

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

THURSTON COUNTY,  Employer.	
GREGORY BURNES,  Complainant,  vs.  WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES,  Respondent.	CASE 133253-U-20  DECISION 13393-A - PECB  DECISION OF COMMISSION

*Sydney Phillips*, Attorney at Law, Freedom Foundation, for Gregory Burnes.

*Ed Stemler*, General Counsel, for the Washington State Council of County and City Employees.

BACKGROUND

On December 22, 2020, Gregory Burnes (complainant) filed an unfair labor practice complaint against the Washington State Council of County and City Employees (union). The agency issued a preliminary ruling, and the case was assigned to Examiner Emily H. Martin.

The parties filed motions for summary judgment. On August 17, 2021, Examiner Martin granted the union's motion for summary judgment and dismissed the complaint. *Thurston County (Washington State Council of County and City Employees)*, Decision 13393 (PECB, 2021). On September 7, 2021, the complainant appealed the decision.

On September 13, 2021, the union filed a motion to dismiss the appeal as untimely. The union asserts that the complainant did not serve the union with the notice of appeal within the 20-day

appeal period. On September 15, 2021, the complainant filed a response to the motion to dismiss. The complainant contends he timely filed the appeal with the agency on September 7, 2021.

## ISSUES

The issue before the Commission is whether to grant the union's motion to dismiss the appeal. To answer that question, we must determine whether the complainant complied with WAC 391-08-120. While the complainant filed a timely appeal with the agency, the complainant did not contemporaneously serve the union as required by WAC 391-08-120(3). Therefore, we grant the union's motion and dismiss the appeal.

## ANALYSIS

### Applicable Legal Standards

#### *Time for Filing an Appeal*

The notice of appeal is due "twenty days following the date of issuance of the order being appealed. The time for filing a notice of appeal cannot be extended." WAC 391-45-350(1). If the due date is a Saturday, Sunday, or a legal holiday, "the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday." WAC 391-08-100. "If an electronic filing is received by the agency after office hours, the documents will be deemed filed on the next business day the office is open." WAC 391-08-120(4)(e).

#### *Service of Documents*

"Documents filed with the agency shall be served upon all parties on the same day the documents are filed. Service shall be upon counsel and representatives of record, or upon unrepresented parties or upon their agents designated by them or by law." WAC 391-08-120(3). Service is complete upon "[r]eceipt of the entire electronic transmission by the recipient. . . ." WAC 391-08-120(4)(e).

"Where a party raises a claim of defective service, the burden is on the party that filed the document to prove that it served the other party or parties." *King County*, Decision 7221-A (PECB, 2001) (citing *King County*, Decision 6329 (PECB, 1998); *Thurston County*, Decision 5633 (PECB, 1996)). Failure to contemporaneously serve the other parties is grounds for dismissal. *Clower Park*

*School District*, Decision 377-A (EDUC, 1978); *Federal Way School District*, Decision 13010-A (PECB, 2019); *Riverview School District (Public School Employees of Washington)*, Decision 13214-A (PECB, 2020).

#### Application of Standards

The underlying decision in this matter was issued on August 17, 2021. The 20th day of the appeal period was Monday, September 6, 2021, the Labor Day holiday. Because the 20th day was a holiday, the due date for the appeal became Tuesday, September 7, 2021. WAC 391-08-100.

On behalf of the complainant, Jennifer Matheson filed a notice of appeal with the agency on September 3, 2021, at 5:31:14 p.m. Because the office was closed, the appeal was deemed filed when the office re-opened on September 7, 2021. Matheson sent the September 3, 2021, email and notice of appeal only to the agency and not to the union.

The union contends that by not serving it with the notice of appeal within the 20-day appeal period, the notice of appeal is untimely and should be dismissed. The complainant argues that it timely filed the notice of appeal with the agency.

In support of its motion to dismiss, the union submitted email messages sent by Matheson to the union. On September 3, 2021, at 5:31 p.m., Matheson emailed two employer representatives, the union's representative, and the complainant's representative. The email was not filed with the agency. The email stated, "Attached is Notice of Appeal for Gregory Burnes in Burnes v WSCCCE No. 133253-U-20, filed this evening for receipt of by PERC Monday September 6, 2021." The union contends, and the email confirms, a document was not attached to the email.

The union submitted a September 8, 2021, email from Matheson to the employer's representative, the union's representative, and the complainant's representative. The September 8, 2021, email was not filed with the agency. Matheson wrote, "On Friday evening I sent an email stating I had attached a Notice Appeal for Gregory Burnes in Burnes v. WSCCCE No. 133253-U-20. It doesn't appear as though there was an attachment to my previous email. I have attached the Appeal here." The email confirms that a document was attached to the email.

The complainant filed with the notice of appeal a form certificate of service indicating that the complainant served the union and the employer with the notice of appeal via email and USPS on September 6. The union contends that the declaration of service is inaccurate. Matheson's September 3 and 8 emails to the union and the complainant's arguments in response to the motion to dismiss lead us to infer that the information provided in the certificate of service was inaccurate and cannot be relied on as proof of service. We expect parties to accurately reflect service on the parties in their certificates of service.

The appealing party must contemporaneously serve all other parties with the notice of appeal. WAC 391-08-120(3); *King County*, Decision 7221-A; *Washington State University*, Decision 12396 (PSRA, 2015). Failure to serve the opposing party on the same day documents are filed with the agency is grounds for dismissal. *Washington State University*, Decision 12396. In this case, as in *Washington State University*, the complainant timely filed its appeal with the agency. However, the complainant did not contemporaneously serve the union with the notice of appeal. Matheson's September 8, 2021, email is an admission that she did not serve the union with the notice of appeal during the 20-day appeal period. As in *Washington State University*, an attempt to correct improper service outside of the appeal period does not cure the complainant's failure to contemporaneously timely serve all parties. Thus, the failure to contemporaneously serve the union within the appeal period is grounds for dismissing the appeal.

The complainant urges us to liberally construe our rules and accept the appeal as timely. WAC 391-45-350(1) does not authorize extending the appeal deadline. The Commission has strictly enforced the time limit for filing an appeal. *Spokane School District*, Decision 310-A (EDUC, 1978); *Seattle Public Health Hospital (American Federation of Government Employees, Local 1170)*, Decision 1781-B (PECB, 1984); *Puget Sound Educational Service District*, Decision 5126-A (PECB, 1995); *Valley Communications Center*, Decision 6097-A (PECB, 1998); *Washington State Department of Transportation*, Decision 7930-A (PECB, 2003). The Commission expects "parties to closely monitor their compliance with the rules." *City of Kirkland*, Decision 6377-A (PECB, 1998). "If a party fails to do so, we have an obligation to apply the rule in fairness to the other party." *Id.* (citing *City of Puyallup*, Decision 5460-A (PECB, 1996); *King County*, Decision 5595-A (PECB, 1996)).

CONCLUSION


The complainant filed its notice of appeal within the appeal period with the agency. However, the complainant has the burden to prove that it contemporaneously served the union with the notice of appeal within the appeal period. In this case, the complainant has not met its burden to comply with WAC 391-08-120(3). We do not agree that this is an appropriate case in which to waive our rule requiring contemporaneous service. Because the complainant did not serve the union with the notice of appeal within the appeal period, the appeal must be dismissed for failure to comply with WAC 391-08-120(3).

ORDER

The union's motion to dismiss is GRANTED. The notice of appeal filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 3rd day of December, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARILYN GLENN SAYAN, Chairperson

  
MARK BUSTO, Commissioner

  
KENNETH J. PEDERSEN, Commissioner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under RCW 34.05.542.



# RECORD OF SERVICE

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ISSUED ON 12/03/2021

DECISION 13393-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: AMY RIGGS

CASE 133253-U-20

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