STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC, PROFESSIONAL & OFFICE-CLERICAL EMPLOYEES AND DRIVERS LOCAL UNION NO. 763,	CASE 8045-U-89-1741
Complainant,	DECISION 3289-B - PECB
vs.	
SOUTHWEST SNOHOMISH COUNTY PUBLIC SAFETY COMMUNICATIONS AGENCY,	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	

Davies, Roberts & Reid, by Bruce E. Heller, Attorney at Law, appeared on behalf of the complainant.

Cabot Dow, Labor Relations Consultant, appeared on behalf of the employer.

Webster, Mrak & Blumberg, by James H. Webster, Attorney at Law, appeared on behalf of the intervenor, Medic 7 Paramedics Association.

On June 20, 1989, Public, Professional and Office-Clerical Employees and Drivers Local Union No. 763,[1] filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Southwest Snohomish County Public Safety Communications Agency (SNOCOM) had committed unfair labor practices in violation of RCW 41.56.140(1). A hearing was held before Examiner Walter M. Stuteville on November 7, 1989.

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[1] The union is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Existing pursuant to one or more intergovernmental agreements, SNOCOM is an agency that provides emergency medical (paramedic) services and emergency dispatch (9-1-1) services to residents of the southern portion of Snohomish County. The paramedic operation is known as "Medic 7".

Teamsters Local 763 had represented a bargaining unit of Medic 7 paramedics for approximately ten years prior to the events involved in this case. There were eight paramedics in the bargaining unit.

Acting through Business Agent Tom Krett, Local 763 began negotiations with the employer during the summer of 1988 for a new collective bargaining agreement. The union's negotiating team included shop steward Greg Macke and bargaining unit member Dan Schulz. The employer was represented by Cabot Dow.

On May 8, 1989, after a number of negotiations and mediation sessions,[2] the union agreed to submit the employer's latest proposal for a vote by the employees. It was decided by the union team that the bargaining unit would vote on May 12, 1989, at Medic 7 headquarters at Stevens Hospital. Krett believed that the union's negotiating team would recommend ratification of the employer's last proposal to the unit membership, and he so advised both the mediator and Dow.

On May 11, 1989, the Medic 7 Paramedics Association (M7PA) filed a petition for investigation of a question concerning representation with the Commission pursuant to Chapter 391-25 WAC, seeking to replace Local 763 as the exclusive bargaining representative of the bargaining unit. Case 7966-E-89-1346 was thus docketed.

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[2] Mediation services were provided by a member of the Commission staff under Chapter 391-55 WAC.

On May 12, 1989, Krett arrived at the time and place designated for the bargaining unit to vote on the employer's proposal, but only Macke and Schulz were present for the meeting. They informed Krett that they had changed the plan and that, in fact, the paramedics were going to attempt to decertify Local 763 as their exclusive bargaining representative. Krett questioned Macke and Schulz about the situation.

There is a conflict in testimony as to what was said at that time. According to Krett, Macke stated that an unnamed individual on the employer's board of directors had told bargaining unit members that they would be more respected if they were not represented by Local 763. While confirming most of Krett's description of their May 12 meeting, both Macke and Schulz denied that anything was said concerning a board member's comments regarding Local 763.

Following the conversation between Krett, Macke and Schulz, the medic crew that was on duty at the time was called in, and the employees present did finally vote on the contract proposal. The proposal was rejected.[3]

On June 20, 1989, Local 763 filed the instant charges. In the statement of facts accompanying its original complaint, Local 763 alleged an "interference" violation, as follows:

> Prior to May 11, 1989, representatives of the Respondent made statements to members of the bargaining unit that the employees would be "more respected" by the Employer if they were not represented by [Local 763], and, by implication, would achieve a more favorable Labor Agreement.

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[3] Macke and Schulz testified that they had not agreed to recommend the employer's proposal, but had only agreed to present it to the members to be voted upon.

The remedies requested included that the employer be required to cease and desist from unlawful conduct, and that the pending representation petition be dismissed.

The M7PA and Local 763 thereafter submitted declarations and counter-declarations signed by bargaining unit employees and Krett, each reciting their view of the facts. On August 7, 1989, the Executive Director issued a preliminary ruling pursuant to WAC 391-45-110, describing the cause of action as:

> Interference with the rights protected by Chapter 41.56 RCW, by the employer's statements to employees disparaging the incumbent exclusive bargaining representative.

At the same time, the Executive Director suspended the processing of the representation ("blocked") case pursuant to WAC 391-25-370.

On August 18, 1989, the Medic 7 Paramedic Association petitioned the Public Employment Relations Commission for review of the Executive Director's action to invoking the "blocking charge" rule.

Also on August 18, 1989, the M7PA filed a motion for intervention "as a respondent" in the instant unfair labor practice case. As part of the same filing, the M7PA sought, if allowed to intervene, a summary judgment dismissing the unfair labor practice charges.

On September 25, 1989, this Examiner denied both the motion to intervene and the motion for summary judgment.[4] The M7PA thereafter petitioned the Commission for review of that order.

On October 3, 1989, a notice of hearing was issued on this case. The hearing was scheduled for November 7, 1989, and the employer was required to file an answer by October 23, 1989.

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4 Decision 3289 (PECB, 1989).

In Southwest Snohomish County Public Safety Communications Agency, Decision 3309 (PECB, October 12, 1989), the Commission reversed the application of the "blocking charge" rule in the representation case. In that decision, the Commission also noted:

> We observe . . . in light of the conclusion reached herein, that the [M7PA] would appear to have a substantial interest as petitioner in the "blocked" representation case, in the outcome of the unfair labor practice case. While not suggesting that any mischief has actually occurred, or is even contemplated by the parties in this situation, it is not difficult to envision that the Commission's representation case processes and the rights of employees could be subject to abuse by an employer who, in the absence of participation by a representation petitioner, fails to assert available defenses or defaults in response to "blocking" unfair labor practice charges filed by a favored incumbent. If an unfair labor practice violation were to result in dismissal of a representation petition under the precedent of Lewis County, Decision 645 (PECB, 1979), the representation petitioner's rights would be adversely affected by the employer's failure to defend.

The Commission thus remanded this unfair labor practice case to the Examiner, for reconsideration of the M7PA's preliminary motions in light of the Commission's order in the representation case.

The employer did not file an answer to the complaint by the October 23, 1989 deadline established by the notice of hearing. The M7PA filed an answer to the complaint on November 1, 1989.

This Examiner reconsidered the intervention and summary judgment motions in an order issued on November 6, 1989.[5] The motion of the M7PA for intervention in this case was granted at that time. The motion for summary judgment was again denied, however, based upon

[5] Decision 3289-A (PECB, 1989).

the conclusion that contested issues of fact were framed by the pleadings and declarations then on file.

The hearing was convened on November 7, 1989, in an auditorium at Stevens Hospital, Edmonds, Washington.

Failure to Answer - Employer Default

At the opening of the hearing, with all parties represented, the Examiner noted that no answer had been received from the employer in response to the notice of hearing issued by the Commission.

The employer then tendered an answer, and requested that Local 763 waive the deadline set for the filing of the answer. The employer stated that it had decided to maintain what it characterized as a "dignified silence" on the matter, because it saw the unfair practice charges as an outgrowth of a representation contest between the complainant and the intervenor, and that it wished to remain neutral in that matter. The employer further stated that, had it filed an answer, it would have simply denied the allegations of the complaint. The employer further submitted that no harm resulted from its making its denials known on the day of hearing, as opposed to filing an answer as directed.

Local 763 declined to waive the failure to answer, and the Examiner ruled that the employer had not shown good cause for its failure to file a timely answer, so that the employer was in default under WAC 391-45-230. The Examiner held that the employer's participation in the hearing would be limited to the presentation of affirmative defenses. Seattle Public Health Hospital, Decision 1781 (PECB, 1983).

Notwithstanding the "default" ruling against the employer, the Examiner ruled that the hearing would proceed with the presentation of the complainant's case, because the intervenor had filed an

answer and was entitled to present a defense. The intervenor objected to the Examiner's "default" ruling, arguing that all material allegations of the complaint were placed into contest by the answer it had filed, albeit as an intervenor, so that finding the employer to be in default was a useless ruling. The Examiner reaffirmed the "default" ruling at that time, but the hearing proceeded on all issues, because all of the allegations of the complaint were denied by the intervenor.

Motion to Sequester Witnesses

Local 763 next moved for the sequestering of all witnesses, with the exception of one representative for each party. That motion was based upon its allegation concerning a conversation between representatives of the employer and the employees, and of a concern that the testimony of witnesses could possibly be distorted by their hearing the testimony of other witnesses.

The intervenor objected to the motion, claiming that the complaint was unusual and lacked specific allegations. The intervenor argued that it was entitled, as a matter of right and due process, to have its designated representative at the side of its counsel at all times. Furthermore, the intervenor argued that another potential witness would have to assist its counsel at times when its original designated representative was on the witness stand.

The Examiner overruled the intervenor's objections and ordered that all potential witnesses be sequestered, citing the paramount need to protect the record and to provide for testimony free from improper influences. The parties then designated which representatives would remain during the taking of testimony, and all other witnesses were excused until called to the witness stand. The intervenor's repeated objections to this procedure were overruled.

Motion For Dismissal - Identity of the Employer

Towards the end of the hearing, the employer moved for dismissal of the unfair labor practice charges, claiming that Local 763 had filed the complaint against the wrong employer. That motion was based on the testimony of the four members of the employer's Board of Directors who had been called to testify by Local 763.

Board member Steve Dwyer testified of a distinction between the "Medic 7 Board", which he viewed as the actual employer of the paramedics, and the "SNOCOM Board" which he saw as the employer of the dispatchers working in the 9-1-1 program. Dwyer saw himself as a member of the latter board only.

Board member John Dolan gave somewhat contradictory testimony, initially suggesting that one board oversees both functions, but then testifying that: "Technically, you've got two separate agencies there." He thereafter testified that two separate boards oversee the paramedic and dispatch operations, and that the "SNOCOM Board" has no jurisdiction over the paramedics.

Board member Jack Weinz testified that he served on both of two separate boards that control SNOCOM and Medic 7.[6] Weinz stated that he was also on the employer's negotiating team for the negotiations concerning the paramedic bargaining unit.

The fourth board member to testify, Patrick Vollandt, stated that he serves as an alternate member on both the "SNOCOM Board" and the "Medic 7 Board".[7]

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[6] Weinz identified himself as the fire chief for the City of Edmonds, one of the municipalities within the area served by the Medic 7 operation.

[7] Vollandt identified himself as the fire chief for the City of Mountlake Terrace, another of the municipalities within the area served by the Medic 7 operation.

The employer asserted that the complaint should have been filed against the "Medic 7 Board", and not against "SNOCOM". The intervenor joined in the motion, stating that the record indicated that separate boards and separate persons were responsible for the paramedic and the dispatch programs.

The Examiner denied the motion for dismissal. Contrary to the statements made in support of that motion, the record concerning the employer's governance structure was, and still remains, very unclear. Whether there are two separate employers, one employer with two "boards", or one employer with one "board" and two negotiating "committees" was never satisfactorily established. Other than testimony concerning the language used to identify the employer in the collective bargaining agreements signed with Local 763,[8] none of the parties presented evidence clarifying the issue sufficiently to warrant granting a motion to dismiss.

<u>Motion For Dismissal - Failure to Make Prima Facie Case</u>

Prior to the last witness being called to testify, the M7PA moved to have the complaint dismissed. The intervenor argued that no evidence had been presented that proved that any statement was made disparaging the exclusive bargaining agent or interfering with the rights of bargaining unit employees. The intervenor argued that, because no such statement had been verified, it could not be argued to have been within the time limitations of RCW 41.56.160.

