City of Renton, Decision 12563 (PECB, 2016)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON POLICE OFFICERS' GUILD, Complainant, vs. CITY OF RENTON, Respondent.	CASE 26695-U-14 DECISION 12563 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On August 19, 2014, and as amended on August 21, 2014, the Renton Police Officers' Guild (union) filed an unfair labor practice complaint against the City of Renton (employer). The union alleged the employer had committed unfair labor practices in violation of RCW 41.56.140. A partial deficiency notice was issued on September 2, 2014. The union amended its complaint a second time on September 23, 2014. A preliminary ruling was issued on October 21, 2014, concerning union allegations of the employer having committed unfair labor practices in violation of RCW 41.56.140(4) and (1) by:

1. Circumventing the union and engaging in direct dealing with employees represented by the union between November 2011 and February 2012, by Deputy Chief Troxel negotiating directly with Bicycle Officers over eliminating the premium to Bicycle Officers identified in the [collective bargaining agreement] (CBA) and replacing it with overtime pay for days in which the officers actually rode bicycles.

2. Unilaterally changing employee compensation in March 2012, by eliminating the premium to Bicycle Officers identified in the CBA and replacing it with overtime pay for days in which the officers actually rode bicycles, without providing an opportunity for bargaining.

3. Unilaterally changing employee compensation on February 20, 2014, by discontinuing its practice of paying Bicycle Officers on the DET Team overtime pay for days on which the officers actually rode bicycles, without providing an opportunity for bargaining.

The employer answered the complaint on November 10, 2014. On August 26, 2015, and November 18, 2015, Examiner Guy Otilio Coss held a hearing. On January 13, 2016, the parties filed post-hearing briefs.

The examiner finds that the union failed to meet its burden of proving, by a preponderance of the evidence it claims the employer circumvented the union by engaging in direct dealing with employees represented by the union between November 2011 and February 2012. Second, the union failed to present a preponderance of evidence to meet its burden of proving that the statute of limitations should be tolled from February 2012 to February 20, 2014. Consequently, the union must have filed its unilateral change complaint on, or before, August 1, 2012. The union's complaint claiming the employer unilaterally changed employee compensation in February 2012 was filed on August 19, 2014, and was thus untimely. Finally, the employer met its Chapter 41.56 RCW bargaining obligation with the union on the issue of eliminating bike patrol premium pay in any form, and therefore, the employer did not unilaterally change employee compensation in January 2014. The union's claims are therefore DISMISSED.

FACTS

The City of Renton is the employer of certain members of the union who are assigned to a special operations division named the Direct Enforcement Team, referred to as the "DET" program. This unfair labor complaint concerns those members of the DET who, at various times, are assigned to bike patrol duties.

Prior to 2007 the employer had a bike patrol program that officers were placed in on a four year rotation basis. Officers assigned to the bike patrol received year round three percent premium pay as provided for in the parties' 2006-2008 collective bargaining agreement.

In 2007 the parties bargained over the DET program which was to include various specialties such as Special Weapons and Tactic (SWAT) as well as incorporating the existing bike patrol. At this time, officers assigned to bike patrol were to continue to receive the year round three percent premium pay provided for in the parties' 2006-2008 collective bargaining agreement.

In June 2007 the parties came to an agreement concerning bike patrol premiums and executed an MOU (2007 Bike Patrol Premium MOU) addressing bike patrol premium pay for employees assigned to the DET who performed bike patrol. The 2007 Bike Patrol Premium MOU contained two provisions, or sections. The first section provided that of those employees currently in a four year rotation assignment per the terms of the 2006-2008 collective bargaining agreement would be "grandfathered" and continue to receive the year round three percent premium pay provided for in that agreement. The second section provided that all other officers would receive one half hour of overtime/compensatory time premium for all days during identified months (*i.e.,* the spring/summer months, generally) and, when outside of those identified periods, on days when the officer was on bike patrol for more than four hours. The 2007 Bike Patrol Premium MOU did not address duration nor any terms for when, if, or how it would expire.

For 2009 the parties bargained a one year collective bargaining agreement mostly rolling over the terms and conditions in their previous contract. Included in Section E(6) of that agreement, is a bike patrol premium pay provision as follows:

> 6. Bicycle Officer* 3.0% per month.
>
> . . .
>
> *The Bicycle Officer premium listed above shall be paid to the one (1) current member of Bicycle patrol. At the conclusion of that Officer's current four-year assignment, the full-time Bicycle patrol premium will no longer exist. Officers

> temporarily assigned to Bicycle patrol will receive the premium only during those times when actually assigned, i.e., fair weather months, special emphasis projects, etc.

At the end of 2009 the parties bargained for, and reached agreement on, a collective bargaining agreement covering January 1, 2010, through December 31, 2012. The same bike patrol language included in the 2009 collective bargaining agreement was included in Section E(6) of the 2010-2012 collective bargaining agreement.

During the 2009 contract term, officers who performed bike patrol were paid according to the bike patrol premium pay practices contained in the 2009 contract, *i.e*., three percent per month during those months they were assigned to bike patrol duties.

During a portion of the 2010-2012 contract term, officers who performed bike patrol were paid according to the bike patrol premium pay practices contained in the 2010-2012 contract, *i.e.*, three percent per month during those months they were assigned to bike patrol duties.

By at least February 2012 officers assigned to the DET program performing bike patrol duties began to submit time sheets claiming bike patrol premium in the format matching the language contained in the parties' 2007 Bike Patrol Premium MOU: one half hour of overtime/compensatory time on days when the officer was on bike patrol for more than four hours. This was being submitted as an *alternate* form of bike patrol premium and not in *addition to* the premium payment provided for in the parties' collective bargaining agreement. The union provided evidentiary documentation of the use of this alternate form of premium payment of at least 156 time sheet submissions made by bargaining unit employees beginning in February 2012. The employer accepted those submissions and paid the officers the alternate bike patrol premium continuously until the parties bargained for an end to all bike patrol premiums in their successor (2013-2015) collective bargaining agreement.

On August 29, 2012, the parties met to bargain a successor collective bargaining agreement. The union bargaining team consisted of Guild President, Officer Mark Coleman, Officer Bill Judd, and Officer Peter Montemayor. The employer's bargaining team consisted of Human Resource

Director Nancy Carlson, Police Chief Kevin Milosevich, Commander Charles Karlewicz, Cathryn Laid, and Brian Sandler.

At the August 29, 2012, meeting, the employer notified the union bargaining team that, among a myriad of other items, it was seeking to eliminate the 2007 Bike Patrol Premium MOU. Carlson presented contemporaneous meeting notes taken by the employer during the meeting. Those notes indicated the employer had submitted a written list of 12 MOU's between the parties that the employer sought to eliminate. Included in this list was the 2007 Bike Patrol Premium MOU which was listed as "Bike Patrol – Dated: June 20, 2007."

Carlson's contemporaneous summary notes show that, concerning the 2007 Bike Patrol Premium MOU, Judd asked the employer "if there was anybody still affected by this *section*" and that "[t]he Chief replied that there was one individual." Judd and Coleman testified that they understood Milosevich's response to this question concerning the terms contained in the parties' 2010-2012 collective bargaining agreement as opposed to a response concerning the terms of the 2007 Bike Patrol Premium MOU. However, Carlson's contemporaneous notes indicate that the question concerned the language regarding grandfathering employees in the 2007 Bike Patrol Premium MOU. The import of this is that the employer did not, even if the union misunderstood, state that only one person continued to be affected by the 2007 Bike Patrol Premium MOU as a whole, but that only one person was affected by the first section of the MOU.

On October 3, 2012, the parties met again to continue bargaining for a successor agreement. By at least this date, the employer had notified the union that it was seeking to completely eliminate any bike patrol premiums received by bargaining unit members. The employer notified the union in writing that it was seeking to eliminate both the bike patrol premium in the contract as well as the 2007 Bike Patrol Premium MOU. The employer provided contemporaneous notes concerning that meeting showing that it had notified the union that it was seeking to eliminate both the contractual bike patrol premium and the 2007 Bike Patrol Premium MOU.

In fall 2013 the parties reached a tentative agreement on all terms and conditions for a 2013-2015 collective bargaining agreement. This tentative agreement included the elimination of the

contractual bike patrol premium as well as elimination of the 2007 Bike Patrol Premium MOU. The union presented the tentative agreement to its membership which voted to decline to ratify the contract based on the tentatively agreed to terms.

In late November to early December 2013 the employer and union bargained a second tentative agreement. The elimination of the contractual bike patrol premium as well as elimination of the 2007 Bike Patrol Premium MOU was not an issue in the membership's failure to ratify, and the second tentative agreement did not change concerning these two items. The union took the second tentative agreement to a vote of its membership. It was ratified by the union, and the parties signed a complete collective bargaining agreement on January 13, 2014.

In early January 2014 per the terms of the new collective bargaining agreement, the employer ceased paying, in any form, bike patrol premiums for officers performing bike patrol duties.

On January 17, 2014, at a labor-management meeting in which Coleman was present, the parties discussed the issue of the cessation of bike patrol premiums per the parties' bargained for agreement.

Sometime prior to February 20, 2014, Coleman came to understand that (contrary to his faulty understanding during bargaining that only one officer was receiving bike patrol premium pay) all DET officers who rode bike patrol had been receiving bike patrol premium pay prior to the ratification of the parties' new collective bargaining agreement. He learned that officers had been receiving the alternate form of bike patrol premium since at least February 2012. Finally, he learned that the alternate form of bike patrol premiums had been ceased by the employer after the effective date of the parties' 2013-2015 agreement. Coleman testified that at some point prior to February 20, 2012, he put these issues on an upcoming labor-management meeting, stating that:

> So my next labor-management meeting was February 20, 2014. So I put that issue on the agenda, you know, the DET bicycle compensation because it's no longer a premium. That's gone and now we've got this *different* compensation.

(Emphasis added.)

Thus, it is clear from Coleman's own testimony that he knew about the alternate bike patrol premium prior to the February 20, 2014, labor-management meeting. In addition, the union's complaint states "the Guild learned sometime in early January of 2014 of the existence of this arrangement" for the alternative bike patrol premium pay.

Concerning the discussion of the issues at the February 20, 2014, meeting, Coleman testified that "[i]t was a very brief conversation with the deputy chief, it was just a couple of sentences, but it's all the sentences I needed." From that "very brief" discussion, he testified that it was the first time that he had "official notice" that there "was an agreement between his then assistant chief and the then DET sergeant that was started by the assistant chief. This agreement was – did take place. And from the human resource director it was ending." Given Coleman's testimony that this discussion was "very brief" and "just a couple of sentences, it is not credible to believe that Coleman had just learned, *for the first time,* of these details. Coleman's use of the term "official notice"[1] also shows he was already aware of the details of what he believed had occurred prior to this February 20, 2014, meeting. Coleman stated that "[s]o I had official notice on February 20th that this past practice was ending . . . . If I am going to file a ULP I've got to get a ULP in within six months of February 20th . . . ."

On May 29, 2014, Coleman sent a letter to Carlson demanding to bargain with the employer over "the decision and the effects of the decision to end" the alternate bike patrol premium pay that had begun in February 2012.

On June 11, 2014, the union represented by Coleman and one of the bike patrol officers, Officer Sue Hassinger, met with Carlson and Milosevich to discuss the union's demand to bargain concerning reinstating the alternate bike patrol premium payment. At that meeting, the employer maintained that the union had agreed in bargaining to the elimination of all bike patrol premium pay.

On August 19, 2014, the union filed this unfair labor practice complaint.

ISSUE 1: The union failed to meet its burden of proving by a preponderance of the evidence that the employer circumvented the union by engaging in direct dealing with employees represented by the union between November 2011 and February 2012.

Applicable Legal Standards

Circumvention - Direct Dealing

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees concerning mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). The scope of bargaining under Chapter 41.56 RCW encompasses "grievance procedures and . . . personnel matters, including wages, hours and working conditions." RCW 41.56.030(4). In order for a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. *University of Washington, Decision* 11600-A (PSRA, 2013), *citing City of Seattle*, Decision 3566-A (PECB, 1991).

Burden of Proof – Hearsay Evidence

In unfair labor practice proceedings, the ultimate burdens of pleading, prosecution, and proof all lie with the complainant. WAC 391-45-270(a); *City of Seattle*, Decision 8313-B (PECB, 2004). This burden of proof requires the complainant to show, by a preponderance of the evidence, that the respondent has committed the complained-of unfair labor practice. *Whatcom County*, Decision 8512-A (PECB, 2005).

Under RCW 34.05.452(1), hearsay evidence "is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." However, hearsay evidence has a low indicia of reliability and thus, the Commission has held that while "hearsay evidence is admissible in hearings before this agency, such evidence, standing by itself, has little probative value." *Port of Tacoma*, Decision 4626-A (PECB, 1995), *see also Olympic Uniserv Council*, Decision 4361-A (PECB, 1994) (The "weight accorded hearsay testimony will generally depend upon the degree of independent corroboration that exists for the hearsay statement").

Application of Standards

The union alleges that the bike patrol premium pay contained in the parties' collective bargaining agreement was replaced by an alternate bike patrol premium pay as the result of illegal circumvention via direct dealing with bargaining unit members by then Deputy Chief Troxel and former DET Supervisor Frazier. The union alleges that the two negotiated directly with members of the DET who performed bike patrol, and that those members accepted the change in terms without union agreement or consultation.

In support of its allegations, the union provided the testimony of one bike patrol officer, Hassinger, and union negotiating team members Coleman and Judd. However, all of the testimony provided by these union witnesses concerning the alleged illegal acts was in the form of uncorroborated hearsay. Hassinger testified about what she remembered Frazier allegedly told the members of the DET bike patrol at a meeting in early 2012 concerning the issue. Hassinger testified that other members of the bike patrol were at the meeting, but she was the only witness to that meeting that was called to testify about it. Included in her testimony was double hearsay concerning what she recalled Frazier told her (and the group) that Troxel had told him. Coleman and Judd also presented hearsay, and double hearsay, testimony concerning what members of the bike patrol (again, who were not called to testify) had told them that Frazier had said and concerning what those bike patrol employees had told Coleman and Judd that Frazier had told them that Troxel had said.

The union did not call either Frazier or Troxel as witnesses - the two people alleged to be at the heart of the conduct and events leading to the alternate bike patrol premium pay: By the time of the hearing, both Frazier and Troxel were no longer employed by the city. The employer had sought permission to have Troxel testify telephonically and that motion was granted. The employer ultimately decided not to call Troxel as a witness, and the union did not attempt to call him. The union did not call Frazier, a member of the bargaining unit during the time of the alleged events, as a witness nor did it attempt to seek leave to have him testify telephonically. During the hearing, the examiner asked the union if it would like to attempt to call Frazier as a telephonic witness and/or to subpoena him if necessary. The union's attorney declined the offer stating that ". . . he is not going to be a cooperative witness." While no direct

reason was given for not calling Frazier, the union noted in its briefing that Frazier was "no friend of the union," and Coleman testified that Frazier "hated me. He hated everything about me. And I don't like people that don't like me, so."

Coleman testified that he had asked Hassinger to contact Frazier and request that he provide a written statement concerning what he recalled happened in 2012 regarding the alternate bike patrol pay. The union attempted to enter a document into evidence purporting to be from Frazier. The employer objected to the admission of the document as hearsay and that the witness was available to testify and be cross examined but for the union's failure to call him as a witness. The objection was sustained and the document, identified in the record as Exhibit 12, was rejected as inadmissible and not admitted into evidence. Nonetheless, the union repeatedly cited to the contents of this rejected, hearsay document. In its brief, the union recites what it says Coleman said that "Frazier's statement" said and/or meant. The union's reference to a rejected hearsay document, as interpreted by a party witness with an interest in the outcome of the hearing, is given no weight in support of meeting its burden of proof.

The employer asserts that there was no circumvention by direct dealing because the alternate practice that began in February 2012 had already been bargained for in the parties' 2007 Bike Patrol Premium Pay MOU which it asserts was still active until the parties ratified their successor bargaining agreement for 2013-2015. In its brief, the union asserts that the 2007 MOU was "modified" to continue the three percent premium but dropped "the half-hour overtime payments for off-season work," then "incorporated" into a one year CBA for 2009, and this incorporation continued into the 2010-2012 contract. In support of its assertion that the 2007 MOU was incorporated into the 2009 contract, the union simply cites to the parties' 2009 contract which contains a provision for bicycle premiums that differ from the provisions of the 2007 MOU. The employer notes that this position was not the position the union took during negotiations when it made no such claim and, in fact, bargained with the employer over the elimination of the 2007 MOU.

The 2007 Bike Patrol Premium MOU did not have any language indicating it had any duration. Further, it was not until after the parties had signed their new 2013-2015 collective bargaining agreement that Coleman first asserted that it was his opinion that the 2007 MOU had

been incorporated into the parties' next contract covering 2009-2012. However, no corroborating testimony or documentary evidence beyond Coleman's bare opinion was offered to support such a finding, and the union did not cite any statute or legal precedent to support a finding that the 2007 MOU had somehow been factually or legally eliminated by incorporation into the contract. It is not contested by the employer, and the facts clearly show, that in February 2012 qualified union members began to claim one half hour of overtime/compensatory time premium for days when the officer was on bike patrol for more than four hours. It is also clear that this alternate practice was not newly created by the union members or the employer in February 2012. The alternate bike patrol premium pay that began in February 2012 identically matches the language of the parties' 2007 Bike Patrol Premium Pay MOU and this is clearly where the practice came from.

Conclusion

In its attempt to meet its burden of proof, the union relied upon uncorroborated hearsay testimony, a document that was ruled inadmissible during the hearing and failed to call a witness (Frazier) critical to its allegations. The union failed to meet its burden of proving by a preponderance of the evidence that the employer circumvented the union by engaging in direct dealing with employees represented by the union between November 2011 and February 2012. Accordingly, the union's claim that the employer circumvented the exclusive bargaining representative and committed an unfair labor practice under RCW 41.56.140(4) and (1) is DISMISSED.

ISSUE 2: The union did not meet its burden of proving by a preponderance of the evidence that the statute of limitations should be tolled.

Applicable Legal Standards

Unilateral Change

A party to a collective bargaining relationship commits an unfair labor practice under RCW 41.56.140(4) if it imposes a new term or condition of employment, or meaningfully changes existing wages, hours or working conditions of bargaining unit employees, without having first exhausted any bargaining obligations it has under Chapter 41.56 RCW. *Whatcom County*, Decision 7288-A (PECB, 2002), *citing City of Tacoma*, Decision 4539-A (PECB, 1994);

Kitsap County Fire District 7, Decision 2872 (PECB, 1988). A complainant alleging a "unilateral change" must establish both: (1) the existence of a relevant status quo or past practice; and (2) a change of a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (citations omitted).

Statute of Limitations

There is a six-month statute of limitations for unfair labor practice complaints. "[A] complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission." RCW 41.56.160(1). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice of" the complained-of action. *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990): *see also City of Bellevue*, Decision 9343-A (PECB, 2007), *citing City of Bremerton*, Decision 7739-A (PECB, 2003) ("The six-month statute of limitations begins to run when the complainant knows or should know of the violation"). The burden of showing that a complaint was filed outside of the statute of limitations lies with the party asserting such an affirmative defense. *City of Bellingham*, Decision 10907-A (PECB, 2012). Nevertheless, a complaint may be dismissed by an examiner as untimely even where the respondent has not raised timeliness as a defense. Filing a complaint within the time limits is a matter of subject matter jurisdiction. A jurisdictional issue may be raised sua sponte by a court at any time. *City of Bellevue*, Decision 9343-A (PECB, 2007) (internal citations omitted).

Burden of Proof - Tolling of the Statute of Limitations

An exception to the strict enforcement of the six-month statute of limitations may exist where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Bremerton*, Decision 7739-A, *citing City of Seattle*, Decision 5930 (PECB, 1997). In such a case, the statute may be "tolled" for the period of time between the acts or events and the time of actual or constructive notice about those acts or events. The time when a complainant has actual or constructive knowledge of a potential unfair labor practice for purposes of tolling the statute of limitations is an issue of fact. *State - Corrections*, Decision 11025-A (PSRA, 2011). The burden of proving the statute of limitations *should be tolled* lies with the complainant who is claiming the statute's time period should be tolled. *City of Pasco*, Decision 4197-B (PECB, 1999). In *City of Pasco*, the Commission's ruling that the respondent

had the burden of proving that the statute of limitations should be tolled was reversed by the Franklin County Superior Court. The court held that "PERC erred by imposing a burden on the [respondent] city to establish that [complainant] PPOA[2] officials had learned about the negotiations in question on an earlier date than they claimed, rather than requiring the [complainant] PPOA to prove an absence of knowledge about the negotiations in question until a particular date."

Application of Standards

The union claims that the employer committed an unfair labor practice by unilaterally changing bargaining unit member's bike patrol premium pay in February 2012. The union does not contest that this alleged unilateral change occurred in February 2012. The union asserts, however, that due to the employer's circumvention of the union, it was unware of the existence of the change until February 20, 2014, and thus the statute of limitations should be tolled until that date. However, as discussed in the analysis of Issue 1, above, the union failed to meet its burden of proving that the alternate bike patrol premium pay practice that began in February 2012 was the result of circumvention of the union. Thus, the union must provide evidence other than its allegation of circumvention[3] in order to meet its burden of proving by a preponderance of the evidence that the statute of limitations should be tolled between February 2012 and February 20, 2014. For the reasons discussed below, the union failed to meet its burden of proving the statute of limitations should be tolled.

In its brief, the union asserts that the burden of proving that a complaint was untimely filed rests upon the respondent employer as an affirmative defense. However, the question at issue in this case is *not* whether the events giving rise to this complaint occurred outside the statute of limitations and thus, that the complaint was untimely filed. There is no dispute that the events giving rise to the union's complaint occurred, at the latest, at the end of February 2012. The union filed this complaint on August 19, 2014. Even using March 1, 2012, as the first date of the change, the acts and events that form the basis for this complaint occurred over two years and six months before the filing of the union's complaint.

The issue in this case is whether the union is entitled to a tolling of the statute because its *leadership* either did not, or should not, have known of those events until a later date. The union

claims that it did not, and should not have known about the change in bike patrol premium payments until Coleman was given what it terms "official notice" at a labor-management meeting on February 20, 2014. The union argues the statute of limitations should not begin to run until this date because it was not until then that it knew, or should have known, of the events giving rise to its complaint. In a tolling case, per *City of Pasco*, Decision 4197-B, when the triggering event for an alleged unfair labor practice case occurs outside of the statute of limitations, the complainant has the burden to prove that it did not, or should not, have known of those events until some other point in time. If proven, the statute of limitations can be tolled from the time of the actual acts or events until the time proven by the complainant to be when it knew, or should have known of those events.

The employer the alternative pay practice from the union.

