallup, Decision 5460-A (PECB, 1996); and Mason County, Decision 3108-B (PECB, 1991). Responding to an acknowledgment of attorney error, the Commission stated:

[T]he only "cause" of the employer's untimely service was its own lack of due diligence. If the Commission were to excuse untimely service for such a reason, we would completely undermine the service requirements of WAC 391-45-350 and the underlying policy of orderly dispute resolution.

Mason County, supra.

The Supreme Court of the State of Washington has similarly required strict compliance with time limits in a case arising out of Chapter 41.56 RCW. See, City of Seattle v. PERC, 116 Wn.2d 923 (1991).

The only instances found where the Commission has waived the time limit for appeal (*i.e.*, election objections or a petition for review) have been where the agency's staff or rules contributed to the late filing. In City of Tukwila, Decision 2434-A (PECB, 1987), the party filing untimely objections had relied upon erroneous advice from a member of the agency staff. In Island County, Decision 5147-C (PECB, 1996), where the party transmitted its petition for review to the Commission by telefacsimile within the 20-day period and filed its original later, a Commission majority

waived the time for the filing based on a conclusion that the then-existing rule concerning the unacceptability of filing by "fax" was not clear. WAC 391-08-120 was amended in April of 1996 to make it clear to practitioners that "filing" cannot be accomplished by a telefacsimile transmission. There is no claim or evidence of an agency error or an ambiguous agency rule in the case now before us, so that these precedents are inapplicable here.

As part of the December 24, 1997 telefacsimile transmission, the employer's attorney requested an extension of time to file a brief. That request was based on:

... the continued illness of Attorney Rocky Jackson. I have been ill since the evening of Thursday, December 11, 1997. I have been able to work only part days the week of December 15. The week of December 22 involved holidays part of December 24, December 25 and December 26. ... The Decision of the hearing officer [sic] was not received until December 8, 1997.

No reasons were asserted as a basis for late filing of a petition for review, and there was no explanation or justification for the attempt to "file" by telefacsimile transmission.

While we sympathize with the attorney's illness, in fairness to the other party in this case, we find no basis to waive the rules:

- The 20-day period for appeal specified in WAC 391-45-350 conforms to the statewide standard for practice before administrative agencies under Chapter 10-08 WAC.⁴ The time

⁴ See, City of Tacoma, Decision 5634-B (PECB, 1996) for discussion of the standards.

period for filing a petition for review clearly begins to run with the service of the Examiner's findings of fact, conclusions of law and order.

- Service of the Examiner's decision was complete upon its deposit in the United States Mail on Thursday, December 4, 1997. This conclusion is rooted in the Administrative Procedure Act, at RCW 34.05.010(18). Since a weekend intervened, receipt of the decision by the employer's attorney on Monday, December 8, 1997, was not prejudicial.
- WAC 391-08-100 defines the computation of time periods where holidays are involved. State government does not recognize a holiday for "part of December 24", so the time period for filing a petition for review in this case was not affected by any holiday. December 25 and December 26 are irrelevant to the question now before us.
- The tardiness of the petition for review here appears to be due only to a mistake made by the employer's attorney in not closely observing the rules.

In light of the amendment to WAC 391-08-120 which now clearly prohibits "filing" by telefacsimile transmission, the attempt to deliver the petition for review by telefacsimile on the day it was due was not substantial compliance with the filing requirement. Consistency in the application of our rules fulfills the charge of the Legislature that the Commission be "uniform" in its administration of public sector collective bargaining. RCW 41.58.005(1). This petition for review must be dismissed.

NOW, THEREFORE, it is

ORDERED

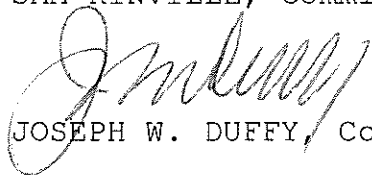
1. The petition for review is DISMISSED, and the decision entered on December 4, 1997 stands as the final order in this matter.
2. Within 30 days following the date of this order, the City of Richland, its officers and agents, shall report the steps taken to comply with the Examiner's order.

Issued at Olympia, Washington, the 6th day of February, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner