STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 280, Complainant, vs. CITY OF RICHLAND, Respondent.	)	CASE 12860-U-96-3099 DECISION 6120-C - PECB ORDER DENYING MOTION FOR RECONSIDERATION

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.

This case comes before the Commission on a motion filed by the employer on February 13, 1998, seeking reconsideration of a final order issued by the Commission on February 6, 1998.[1] Such motions are controlled by the Administrative Procedure Act (APA), Chapter 34.05 RCW, as follows:

> 34.05.470 RECONSIDERATION. (1) Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The place of filing and other procedures, if any, shall be specified by agency rule.
>
> (2) No petition for reconsideration may stay the effectiveness of an order.

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[1] City of Richland, Decision 6120-B (PECB, 1998).

> (3) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration. The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed, the agency does not either: (a) Dispose of the petition; or (b) serve the parties with a written notice specifying the date by which it will act on the petition.
>
> (4) Unless the petition for reconsideration is deemed denied under subsection (3) of this section, the petition shall be disposed of by the same person or persons who entered the order, if reasonably available. The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving and modifying the final order, or granting the petition and setting the matter for further hearing. ...

The employer's motion was accompanied by a written argument and an affidavit of its attorney, Rocky L. Jackson. The union filed a declaration of its attorney on February 24, 1998, stating there was no direct conversation between counsel about the employer's request for an extension, and that union counsel understood the request to relate only to the time for filing briefs.

PROCEDURAL HISTORY

The Complaint and Proceedings Before the Examiner

The complaint filed in this case on December 5, 1996 concerns a unilateral "skimming", by transferring work historically performed by members of a bargaining unit represented by International Union of Operating Engineers (IUOE), Local 280, to employees in a

bargaining unit represented by International Brotherhood of Electrical Workers (IBEW), Local 77.

Examiner Walter M. Stuteville held a hearing, and ruled that the employer violated RCW 41.56.140(4) and (1).[2] The Examiner's remedial order included the customary notice for posting and, consistent with a policy recently stated by this Commission,[3] required the employer to:

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[2] City of Richland, Decision 6120 (PECB, 1997).

[3] In Seattle School District, Decision 5542-C (PECB, 1997) we wrote:

> Reading of the Notice into Public Meeting Record - The Examiner ordered that the customary notice of the unfair labor practice violation be read into the record of the next public meeting of the Board of Directors of the Seattle School District. ... We fully support the Examiner's approach, as it is prudent that the public be made aware of violations of the law such as occurred in this case.
>
> The Legislature and the courts have indicated a strong public interest in preserving records for public perusal on a long term basis [footnote citing State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970)]. RCW 42.32.030 reads:
>
> > Minutes. The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.
>
> That section applies to all public agencies as defined by RCW 42.30.020, and has remained inviolable since 1953.
>
> In the case at hand, reading the "Notice" into the record of the next public meeting of the school board would allow for public knowledge of the unfair labor practice. In order to assure that the "Notice" becomes part of the permanent record, we are ordering it to be appended to the minutes of the meeting where it is read. We conclude it appropriate for the remedy to become standard in cases where unfair labor practices are committed.

> d. Read the notice attached hereto at the regular public meeting of the City Council of the City of Richland which next follows the receipt of this decision, and permanently append a copy of the attached notice to the official minutes of the meeting where the notice is read as required by this paragraph.

That was followed, in paragraphs designated "e." and "f.", with the customary requirement that the employer notify the complainant and the Commission's Executive Director of the steps taken to comply with the order.

With the issuance of the Examiner's decision on December 4, 1997, the deadline for filing a petition for review was automatically established in this case as December 24, 1997.[4]

The Employer's Motion to the Examiner

By a telefacsimile transmission on December 10, 1997, Jackson sent Examiner Stuteville a motion that was dated December 9, 1997. That motion cited WAC 391-45-330, but bore a title of:

> Motion to Set Aside, Modify, Change or Reverse Findings of Fact, Conclusions of Law and Order; and Motion to Stay Appeal Period, and Stay of Portions of the Order

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[4] 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. The original and three copies of the petition for review shall be filed with the Commission at its Olympia office ...

[Emphasis by **bold** supplied.]

The original motion was not filed at the Examiner's office until Friday, December 12, 1997.

Motion Was Substantively Defective -

Our examiners issue what are characterized as "initial orders" under RCW 34.05.461(c). No provision of the APA provides parties a right to move for "reconsideration" of such an order, and Chapter 391-45 WAC does not authorize our examiners to reconsider or stay their decisions. Our examiners have authority to take further action on a case in very limited circumstances, as follows:

> WAC 391-45-330 WITHDRAWAL OR MODIFICATION OF EXAMINER DECISION. 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 text of the employer's motion in this case did not point out any clerical or computational mistakes, instead stating only:

> The hearing officer [sic] ordered in paragraph 2a. to "restore and maintain the status quo ante by assigning the work of the central stores storekeeper function to an employee or employees who are members of the bargaining unit represented by Local 280."
>
> The evidence presented in the record was that there were two storekeepers positions regardless of the union affiliation, within the City of Richland. If the City of Richland is to follow the hearing [sic] examiner's Order, the result would be to lay off one IBEW storekeeper, and promote from within the Local 280 an employee to an IUOE storekeeper position. The IBEW employee who would be laid

> off, is a former IUOE member but under the current status has no IUOE representation. Further, the IBEW employee has no bumping right into the IUOE Local 280. The net result of the hearing [sic] examiner's Order will be to lay off a senior employee (Mr. Hyland), who will only have bumping rights within the IBEW. This would result in an approximate a [sic] $4.00 per hour decrease in Mr. Hyland's wages. Should Mr. Hyland chose [sic] not to bump within the IBEW, Mr. Hyland would be out of work. The City **requests the** hearing [sic] **examiner clarify his decision** by confirming in writing that the language in paragraph 2.a. requires assignment of the storekeeper function to a current employee of Bargaining Unit represented by Local 280, to the exclusion of the IBEW storekeeper.
>
> The City further moves for a **stay of the appeal period for filing a petition for review** of the examiner's decision. Further, the City moves for a **stay of paragraph 2d.** as the next regular City Council meeting will be likely prior to any decision on this Motion for Review [sic]. The City further requests the hearing [sic] examiner to **reconsider paragraph 2d** as an unnecessary, extraordinary remedy.
>
> **The City further moves for a stay of the Order** found in paragraphs 2(e) and (f) pending resolution of this motion.

[Emphasis by **bold** supplied.]

Thus, the employer did not identify anything in the Examiner's decision as a "mistake" sufficient to invoke WAC 391-45-330.

Examiner Denied Motion on Procedural Grounds -

Since December 14, 1997 was a Sunday, the 10-day period for the Examiner to take any action under WAC 391-45-330 was extended, by operation of WAC 391-08-100, to the close of business on Monday,

December 15, 1997. In an order issued on December 15th,[5] Examiner Stuteville:

- Denied the motion for clarification of the "restore and maintain status quo ante" portion of the order, on the basis that no mistake was alleged or shown;
- Denied the motion for a stay of the appeal period, specifically stating that he had no authority to extend the period for filing a petition for review and that the request was outside the scope of WAC 391-45-330;
- Denied the motion for a stay 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
- Denied the motion for reconsideration of the "read into the record and append to minutes" portion of the order, on the basis that no mistake was alleged or shown.

The Examiner clearly did not set aside, modify, change, or reverse any portion of his decision in this case.

Inasmuch as it was not properly filed until the day before the last business day for the Examiner to take any action under WAC 391-45-330, and did not cite any mistake to invoke WAC 391-45-330, the Examiner could properly have ignored the employer's motion. In making a response, the Examiner gave the employer more, not less, than that to which it was entitled.

Request That Appeal Period Be Tolled -

The employer now urges that the due date for its appeal should be extended to 20 days after the Examiner's order on its motion, which

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[5] City of Richland, Decision 6120-A (PECB, 1997).

would reset the due date in this case to January 5, 1998. However, we find no support for that argument in the rules and facts applicable to this case:

- Distinctly different from the "reconsideration" procedure of RCW 34.05.470, nothing in WAC 391-45-330 automatically tolls the period for filing an appeal when a party files a motion under WAC 391-45-330.

- Again different from RCW 34.05.470, where the 20-day period allowed for agency responses to motions for reconsideration may carry up to the end of the 30-day period to file a petition for judicial review of the final order, the 10-day period for an examiner to correct mistakes under WAC 391-45-330 leaves a dissatisfied party with time to appeal during the last half of the 20-day appeal period established by issuance of the original decision.

- No rights flow to a party from its submission of a procedurally deficient and/or substantively deficient motion, such as Jackson's motion invoking a rule inapposite to his actual requests in this case. To hold otherwise might reward the creativity of counsel, but could only lead to disrupting and prolonging of case processing.

- While an examiner's order setting aside, modifying, changing, or reversing any portion of his decision would be a new order that would give rise to a new 20-day period for appeal, those are not the facts before us.

Moreover, the Examiner expressly denied the employer's request for an extension of the period for appeal in this case, stating:

> WAC 391-45-350 provides for appeal of an Examiner's Findings of Fact, Conclusions of

> Law and Order to the Commission, upon a petition for review filed within 20 days. **Neither the Examiner, the Executive Director nor any Commission member has authority to extend the period for filing a petition for review.** The motion is entirely outside the scope of WAC 391-45-330.

[Emphasis by **bold** supplied.]

Jackson clearly had no basis to believe that an extension of the appeal period had been or would be granted. We thus reject the employer's "appeal period tolled" argument.

Petition for Review Untimely

To be timely in this case, the original and three copies of a petition for review had to be filed in the Commission's Olympia office by the close of business on Wednesday, December 24, 1997.

Telefacsimile Transmission Procedurally Defective -
In Island County, Decision 5147-B (PECB, November 14, 1995), the Commission noted that the APA makes a distinction between "filing", at RCW 34.05.010(6), and "service", at RCW 34.05.010(18), and concluded that the Legislature has deprived administrative agencies of authority to accept telefacsimile transmissions as "filing" in adjudicative proceedings under the APA. In a subsequent decision in the same case, Island County, Decision 5147-C (PECB, January 31, 1996), the Commission concluded that the rules then in effect might have contributed to the error of a practitioner who had attempted to "file" a petition for review by telefacsimile transmission.

On February 29, 1996, the Commission amended its Rules of Practice and Procedure, Chapter 391-08 WAC, to clearly delineate the distinction drawn by the APA between "filing" and "service":

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.

SUBMISSION OF PAPERS FOR NONADJUDICATIVE PROCEEDINGS

(2) **Submission of papers to the agency for cases that are not adjudicative proceedings** under the Administrative Procedure Act (cases under chapters 391-55 and 391-65 WAC) shall be deemed complete upon actual receipt of the original paper and any required copy during office hours at the Olympia office or at the office of the agency staff member assigned to process the case. **Papers will also be accepted by electronic telefacsimile transmission in cases under this subsection,** with the following limitations:

(a) The maximum length of papers acceptable for submission by electronic telefacsimile transmission is ten pages;

> (b) The party sending papers by electronic telefacsimile transmission is responsible for confirming that the material was complete and legible when received by the agency;
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> (c) An agency staff member processing the case may require mailing of the original papers to the agency;
>
> (d) Electronic telefacsimile transmission shall not be used to submit authorization cards for purposes of a showing of interest or cross-check under chapter 391-25 WAC.
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> SERVICE ON OTHER PARTIES
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> (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:
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> (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.
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[Emphasis by **bold** supplied.][6]

Our amended rule was duly published in the Washington State Register, and went into effect on April 20, 1996. The agency

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[6] WAC 10-08-110 is a section of the Model Rules of Procedure adopted by the Chief Administrative Law Judge of the State of Washington, pursuant to RCW 34.05.250.

subsequently made the statutes and rules it administers available to clientele in booklet form. Neither RCW 34.05.010(6), nor WAC 10-08-110, nor WAC 391-08-120(1) has been amended to allow "filing" by telefacsimile transmission. As an attorney who is listed as counsel of record for the employers in approximately 5% of all cases now pending before the agency, Jackson is responsible for knowing and following the Commission's rules.

On December 24, 1997 at 2:00 p.m., Jackson's office sent three items concerning this case to the Commission's Olympia office, by telefacsimile transmission. They were:

1. The employer's petition for review under WAC 391-45-350;

2. A motion for an extension of the time for filing the employer's brief in support of its petition for review; and

3. An affidavit of the employer's attorney supporting the latter motion.

The Commission's clerk telephoned Jackson's office at 2:28 p.m. on December 24, 1997, and, upon receiving no answer, left a message pointing out that a petition for review cannot be filed by telefacsimile transmission. For the reasons indicated above, that message was entirely correct.

In light of the amendment to WAC 391-08-120 in 1996, Jackson knew or should have known that waiting until December 24, 1997 to sign a petition for review at Yakima, and then attempting to send it to the Commission by telefacsimile transmission, would not constitute "substantial compliance" under Island County, Decision 5147-C (PECB, 1996). We reiterate the discussion in our decision from which reconsideration is sought, because it applies equally to the arguments made on this motion for reconsideration:

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

Since it was not mailed from Yakima until the day it was due, it was predictable that the employer's original petition for review was not filed at Olympia until Friday, December 26, 1997. That filing was, and unalterably remains, two days late.

"Holiday" Justification Insufficient -

The motion for reconsideration which is now before the Commission was supported by an affidavit from Jackson, which includes:

> This document was faxed due to the holidays following. My office was closed from 12:00 p.m. on December 24, 1997 through December 28, 1997.

While WAC 391-08-100 (and WAC 10-08-080 which it parallels) automatically extend a time period which ends on "a Saturday, Sunday, or a legal holiday" through the close of business on the next day which is neither "a Saturday, Sunday or a holiday", the 24th day of December (commonly known as "Christmas Eve") is not a legal holiday in Washington.

Mis-characterization of Agency Practice and Precedent -
The employer argues in the motion now before us that "the appeal period is routinely extended by the Executive Director upon agreement of the parties". That assertion is based, however, on an inapposite citation. Moreover, it flies in the face of both WAC 391-45-350 and years of agency practice.

The employer cites City of Omak, Decision 5579-A (PECB, 1997),[7] where another of our examiners issued a decision on Monday, December 29, 1997, finding violations as to some allegations, and dismissing other allegations. The 20-day period for filing a petition for review under WAC 391-45-350 would have ended on Sunday, January 18, 1998, and so was extended by operation of WAC 391-08-100 to Tuesday, January 20, 1998 (since Monday, January 19, 1998 was a legal holiday). The union in that case filed a timely petition for review on January 20th. Acting as counsel for the employer in that case, Jackson signed a petition for review which was dated January 19th, but was mailed under cover of a letter dated January 21st, and was accompanied by an affidavit of service which

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[7] Four separate cases were consolidated for processing, and were the subject of a single decision.

had been corrected twice (first to indicate service on January 20th, and then to indicate service on January 21st). That petition for review was not filed in the Commission's Olympia office until Monday, January 26, 1998. Contrary to the claim here that an untimely petition for review filed by the employer in Omak was accepted by the Commission pursuant to some agreement of the parties in that case, it was only accepted as a timely cross-petition for review under WAC 391-45-370, and then only because the union in that case had filed a timely petition for review.

Since its adoption in 1980, WAC 391-45-350 has always made a distinction between appeal notices and appeal briefs. The same distinction exists in all procedures set forth in Chapters 391-25, 391-35 and 391-95 WAC for appeals to the Commission, and existed in the Commission rules which preceded Chapter 391-45 WAC. As was stated by Examiner Stuteville in his order denying the employer's motion under WAC 391-45-330, there is *NO AUTHORITY* for any agency staff member, the Executive Director, any Commission member, or even the Commission itself, to extend the due date for a petition for review. Jackson had no reason to expect otherwise.

Alleged Consent of Commission Staff

In support of the motion for reconsideration, Jackson now asserts (for the first time) that he obtained consent from an agency staff member for the late filing of the employer's petition for review. The alleged exchange was, however, too little and too late.

By the time Jackson returned to his office and telephoned the Commission's office on Monday, December 29th, the petition for review had already been filed on December 26, 1997. No error by the agency staff on December 29th could have prejudiced the

employer, and no assent given by a staff member at that late date could undo or overcome the fundamental fact that the petition for review was untimely.[8] The Commission waived the time period for appeal in a case where a party relied to its detriment on erroneous advice from the agency staff,[9] but those are not the facts here.

An alternate interpretation of the facts set forth in Jackson's affidavit is that the agency staff member understood the extension request to relate to the appeal brief. WAC 391-45-350 includes:

> The commission, the executive director or his designee may, for good cause, grant any party an extension of the time for filing its brief or written argument. ...

Certainly, the staff member's indication of a need for Jackson to contact opposing counsel would have been consistent with WAC 391-45-350 and agency practice under WAC 391-08-180, as well as with union counsel's understanding that he was being asked for an extension of the time to file the supporting brief.

Request for Commission to Act on its Own Motion

Without citation of authority, the employer asks the Commission to take this case on its own motion. WAC 391-45-350 includes:

> In the event no timely petition for review is filed, and no action is taken by the

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[8] The named staff member denies giving consent on a matter which she understands to be far beyond her authority.

[9] The decision from which reconsideration is sought noted that the Commission has reserved authority, in WAC 391-08-003, to waive the application of its rules. One such case was City of Tukwila, Decision 2434-A (PECB, 1987).

> commission on its own motion within thirty days following the examiner's final order ....

The time for the Commission to act under that rule has long-since passed, however.

Additionally, the reason asserted by the employer for this request is insufficient. It now alleges:

> ... a significant issue of fairness and due process as these topics related to joinder of an indispensable third party. ... The remedy ordered will result in the layoff of an IBEW employee. Neither the IBEW or the employee participated in this hearing.

From its outset, this case has concerned "skimming" under precedent dating back to South Kitsap School District, Decision 472 (PECB, 1978). Reinstatement of unlawfully transferred work to the bargaining unit represented by a successful complainant has been ordered routinely in "skimming" cases. This employer knew or should have known that employees who were enjoying the benefit of its unlawful transfer of unit work would be at risk if a violation were to be found, yet it took no steps to join those employees (or their union) earlier in this case.

Even if the employer had moved for joinder, the granting of such a motion would not have been automatic or routine. The wages, hours and working conditions (including work jurisdiction) of a bargaining unit are subject to the duty to bargain only between the employer and the exclusive bargaining representative of that unit. Employees and unions outside of that relationship have no legitimate role in proceedings concerning breach of the duty to bargain within the relationship, and are not changeable with any wrongdoing which would put them in the role of respondent in a skimming case.

Conclusions

As in Mason County, supra, and as noted in our previous decision in this case, the tardiness of the petition for review appears to be due only to a failure to closely observe the applicable rules. 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 was properly dismissed.

NOW, THEREFORE, it is

ORDERED

1. The employer's motion for reconsideration is DENIED.

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 5th day of March, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner