STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBERT PAUL GLASSEN, Complainant, vs. CHELAN-DOUGLAS COUNTY MENTAL HEALTH CENTER, Respondent.	CASE 9148-U-91-2023 DECISION 3886 - PECB ORDER DENYING MOTION FOR DEFAULT JUDGEMENT

Robert Paul Glassen, appeared pro se.

Heller, Ehrman, White and McAuliffe, by Otto G. Klein, III, Attorney at Law, appeared on behalf of the respondent.

On May 2, 1991, Robert Paul Glassen filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Chelan-Douglas County Mental Health Center had violated his rights as a "public employee" under Chapter 41.56 RCW. The case is now before the undersigned Examiner for a ruling on a motion for default judgment.

PROCEDURAL BACKGROUND

The Executive Director issued a preliminary ruling in the matter on June 6, 1991, pursuant to WAC 391-45-110. The Executive Director found that the complaint stated a cause of action for "interference" with union activity (e.g., threats of discipline) and "discrimination" against Glassen in retaliation for protected activities (e.g., denial of training and placement on probation). The undersigned was assigned as Examiner.

A notice of hearing issued on July 17, 1991, established August 14, 1991 as the date for a hearing in the matter, and specified August 8, 1991 as the date for filing of an answer.[1]

On July 26, 1991, the complainant filed two additional documents with the Commission, as follows:

1. The first document is an amended complaint alleging that the employer had engaged in further interference and discriminated against him, in retaliation for his filing of the original complaint. At the end of the statement of facts in that amended complaint, Glassen indicated that his employment had been terminated, effective July 2, 1991.

2. The second document is a "motion for judgement" in which the complainant asked that a judgement be issued finding the respondent guilty of an unfair labor practice violation. He argued that the employer had illegally disciplined him for ignoring a prohibition against discussing a collective bargaining agreement on "company" time. The complainant asserted that, in fact, there had been no "ground rules" established which would prohibit such discussions. Glassen requested remedies of acknowledgement of the discriminatory practices and reinstatement.

The employer did not file an answer to the original complaint by August 8, 1991, as required by the notice of hearing.

On August 20, 1991, the Executive Director issued a preliminary ruling on the July 26, 1991 amended complaint, pursuant to WAC 391-45-110. The Executive Director found a cause of action to exist on the alleged escalation of the interference with and discrimination against Glassen's pursuit of statutory rights, culminating in his discharge from employment.

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[1] A first amended notice of hearing issued on July 18, 1991, changed the hearing date to September 5, 1991, but made no change in the date for filing of an answer.

On August 20, 1991, the undersigned Examiner denied the "motion for judgement" filed by Glassen on July 26, 1991. It was concluded that the case did not qualify for a "summary judgment" under WAC 391-08-230, which requires a showing that there are no genuine issues as to any material facts.

On August 28, 1991, the complainant filed the "motion for a default judgment" which is now before the Examiner. That motion was based on the failure of the respondent to file an answer to the original complaint.

The amendment of the complaint automatically gave rise to a right on the part of the respondent to answer, and the undersigned Examiner issued notice on August 28, 1991, setting aside the September 5, 1991 hearing date previously established.[2]

On September 20, 1991, the respondent was ordered to make a showing of good cause as to why the answer to the original complaint had not been filed. Both parties thereafter submitted written statements of position on the issue.

DISCUSSION

The statute providing for the filing of an answer in an unfair labor practice case is as follows:

> **RCW 41.56.170 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS -- PROCEDURE -- COMPLAINT -- NOTICE OF**

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[2] On September 12, 1991, the undersigned Examiner issued a notice setting hearing on the original and the amended complaints for October 24 and 25, 1991. The date for filing of an answer was specified as October 9, 1991. Those actions were necessary to orderly administrative processing of the case, and did not constitute a ruling on the motion at hand.

> **HEARING -- ANSWER -- INTERVENING PARTIES -- COMMISSION NOT BOUND BY TECHNICAL RULES OF EVIDENCE.** Whenever a complaint is filed concerning any unfair labor practice, the commission shall have power to issue and cause to be served a notice of hearing before the commission at a place therein fixed to be held not less than seven days after the serving of said complaint. Any such complaint may be amended by the commission any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise to give testimony at the place and time set in the complaint. In the discretion of the commission, any other person may be allowed to intervene in the said proceedings and to present testimony. In any such proceeding the commission shall not be bound by technical rules of evidence prevailing in the courts of law or equity. [Emphasis supplied.]

The required contents of an answer, and the effects of a failure to file an answer, are set forth in the Commission's rules, as follows:

> **WAC 391-45-210 ANSWER -- CONTENTS AND EFFECT OF FAILURE TO ANSWER.** An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted. [Emphasis supplied.]

Four factors must be considered in determining the merits of the complainant's motion for a default judgement, as discussed below.

First, WAC 391-45-210 provides for a waiver of a hearing on facts not denied as a remedy where an answer has not been filed, not an automatic judgement by default. There is a distinction between the two procedures. Whereas the failure to answer a complaint in a timely fashion does set up the possibility of a default on the facts as alleged in the complaint, it does not disable the respondent from: (1) Presenting evidence as to good cause for the failure to answer the complaint; or (2) presenting affirmative defenses such as "lack of jurisdiction", "res judicata", "laches", or the timeliness of the complaint. Thus, the failure to file an answer is not, by itself, sufficient to warrant a default judgement in favor of the complainant.

Second, the amended complaint filed in this case goes far beyond the harassment or discrimination charged in the first complaint, to allege that the complainant has been discharged for engaging in protected activity. Apart from a "cease and desist" order, the finding of a violation on the original allegations might result in an order that training be provided to the complainant on the same basis as other employees, and that the "probationary" status be stricken, but could not result in an overturning of the subsequent discharge. The complainant's right to reinstatement and back pay are only raised by the amended complaint. In light of the significance of this amendment, the Examiner rescheduled the hearing to allow time for the respondent to answer the amended complaint, as required by RCW 41.56.170.

Third, the respondent had not yet been obligated to answer the original complaint when the amendment was filed. The respondent contends that the requirement for the respondent to file an answer to the amended complaint makes a default judgement on the limited facts of the original complaint premature, and that argument is also persuasive.

A final point, also raised by the respondent, is that the complainant has neither alleged nor shown that he has been prejudiced by the failure to provide an answer on the original complaint. Indeed, it would be difficult to prove such prejudice, since a hearing on the original complaint has not yet been held. Battle Ground School District, Decision 2449, (PECB, 1986).

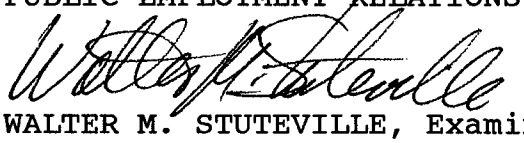
NOW, THEREFORE, it is

ORDERED

The Motion for a Default Judgement on the original complaint in the above-entitled matter is DENIED.

Issued at Olympia, Washington, on the 17th day of October, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner