STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petitions of:	
PUBLIC SCHOOL EMPLOYEES OF MOUNT VERNON, an affiliate of PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	CASE NO. 4871-C-83-242 4872-C-83-243 4873-C-83-244
For clarification of bargaining units of employees of:	DECISION 2273-A - PECB
MOUNT VERNON SCHOOL DISTRICT NO. 320	DECISION OF COMMISSION

Edward A. Hemphill, Attorney at Law, appeared on behalf of the Public School Employees of Mount Vernon.

Perkins, Coie, Stone, Olsen and Williams, by Thomas E. Platt and Michael T. Reynvaan, Attorneys at Law, appeared on behalf of the Mount Vernon School District.

An Obituary

We hereby confirm the demise of a certain regulation issued by the Department of Labor and Industries many years ago.

The deceased is WAC 296-132-150. It contained this feature: "Employees not employed on a regular basis, but subject to call, shall not be included in any bargaining unit."

Our subject came into being in 1970, along with a number of companion provisions in Chapter 296-132 WAC, properly promul-

gated, we assume, by the Department of Labor and Industries (L&I).

In 1975, the Legislature transferred the administrative responsibility for Chapter 41.56 RCW from L&I to this Commission. L&I regulations were never utilized by this Commission in its decisions; they were abandoned in favor of our own offspring: Title 391 WAC.

The L&I regulations would have remained indefinitely in a regulatory limbo, were it not for the vigilance of counsel for the school district.

A debate as to the continued viability of the L&I regulations arose in the context of a ruling by the Executive Director concerning the eligibility of "substitute" employees for inclusion in a bargaining unit. The Executive Director ruled that persons employed "on-call" for more than 30 work days within a 12-month period and who continue to be available for employment constitute regular part-time employees of the school district. They are entitled to be included in the bargaining unit of full-time and other regular part-time classified employees of the school district. Mount Vernon School District, Decision 2273 (PECB, 1986).

Appealing to this Commission, the school district contends that the Executive Director singularly erred when he failed to recognize the continued validity of WAC 296-132-150.[1] Accord-

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[1] The school district's brief to the Commission addresses only the issue discussed herein. We assume that other arguments submitted to the Executive Director have been abandoned.

ing to the school district's research, as conveyed in its brief (emphasis added):

> On February 2, 1976, PERC published notice in the WAC bulletins of an "emergency order" regarding the adoption of rules. . . that would be designated WAC 391-20-001 through 391-20-380. WAC Bulletin, 76-1, 2/2/76. In May, PERC published another notice of emergency rules also regarding rules of practice and procedure, but including the following statement: "This repeals the now outdated and [sic] replaced Chapter 296-132 WAC (previously under Labor & Industries.)" WAC Bulletin 76-2, 5/3/76. Several similar notices were published during 1976. E.g., WAC bulletin 76-38, 7/30/76.
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> In 1977, PERC published notice of the adoption of permanent procedural rules to be identified as Ch. 391-08 WAC. This notice was not denoted an emergency rule. WAC Bulletin 77-1, 1/27/77. Four days later, PERC provided another notice of emergency rules regarding general practice and procedure with the same statement quoted above regarding the repeal of the "outdated" Ch. 296-132. WAC Bulletin, 77-2, 1/31/77. PERC published several such notices during 1977. E.g., WAC Bulletin 77-7, 11/9/77. Thus, PERC's only attempts to repeal WAC 296-132-150 were emergency rule proposals.

As the school district points out, this Commission initially adopted rules that were substantially similar to the L&I rules. Chapter 391-20 WAC. Those regulations were allowed to lapse, and the school district does not contend that they have any applicability here. The regulations in Chapter 391-20 WAC were replaced in 1978 by permanent regulations, Chapter 391-21 WAC.

After the hearing on this dispute was closed, L&I filed a notice with the Code Revisor on March 25, 1986 to repeal its Chapter 296-132 WAC. That repeal became effective on April 24, 1986. WSR 86-08-015.

The school district also advises us that the legislature never took steps to repeal the old L&I rules, although it had considerable opportunity to do so. Thus, reasons the school district, the legislature has impliedly ratified those regulations.

Assuming the school district's research to be correct, we nevertheless disagree with the school district's conclusions, for the several reasons which follow.

L&I Rules Not Transferred To PERC

The regulation championed by the school district was not ours to repeal. When PERC was created, the Legislature, through RCW 41.58.803, stated (emphasis ours):

> On January 1, 1976, all rules and regulations, and all business pending before the agency or divisions thereof from whom functions are transferred and pursuant to Chapter 296, Laws of 1975 1st Ex. Sess. which pertain to such functions shall be continued and acted upon by the Commission.

Contrary to the school district's assertion, RCW 41.58.803 did not transfer the rules and regulations of L&I to this Commission. Rather, the functions of that agency were transferred. The rules and regulations, as well as pending business were to be "continued and acted upon by the Commission." Had the

Legislature desired to transfer the L & I rules, it would have so stated. We complied with the Legislative Directive. We adopted new regulations under Title 391 WAC, the title assigned to the Commission by the Code Revisor. Although emergency WAC 391-20-150 was identical to the provisions of WAC 296-132-150, the school district does not contend that the former regulation is still viable. Since the L&I regulations themselves were never transferred to this Commission, they were L&I's to repeal. This was done earlier this year.

The L&I Rules Were Effectively Repealed

Even if the Commission was obliged to repeal the L&I regulations, such repeal occurred as a result of substantial compliance with the rule-making procedures of RCW 34.04.025 - .045 and by implication.

RCW 34.04.025(5) states that rule-making is effective if there is substantial compliance with Chapter 34.04 RCW. RCW 34.04-.010 defines a "rule" as including a "repeal of a prior rule". The Commission substantially complied with required rule-making procedures by the emergency repealers of Chapter 296-132 WAC which were noted in connection with the emergency adoption and re-adoption/modification of Chapter 391-20 WAC.

More importantly, the Commission substantially complied with Chapter 34.04 RCW and implicitly repealed Chapter 296-132 WAC by its adoption and near-decade-long utilization of comprehensive regulations published under the Commission's assigned Washington Administrative Code title. The regulations adopted by this Commission never incorporated by reference any of the

regulations listed under L&I's assigned title.[2] No decision of this Commission is cited or found where this Commission relied on any provision of Chapter 296-132 WAC as an operative regulation. Case precedent for the Executive Director's ruling in this case dates as early as 1977. Everett School District, Decision 268 (EDUC, 1977).

As stated by the union,

> [n]o entity involved with public employee labor law since 1977 has presumed the regulations contained in WAC 296-132 were anything other than an obsolete memorial to the vagaries of the Administrative Procedure Act.

The school district has not proven, and in fact does not assert, any claim of prejudice arising from any defects which occurred in the repeal of the L&I rules.

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2 Our Chapter 391-20 WAC emergency regulations which were the same or similar to Chapter 296-132 WAC regulations were allowed to lapse. They were replaced by properly promulgated regulations in Chapter 391-21 WAC which, like Chapter 296-132 WAC and Chapter 391-20 WAC, was applicable only to the administration of Chapter 41.56 RCW. Between 1976 and 1977, the Commission had separately adopted Chapter 391-30 WAC for the administration of Chapter 41.59 RCW, Chapter 391-50 WAC for the administration of Chapter 28B.52 RCW and Chapter 391-70 WAC for the administration of Chapter 47.64 RCW.

Chapter 391-21 WAC and all of the other rules mentioned in the preceding paragraph were replaced in 1980 by the current "consolidated" rules properly promulgaged in Chapters 391-25, -35, -45, -55, -65 and -95 WAC. Currently, Chapter 391-25 WAC regulates the processing of representation cases under all of the statutes administered by the Commission and Chapter 391-35 WAC similarly regulates processing of unit clarification petitions under all of the statutes administered by the Commission.

Objection is Barred by Limitation Period

The school district's claim is barred by RCW 34.04.025(5), which sets forth a two-year limitation period for challenges to rules (which, as noted above, by definition includes repeals of rules) on grounds of noncompliance with Chapter 34.04 RCW. The school district's challenge misses the mark by about seven years.

Even if RCW 34.04.025(5) were not applicable, the doctrine of laches would be.

WAC 296-132-150 Is Not Inconsistent With The Decision

Another point, perhaps so obvious that it has been overlooked until now, is that the Executive Director's ruling is not inconsistent with WAC 296-132-150. The regulation excludes from bargaining units employees "not employed on a regular basis, but subject to call." So did the Executive Director. He excluded from the bargaining unit as "casual" those on-call employees who were employed less than 30 days in a year. Also consistent with the rule, he included in the bargaining unit those that he found were "employed on a regular basis", i.e., those who worked more than 30 days in a year. Although the L&I regulation may imply that a regular on-call employee is an oxymoron, it also may be read otherwise. So read, the Executive Director's ruling, which creates a class of "regular on-call" employees, is not at odds.[3]

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[3] 1 Morris, The Developing Labor Law 1484 (2nd ed. 1983) would include some on-call employees in the category of "regular part-time" employees, citing cases such as Scoa, Inc., 140 NLRB 1379, 52 LRRM 1244 (1963) (on-call department store "floaters" who worked 15 days in a 90-day period are regular part-time employees).

Absence of Prejudice To School District

This brings us to the point of observing that, as intriguing as it may be, this dispute is a tempest in a teapot. Unit determinations are prospective in application, meaning that no past conduct is being adjudicated. Therefore it is not inherently prejudicial to "change the rules of the game" at any point in time. With WAC 296-132-150 now formally repealed, the school district would not be prejudiced by a Commission ruling on this date which adopts the Executive Director's decision. Even if it were, the union could simply refile.

Legislative Intent Is Not Contrary

The school district, however, advises us that the Legislature, in failing to change L&I's "on-call" rule when it had the opportunity, implicitly ratified the same. The Legislature's intentions, however, are not easily perceived, since the Legislature has not called our attention to this issue during the near-decade in which our own precedent has been at odds with the policy urged here by the school district. We cannot, therefore, draw any conclusion from the Legislature's silence.

While we do not begrudge the school district its opportunity, we are quite certain that were we to resurrect and apply the old L&I rules, the school district's voice would be heard along with others in the protest. As the Executive Director pointed out, along with WAC 296-132-150 comes its companions, such as a provision which creates a presumption of employer liability in

impasse-implementation unfair labor practice cases. For this regulation:

An Epitaph

Far off from these a slow and silent stream
Lethe the River of Oblivion[4]

WAC 296-132-150

R.I.P.

The decision of the Executive Director is AFFIRMED.

DATED at Olympia, Washington, this 15th day of December, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman

MARK C. ENDRESEN, Commissioner

JOSEPH F. QUINN, Commissioner

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4 John Milton, Paradise Lost, Book II, Line 582.