The Examiner denied the motion at the hearing, and re-affirms that ruling here. An issue of fact had been framed between the parties. The motion goes to the weight to be given to the evidence, not to a complete absence of evidence.

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[8] None of the parties offered a copy of an organizational chart or any other documentary evidence which would shed light on the situation.

POSITIONS OF THE PARTIES

At the close of the hearing, the Examiner directed the parties to file briefs on the case. The intervenor inquired as to the basis for that directive, and its request was denied. The Examiner should have stated that the directive to file briefs was based upon WAC 391-45-290, which provides:

> BRIEFS AND PROPOSED FINDINGS. Any party shall be entitled . . . to file a brief . . . The examiner may direct the filing of briefs when he or she deems such filing warranted by the nature of the proceeding or of particular issues therein.

The intervenor filed a post-hearing brief, but the employer and Local 763 disregarded the Examiner's directive and failed to do so. Thus, the Examiner must glean the positions of those parties from the pleadings, the record of the hearing, and from the limited oral arguments made on the record.

Local 763 relies almost exclusively on the testimony of Krett as to what was said by bargaining unit employees during the contract ratification meeting held on May 12, 1989. It apparently argues that the statement attributed to bargaining unit employees as a quotation from a management official implied a preference on the part of at least one member of the employer's board, as to who should be the certified bargaining representative. Local 763 reasons that such a statement interferes with its ability to fulfill its responsibilities as a duly authorized exclusive bargaining representative.

The Examiner has virtually no basis for discerning the position of the employer beyond a general denial of the complainant's charges. The employer actually participated in the hearing only to the extent of moving to dismiss the charges.

The intervenor's post-hearing brief seeks to discredit Krett's testimony concerning a statement allegedly made by Macke on May 12, 1989, noting that Krett's testimony has not been supported by any other evidence. Even if such a statement were to be given credit, the intervenor asserts that Local 763 has failed to prove that any management official actually made a such a statement, or that any such statement contained any unlawful threat of reprisal or force, or promise of benefit.

DISCUSSION

Although this case has a highly unusual and complex procedural history, and is a case of first impression on some of the issues, it will have virtually no impact on future relations between these parties. Local 763 made no attempt to amend the complaint or to re-invoke the "blocking charge" rule after the Commission reversed application of the "blocking charge" rule.[9] An election was conducted, and the Medic 7 Paramedics Association prevailed at the polls. No objections were filed, and the M7PA was certified as exclusive bargaining representative of the employees involved.[10] No remedial order issued in this case could un-do the termination of the bargaining relationship between the employer and Local 763. Cf. City of Olympia, Decision 1208, 1208-A (PECB, 1981).[11]

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9 The Commission concurred that the complaint filed by Local 763 stated a cause of action, and that it would survive a motion for summary judgment, but the Commission held that the "blocking charge" rule called for a standard of pleading higher than in ordinary unfair labor practice cases.

10 Southwest Snohomish County Public Safety Communications Agency, Decision 3309-A (PECB, December 7, 1989).

11 In Olympia, a discriminatory discharge made in connection with an organizational campaign was remedied as to the individual employee, but that did not nullify a certification of "no representation" issued separately.

Procedural Issue - The Employer's Default

This case presents a classic example of the confusion that results when the parties do not follow the procedures established in the Washington Administrative Code to define and narrow issues, both before and during an administrative hearing.

The Commission's rules provide, at WAC 391-45-210, for the filing of an answer and the effects of a failure to answer. Respondents have been held in "default" in a number and variety of past cases. City of Vancouver, Decision 808-A (PECB, 1980) involved an employer with millions of dollars at risk in a "subcontracting" transaction. City of Wenatchee, Decision 2216 (PECB, 1985) involved a union that had a change of heart after being charged with unlawfully pursuing a non-mandatory bargaining subject beyond the point of "impasse". City of Benton City, Decision 436-A (PECB, 1978) led to judicial affirmation of a "default" judgment against an employer that failed to appear at a hearing, and then came unprepared to defend itself. The employer thus put itself at substantial risk by adopting its "dignified silence" tactic in disregard of its statutory right under RCW 41.56.170 to answer and defend.

Local 763 could well have been prejudiced by the employer's failure to answer. That union was entitled to know in advance of the hearing that an issue was to be raised concerning the structure of the employer and/or the designation of the respondent. Even in its answer tendered at the outset of the hearing, the employer failed to raise any claim that it was improperly designated as the alleged violator in this case. The employer then waited until nearly the close of the hearing before presenting the issue, thus putting the complainant at a severe disadvantage in attempting to defend against a "surprise" affirmative defense. If the employer suspected or knew that an issue was present concerning the proper identification of the respondent, its pursuit of its "dignified silence" tactic furthered its considerable risk. A timely answer,

filed as required by WAC 391-45-190, or a motion for dismissal filed prior to the hearing, could have brought such an issue before the Commission for appropriate argument and decision. As it developed at the hearing, the testimony on this issue was contradictory and incomplete. Actual prejudice to Local 763 was avoided by denial of the motion to dismiss.

The granting of "intervenor" status to the Medic 7 Paramedics Association did not cause the intervenor to supplant the employer as respondent, but only to join in presenting testimony in the case. RCW 41.56.170. The employer and the intervenor are presumed to be independent of one another,[12] and their status as parties must be treated individually. The intervenor's answer did not necessarily put the complainant on notice as to what defenses it might face from the employer. It was also entirely possible for the employer and intervenor to have different positions on various issues in the case. The Examiner thus continued to treat all the parties separately throughout the course of the hearing. The employer will escape liability in this case only to the extent that the answer and defenses asserted by the intervenor happen to be in complete harmony with its own interests.

Procedural Issue - The Intervenor's Incomplete Answer

Late in the hearing, the intervenor made a motion to dismiss, arguing that the complainant had not alleged the time period when the supposed violation of the statute occurred. RCW 41.56.160 imposes a six month period of limitations on the filing of unfair labor practice charges. No such issue had been raised by the intervenor previously.

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[12] Indeed, were it otherwise, assistance/domination charges under RCW 41.56.140(2) and interference charges under RCW 41.56.140(1) would have some basis in fact.

For many years, the trend in both state and federal administrative procedure has been to abandon "trial by surprise". Although the "discovery" procedures used in the civil courts are not available in proceedings before the Commission, the Commission's rules do provide mechanisms for clarification of issues. Had the intervenor filed a Motion to Make More Definite and Certain, pursuant to WAC 391-45-250, or had it raised a "statute of limitations" defense in its answer, this issue also could have been dealt with prior to the opening of the hearing. Much of the frustration expressed at the hearing could have been avoided.

The Merits - The Burden of Proof and its Application

The Public Employment Relations Commission does not "investigate" or "prosecute" unfair labor practice charges in the manner provided by the General Counsel and regional offices of the National Labor Relations Board. Rather, the Commission maintains an impartial role in unfair labor practice proceedings, hearing and determining allegations filed by the parties on the basis of the evidence that they produce in an administrative hearing conducted under Chapter 34.05 RCW. At the preliminary ruling stage of the proceedings, the Executive Director presumes all of the facts alleged in a complaint to be true and provable, questioning only whether an unfair labor practice violation could be found from those facts. At the hearing, the party filing an unfair labor practice complaint under RCW 41.56.170 et seq. and Chapter 391-45 WAC undertakes the burden of proving that the facts alleging a violation of RCW 41.56.140(1) are true. Peninsula School District No. 401, Decision 1477 (EDUC, 1982).

In this instance, the only evidence presented that addresses the substance of the complaint is found in the contradicted and uncorroborated testimony of Tom Krett. That testimony was clearly hearsay. Krett was not a witness to any employer statement disparaging the union. He could only testify about what he was told

by Macke, with Schulz present. Neither Schulz nor Macke would confirm that Krett was told about a board member having made a disparaging statement, let alone telling us who made such a statement or who was the employee who received it. The rules of evidence do not control in an unfair labor practice proceeding before the Commission. RCW 41.56.170. The hearsay statement was certainly admissible, but such evidence, standing alone as it does here, has limited value.

Further weakening its case, Local 763 failed to ferret out a board member willing to take credit for making a disparaging statement. It called only four board members as witnesses.[13] Dwyer, Vollandt and Weinz denied having knowledge of statements disparaging Local 763. Dolan was asked about the structure of the organization but, curiously, was not even questioned about the alleged statement that was the real crux of the case. Thus, even if it is accepted that Krett was told of a "disparaging statement", the record falls short of establishing either that such a statement was actually made or the identity of the declarant.

FINDINGS OF FACT

1. Southwest Snohomish County Public Safety Communications Agency (SNOCOM) is a "public employer" within the meaning of RCW

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[13] Although the Commission's rules do not provide for "discovery" prior to hearing, it is expected that all witnesses will be called with some assurance that they will be able to contribute to the record. While acknowledging the complainant's problem of having to call hostile witnesses to testify against their own interest, the complainant apparently did little pre-hearing investigation. For the most part, it called witnesses who had no direct involvement in the bargaining between the employer and the union. The witnesses called by the complainant expressed much frustration at being called to testify on issues that they knew nothing about.

41.56.030(1). By its failure to answer and default in this case, it is associated for the purposes of this case with operation of both an emergency medical service, known as "Medic 7", and emergency dispatch services, serving Snohomish County.

2. Public, Professional & Office Clerical Employees and Drivers Local Union No. 763, a "bargaining representative" within the meaning of RCW 41.56.030(3), was the exclusive bargaining representative of paramedics employed in the SNOCOM Medic 7 operation. At all times pertinent hereto, Thomas Krett was the union's business agent for the bargaining union consisting of SNOCOM Medic 7 employees.

3. During 1988 and continuing until May 8, 1989, representatives of the employer and Local 763 met regularly to bargain issues intended to be finalized in a successor collective bargaining agreement between the parties. With assistance of a mediator, the employer and Local 763 reached a tentative agreement on May 8, 1989, and the union agreed to submit the employer's offer for ratification by the bargaining unit employees.

4. On May 11, 1989, the Medic 7 Paramedics Association filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of paramedics employed in the SNOCOM Medic 7 operation.

5. On May 12, 1989, at the union meeting called for the purpose of conducting a ratification vote on the tentative agreement, bargaining unit employee Greg Macke informed Krett that the bargaining unit had decided to decertify the exclusive bargaining agent.

6. There is a conflict in testimony as to whether Macke also advised Krett on May 12 of a statement attributed to an unidentified member of the employer's board of directors, to the effect that bargaining unit members would "be more respected" if they were not represented by Local 763. Both Macke and the other employee who was present denied making or hearing such a statement.

7. No other evidence corroborates the hearsay statement attributed by Krett to Macke, or supports an inference that any employer official has made any statement that disparaged Local 763 or otherwise interfered with the right of bargaining unit employees to select a bargaining representative.

8. The employer failed to file a timely answer to the complaint within the time set forth in the notice of hearing. The employer appeared at the hearing and tendered an answer to the complaint, but offered no explanation for its failure to answer other than that it desired to maintain a "dignified silence" with respect to the matter.

9. Medic 7 Paramedic Association made a motion for intervention in this proceeding on August 8, 1989, claiming interest in the outcome of this proceeding based on its status as petitioner in the representation case referred to in paragraph 4 of these findings of fact. The organization filed an answer to the complaint, denying the allegations.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The employer has failed to demonstrate good cause for its failure to file a timely answer, and is in default.

3. The complainant has not fulfilled its burden of proving, in response to the answer filed by the intervenor, that representatives of the employer made statements to bargaining unit employees that disparaged Local 763.

ORDER

The complaint charging unfair labor practices shall be, and hereby is, dismissed.

Issued at Olympia, Washington, the 27th day of March, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.