STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 1504, Complainant,	)	CASE 6903-U-87-1399
vs.	)	DECISION 3108-B - PECB
MASON COUNTY, Respondent.	)	DECISION OF COMMISSION ON REMAND

Pamela G. Bradburn, General Counsel, appeared on behalf of the union.

Gary P. Burleson, Prosecuting Attorney, by Michael Clift, Deputy Prosecuting Attorney, appeared on behalf of the employer.

This case comes before the Public Employment Relations Commission on remand from the Superior Court for Mason County.

BACKGROUND

On June 10, 1987, the Washington State Council of County and City Employees, Local 1504, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Mason County had committed a violation of RCW 41.56.140. The conduct at issue was the employer's adoption of an ordinance banning smoking at work sites of employees represented by the union.

Examiner Walter M. Stuteville issued his findings of fact, conclusions of law and order in the matter on January 26, 1989. The Examiner ruled that the employer had violated RCW 41.56.140(4) and (1), by unilaterally adopting the disputed ordinance, without

first giving notice to the union and providing an opportunity for bargaining on the matter. The Examiner's decision notified the parties of their right to appeal, "by filing a petition for review with the Commission pursuant to WAC 391-45-350".[1]

On February 15, 1989, the employer filed a petition with the Commission, seeking review of the Examiner's decision. While that petition for review was filed with the Commission within the time specified in WAC 391-45-350, the employer failed to serve a copy on the union or its attorney, as is also required by that rule.

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[1] Mason County, Decision 3108 (PECB, 1989). The cited rule provides, in relevant part:

> **WAC 391-45-350 PETITION FOR REVIEW OF EXAMINER DECISION.** The examiner's findings of fact, conclusions of law and order shall be subject to review by the commission on 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 and the party filing the petition shall serve a copy on each of the other parties to the proceeding. ... A petition for review shall have attached to it any appeal brief or written argument which the party filing the petition for review desires to have considered by the commission. Other parties to the proceeding shall have fourteen days following the date on which they are served with a copy of such petition for review and accompanying brief or written argument to file a responsive brief or written argument. ... In the event no timely petition for review is filed, and no action is taken by the commission on its own motion within thirty days following the examiner's final order, the findings of fact, conclusions of law and order of the examiner shall automatically become the findings of fact, conclusions of law and order of the commission and shall have the same force and effect as if issued by the commission. [emphasis by underline supplied]

On March 29, 1989, the union filed a motion to dismiss the petition for review, based on the lack of timely service. In response, the employer admitted its omission of service, but contended that dismissal of the appeal was not appropriate because the union had constructive notice of the petition for review on March 20, 1989 and "was not prejudiced".

On July 26, 1989, the Commission ruled that the employer had violated WAC 391-45-350, by its failure to timely serve the union with the petition for review. The Commission held that such service was a jurisdictional requirement, and it refused to consider the merits of the employer's appeal.[2]

The employer petitioned for judicial review of the Commission's decision. On June 6, 1991, the Superior Court for Mason County held that timely service of a petition for review on a party was not a jurisdictional requirement under WAC 391-45-350. The court reversed the Commission's decision, and remanded the case for a determination as to whether the Commission should waive Mason County's failure to comply with WAC 391-45-350 when filing its petition for review.

POSITIONS OF THE PARTIES

The employer argues that the union was not prejudiced by the lack of service of the petition for review, and that waiver is appropriate in the present case. The employer requested the opportunity to present new evidence, briefing and argument on the case.

The union responded that the reasons for the employer's failure to serve the union are in the record, and that the case should be decided on the record already made.

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[2] Mason County, Decision 3108-A (PECB, 1989).

DISCUSSION

This Commission recognizes that it has the authority to waive Commission rules, when a party is not prejudiced.[3] The subject is addressed in Chapter 391-08 WAC, which sets forth general rules of practice and procedure applicable to all types of proceedings before the Commission. That chapter includes:

> **WAC 391-08-003 POLICY--CONSTRUCTION--WAIVER.** The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver. [emphasis by underline supplied]

As can be seen from the underscored provisions, the Commission has the option to waive any requirement of the rules, when a party is not prejudiced, but the exercise of that discretion should be based on whether such a waiver effectuates the purposes and provisions of the applicable collective bargaining statute.[4] In the present case, we do not find sufficient justification for such a waiver.

The collective bargaining statutes administered by the Commission embody a legislative policy requiring employers and unions to communicate to one another. RCW 41.56.030(4); RCW 41.56.100; 41.58.040. The same statutes also establish administrative

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[3] See, e.g., Central Kitsap School District, Decision 3671-A (PECB, 1991).

[4] In this case, the applicable statute is Chapter 41.56 RCW.

procedures for bringing an orderly resolution to disputes. RCW 41.56.050 through .080; 41.56.160 through .190; 41.58.020. In this case and in countless others, appeals have been dismissed when employers or unions fail to process their disputes in accordance with those statutes.

We have found waiver of Commission rules to be appropriate in cases where a party's procedural error has resulted from reliance on erroneous agency advice.[5] No such error is claimed here, however, and the Examiner's decision called attention to the rule governing appeals. In this case, the 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.

The employer's claim of "constructive notice" is not compelling. In this case, the union did not get even constructive notice of the appeal until more than three weeks after expiration of the filing period. Thus, the facts do not support a finding of "substantial compliance" as might be urged upon us had the employer given the union constructive notice of the petition for review within the prescribed time period.

Under the circumstances present in this case, we find waiver of the service requirements of WAC 391-45-350 would not effectuate the purposes of that rule. Such a waiver would neither further the statutory policies of "communication" and "orderly dispute resolution", nor promote peace in labor relations. We thus decline the exercise of discretion requested by the employer.

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[5] City of Tukwila, Decision 2434-A (PECB, 1987).

NOW, THEREFORE, it is

ORDERED

1. The employer's request for waiver, under WAC 391-08-003, of its failure to comply with the service requirements of WAC 391-45-350 is DENIED.

2. The findings of fact, conclusions of law and order issued in the above-entitled matter on January 26, 1989 by Examiner Walter M. Stuteville shall stand under WAC 391-45-350 as the final order of the agency on the merits of the case.

3. Mason County, its officers and agents, shall immediately:

   a. Take steps to comply with the remedial order issued in the above-entitled matter on January 26, 1989 by Examiner Walter M. Stuteville.

   b. Notify the Washington State Council of County and City Employees and its Local 1504, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the remedial order issued in the above-entitled matter on January 26, 1989 by Examiner Walter M. Stuteville, and at the same time provide the above-named complainant with a signed copy of the notice required by the Examiner's order.

   c. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the remedial order issued in the above-entitled matter on January 26, 1989 by Examiner Walter M. Stuteville, and at the same time provide the

Executive Director with a signed copy of the notice required by the Examiner's order.

Issued at Olympia, Washington, the 19th day of December, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner