

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WASHINGTON STATE COUNCIL OF COUNTY)	CASE 10659-C-93-629
AND CITY EMPLOYEES)	
)	
For clarification of an existing)	DECISION 5147-B - PECB
bargaining unit of employees of:)	
)	
ISLAND COUNTY)	DECISION OF COMMISSION
)	
)	
)	

Lori Province, Representative, Washington State Council of County and City Employees, appeared for the union.

Braun Consulting Group, by Robert R. Braun, Jr., represented the employer.

This case comes before the Commission on a telefacsimile transmission by Island County, seeking review of an order clarifying bargaining unit issued by Executive Director Marvin L. Schurke.¹ The sole issue now before the Commission is whether the employer's petition for review can be accepted as timely filed.

BACKGROUND

On September 1, 1993, the Washington State Council of County and City Employees (union) filed a petition for clarification of an existing bargaining unit of employees of Island County. Hearing Officer J. Martin Smith held a hearing on July 11, 1994. On June 8, 1995, the Executive Director issued a decision which excluded some of the disputed positions from the bargaining unit and

¹ Island County, Decision 5147 (PECB, 1995).

included other disputed positions in the unit. WAC 391-35-210 gives parties a right to appeal a unit clarification order, by filing a petition for review within 20 days. The deadline for a petition for review in this case was thus June 28, 1995.

On June 14, 1995, the Executive Director issued an order correcting an error in his original decision.² A lone reference to a "human resource administrator" title was corrected to the "human service administrator" title used elsewhere in the decision.

On June 28, 1995, at approximately 3:07 p.m., employer consultant Robert R. Braun, Jr. sent a petition for review to the Commission's Olympia office by telefacsimile transmission (fax). The Executive Director's secretary called Mr. Braun by 3:30 p.m. that same day, and notified him that a petition for review cannot be filed by fax.

On June 29, 1995, the original petition for review was filed with the Commission, along with a letter requesting the Commission to consider the circumstances by which the original petition for review was filed one day late.

DISCUSSION

Effect of Correcting Order

The employer argues that its petition was filed well within 20 days from the date of the order correcting the error. The deadline for a petition for review would clearly be extended by a correcting order making a substantive change. In this case, however, the order issued on June 14, 1995 merely corrected "human **resource** administrator" to "human **service** administrator". The meaning of

² Island County, Decision 5147-A (PECB, 1995).

"human resource administrator" in paragraph 3 of the Executive Director's order should have been clear to the parties, since it was the only paragraph of the order which addressed any "human ... administrator" position,³ and the discussion section which preceded the order had correctly used the "human service administrator" title. Because the error was harmless, and not critical to the decision, we decline to waive the 20-day filing requirement to allow appeal based on the June 14, 1995 order.

The Administrative Procedure Act

The employer argues the copy of the petition for review submitted by fax on June 28, 1995 should be considered timely filed. It contends the rules relating to the filing of a petition for review do not specify any particular method of delivery of documents to the Commission office, and that the method it chose does not appear to be precluded. It claims that, when it learned that fax copies were not acceptable, it was too late in the day to deliver documents to Olympia by 5:00 p.m.

The Model Rules of Procedures promulgated by the Chief Administrative Law Judge, Chapter 10-08 WAC, distinguish "filing" from "service" and permit the use of fax only for "service". WAC 391-08-120 duplicates WAC 10-08-110 in all relevant parts. Thus, our rule also distinguishes "filing" from "service", and permits the use of fax only for "service":

WAC 391-08-120 SERVICE OF PROCESS--
FILING AND SERVICE OF PAPERS. (1) All
notices, pleadings, and other papers **filed**
with the agency or the presiding officer shall
be **served** upon all counsel and representatives
of record and upon parties not represented by
counsel or upon their agents designated by
them or by law.

³ Other paragraphs of the order addressed the other positions at issue in the case.

(2) **Service** shall be made personally or, unless otherwise provided by law, 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. Service by telegraph shall be regarded as completed when deposited with a telegraph company properly addressed and with charges prepaid. **Service by electronic telefacsimile transmission** shall be regarded as completed upon production by the telefacsimile device of confirmation of transmission. Service by commercial parcel delivery shall be regarded as completed upon delivery to the parcel delivery company with charges prepaid.

(4) **Papers required to be filed with the agency or with the presiding officer shall be deemed filed upon actual receipt during office hours at any office of the agency.** Papers required to be filed with the presiding officer shall be **deemed filed upon actual receipt during office hours:**

(a) **The Olympia office of the commission for any papers required to be filed with the commission, the executive director, or the agency generally; ...**

[Emphasis by **bold** supplied.]

The filing of documents with the Commission is ultimately regulated by the Administrative Procedure Act, Chapter 34.05 RCW, which also distinguishes between "filing" and "service":

RCW 34.05.010. DEFINITIONS. The definitions set forth in this section shall apply throughout this chapter, unless the context clearly requires otherwise.

...
 (6) **"Filing"** of a document that is required to be filed with an agency means **delivery of the document to a place designated by the agency** by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.
 ...

(18) "**Service**," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. **Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously,** or by commercial parcel delivery company.

[Emphasis by **bold** supplied.]

Under the principles of statutory construction, we must give effect to the intention of the Legislature in defining "filing" and "service" in RCW 34.05.010. This intent is determined primarily from the language of the statute itself.⁴ A basic principle of statutory construction is "expressio unius est exclusio alterius" (express mention of one thing implies exclusion of another).⁵

Based on the plain language of the statute, we are unable to find that "filing" by fax is permitted. The Legislature expressly stated in RCW 34.05.010(18), that agencies may, by rule, authorize "service" by electronic telefacsimile transmission. In RCW 34.05.010(6), the Legislature did not give agencies similar authority to allow "filing" of documents by fax. We must give effect to the law as the Legislature wrote it. In specifically authorizing fax transmissions for "service", but not for "filing", the Legislature, in our opinion, has excluded fax filings from the realm of authority of the agency.

⁴ See, Department of Transportation v. State Employees' Insurance Board, 97 Wn.2d 454 (1982); and Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305 (1994).

⁵ Applying this rule to discover legislative intent should not be permitted to defeat the plainly indicated purpose of the Legislature. See, Boise Cascade Corporation v. Washington Toxics Coalition, 68 Wn.App. 447 (1993). We do not have such a situation, in the case before us.

From a public policy standpoint, we recognize that the use of existing technology to accommodate filing of documents could have benefits. The sender has a greater certainty that documents have been received; the agency receiving the document has the benefits of a machine-printed legend showing not only the date, but also the time, of receipt. We note that the Washington courts now accept filing by fax.⁶

Despite persuasive reasons to find the petition for review timely, we must give effect to the intent of the Legislature in adopting RCW 34.05.010(6) and (18). Finding the petition for review in this case to be timely is dependent upon our acceptance of the faxed document, and we cannot accept a faxed document where to do so would be prohibited by statute.

Waiver of Commission Rules

Our rules for the processing of unit clarification cases include WAC 391-35-210, which reads as follows:

The final order of the executive director shall be subject to review by the commission on its own motion, or at the request of any party made within twenty days after the date of the order. 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 any other parties. ...**

WAC 391-08-003 allows the Commission to waive rules, and provides:

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

⁶ See, Rules of Court for the State of Washington, General Rule (CR) 17 (1995).

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 **bold** supplied.]

Under WAC 391-08-003 and Mason County, Decision 3108-A (PECB, 1989),⁷ the Commission has the authority to waive the 20-day filing requirement of WAC 391-35-210. The case will be held open for the employer to present grounds for such a waiver, and for the union to respond to any arguments advanced on that topic by the employer.

NOW, THEREFORE, it is

ORDERED


1. The matter will be held open for 20 days following the date of this Order, to permit the employer time to file and serve a statement of proposed grounds for waiver of the 20-day time limit established by WAC 391-35-210. In the absence of the timely filing and service of such a statement, the case will be closed.
2. If the employer files a statement under paragraph 1 of this order, the union will be permitted an additional 20 days to file and serve a response to the proposed grounds for waiver

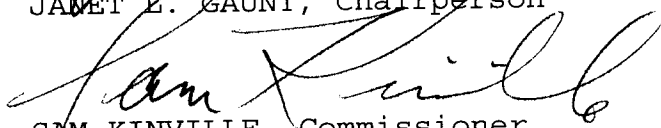
⁷ In that case, the Commission dismissed a petition for review as procedurally defective, because it was not served upon the union or its attorney, as required by WAC 391-45-350. The matter was appealed to the Superior Court for Mason County, which remanded the case to the Commission for a determination as to whether the Commission should waive the requirements of WAC 391-45-350 under authority of WAC 391-08-003.

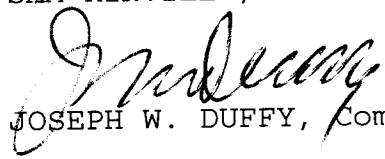
advanced by the employer. At the end of that period, the case will be reconsidered by the Commission.

Issued at Olympia, Washington, the 14th day of November, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JANET L. GAUNT, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner