STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TECHNICAL EMPLOYEES' ASSOCIATION, Complainant,	)	CASE 12646-U-96-03017
vs.	)	DECISION 6064-B - PECB
KING COUNTY, Respondent.	)	DECISION ON MOTION TO DISMISS

Cline and Emmal, by James M. Cline and Sidney D. Vinnedge, Attorneys at Law, appeared on behalf of the complainant.

Norm Maleng, Prosecuting Attorney, by Kerry H. Delaney, Special Deputy Prosecuting Attorney, appeared on behalf of the employer.

This case is before the assigned Examiner for a ruling on a motion to dismiss filed by the employer. For the reasons indicated below, the motion is denied.

BACKGROUND

The complaint charging unfair labor practices in this matter was filed with the Commission on August 16, 1996. The controversy arose while two representation petitions were pending before the Commission in which the Technical Employees Association (union) sought certification as exclusive bargaining representative of certain employees of King County (employer) who were formerly employed by the Municipality of Metropolitan Seattle (METRO).

In King County, Decisions 5910 and 5911 (PECB, 1997), the Executive Director dismissed both representation petitions, based upon a determination that the petitioned-for bargaining units were not appropriate units under RCW 41.56.060. The union appealed those dismissals, but the Commission affirmed them on September 17, 1997. King County, Decisions 5910-A and 5911-A, (PECB, 1997).

The Executive Director dismissed the complaints in this and two other unfair labor practice cases on October 2, 1997, based on the impropriety of the units sought in the related representation cases. King County, Decision 6064 (PECB, 1997). The union appealed those dismissals to the Commission. The Commission affirmed the dismissals in the other two cases, but vacated the dismissal in this case. The Commission gave the union leave to file and serve an amended complaint within 14 days following the date of its order, and remanded this case to the Examiner for further proceedings on such an amended complaint. King County, Decision 6064-A (PECB, 1998). Based on the April 21, 1998 issuance of the Commission's order, the amended complaint was to be filed and served on or before May 5, 1998.

The union filed its amended complaint with the Commission on May 6, 1998. The union's certificate of service indicating that date conforms to the Commission's date stamp on the amended complaint filed in the Commission's Olympia office. A hearing on the amended complaint was scheduled for January 12 and 13, 1999.

THE MOTION FOR DISMISSAL

On December 10, 1998, the employer filed a motion for dismissal of the complaint. The employer advanced two lines of argument in

support of its motion: (1) That the amended complaint was untimely, based on the claim that it had received the amended complaint on May 6, 1998, where the 14-day period allowed by the Commission's order had expired on May 5, 1998, so that service was defective; and (2) that the complaint is moot, based on the Commission's dismissal of the underlying representation petitions.[1]

By letter dated December 15, 1998, the Examiner requested a response from the union on the employer's motion. The union filed its response to the motion on December 29, 1998.

POSITIONS OF THE PARTIES

The employer argues that the union filed and served the amended complaint one day late, as calculated under WAC 391-08-100. It cites City of Seattle, Decision 3199-A (PECB, 1989), in which the Commission upheld the Executive Director's dismissal for lack of timeliness under WAC 10-08-080 and WAC 391-08-100. It argues that that case and six additional cited cases stand for the principle that lack of timely service deprives the Commission of jurisdiction to proceed with the processing of unfair practice charges. As to the mootness claim, the employer cites the dismissal of the original representation cases as the basis for claiming that this unfair labor practice complaint "springing" from those cases has been rendered moot.

The union distinguishes its action of filing an amended complaint in this case from the filing of an appeal at issue in the City of

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[1] The employer also requested that the hearing be continued, pending a decision on this motion. The motion was granted as to continuing the hearing.

Seattle case cited by the employer. The union acknowledges that timely filing and service of an appeal is a "jurisdictional requirement" for the Commission to proceed as an appellate body in an unfair labor practice case, but it asserts there is a definitive distinction between appeals and other papers, such as an amended complaint. It cites Port of Tacoma, Decision 4627-A (PECB, 1995), as stating:

> It has been a **long-standing practice of the Commission to grant requests for extensions of time to answer complaints and file briefs.** See Port of Seattle, Decision 2796-A (PECB, 1989). The case now before the Commission does not involve an interlocutory action before an Examiner, but a petition for review of an order that would otherwise become final under WAC 391-45-350.

[Emphasis by **bold** supplied.]

Citing State ex rel King County v. Superior Court, 33 Wn.2d 76 (1949), the union further argues that civil court orders granting leave to amend a case have not been deemed to be jurisdictional.

DISCUSSION

The "Commission Lacks Jurisdiction" Claim

In making this motion, the employer would have the Commission raise the filing and service of any and all ordered documents to the importance of a jurisdictional requirement. That has never been the Commission's policy, and is not true in this case.

The Commission's jurisdiction in this case originated with the union's filing of a complaint charging unfair labor practices under

Chapter 391-45 WAC. At that point, the only jurisdictional requirement was that the complaint had to be filed within six months after the complained-of acts or events. RCW 41.56.160. The union complied with that statutory standard. Having once invoked the Commission's jurisdiction in the matter, time limitations subsequently imposed by agency rule, order or written directive are generally subject to continuance under WAC 391-08-180 or waiver under WAC 391-08-003.

The Commission precedents cited by the employer in support of its motion are inapposite. Appeal periods are, and always have been, removed from the coverage of WAC 391-08-180 and WAC 391-08-003 by specific language in rules stating that the time for appeal cannot be extended. Review of the cases cited by the employer readily discloses that they all involved untimely appeals: City of Seattle, Decision 3199-A (PECB, 1989), arose out of an appeal of an order of dismissal issued by the Executive Director; Port of Seattle, Decision 2661-A (PECB, 1989), Lewis County, Decision 2957-B (PECB, 1988), City of Seattle, Decision 2230-A (PECB, 1985), Seattle Public Health Hospital, Decision 1781-A (PECB, 1984), Port of Ilwaco, Decision 970-A (PECB, 1980), Spokane School District, Decision 310-A (PECB, 1978), and Mason County, Decision 3108-A (PECB, 1989), all involved appeals from Examiner decisions.

In this case, the union did not make a continuance request under WAC 391-08-180. In so doing, it assumed a risk that a waiver might be rejected under WAC 391-08-003.

Waiver is not automatic under WAC 391-08-003: Issues of prejudice, bad faith, and dilatory motive must be considered. No such claims were advanced by the employer in this motion to dismiss, however. Given that the amended complaint was only one day late in a case

that had already been held in abeyance for a substantial period, such arguments would, in all probability, have been viewed as specious had they been made.

The "Complaint is Moot" Claim

The employer's mootness argument based on the dismissal of the underlying representation cases conforms to the reasons set forth by the Executive Director for dismissal of this case, but those reasons were rejected by the Commission in its order remanding this case for further proceedings. It is interesting to note that the Commission understood the employer to be arguing the opposite side of the question at the time the Commission was considering the dismissal of the representation petitions, as the Commission noted in its decision:

> The employer argues that the **propriety of a petitioned-for bargaining unit is largely irrelevant** to the analysis of whether the employer's actions in changing working conditions constitute an unfair labor practice, and it asserts that the focus should instead be on whether the employer interfered with the laboratory conditions for an election.

[Emphasis by **bold** supplied.]

The employer's brief presents no citations or precedents supporting the authority of an examiner to overrule the Commission decision remanding the case to the Examiner, or to dismiss the union's complaint prior to a full evidentiary hearing. Rejection of the motion for dismissal at this time does not, of course, preclude the employer from asserting defenses and arguing that the complaint should eventually be dismissed on its merits.

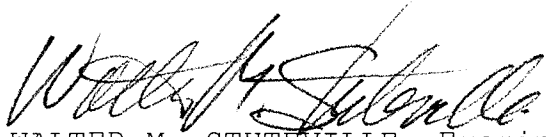
NOW, THEREFORE, it is

ORDERED

The employer's motion for dismissal of the unfair labor practice complaint in this proceeding is DENIED.

Issued at Olympia, Washington, on the 9th day of February, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner