

AMENDATORY SECTION (Amending WSR 03-03-064, filed 1/14/03, effective 2/14/03)

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.

AMENDATORY SECTION (Amending WSR 96-07-105, filed 3/20/96, effective 4/20/96)

WAC 391-35-010 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.

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

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

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

~~((f))~~ (e) 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~~((r))~~ or regular part-time status ~~((as a regular part-time or casual employee))~~ under WAC 391-35-350~~((r 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 rea-~~

~~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))~~ 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.

AMENDATORY SECTION (Amending WSR 01-14-009, filed 6/22/01, effective 8/1/01)

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's))~~ 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 col-

lective bargaining relationship ((in which the disagreement arises)), as required by WAC 391-08-120 (3) and (4).

AMENDATORY SECTION (Amending WSR 01-14-009, filed 6/22/01, effective 8/1/01)

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 of its principal)) and of 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((;

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

~~(d)).~~

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

(a) The parties' contractual relationship, indicating that:

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

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

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

(i) The parties' contract is closed; or

(ii) The parties are currently in contract negotiations;

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

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

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

~~((2))~~ (3) 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))~~ (4) Identification of other interested employee organizations, including the name((s and addresses)), email address, and mailing address of any other employee ((organizations)) organization(s) claiming to represent any employee((s)) affected by the proposed clarification(s)((; and a brief description((s)) of ((the contracts, if any,)) any contract(s) covering ((such)) those employees.

~~((4))~~ (5) Any other relevant facts.

~~((5))~~ (6) 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).

(7) 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.

AMENDATORY SECTION (Amending WSR 90-06-073, filed 3/7/90, effective 4/7/90)

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.

AMENDATORY SECTION (Amending WSR 08-15-032, filed 7/9/08, effective 8/9/08)

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.

AMENDATORY SECTION (Amending WSR 01-14-009, filed 6/22/01, effective 8/1/01)

WAC 391-35-090 Notice of hearing. 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))~~ unit(s), a ~~((hearing officer shall issue a))~~ notice of hearing ~~((and have it))~~ will be issued and served on the parties. A notice of hearing may be amended or withdrawn before the close of the hearing.

AMENDATORY SECTION (Amending WSR 01-14-009, filed 6/22/01, effective 8/1/01)

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.

AMENDATORY SECTION (Amending WSR 90-06-073, filed 3/7/90, effective 4/7/90)

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.

AMENDATORY SECTION (Amending WSR 08-04-058, filed 1/31/08, effective 4/1/08)

WAC 391-35-170 Hearings—Reopening of hearing—Briefs. (1) Hearings ~~((shall be))~~ are public, ~~((except where))~~ unless a protective order is issued under WAC 10-08-200(7), and ~~((shall be))~~ are limited to matters concerning the clarification of the existing bargaining unit.

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

(b) The hearing officer shall ascertain the respective positions of the parties ~~((r))~~ 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)).~~

~~((4))~~ (6) A party filing a brief under this section must limit ~~((its))~~ the brief's total length to ~~((twenty-five))~~ 25 pages (double-spaced, ~~((twelve-point))~~ 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))~~.

~~((e))~~ (7) 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.

AMENDATORY SECTION (Amending WSR 08-04-058, filed 1/31/08, effective 4/1/08)

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 direc-~~

tor'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 agency(~~r~~) with the same force and effect as if issued by the commission.

AMENDATORY SECTION (Amending WSR 08-04-059, filed 1/31/08, effective 4/1/08)

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)(~~r, 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~~) Requests (~~shall~~) to extend the due date may only be considered if made (~~on or before~~) by the date the brief is due(~~r~~) 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))~~ 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 ~~((shall))~~ (9) of this section tolls the due date for briefs under subsections (1) and (2) of this section until the commission or its designee responds to ~~((such))~~ the motion.

AMENDATORY SECTION (Amending WSR 00-14-048, filed 6/30/00, effective 8/1/00)

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~~((r))~~ and ~~((shall))~~ issue appropriate orders.

AMENDATORY SECTION (Amending WSR 96-07-105, filed 3/20/96, effective 4/20/96)

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 include))~~ with employees ~~((who))~~ occupying positions that are not eligible for interest arbitration.

AMENDATORY SECTION (Amending WSR 01-14-009, filed 6/22/01, effective 8/1/01)

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.

AMENDATORY SECTION (Amending WSR 01-14-009, 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.

REPEALER

The following sections of the Washington Administrative Code are repealed:

- | | |
|----------------|---|
| WAC 391-35-002 | Sequence and numbering of rules—Special provisions. |
| WAC 391-35-026 | Special provision—State civil service employees. |
| WAC 391-35-099 | Special provision—Private sector and other employees. |
| WAC 391-35-254 | Special provision—Marine employees. |
| WAC 391-35-300 | School district employees. |
| WAC 391-35-301 | Higher education employees. |
| WAC 391-35-326 | Special provision—State civil service employees. |
| WAC 391-35-327 | Special provision—Higher education faculty. |
| WAC 391-35-342 | Special provision—Educational employees. |
| WAC 391-35-343 | Special provision—Academic employees. |
| WAC 391-35-344 | Special provision—Marine employees. |
| WAC 391-35-346 | Special provision—State civil service employees. |
| WAC 391-35-347 | Special provision—Higher education faculty. |