STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

Jon Stables, Representative, Washington State Council of County and City Employees, appeared for the union.

Braun Consulting Group, by Robert R. Braun, Jr., appeared for the employer.

This case comes before the Commission on a petition for 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 time requirement for filing petitions for review in WAC 391-35-210 should be waived in this case, to allow a filing which was one day late.

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 in the matter. On June 8, 1995, the Executive Director issued a decision which excluded some of the disputed positions from the bargaining unit and included other disputed positions in the unit. WAC 391-35-210 gives parties

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

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 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 telephoned Mr. Braun by 3:30 p.m. that same day, and notified him that a petition for review cannot be filed by fax. The original petition for review was filed with the Commission on June 29, 1995, along with a letter asking the Commission to consider the circumstances by which the petition for review was being filed one day late.

The Commission ruled in Island County, Decision 5147-B (PECB, 1995), that it had no authority to accept a fax as "filing" of a petition for review.[2] The Commission did, however, allow the parties a period of time in which to present grounds for waiver of the 20-day filing requirement. The parties have done so, and the case is again before the Commission.

POSITIONS OF THE PARTIES

The employer argues that there was substantial compliance within the 20-day period allotted for delivery. It argues that its fax was delivered on time, so there was actual compliance with the statutory requirement of delivery. It claims that furtherance of the purposes of Chapter 41.56 RCW would best be achieved by waiving the technical deficiency of a one day delay, because individuals would be properly excluded from a bargaining unit if there is merit

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[2] The Commission also declined to accept the petition for review as timely based on a correcting order, Island County, Decision 5147-A (PECB, 1995), which the Executive Director had issued on June 14, 1995.

to the employer's petition. The employer claims that failure to waive the 20-day filing requirement would result in significant prejudice to it and the affected employees, and that waiver would cause no harm to any party.

The union argues that the Commission's fax procedure has been clearly shown in correspondence from the Commission regarding active cases. It contends a waiver of filing deadlines would degrade the integrity of the adjudicative process and frustrate timely closure of cases. It asserts it would be harmed by a waiver here, due to escalation of a dispute that had been settled and the loss of dues revenues from the positions in question.

DISCUSSION

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.** ...
>
> [Emphasis by **bold** supplied.]

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 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.**
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> [Emphasis by **bold** supplied.]

Under WAC 391-08-003 and Mason County, Decision 3108-B (PECB, 1991), the Commission has the authority to waive the 20-day filing requirement of WAC 391-35-210.[3] The Commission concluded that a waiver would not effectuate the purposes of the rule in that case, since a party did not have even constructive notice of the filing of the petition for review until more than three weeks after the filing period expired. We have different circumstances here.

An initial consideration here is the fact that the impropriety of filing a petition for review by fax is not readily apparent. To learn that such a submission is inappropriate, a party needs to examine several regulations: WAC 391-35-210 does not specifically state that a faxed petition for review is unacceptable; WAC 10-08-110 and WAC 391-08-120 are not particularly clear on their face.

A second consideration is the fact that the purpose of our rule was substantially complied with. The doctrine of substantial compliance has long been recognized by Washington courts. See, e.g., In

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[3] In Mason County, Decision 3108-A (PECB, 1989), the Commission had 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 Commission viewed the service of a petition for review as a jurisdictional requirement, equivalent to the service of a notice of appeal from a superior court to the court of appeals. On appeal, 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 391-45-250, and remanded the case for the Commission to determine whether the requirements of WAC 391-45-350 should be waived under authority of WAC 391-08-003.

re Santore, 18 Wn.App. 319, 327, review denied, 95 Wn.2d 1019 (1981). In a recent case, the Supreme Court stated:

> Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute. [Citations omitted] In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.

Seattle v. Public Employment Relations Commission, 116 Wn.2d 923, 928 (1991).[4]

We evaluate the employer's effort in this case from the point of view that the purpose of the time limit in WAC 391-35-210 is to set a date certain for the filing of a petition for review, as well as to assure that the other parties to the case are informed of the fact that there is an appeal.

In this case, the union was properly served with the employer's petition for review by fax on June 28, 1995, so it had timely notice that the employer was seeking to overturn the Executive Director's decision. The Commission likewise received notice that the employer was seeking review within 20 days of the Executive Director's order. The form of notice received by the Commission did not meet statutory requirements for filing, but the faxed petition for review did satisfy the principal purpose of the time limit set forth in our rule. Unlike Mason County, supra, where a party completely overlooked a requirement and then sought to escape the consequences of its oversight by waiver of an applicable rule,

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[4] An example of actual compliance with the substance of a statutory requirement can be found in In re Saltis, 94 Wn.2d 889, 621 P.2d 716 (1980). In that case, a petition was delivered to the Department of Labor and Industries, not to the "director" of the department as required by an applicable statute. The court found that there had been substantial compliance with the statute since the director would in fact eventually receive the petition.

the employer in the case now before us attempted to comply with the rules before the applicable time period had expired.

Had the petition for review been delivered to the Commission office by a different method of delivery, there would be no question as to its acceptability. Since notice of the petition was given within 20 days of the order clarifying bargaining unit, and the petition was received in proper form (i.e., by delivery of an original document) just one day later, we find no prejudice from the late "filing". With the foregoing considerations in mind, we see little justification for declining to exercise the discretion we have reserved in WAC 391-08-003, and which the court in Mason County reminded us to keep in mind.

NOW, THEREFORE, it is

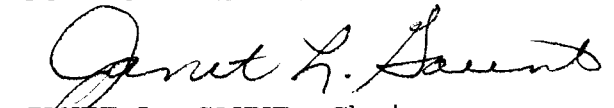
ORDERED

1. The time limit set forth in WAC 391-35-210 is waived, and the petition for review filed in this case is accepted.

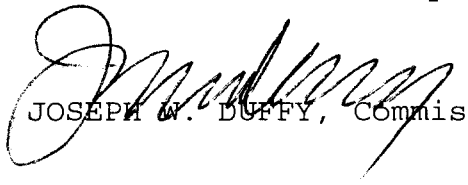
2. The parties have 21 days following the date of this order to file briefs in support of their positions on the merits of this case, after which the case will again be presented to the Commission.

Issued at Olympia, Washington, the 31st day of January, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



JOSEPH W. DUFFY, Commissioner

DISSENTING OPINION

In Decision 5147-B (PECB, 1995), the Commission found it had no authority to allow the filing by fax, but allowed the parties to present grounds for waiver of the 20-day filing rule. In its response to this order, the employer spends five-plus pages of a seven page letter arguing how wrong the Commission is in its holding on the fax issue. In the closing two pages of the letter the employer goes on to argue that because his petition for review was received by mail and only one day late he substantially complied with the rule. Hence, the Commission should waive the 20-day requirement.

In this same letter, the employer quotes a court case and he says:

> The Court concludes that it is not possible to substantially comply with a time limit after the time limit has tolled ...

Also, in the same order, the Commission cites a WAC that allows the Commission to waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver. I find it difficult to believe the employees involved would not be prejudiced by further delay. This case started on September 1, 1993. On June 8, 1995, the Executive Director issued an order. On June 14, 1995, the Executive Director issued a corrected order. On June 29, 1995, an untimely petition for review was filed by the employer. On November 14, 1995, the Commission issued an order allowing the employer twenty days to file a statement as to why the 20-day time limit should be waived. Now the Commission is using another order but allowing additional days for the parties to again argue the decision. At the rate we are going, it may well be the heirs of the employees who will learn the final decision by the Commission. It appears that with yet another delay the union could be prejudiced.

By statute, filing by fax is not allowed.

The court has said it is not possible to substantially comply with a time limit after the time limit has been tolled.

The union could be prejudiced by further delay.

I respectfully dissent.

SAM KINVILLE, Commissioner