

Chapter 391-35 WAC

UNIT CLARIFICATION CASE RULES

Last Update: 2/15/12

WAC

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DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

391-35-080 Prehearing conferences. [Statutory Authority: RCW

28B.52.080, 41.56.090, 41.59.110, 41.58.050 and

34.05.431. WSR 96-07-105, § 391-35-080, filed

3/20/96, effective 4/20/96. Statutory Authority: RCW

41.58.050, 28B.52.080, 41.56.090, 41.59.110,

28B.52.073 and 41.56.040. WSR 90-06-073, § 391-35-

080, filed 3/7/90, effective 4/7/90.] Repealed by

WSR 01-14-009, filed 6/22/01, effective 8/1/01.

Statutory Authority: RCW 28B.52.080, 41.56.090,
41.59.110, 41.58.050.

391-35-150 Authority of hearing officer. [Statutory Authority:
RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and
47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-150,
filed 9/30/80, effective 11/1/80.] Repealed by WSR
83-24-033 (Order 83-03), filed 12/1/83, effective
1/1/84. Statutory Authority: RCW 34.04.022,
41.58.050, 41.56.090, 41.59.110 and 28B.52.080.

391-35-230 Filing and service of cross-petition for review.
[Statutory Authority: RCW 41.58.050, 28B.52.080,
41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR
90-06-073, § 391-35-230, filed 3/7/90, effective
4/7/90. Statutory Authority: RCW 28B.52.080,
41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR
80-14-047 (Order 80-6), § 391-35-230, filed 9/30/80,
effective 11/1/80.] Repealed by WSR 98-14-112, filed

7/1/98, effective 8/1/98. Statutory Authority: RCW

28B.52.080, 41.56.090, 41.59.110 and 41.58.050.

~~Reviser's note: Chapter 15, Laws of 1983 recreates the marine employees' commission, Title 316 WAC, and transfers the authority for the administration of chapter 47.64 RCW to that agency. Title 391 WAC will reflect some of the changes resulting from this statutory revision.~~

WAC 391-35-001 ~~Scope-Contents-Other rules.~~ This chapter governs unit clarification proceedings ~~before the public employment relations commission on petitions for clarification of existing bargaining units~~ under all chapters of the Revised Code of Washington (RCW) administered by the ~~commission and contains some well-established unit determination standards in a subchapter of rules beginning at WAC 391-35-300.~~ The provisions of this chapter should be read in conjunction with:

~~(1) Chapter 10-08 WAC, which contains the model rules of procedure promulgated by the chief administrative law judge to regulate adjudicative proceedings under chapter 34.05 RCW, except:~~

~~(a) WAC 10-08-035, which is replaced by detailed requirements in WAC 391-35-050;~~

~~(b) WAC 10-08-050, which relates to office of administrative hearings procedures inapplicable to proceedings before the public employment relations commission;~~

~~(c) WAC 10-08-211, which is replaced by detailed requirements in WAC 391-35-210 and 391-35-250; and~~

~~(d) WAC 10-08-230, which is replaced by detailed requirements in WAC 391-35-070.~~

~~(2) Chapter 391-08 WAC, which contains rules of practice and procedure applicable to all types of proceedings before the public employment relations commission, and which also replaces some provisions of chapter 10-08 WAC.~~

~~(3) Chapter 391-25 WAC, which regulates representation proceedings.~~

~~(4) Chapter 391-45 WAC, which regulates unfair labor practice proceedings.~~

~~(5) Chapter 391-55 WAC, which regulates the resolution of impasses in collective bargaining.~~

~~(6) Chapter 391-65 WAC, which regulates grievance arbitration and grievance mediation proceedings.~~

~~(7) Chapter 391-95 WAC, which regulates union security nonassociation proceedings.~~agency. To the extent these rules of practice and procedure differ from the model rules in chapter 10-08 WAC or this agency's general rules of practice and procedure in chapter 391-08 WAC, these special rules prevail.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060. WSR 03-03-064, § 391-35-001, filed 1/14/03, effective 2/14/03. Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050. WSR 01-14-009, § 391-35-001, filed 6/22/01, effective 8/1/01; WSR 96-07-105, § 391-35-001, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and chapters 28B.52, 41.56, 41.58, 41.59, 49.08 and 53.18 RCW. WSR 90-06-073, § 391-35-001, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-001, filed 9/30/80, effective 11/1/80.]

~~**WAC 391-35-002 Sequence and numbering of rules-Special provisions.** This chapter of the Washington Administrative Code is designed to regulate proceedings under a number of different chapters of the Revised Code of Washington. General rules are set forth in sections with numbers divisible by ten. Where a deviation from the general rule is required for conformity with~~

~~a particular statute, that special provision is set forth in a separate rule, numbered as follows:~~

~~(1) Special provisions relating to chapter 41.56 RCW (Public Employees' Collective Bargaining Act) and to chapter 53.18 RCW (port employees) are set forth in WAC sections numbered one digit greater than the general rule on that subject matter.~~

~~(2) Special provisions relating to chapter 41.59 RCW (Educational Employment Relations Act) are set forth in WAC sections numbered two digits greater than the general rule on that subject matter.~~

~~(3) Special provisions relating to chapter 28B.52 RCW (Collective Bargaining Academic Personnel in Community Colleges) are set forth in WAC sections numbered three digits greater than the general rule on that subject matter.~~

~~(4) Special provisions relating to chapter 47.64 RCW (Marine employees Public employment relations) are set forth in WAC sections numbered four digits greater than the general rule on that subject matter.~~

~~(5) Special provisions relating to RCW 41.06.340 and/or chapter 41.80 RCW (Personnel System Reform Act) are set forth in WAC sections numbered six digits greater than the general rule on that subject matter.~~

~~(6) Special provisions relating to chapter 41.76 RCW (faculty at public four-year institutions of higher education) are set forth in WAC sections numbered seven digits greater than the general rule on that subject matter.~~

~~(7) Special provisions relating to chapter 49.39 RCW (symphony musicians) and chapter 49.08 RCW (private sector and other employees) are set forth in WAC sections numbered nine digits greater than the general rule on that subject matter.~~
~~[Statutory Authority: RCW 28B.52.080, 41.06.340, 41.56.090, 41.58.050, 41.58.065, 41.59.110, 41.76.060, 41.80.080, and 49.39.060. WSR 12-05-066, § 391-35-002, filed 2/15/12, effective 3/17/12. Statutory Authority: RCW 28B.52.080, 41.06.340, 41.56.090, 41.58.050, 41.59.110, 41.76.060, 41.80.080, and 49.39.060. WSR 10-20-172, § 391-35-002, filed 10/6/10, effective 11/6/10. Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060. WSR 03-03-064, § 391-35-002, filed 1/14/03, effective 2/14/03. Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050. WSR 01-14-009, § 391-35-002, filed 6/22/01, effective 8/1/01.]~~

~~Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and chapters 28B.52, 41.56, 41.58, 41.59, 49.08 and 53.18 RCW. WSR 90-06-073, § 391-35-002, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 34.04.022, 41.58.050, 41.56.090, 41.59.110 and 28B.52.080. WSR 83-24-033 (Order 83-03), § 391-35-002, filed 12/1/83, effective 1/1/84. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-002, filed 9/30/80, effective 11/1/80.]~~

WAC 391-35-010 ~~P~~Unit clarification ~~petition for~~
~~clarification of an existing bargaining unit~~**Who may file.** A
unit clarification petition ~~for clarification of an existing~~
~~bargaining unit~~ may only be filed by the employer, the exclusive
representative, ~~or~~ their agents, or by the parties jointly.
[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110,
41.58.050, 34.05.413, 41.56.060 and 41.59.080. WSR 96-07-105, §
391-35-010, filed 3/20/96, effective 4/20/96. Statutory
Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and
chapters 28B.52, 41.56, 41.58, 41.59, 49.08 and 53.18 RCW. WSR
90-06-073, § 391-35-010, filed 3/7/90, effective 4/7/90.
Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050,
41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-
010, filed 9/30/80, effective 11/1/80.]

WAC 391-35-020 Time for filing petition—Limitations on

results of proceedings. TIMELINESS OF PETITION

(1) A unit clarification petition may be filed at any time, with regard to:

(a) Disputes ~~concerning~~about the appropriate bargaining unit placement for newly created positions ~~which have been newly created by an employer.;~~

~~(b) Disputes concerning the allocation of employees or positions claimed by two or more bargaining units.~~

~~(c)~~ Disputes under WAC 391-35-300 concerning a requirement for a professional education certificate~~;~~;

~~(d)~~ Disputes under WAC 391-35-310 concerning eligibility for interest arbitration~~;~~;

~~(e)~~ Disputes under WAC 391-35-320 concerning status as a confidential employee~~;~~; or

~~(f)~~ Disputes under WAC 391-35-330 concerning one-person bargaining units.

(2) A ~~unit clarification~~ petition concerning supervisory status ~~as a supervisor~~ under WAC 391-35-340~~;~~ or regular part-time status ~~as a regular part-time or casual employee~~ under WAC

391-35-350, ~~is subject to the following conditions~~ will be considered timely if:

(a) ~~The signing of a collective bargaining agreement will not bar the processing of a petition filed by a party to the agreement, if the petitioner can demonstrate that it put the other party on notice during negotiations that it would contest the inclusion or exclusion of the position or class through a unit clarification proceeding, and it filed the petition prior to signing the current collective bargaining agreement.~~ All parties agree to raise the issue;

(b) ~~Except as provided under subsection (2)(a) of this section, the existence of a valid written and signed collective bargaining agreement will bar the processing of a petition filed by a party to the agreement unless the petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the agreement which warrant a modification of the bargaining unit by inclusion or exclusion of a position or class.~~ The petitioner demonstrates that it put the other party on notice during negotiation for the most recent collective bargaining agreement that it would contest the

inclusion or exclusion of the position or class through a unit clarification proceeding and the petitioner files the petition before ratification of the current collective bargaining agreement; or

(c) The petitioner demonstrates through evidence that a substantial change in circumstances occurred within a reasonable time before the filing of the petition and that the change in circumstances warrants a modification of the bargaining unit by inclusion or exclusion of a position or class.

LIMITATIONS ON RESULTS OF PROCEEDINGS

(3) Employees or positions may be removed from an existing bargaining unit ~~in a unit clarification proceeding filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions~~if the petition was timely filed as provided in subsections (1) and (2) of this section.

(4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding if:

(a) ~~Where a~~The petition is filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions;~~or~~

(b) ~~Where t~~The existing bargaining unit is the only appropriate unit for the employees or positions~~;~~ or

(c) All parties to the proceeding agree the agency should rule upon the request for clarification.

(5) ~~Except as provided under subsection (4) of this section, a question concerning representation will exist under chapter 391-25 WAC, and an order clarifying bargaining unit will not be issued under chapter 391-35 WAC.~~

~~(a) Where a unit clarification petition is not filed within a reasonable time period after creation of new positions.~~

~~(b) Where employees or positions have been excluded from a bargaining unit by agreement of the parties or by a certification, and a unit clarification petition is not filed within a reasonable time period after a change of circumstances.~~

~~(c) Where addition of employees or positions to a bargaining unit would create a doubt as to the ongoing majority status of the exclusive bargaining representative.~~An order

clarifying bargaining unit will not be issued under this section
if:

(a) Employees or positions have been excluded from a
bargaining unit by agreement of the parties or by a
certification, and a unit clarification petition is not filed
within a reasonable time period after a change of circumstances;
or

(b) Adding the disputed employees or positions to a
bargaining unit would create a doubt as to the ongoing majority
status of the exclusive bargaining representative.

(6) ~~Where a petitioning union seeks severance of a portion~~
~~of an existing~~An appropriate bargaining unit of classified
employees at a school district or educational service district,
~~appropriate bargaining units existing on July 25, 2005,~~ may not
be divided into more than one appropriate bargaining unit
without the agreement of the employer and certified bargaining
representative of the unit where severance is sought.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.58.050,
41.59.110, 41.76.060, 41.80.070. WSR 08-04-058, § 391-35-020,
filed 1/31/08, effective 4/1/08. Statutory Authority: RCW
28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.413,

41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-020, filed 6/22/01, effective 8/1/01; WSR 96-07-105, § 391-35-020, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and chapters 28B.52, 41.56, 41.58, 41.59, 49.08 and 53.18 RCW. WSR 90-06-073, § 391-35-020, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.58.050, 41.56.090 and 41.59.110. WSR 88-12-061 (Order 88-03), § 391-35-020, filed 5/31/88.]

~~**WAC 391-35-026 Special provision-State civil service employees.** In addition to the circumstances described in WAC 391-35-020, bargaining units of state civil service employees may be modified under this section until RCW 41.80.050 and 41.80.080 take effect on July 1, 2004.~~

~~(1) Bargaining units of state civil service employees in existence on June 13, 2002, shall be subject to being "divided" into separate units of supervisors and nonsupervisory employees under this section.~~

~~(a) A petition to have an existing unit divided may be filed by the exclusive bargaining representative, by the employer, or by those parties jointly.~~

~~(b) The separation of bargaining units shall be implemented on or before July 1, 2004.~~

~~(2) Bargaining units of state civil service employees in existence on June 13, 2002, shall be subject to being "perfected" under this section.~~

~~(a) A petition to have an existing bargaining unit perfected may be filed by the exclusive bargaining representative, or by the employer and exclusive bargaining representative jointly.~~

~~(b) All of the unit determination criteria set forth in RCW 41.80.070 shall be applicable to proceedings under this section. The history of bargaining in a unit configuration that is fragmentary and/or was based on narrower considerations shall not preclude creation of a "perfected" bargaining unit as to which a community of interests is demonstrated with regard to:~~

~~(i) The duties, skills and working conditions of all positions or classifications to be included in the "perfected" bargaining unit; and~~

~~(ii) The extent of organization and avoidance of unnecessary fragmentation shall be implemented to avoid stranding of other positions or classifications in units so small as to prejudice their statutory bargaining rights; and~~

~~(iii) The required separation of supervisors and nonsupervisory employees is implemented based on the delegations of authority then in existence; and~~

~~(iv) Two or more existing bargaining units can be merged through the procedure set forth in this section; and~~

~~(v) The exclusive bargaining representative demonstrates that it has majority support among any employees to be accreted to the bargaining unit(s) being "perfected."~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060. WSR 03-03-064, § 391-35-026, filed 1/14/03, effective 2/14/03.]~~

WAC 391-35-030 ~~Petition in writing~~ ~~Number of copies~~
~~Filing~~ **Filing and service.** ~~Each~~ A unit clarification petition
~~for clarification of an existing bargaining unit shall~~ may be
filed through the agency's online e-filing system, by email, or
in writing, ~~and shall be filed at~~ to the ~~commission~~ agency's
Olympia office, as required by WAC 391-08-120 (1) and (2). If
the petition is not filed ~~other than as a jointly filed~~
~~petition~~, the party filing the petition shall serve a copy on
the other party to the collective bargaining relationship ~~in~~

~~which the disagreement arises~~, as required by WAC 391-08-120 (3) and (4).

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.413, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-030, filed 6/22/01, effective 8/1/01; WSR 00-14-048, § 391-35-030, filed 6/30/00, effective 8/1/00; WSR 98-14-112, § 391-35-030, filed 7/1/98, effective 8/1/98; WSR 96-07-105, § 391-35-030, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-030, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-030, filed 9/30/80, effective 11/1/80.]

WAC 391-35-050 Contents of petition filing forms. Each completed unit clarification petition ~~for clarification of an existing bargaining unit shall contain, in separate numbered paragraphs~~ filing form, whether obtained from the agency's website or through the agency's e-filing system, must include all of the following:

(1) Information identifying the parties and their ~~relationships~~ representatives, including:

(a) The name, email address, mailing address, and telephone number of the employer, ~~and the name, address, telephone number,~~

~~fax number, and email address and~~ of ~~its principal~~the employer's
representative; and

(b) The name, email address, mailing address, and telephone
number, ~~fax number, and email address~~ of the exclusive
representative, ~~and the name, address, telephone number, fax~~
~~number, and email address and~~ of its principal representative; .

(2) Information concerning the parties' relationships,
including:

~~(ea) The employer's principal business;~~

~~(d)~~ The parties' contractual relationship, indicating that:

(i) The parties have never had a contract; or

(ii) AThe parties have had a contract, and a copy of the
current ~~(or most recent)~~ collective bargaining agreement is
attached;

~~(eb)~~ The status of negotiations between the parties,
indicating that:

(i) The parties' contract is closed; or

(ii) The parties are currently in contract negotiations;

~~(fc)~~ The description of the existing bargaining unit,
specifying inclusions and exclusions;

(~~ed~~) The number of employees in the bargaining unit; and

(~~he~~) The history of the bargaining unit, including at least the approximate date of its creation.

(2) ~~Identification of~~ An explanation of the proposed change and the reasons for the proposed change, including identification of the position(s), classification(s), or group(s) at issue~~;~~ the number of employees in each position, classification, or group~~;~~ and the ~~present~~-bargaining unit ~~inclusion or exclusion~~-status of each position, classification, or group~~, identification of the party proposing that the present status be changed, and the reason for the proposed change.~~

(3) Identification of other interested employee organizations, including the names~~s and~~, email addresses, and mailing address of any other employee organization(s) claiming to represent any employees affected by the proposed clarification(s)~~,~~ and a brief description~~(s)~~ of ~~the~~any contract(s)~~, if any,~~ covering ~~such~~those employees.

(4) Any other relevant facts.

(5) The name (s), signature(s) , and ~~, if any,~~ title(s) , if any, of the ~~representative(s) of the petitioner(s), and person(s)~~ filing the petition as well as the date (s) of the signature (s).

(6) Any other information requested in the unit clarification petition filing form found on the agency's website at www.perc.wa.gov or as required through the agency's e-filing system.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.413, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-050, filed 6/22/01, effective 8/1/01; WSR 96-07-105, § 391-35-050, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-050, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-050, filed 9/30/80, effective 11/1/80.]

WAC 391-35-070 Amendment and withdrawal. ~~Any~~A petition may be amended or withdrawn by the petitioner(s) under ~~such~~any conditions ~~as~~ the executive director or the commission may impose.

[Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-070, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW

28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-070, filed 9/30/80, effective 11/1/80.]

WAC 391-35-085 Amendment of certification. A party may file a petition to amend an existing certification to reflect a minor change in circumstances, such as a change of an employee organization's name or an employer's name, and the executive director may amend the certification, ~~provided that the purpose of~~ if the amendment ~~is to reflect changed circumstances such as the name of a labor organization or the name of an employer, and the bargaining unit is not affected by the change and there is no question concerning representation~~ does not add or remove positions from the existing bargaining unit or change the bargaining unit's configuration and there is no question concerning representation.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.58.050, 41.59.100, 41.76.060, 41.80.070. WSR 08-15-032, § 391-35-085, filed 7/9/08, effective 8/9/08.]

WAC 391-35-090 ~~Notice of hearing~~ Directions for further proceedings. ~~If it appears to the executive director or designee that a disagreement exists which could be the basis for~~

~~issuing an order clarifying the bargaining unit or units, a hearing officer shall issue a notice of hearing and have it served on the parties. A notice of hearing may be amended or withdrawn before the close of the hearing.~~(1) The executive director shall determine the appropriate method for resolving all disputes under this chapter and may determine the appropriate method for assembling a record to resolve issues identified during the investigation conference or any other subsequent conference with the parties. If it appears to the executive director that a hearing on the record may be needed, a notice of hearing must be issued and served on the parties. A notice of hearing may be amended or withdrawn before the close of the hearing.

(2) The executive director may direct the parties to jointly engage in discussions with the executive director, a hearing officer, or any agency staff member concerning the purpose of the petition. Nothing in this subsection precludes the parties from requesting that the executive director, a hearing officer, or any agency staff member engage in

discussions with the parties concerning the purpose of the petition.

(3) The agency will not issue an order clarifying a bargaining unit based on an agreement of the parties unless the executive director or designee has reviewed and approved the agreement and determined that the agreement is appropriate under the applicable statute.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.434. WSR 01-14-009, § 391-35-090, filed 6/22/01, effective 8/1/01. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-090, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-090, filed 9/30/80, effective 11/1/80.]

~~**WAC 391-35-099 Special provision Private sector and other employees.** The commission lacks authority to proceed in unit clarification proceedings under chapter 49.08 RCW absent the agreement of all parties. The executive director shall not proceed in such matters unless a written agreement is filed by the parties to submit their dispute for arbitration by the commission under chapter 49.08 RCW and these rules.~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050. WSR 01-14-009, § 391-35-099, filed 6/22/01, effective 8/1/01. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and chapter 49.08 RCW. WSR 90-06-073, § 391-35-099, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-099, filed 9/30/80, effective 11/1/80.]~~

WAC 391-35-110 Coordination of proceedings. (1) If a petition for clarification under this chapter is pending at the same time as a petition under chapter 391-25 WAC involving all or any part of the same bargaining unit, the proceedings under this chapter ~~shall~~must be suspended, and all issues concerning the description of the bargaining unit ~~shall~~must be resolved in the proceedings under chapter 391-25 WAC.

(2) A unit clarification proceeding may control or be controlled by an unfair labor practice proceeding. If a petition for clarification under this chapter is pending at the same time as a complaint under chapter 391-45 WAC involving all or any part of the same bargaining unit, the executive director or designee ~~shall have~~has discretion to withhold processing of one

of the related proceedings pending the outcome of the other related proceeding.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.070. WSR 01-14-009, § 391-35-110, filed 6/22/01, effective 8/1/01; WSR 96-07-105, § 391-35-110, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110 and chapters 28B.52, 41.56, 41.58, 41.59, 49.08 and 53.18 RCW. WSR 90-06-073, § 391-35-110, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-110, filed 9/30/80, effective 11/1/80.]

WAC 391-35-130 Hearings—Who ~~shall~~may conduct. Hearings may be conducted by the commission, ~~by~~ the executive director, ~~by or~~ a member of the agency staff ~~or by any other individual designated by the commission or executive director as a hearing officer~~. At any time, a hearing officer may be substituted for the hearing officer previously ~~presiding~~assigned.

[Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060, 41.56.070, 41.59.070, 41.59.080 and 53.18.015. WSR 90-06-073, § 391-35-130, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-130, filed 9/30/80, effective 11/1/80.]

WAC 391-35-170 Hearings—Reopening of hearing—Briefs. (1)

Hearings ~~shall beare~~ public, ~~except where~~unless a protective order is issued under WAC 10-08-200(7), and ~~shall beare~~ limited to matters concerning the clarification of the existing bargaining unit.

(a) The parties ~~shall beare~~ responsible for the presentation of their cases.

(b) The hearing officer shall ascertain the respective positions of the parties, ~~7~~ to obtain a full and complete factual record upon which the agency may discharge its responsibilities under the applicable statute. The hearing officer has authority, under WAC 10-08-200 (8) and (9), to ask questions, call witnesses, and explore matters not raised or only partially raised by the parties.

(2) Once a hearing has been declared closed, it may be reopened only upon the timely motion of a party ~~upon discovery~~ ~~of~~that discovered new evidence which could not with reasonable diligence have been discovered and produced at the hearing.

(3) The hearing officer may ~~allow or~~ direct the filing of briefs as to any or all of the issues in a case.

(4) Arrangements and due dates for briefs ~~shall be~~are established by the hearing officer.

(5) Any brief ~~shall~~must be filed ~~with the hearing officer and served~~ as required by WAC 391-08-120 ~~(1), and copies shall be served on all other parties to the proceeding as required by WAC 391-08-120 (3) and (4).~~

(46) A party filing a brief under this section must limit ~~its~~the brief's total length to ~~twenty-five~~25 pages (double-spaced, ~~twelve~~12-point type), unless:

(a) It files and serves a motion for permission to file a longer brief ~~in order~~ to address novel or complex ~~legal and/or factual issues raised by the objections~~issues; and

(b) The executive director, ~~his or her~~the executive director's designee, or the hearing officer grants ~~such a~~the motion for good cause shown; ~~and.~~

(e7) A motion for permission to file a longer brief may be made orally to the hearing officer at the end of the ~~administrative~~ hearing, and the hearing officer has the authority to orally grant ~~such a~~the motion at ~~such~~that time.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.58.050, 41.59.110, 41.76.060, 41.80.070. WSR 08-04-058, § 391-35-170, filed 1/31/08, effective 4/1/08. Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.437, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-170, filed 6/22/01, effective 8/1/01; WSR 00-14-048, § 391-35-170, filed 6/30/00, effective 8/1/00; WSR 98-14-112, § 391-35-170, filed 7/1/98, effective 8/1/98; WSR 96-07-105, § 391-35-170, filed 3/20/96, effective 4/20/96. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060, 41.59.080 and 53.18.015. WSR 90-06-073, § 391-35-170, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-170, filed 9/30/80, effective 11/1/80.]

WAC 391-35-190 Proceedings before the executive director.

(1) The executive director may proceed upon the record, after submission of briefs or after hearing, as ~~may be~~ appropriate.

The executive director shall determine the status of each position, classification, or group of employees ~~over which there is a disagreement~~ at issue and issue an order clarifying the bargaining unit, dismiss the petition, or make other disposition of the matter.

(2) ~~Where~~If the executive director determines that employee eligibility issues exist, the executive director may delegate authority to the hearing officer to decide those issues.

(3) (a) A party seeking review by the commission of an interlocutory decision of the executive director, ~~his or her~~the executive director's designee, or a hearing officer must file a motion for discretionary review with the commission and a copy with the ~~executive director or his or her designee~~person who issued the interlocutory decision within seven days after the decision is issued.

(b) Discretionary review of an interlocutory decision issued by the executive director, ~~his or her~~the executive director's designee, or a hearing officer will be accepted by the commission only:

(i) If the executive director, ~~his or her~~the executive director's designee, or the hearing officer has committed an obvious error ~~which~~that would render further proceedings useless; ~~or~~

(ii) If the executive director ~~or his or her~~, the executive director's designee, or the hearing officer has committed

probable error and the interlocutory decision ~~of the executive director, his or her designee, or hearing officer~~ substantially alters the status quo or substantially limits the freedom of a party to act; or

(iii) If the executive director, ~~his or her~~ the executive director's designee, or the hearing officer has so far departed from the accepted and usual course of administrative proceedings as to call for ~~the exercise of revisory jurisdiction~~ immediate review by the commission.

(c) A motion for discretionary review under this rule, and any response, should not exceed ~~fifteen~~ 15 pages (double-spaced, 12-point type) excluding appendices.

(d) Denial of discretionary review of a decision does not affect the right of a party to obtain later review of the ~~executive director's, his or her designee's, or hearing officer's~~ interlocutory decision or the issues pertaining to that decision.

(4) Unless appealed to the commission under WAC 391-35-210, a decision issued under this section ~~shall be~~ is the final order

of the agency⁷ with the same force and effect as if issued by the commission.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.58.050, 41.59.110, 41.76.060, 41.80.070. WSR 08-04-058, § 391-35-190, filed 1/31/08, effective 4/1/08. Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-190, filed 6/22/01, effective 8/1/01; WSR 98-14-112, § 391-35-190, filed 7/1/98, effective 8/1/98; WSR 90-06-073, § 391-35-190, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 34.04.022, 41.58.050, 41.56.090, 41.59.110 and 28B.52.080. WSR 85-19-059 (Resolution No. 85-01), § 391-35-190, filed 9/16/85. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-190, filed 9/30/80, effective 11/1/80.]

WAC 391-35-210 Appeals. An order issued under WAC 391-35-190 and any rulings in the proceedings up to the issuance of the order may be appealed to the commission as follows:

(1) The due date for a notice of appeal ~~shall be twenty~~is 20 days following the date of issuance of the order being appealed. The time for filing a notice of appeal cannot be extended.

(2) ~~Where~~If an order has been appealed, the due date for a notice of cross-appeal by other parties ~~shall be~~is seven days after the last date on which a notice of appeal could be timely. The time for filing a notice of cross-appeal cannot be extended.

(3) A notice of appeal or notice of cross-appeal ~~shall~~must identify, in separate numbered paragraphs, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error.

(4) A party ~~which~~that desires to cite or reassert a document previously filed in the matter ~~shall~~must do so by reference to the document already on file~~r~~, and shall not file or attach another copy of the document to ~~papers~~documents filed regarding an appeal.

(5) A notice of appeal or notice of cross-appeal ~~shall~~must be filed ~~at the commission's Olympia office~~and served as required by WAC 391-08-120~~(1), and copies shall be served on all other parties as required by WAC 391-08-120 (3) and (4).~~

(6) The due date for any appeal brief ~~which~~that the party filing an appeal or cross-appeal desires to have considered by the commission ~~shall be fourteen~~is 14 days following the filing

of its notice of appeal or notice of cross-appeal. Any brief ~~shall~~must be filed ~~at the commission's Olympia office~~and served as required by WAC 391-08-120 ~~(1), and copies shall be served on~~ all other parties as required by WAC 391-08-120 ~~(3) and (4).~~

(7) The due date for any responsive brief ~~which~~that a party desires to have considered by the commission ~~shall be fourteen~~is 14 days following the date on which that party is served with an appeal brief. Any brief ~~shall~~must be filed ~~at the commission's Olympia office~~and served as required by WAC 391-08-120 (1) ~~, and copies shall be served on all other parties as required by WAC 391-08-120 (3) and (4).~~

(8) The executive director or designee may extend the due date for an appeal brief or responsive brief. ~~Such r~~Requests ~~shall~~to extend the due date may only be considered if made ~~on or before~~by the date the brief is due~~, and~~ in compliance with WAC 391-08-180. Extensions of time ~~shall~~may not be routine or automatic.

(9) A party filing a brief under this section must limit ~~its~~the brief's total length to ~~twenty-five~~25 pages (double-spaced, 12-point type), unless:

(a) It files and serves a motion for permission to file a longer brief ~~in order~~ to address novel ~~and/or~~ complex issues raised by the appeal; and

(b) The commission or its designee grants ~~such a~~the motion for good cause shown.

(10) Any motion filed under ~~this~~ subsection (9) of this section ~~shall tolls~~ the due date for briefs under subsections (1) and (2) of this section until the commission or its designee responds to ~~such a~~the motion.

[Statutory Authority: RCW 41.56.060, 41.56.090, 41.58.050. WSR 08-04-059, § 391-35-210, filed 1/31/08, effective 4/1/08.

Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.464, 41.56.060 and 41.59.080. WSR 00-14-048, § 391-35-210, filed 6/30/00, effective 8/1/00; WSR 98-14-112, § 391-35-210, filed 7/1/98, effective 8/1/98. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-210, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 34.04.022, 41.58.050, 41.56.090, 41.59.110 and 28B.52.080. WSR 85-19-059 (Resolution No. 85-01), § 391-35-210, filed 9/16/85. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-210, filed 9/30/80, effective 11/1/80.]

WAC 391-35-250 Commission action on appeals. If an order is appealed under WAC 391-35-210, the entire record in the proceedings ~~shall~~must be transmitted to the commission~~members~~. The commission may request the parties to appear before it to make oral argument as to any or all of the issues in the matter. The commission shall, on the basis of the entire record transmitted to it, determine the status of each position, classification, or group covered by the appeal, and ~~shall~~ issue appropriate orders.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 34.05.464, 41.56.060 and 41.59.080. WSR 00-14-048, § 391-35-250, filed 6/30/00, effective 8/1/00; WSR 98-14-112, § 391-35-250, filed 7/1/98, effective 8/1/98. Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.060 and 41.59.080. WSR 90-06-073, § 391-35-250, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. WSR 80-14-047 (Order 80-6), § 391-35-250, filed 9/30/80, effective 11/1/80.]

~~**WAC 391-35-254 Special provision-Marine employees.** If an order is appealed under WAC 391-35-210 involving employees covered by chapter 47.64 RCW, the marine employees' commission shall act in place of the commission, and the entire record in~~

~~the proceedings shall be transmitted to the marine employees' commission members. The marine employees' commission may request the parties to appear before it to make oral arguments as to any or all of the issues in the matter. The marine employees' commission shall determine the status of each position, classification or group covered by the appeal, and shall issue appropriate orders.~~

~~[Statutory Authority: RCW 41.58.050 and 41.58.065. WSR 12-05-066, § 391-35-254, filed 2/15/12, effective 3/17/12.]~~

~~**WAC 391-35-300 School district employees.** A collective bargaining relationship cannot lawfully be maintained under the Educational Employment Relations Act, chapter 41.59 RCW, with respect to school district jobs for which a professional education certificate is not required by chapter 28A.410 RCW, as implemented through rules adopted by the state board of education and the office of the superintendent of public instruction, or by established practice or written policy of the employing school district. Any collective bargaining rights of employees performing school district jobs not requiring a~~

~~professional education certificate are regulated by the Public Employees' Collective Bargaining Act, chapter 41.56 RCW. [Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.59.010 and [41.59].020. WSR 96-07-105, § 391-35-300, filed 3/20/96, effective 4/20/96.]~~

~~**WAC 391-35-301 Higher education employees.** A bargaining unit of higher education employees under RCW 41.56.021 shall not include any employees eligible for collective bargaining rights under RCW 41.56.022, 41.56.024, or 41.56.203, chapter 28B.52, 41.76, or 41.80 RCW. Employees whose eligibility for collective bargaining is covered by chapter 28B.52, 41.76, or 41.80 RCW are exempt from the provisions of RCW 41.56.021. [Statutory Authority: RCW 41.56.060, 41.56.090, 41.58.050. WSR 08-04-058, § 391-35-301, filed 1/31/08, effective 4/1/08.]~~

WAC 391-35-310 Employees eligible for interest arbitration. Due to the separate impasse resolution procedures established for them, employees occupying positions eligible for interest arbitration ~~shall~~may not be included in bargaining units ~~which includewith~~ employees ~~who~~occupying positions that are not eligible for interest arbitration.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050 and 41.56.430. WSR 96-07-105, § 391-35-310, filed 3/20/96, effective 4/20/96.]

WAC 391-35-320 Exclusion of confidential employees.

Confidential employees excluded from all collective bargaining rights ~~shall be~~are limited to:

(1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, ~~except that~~and the role of ~~such~~that person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and

(2) Any person who assists and acts in a confidential capacity to such person.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.56.030(2) and 41.59.020 (4)(c)(i) and (ii). WSR 01-14-009, § 391-35-320, filed 6/22/01, effective 8/1/01.]

~~**WAC 391-35-326 Special provision State civil service employees.** Confidential exclusions for state civil service employees shall be determined under RCW 41.80.005(4).~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060 and 41.80.005(4). WSR 03-03-064, § 391-35-326, filed 1/14/03, effective 2/14/03.]~~

~~**WAC 391-35-327 Special provision-Higher education faculty.**~~

~~Confidential exclusions for higher education faculty employees shall be determined under RCW 41.76.005 (5) and (10).~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060 and 41.76.005 (5) and (10). WSR 03-03-064, § 391-35-327, filed 1/14/03, effective 2/14/03.]~~

WAC 391-35-330 One-person bargaining unit inappropriate.

A bargaining unit cannot be considered appropriate if it includes only one employee.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-330, filed 6/22/01, effective 8/1/01.]

WAC 391-35-340 Unit placement of supervisors-Bargaining

rights of supervisors. (1) It ~~shall be~~is presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file subordinates, ~~in order~~ to avoid a potential for conflicts

of interest ~~which~~that would otherwise exist in a combined bargaining unit.

(2) It ~~shall be~~is presumptively appropriate to include persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") in separate bargaining units for the purposes of collective bargaining.

(3) The presumptions set forth in this section ~~shall be~~are subject to modification by adjudication.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-340, filed 6/22/01, effective 8/1/01.]

~~**WAC 391-35-342 Special provision-Educational employees.**~~
~~Supervisors, principals and assistant principals acquire collective bargaining rights under chapter 41.59 RCW only by means of an election conducted under RCW 41.59.080.~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.59.080. WSR 01-14-009, § 391-35-342, filed 6/22/01, effective 8/1/01.]~~

~~**WAC 391-35-343 Special provision-Academic employees.**~~
~~Administrators acquire collective bargaining rights under~~

~~chapter 28B.52 RCW only by means of an election conducted under RCW 28B.52.020(3).~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 28B.52.020(3). WSR 01-14-009, § 391-35-343, filed 6/22/01, effective 8/1/01.]~~

~~**WAC 391-35-344 Special provision-Marine employees.** The captains of a Washington state ferry vessel, also known as the master of a vessel or the commanding officer, are "supervisors," and shall be placed in a separate bargaining in accordance with section 8, chapter 16 (2ESSB 5742), Laws of 2011 1st sp. sess. and WAC 391-35-340.~~

~~[Statutory Authority: RCW 41.58.050 and 41.58.065. WSR 12-05-066, § 391-35-344, filed 2/15/12, effective 3/17/12.]~~

~~**WAC 391-35-346 Special provision-State civil service employees.** Supervisor exclusions for state civil service employees shall be determined under RCW 41.80.005(13) and 41.80.070(1).~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060, 41.80.005(13) and [41.80].070(1). WSR 03-03-064, § 391-35-346, filed 1/14/03, effective 2/14/03.]~~

~~WAC 391-35-347 Special provision-Higher education faculty.~~

~~Administrator exclusions for higher education faculty employees shall be determined under RCW 41.76.005 (5) and (9).~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060 and 41.76.005 (5) and (9). WSR 03-03-064, § 391-35-347, filed 1/14/03, effective 2/14/03.]~~

WAC 391-35-350 Unit placement of regular part-time

employees-Exclusion of casual and temporary employees. (1) It

~~shall be~~is presumptively appropriate to include regular part-time employees in the same bargaining unit ~~with~~as full-time employees performing similar work,~~in order~~ to avoid a potential for conflicting work jurisdiction claims ~~which~~that would otherwise exist in separate units. Employees who, during the previous ~~twelve~~12 months, have worked more than one-sixth of the time normally worked by full-time employees~~,~~ and who remain available for work on the same basis,~~shall be~~are presumed to be regular part-time employees. For employees of school districts and educational institutions, the term "time normally worked by full-time employees" ~~shall be~~is based on the number of days in the normal academic year.

(a) It is presumptively appropriate to include employees who are covered by chapter 41.06 RCW and work less than full time in the same bargaining unit as full-time employees performing similar work.

(2) It ~~shall be~~is presumptively appropriate to exclude casual and temporary employees from bargaining units.

(a) Casual employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to have had a series of separate and terminated employment relationships, so that they lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.

(b) Temporary employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.

(3) The presumptions set forth in subsections (1) and (2) of this section ~~shall be~~are subject to modification by adjudication.

[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.56.060 and 41.59.080. WSR 01-14-009, § 391-35-350, filed 6/22/01, effective 8/1/01.]

~~WAC 391-35-356 Special provision-State civil service~~

~~employees. (1) For employees covered by chapter 41.06 RCW who work less than full-time, it shall be presumptively appropriate to include those employees in the same bargaining unit with full-time employees performing similar work.~~

~~(2) The presumption set forth in this section is intended to avoid excessive fragmentation and a potential for conflicting work jurisdiction claims which would otherwise exist in separate units of full-time and less than full-time employees.~~

~~(3) The presumption set forth in this section shall be subject to modification by adjudication.~~

~~[Statutory Authority: RCW 28B.52.080, 41.56.090, 41.59.110, 41.58.050, 41.06.340, 41.76.060, 41.80.005(6) and [41.80].070(1). WSR 03-03-064, § 391-35-356, filed 1/14/03, effective 2/14/03.]~~