STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SPOKANE SCHOOL DISTRICT, Employer.	)	
MICHAEL RUST, Complainant,	)	CASE 11198-U-94-2608
vs.	)	DECISION 5151 - PECB
SPOKANE EDUCATION ASSOCIATION/ WEA/NEA, Respondent.	)	ORDER OF DISMISSAL
MICHAEL RUST, Complainant,	)	CASE 11199-U-94-2609
vs.	)	DECISION 5152 - PECB
SPOKANE SCHOOL DISTRICT 81	)	ORDER OF DISMISSAL

On June 21, 1994, Michael Rust filed a large volume of materials with the Public Employment Relations Commission, including a "complaint charging unfair labor practices" on the form promulgated by the Commission. The Spokane School District was listed as the respondent on the complaint form, but only a handwritten bracket and question mark were inserted adjacent to the boxes provided on the form to designate the type of unfair labor practice being alleged. Directly attached to the complaint form were: (1) A copy of a table of organization for the Spokane School District, and (2) a copy of a letter from Mr. Rust to the Commission under date of June 17, 1994. In turn, that letter indicated that it was covering transmittal of enclosures "too numerous to list". Accompanying the complaint form and its direct attachments were five packages of

materials with a total thickness of more than 1-1/2", marked "Read 1st",[1] "Read 2nd",[2] "Overtime Reports go along with #2",[3] "Read 3rd",[4] and "Read 4th".[5]

The June 17, 1994 letter from Rust was taken to be his attempt to comply with the requirement, specified in WAC 391-45-050(3), for a complainant to supply:

> Clear and concise statements of facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences.

That June 17, 1994 letter set out allegations of unfair labor practice violations by the Spokane School District in a section headed as follows:

> I. UNFAIR LABOR PRACTICES:
> Employer:
> Spokane Public School District No. 81
> 200 North Bernard Street
> Spokane, Washington 99201-0282

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[1] This volume contains a manuscript "journal" apparently written by Rust, which documented events at least as far back as 1989. This file also contained written correspondence with respect to an unidentified grievance filed with the employer, a copy of the collective bargaining agreement, and some organization charts for the school district.

[2] This volume contains letters related to a grievance involving the assignment of overtime.

[3] This volume contains many pages of logs and accounts relating to assignment of overtime to custodian at Lewis and Clark High School.

[4] This volume contains letters related to a sexual harassment claim against Rust, a grievance concerning medical leave, and a transfer to other schools in the district.

[5] This last volume contains medical records and letters related to Rust's use of family medical leave in 1994.

The same letter set out allegations of unfair labor practice violations by the Spokane Education Association in a separate section headed as follows:

> II. BREACH OF FAIR REPRESENTATION:
> Union:
> Spokane Education Association
> E. 230 Montgomery
> Spokane, Washington 99207

Consistent with Commission docketing procedures which require a separate case for each respondent, two separate case numbers were assigned: Case 11198-U-94-2608 covers charges against the Spokane Education Association (SEA); Case 11199-U-94-2609 covers charges against the Spokane School District (employer).

The case files were reviewed by the Executive Director for the purpose of making a preliminary ruling pursuant to WAC 391-45-110.[6] A preliminary ruling letter issued on February 2, 1994, found that a cause of action existed for:

> Discrimination and retaliation by the employer and union for filing and processing a grievance concerning assignment of overtime.

The respondents were asked to file answers to the complaints within 21 days following the date of the preliminary ruling letter.

Counsel for the employer filed an answer on February 21, 1995, in which it denied the allegation that it had conspired with the SEA to deny Rust his rights under Chapter 41.56 RCW. The employer asserted that it never took action against Rust because he filed

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[6] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

grievances, and that it did not transfer Rust from job site to job site in an effort to slander or defame him.

Counsel for the SEA requested an extension of the time to answer until March 8, 1995, and that request was granted without opposition by the other parties. Prior to the March 8 date, counsel for the SEA moved for dismissal of the complaint as against that organization and its affiliates, on due process grounds. The SEA supplied affidavits supporting its claim that none of its representatives had ever seen, or been served with, either the complaint form or the attachments that were filed with the Commission in June of 1994. The SEA observed that the six-month statute of limitations period had run, so that any attempt to re-file or re-serve would be untimely.

Rust was invited to respond to the motion for dismissal filed by the SEA. A response was submitted on March 29, 1995, together with supporting affidavits. One of those was an affidavit by Rust, asserting that he had given a copy of the June 17, 1994 letter to SEA representative John Kostecka. That affidavit of service **was not made in June of 1994**, however, and it did not assert that a copy of the complaint form or other attachments were given to the SEA contemporaneous with their filing with the Commission.

By a letter dated March 24, but not filed until March 31, 1995, attorneys for the employer amended its answer and moved for dismissal of the complaint against the employer, on the basis that the employer had not been served the complaint or attachments.[7] Declarations of two employer officials and its attorney were submitted, each denying that Rust had ever served them with copies of the papers that were filed with the Commission on June 21, 1994.

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[7] The employer explained that it was able to generate its original answer based upon copies of documents supplied to it by the Commission, upon its request.

When asked to reply to the employer's motion for dismissal, counsel for Rust responded on May 22, 1995. Accompanying that response were an affidavit from a student who may have been a witness to some of the incidents involved in the complaints, another recently-made affidavit from Michael Rust regarding the circumstances of his giving the June 17, 1994 letter to union representatives back in 1994, and an affidavit from Rust's neighbor which did not address the "service" issue.

DISCUSSION

Service of the complaints in these unfair labor practice cases was fatally defective, and in violation of well-established rules of administrative procedure. Because of the lack of service, the respondents were not given notice of the charges against them until more than six months after the complained of incidents. Any attempt to cure that procedural defect now would clearly be beyond the six-month period of limitations imposed by statute on the filing and service of unfair labor practice charges.

Requirement for Service Upon Parties -

This dispute arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. That state law is administered by the Commission, which is a state administrative agency. The conduct of adjudicative proceedings before Washington administrative agencies is regulated by the Administrative Procedure Act, Chapter 34.05 RCW, and by the Model Rules of Procedure promulgated by the Chief Administrative Law Judge in Chapter 10-08 WAC. The Commission itself has adopted general Rules of Practice and Procedure in Chapter 391-08 WAC, and has adopted specific rules for processing unfair labor practice cases in Chapter 391-45 WAC.

WAC 10-08-110 and 391-08-120 are each general rules which require **service** of "**all** notices, **pleadings and other papers**" which are

filed with an agency [emphasis by **bold** supplied]. Those rules each detail the requirements for service, as follows:

> (2) Service shall be made personally or ... by first class, registered, or certified mail; by telegraph; by electronic telefacsimile transmission and same-day mailing of copies; or by commercial parcel delivery company.
>
> (3) Service by mail shall be regarded as completed upon deposit in the United States mail properly stamped and addressed. ...

As to unfair labor practice complaints, WAC 391-45-030 provides, specifically:

> WAC 391-45-030 FORM--NUMBER OF COPIES--FILING--SERVICE. Charges shall be in writing, in the form of a complaint of unfair labor practices. The original and three copies shall be filed with the agency at its Olympia office. **The party filing the complaint shall serve a copy on each party named as a respondent.**
>
> [Emphasis by **bold** supplied.]

The reverse side of the complaint form promulgated by the Commission (and used by Rust to initiate these cases) states, pointedly:

> D. SERVICE: The party who submits a case to PERC **must give or send a copy of the completed form, together with all attachments, to the other party or parties to the dispute.**
>
> [Emphasis by **bold** supplied.]

The instructions printed on the reverse side of the complaint form also repeat the text of WAC 391-08-120, which requires service.

Taking the affidavits in the light most favorable to Mr. Rust, it nevertheless appears that service was defective in these cases.

Untimely Affidavits of Service -

The documents filed with the Commission do not indicate, on their face, that copies were provided to either the SEA or the employer. No affidavits of service were included. The Commission's rules do not require the filing of an affidavit of service in every case, but it is worthwhile to refer to the standardized requirements for proof of service in a case where the sufficiency of service is contested. WAC 10-08-110 and WAC 391-08-120 provide as follows:

> (5) Where proof of service is required by statute or rule, filing the papers with the presiding officer, together with one of the following shall constitute proof of service:
>
> (a) An acknowledgement of service.
>
> (b) A certificate that the person signing the certificate **did on the date of the certificate serve the papers upon all parties** of record in the proceeding by delivering a copy thereof in person to (names).
>
> (c) A certificate that the person signing the certificate **did on the date of the certificate serve the papers upon all parties** of record in the proceeding by:
>
> (i) Mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent; or
>
> (ii) Telegraphing a copy thereof, properly addressed with charges prepaid, to each party to the proceeding or to his or her attorney or authorized agent; or
>
> (iii) Transmitting a copy thereof by electronic telefacsimile device, and on the same day mailing a copy, to each party to the proceeding or his or her attorney or authorized agent; or
>
> (iv) Depositing a copy thereof, properly addressed with charges prepaid, with a commercial parcel delivery company.
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> [Emphasis by **bold** supplied.]

A contemporaneous recording by Rust of steps he took to serve copies of the unfair labor practice documents on the other parties to the dispute would clearly be of greater value in these cases than his recent affidavits based on recall of months-old events.

Failure to Name Union as Respondent -

There is a fundamental question as to whether the union was ever put on notice that it was being named as a respondent in an adjudicative proceeding before the Commission. There is no claim by Rust that a copy of the complaint form was ever given to any union official. Even if it had been served, the complaint form filed with the Commission is devoid of mention of the union. The handwritten question mark adjacent to the empty check boxes gave no clue that a union unfair labor practice was being alleged. While there is an assertion from Rust that a union official was given a copy of the June 17, 1994 letter, it is not at all clear that the SEA was put on notice that the letter was part of a package mailed to the Commission under date of June 20, 1994.

Service of Incomplete Documents -

The documents filed with the Commission on June 21, 1994, included the complaint form dated June 20, 1994 (PERC form U-1), the letter dated June 17, 1994, and the five packets of supplemental information described above. It is clear that the five packets were an integral part of the documents filed with the Commission. For example, Rust referred to "enclosed documentation" in the first page of his June 17 letter, and stated that a "capsulation of what has taken place" was contained in his personal diary "enclosed herewith". He referred on the second page of the June 17 letter to "... other District personnel involved: **see enclosed document titled, District Hierarchy**". Rust's references to an investigative report made by Bob Harris of the employer's staff, and to documents concerning cancellation of his medical benefits, appear to relate to materials in the five packages. Rust concluded his June 17 letter with a statement that he had mailed to the Commission, "... what I believe is the most compelling evidence of establishing and prooving [sic] my complaints". And at the bottom of the four-page letter, he indicated "enclosures ... too numerous to list". These cases were docketed as having been opened on June 21, 1994, on the basis of those documents.

Rust's responses to the motions for dismissal indicate that complete sets of the materials contained in the five packages were never served on the employer or union. There is no claim that the other parties were ever made aware of the mass of documents in the five numbered packets.

Allowing that Rust did not serve the other parties on June 20, when he mailed the materials to the Commission, it would have been logical for him to have served the other parties during meetings he had with them during the next business week. But nothing was said about the unfair labor practice complaint at a meeting concerning one of his grievances held at the employer's offices just two days after the materials were received by the Commission (i.e., June 23, 1994). In his affidavit of March 18, 1995, Rust did not mention school district officials being at the June 23 meeting; in his affidavit of May 18, 1995, he adds a recollection that "he had a meeting with" Delores Humiston.[8] Thus, an early opportunity to correct any defect of service regarding the docketed case papers was not utilized.

Effect of Statute of Limitations -

The six-month period of limitations imposed on unfair labor practice complaints by RCW 41.56.160 parallels the period of limitations found in the federal National Labor Relations Act applicable in the private sector, and is a well-established principle of labor law. In the context of ongoing employment and collective bargaining relationships, there is a strong public policy favoring prompt resolution of disputes. Calling upon these parties to respond to stale disputes contravenes that policy.

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[8] The first two paragraphs of the May 18 affidavit are identical to the first two paragraphs of the March 31 affidavit. The third paragraph of the May 18 affidavit adds a reference to the meeting with Humiston present for the employer, and provides more details about his meeting with union representative John Kostecka, who represented the custodian bargaining unit in which Rust worked.

Had Rust put the employer and SEA on notice in June of 1994 that they were being accused of statutory violations in official proceedings before the Commission, any ensuing delays in the Commission's processing of the case would not have prejudiced the respondents. They could have proceeded with timely investigations into the allegations, and could have taken timely steps to resolve the dispute. By the time they were called upon to answer, however, more than six months had passed since the complained-of actions, and any attempt by Rust to effect service at that late date was untimely. The employer's actions to obtain copies of documents from the Commission's case file under the public disclosure law is not a substitute for timely service by the complainant.

Conclusions on Failure to Serve -
A complaint was dismissed in King County Fire District 16, Decision 4116-A (PECB, 1993), where the complainant union failed to effect timely service of the pleadings on the employer. The same result must be reached in these cases, where the individual complainant did not serve complete copies of the pleadings on either the employer or the SEA.

Reconsideration of Preliminary Ruling

The preparation of a ruling on the motions for dismissal has necessitated a detailed review of the documents in this file. That has caused the Executive Director to reconsider the preliminary ruling made in these cases under WAC 391-45-110.

The Charges Against the Employer -
The June 17 letter is often vague as to times, dates, places, and explanations as to what employer actions are alleged to have comprised violations of Rust's rights under the collective bargaining statute. The "discrimination for filing and processing a grievance" theory posed in the earlier preliminary ruling is not borne out by more detailed examination of the materials.

Much of the material filed by Rust appears to solicit rulings on the merits of his various grievances. The name "Public Employment Relations Commission" is sometimes interpreted as implying a broader scope of authority than is actually conferred upon the agency by statute. The Commission's jurisdiction is limited to the resolution of collective bargaining disputes between employers, employees and unions. The agency does not have authority to resolve each and every dispute that might arise in public employment. In particular, the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976). Any allegations of discrimination in reprisal for filing grievances are so buried within this large mass of material that a more definite and certain complaint focused on such a claim would be necessary as a condition precedent to any further proceedings.

The Charges Against the Union -

Even if the Commission were to disregard the failure to name the union as a respondent on the complaint form, the failure to identify any union unfair labor practices on the complaint form, and the failure to serve the complaint form on the union, the June 17 letter that may have been served on the union is often vague as to times, dates, places, and explanations as to what union actions are alleged to have comprised violations of Rust's rights under the collective bargaining statute.

The Commission does police its certifications, and has asserted jurisdiction over "breach of duty of fair representation" claims where alleged discrimination by a union on the basis of union membership or some other invidious grounds (e.g., sex, race, creed, etc.) would place in question the right of the union to enjoy the benefits of status as exclusive bargaining representative under the statute. Much of the material filed by Rust appears, however, to take issue with the union's processing of his grievances. Labor

organizations who represent employees pursuant to Chapter 41.56 RCW have a wide latitude in making decisions about which employee grievances merit the sometimes onerous expense of litigation. As long as there are no threats of reprisals or of force, and no unlawful discrimination, it is not necessary for union officials to achieve absolute equality and complete satisfaction on the part of all of their members. North Thurston School District, Decision 4764 (EDUC, 1994); City of Bonney Lake, Decision 4916 (PECB, 1994); Seattle School District, Decision 4917 (EDUC, 1994). In the context that it lacks jurisdiction to determine or remedy any underlying contract violation, the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of contractual grievances. Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982).[9]

Conclusions on Existence of Cause of Action -
Even if there were a basis to conclude that the complaint(s) were timely served on the respondent(s), or that some defect of service should be waived under WAC 391-08-003 in the absence of prejudice to one or both of the respondent(s), amended complaints would be needed to warrant further proceedings in these matters. In the absence of amended complaints, the cases would be subject to dismissal for absence of a cause of action.

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[9] It is recognized that some "breach of duty of fair representation" claims arise from disagreements between bargaining unit members and their union concerning the merits of grievances over which the Commission has no jurisdiction. An employee may have a cause of action for a violation of contract lawsuit in the courts, as a third-party beneficiary to the contract in the absence of fair representation by the union party to the contract. In such a case, the court could assert jurisdiction over the "fair representation" question which is a condition precedent to its assertion of jurisdiction over any "violation of contract" claim, so there is no need for (and no inherent efficiency in) any involvement by the Commission in administrative adjudicatory proceedings on such issues.

NOW, THEREFORE, it is

ORDERED

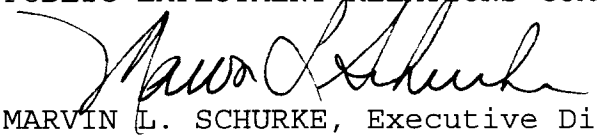
1. The preliminary rulings previously issued in these matters under WAC 391-45-110 are vacated.

2. The complaint charging unfair labor practices in Case 11198-U-94-2608 is DISMISSED for failure of the complainant to effect timely service of the complaint and its complete attachments on the Spokane Education Association/WEA/NEA.

3. The complaint charging unfair labor practices in Case 11199-U-94-2609 is DISMISSED for failure of the complainant to effect timely service of the complaint and its complete attachments on Spokane School District 81.

Issued at Olympia, Washington, on the 8th day of June, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.