

**STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

DAVID M. ABERCROMBIE,

Petitioner,

v.

CHELAN COUNTY,

Respondent

Case No.: 00-1-0008

**ORDER ON DISPOSITIVE
MOTIONS**

THIS MATTER having come before the Board upon the motions of Respondent Chelan County, by and through Susan E. Hinkle, Deputy Prosecuting Attorney, and Petitioner David M. Abercrombie, an attorney, representing himself, the Board having reviewed the files and records herein, the briefing of counsel, having considered the oral arguments of the parties, and being duly advised in the premises, makes the following findings:

I. PROCEDURAL HISTORY

On March 30, 2000, David M. Abercrombie filed a Petition for Review with this Board. A Prehearing Conference was conducted on Friday, April 21, 2000. At that hearing, Respondent Chelan County filed a Notice of Appearance, Answer, and Statement of Issues.

At the Prehearing Conference, the parties were directed to redraft the issues, make them more specific and present them to the Board no later than April 28, 2000.

Counsel for Respondent submitted a Proposed Amended Statement of Issues on April 28, 2000.

Petitioner filed a letter agreeing only with issues five through nine of the Amended Statement of

Issues, but did not file an alternative version of the Statement of Issues.

Respondent Chelan County filed an Index of the Record on April 28, 2000.

The Board issued its Prehearing Order on May 4, 2000, listing the issues with changes as agreed to by Petitioner.

On May 9, 2000, Respondent Chelan County filed eight dispositive motions, a brief in support thereof, and the Affidavits of Kathleen L. Ward and Lisa M. Riibe.

On May 10, 2000, Petitioner Abercrombie filed Petitioner's Motions to Require Respondent to Complete Record, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply, together with the Affidavit of David M. Abercrombie.

On May 15, 2000, this Board issued an Order Setting Motion Hearing and directing the Respondent to respond by May 18, 2000, for a hearing on May 19, 2000.

On May 17, 2000, Respondent Chelan County's Response to Petitioner's Motions to Require Response to Complete Record, to Transcribe Proceedings and to Extend Calendar to Allow Respondent to Comply, Affidavit of Christy Osborn, Motion to Disqualify, and Affidavit of Susan E. Hinkle were filed.

On May 18, 2000, Petitioner Abercrombie filed a Response to Chelan County's Motion to Disqualify and Affidavit of David M. Abercrombie.

On May 19, 2000, the Board conducted a hearing via telephone regarding Petitioner's Motions to Require Respondent to Complete Records, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply and Respondent Chelan County's Motion to Disqualify.

At the hearing, Chelan County withdrew its Motion to Disqualify.

On May 19, 2000, Petitioner Abercrombie filed a Response to Dispositive Motions, Affidavit of David M. Abercrombie, and Affidavit of Catherine Freeman.

On May 23, 2000, the Board issued its Order Denying Petitioner's Motion to Require Respondent to Complete Record, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply. Motion to Disqualify had been withdrawn by Respondent.

On May 24, 2000, the Board issued an Order Resetting Motion Hearing for the dispositive motions on June 6, 2000.

On May 25, 2000, Respondent Chelan County's Reply to Petitioner's Response to Dispositive Motions was filed.

On June 6, 2000, the Board conducted the hearing on dispositive motions and the oral arguments of the parties were presented.

II. DISPOSITIVE MOTION

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The Respondent's second motion moved this board for an order dismissing the Petitioner's petition for failure to promptly serve the Respondent. The Respondent filed 8 motions before the Board. Because of the decision of this board, Motions 1 and 3 through 8 need not be addressed.

III. FINDINGS

A copy of the Petition was mailed through the U. S. Mail to the board of commissioners and received on April 3, 2000. The envelope had not been received by nor processed through the Chelan County Auditor's Office. She placed a date received stamp for the commissioner's office in the upper right-hand corner of the first page of the Petition. Attached to her affidavit as Exhibit "A" is a copy of the front page of Petition for Review containing in the upper right-hand corner a faint remnant of the date received stamp from the commissioner's office and on top of it a date received stamp for the Chelan County Prosecuting Attorney's Office. Further, affiant Kathleen L. Ward reported that according to county procedures there is no record that the Petition

was ever received by nor served upon the Chelan County Auditor's Office.

Pursuant to the Affidavit of Lisa M. Riibe, Deputy Auditor, she maintains the official Acceptance of Service and Summons Log for the auditor which documents the service of legal matters upon the county. According to her affidavit, Ms. Riibe has been responsible for all entries in that log from the beginning of 1998 to the present and her review of that log indicates that no record exists in said log that a Petition to the Eastern Washington Growth Management Hearings Board was ever filed with the auditor on behalf of or by David M. Abercrombie. The absence of such an entry supports the contention that said Petition was neither personally served upon nor mailed to the Auditor for Chelan County. Further, affiant Riibe indicates that any mail addressed to the Chelan County Auditor is date stamped received with the auditor's office stamp on the outside of the envelope and then also the cover sheet of the document is so stamped. Affiant Riibe also refers to an example of the auditor's office stamp incorporated into her affidavit and a copy of the front page of the Petition and verifies that the copy of the Petition was never date stamped received with an auditor's office stamp, rather only by the commissioner's office and by the prosecuting attorney's office.

At the hearing on dispositive motions, counsel for Respondent Chelan County submitted a clearer copy of the front page of the Petition which better shows that the stamp of the commissioner's office in the upper right-hand corner of the first page of the Petition is indeed not the date received stamp of the Chelan County Auditor. This document is admitted as part of the record of this proceeding as Respondent's Exhibit 1.

Petitioner submitted the Affidavit of David M. Abercrombie which stated that affiant Abercrombie directed his legal assistant, Catherine Freeman, to fax a copy of the Petition to this Board, to place in the mail the original addressed to this Board and a copy of the same to be addressed and mailed to the Auditor of Chelan County.

The Affidavit of Catherine Freeman states that she was instructed by Mr. Abercrombie to fax and mail the original to this Board and to mail a copy to the Chelan County Auditor's Office and that on March 31, 2000, she mailed a copy to the auditor.

Petitioner did not file an Affidavit of Service contemporaneously with the filing of the Petition; the Affidavit of Catherine Freeman filed in response to Respondent's motion is the only affidavit regarding service of a copy upon the Respondent ever filed by Petitioner in this case. The Petitioner prepared an Affidavit of the Petitioner prepared an Affidavit of Service on the 19th day of May, 2000. While the service is claimed to have occurred on March 31, 2000.

Respondent Chelan County first apprised the Board and Petitioner of the lack of service issue at the Prehearing Conference in this case on April 21, 2000.

To date, Petitioner Abercrombie has not served a copy of the Petition upon the Chelan County Auditor since learning of Respondent Chelan County's claim of failure to properly serve a copy of the Petition upon the auditor.

IV. DISCUSSION

WAC 242-02-230(1) requires a copy of the Petition be served promptly upon Respondent, and as Respondent is a county in this matter, the county auditor shall be served.

Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC.

It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the various evidence presented.

The evidence with respect to this motion shows that the Petitioner does not have a mechanism independent of memory by which to verify that service of a copy of the Petition was made upon the Chelan County Auditor. The Petitioner did not file a Certificate and/or Affidavit of Service on March 31, 2000 or soon thereafter, the time the copy of the Petition was claimed to have been mailed to the auditor.

The Chelan County Auditor's Office maintains an Acceptance of Service and Summons Log which is an independent mechanism which verifies the lack of service of the Petition herein upon

the county auditor.

The credible evidence shows that at no time did the Chelan County Auditor receive a copy of the Petition as filed herein, therefore, no compliance with WAC 242-02-230(1) occurred.

V. CONCLUSIONS

Respondent Chelan County's motion two, requesting dismissal of this case for failure of Petitioner to timely serve a copy of the Petition on the Chelan County Auditor in compliance with the provisions of WAC 242-02-230 is hereby granted. Motions 1 and 3 through 8 need not be addressed at this time.

Now, therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Respondent Chelan County's dispositive motion two is granted and Petitioner's Petition is dismissed for failure to promptly serve a copy of such petition on the Chelan County Auditor or to substantially comply with said requirement.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a clearer copy of the face sheet of the Petition provided by counsel for Respondent at the dispositive motion hearing is made a part of the record in this matter as Respondent's Exhibit 1.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Hearing on the Merits set for August 3, 2000, is stricken.

Pursuant to RCW 36.70A.300, this is a final order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order.

SO ORDERED this 16th day of June, 2000.

EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD

D. E. "Skip Chilberg, Presiding Officer

Judy Wall, Board Member

Dennis A. Dellwo, Board Member