The Commission has ruled that the statute of limitations period may begin to run when an adverse employment action is communicated to employees and where the employer does not attempt to conceal its actions, even if the exclusive bargaining representative did not have actual notice of the alleged violation. *City of Chehalis*, Decision 5040 (PECB, 1995). In this case, the union repeatedly uses the term concealment in its brief to support its claim that it should not have known that an alternate bike patrol premium was being used. However, its testimony, evidence, and arguments do not describe any level of concealment of the alternate bike patrol premium.

The evidence in this case shows that eligible bargaining unit members were completely aware of the alternative practice and there was no attempt made by bargaining unit members or the employer to conceal this pay practice. The union itself argues in its brief that this alternative bike patrol premium was so well known by impacted bargaining unit employees and the employer that it could qualify as a past practice. However, even with the practice being so open and admittedly well known, the union asserts that its leadership and/or bargaining team did not, and should not, have known of its existence until it received what it terms "official notice" from the employer at a labor-management meeting on February 20, 2014.

What the testimony and evidence does show is that the use of the alternate premium pay practice was not being concealed at all. The union's own brief states that it was so well known to the bargaining unit members, their supervisors, and the employer in general that the Commission

should treat it as a past practice. This, even though the union argues that it did not know of the practice. In its brief, the union stated that:

> Here there is no question that the City and the affected officers were aware of this practice and that it was followed. Yet the City might argue that the Guild's lack of knowledge means there is no "past practice" *even though the practice was well known to the City and the affected employees.*

(Emphasis supplied.)

The union failed to do any investigation to respond to the employer's bargaining proposals.

By at least October 3, 2012, the clear and convincing evidence shows that the employer had notified the union in writing that it was seeking to end both the bike patrol premiums in the contract as well as the 2007 MOU concerning bike patrol premiums. When presented with the employer's bargaining position, the union could have, but did not, speak to any of its potentially impacted employees, those employees' supervisors and/or the employer's payroll department. Rather, in preparation for their response to the employer's proposals concerning the bike patrol premiums, the union bargaining team undertook no preparation and spoke to none of its members performing bike patrol duties. By their own testimony, they decided, instead to rely on their memory of what they believed the status to be.

The union only began to inquire into any information concerning the bike patrol until *after* the conclusion of bargaining, the voting on and ratification of the bargained for terms, and the signing of the 2013-2015 collective bargaining agreement. When the union did begin to look into the bike patrol premium issue, it was able to amass a plethora of information. In contrast to a finding in this case that the employer had attempted to conceal the practice, the union's own investigation found evidence of 156 separate instances of union member time records claiming, and the employer paying the alternate premium pay. This is clearly not the conduct of anyone, least of all the employer, attempting to "conceal" the alternate bike patrol premium pay.

The union states repeatedly in its testimony and briefing that during negotiations it materially misunderstood the status of how its members were receiving bike premium pay.[4] In fact, their misunderstanding was so great that they did not even understand that some of their members were receiving bike premium pay (under *either* the contract's terms or another format) with the exception of one member covered under the grandfather clause that first appeared in the 2007

Bike Patrol Premium Pay MOU. The union admits that the bargaining team had done little to understand what the current practices were concerning bike patrol premiums and instead relied on their memory of what they believed the current state of affairs were. Coleman testified that:

> To be honest, because we had been thinking that for years. It almost became a habit of thinking of that as the Dave Adams sunset clause because when DET was formed in 2007, they had a grandfather clause that couple of the bicycle riders to go over to DET which triggered an unfair labor practice, you know, by altering their pay by making this work change. So they were grandfathered in with the sunset clause and that's what made the whole thing work. And so this has been going on for years and, like I say, it became a part of the actual thinking that that was the Dave Adams sunset clause. I think *we forgot to critically look at it*.

(Emphasis added.)

Coleman goes on to admit that they made a mistake: "I mean, the primary thing was, oh my god, we accidentally negotiated away a three percent premium, which we did."

In contrast to the union's admission that it misunderstood the employer's proposals concerning bike patrol premium pay, the employer made clear and consistent proposals that it was seeking to eliminate the contractual bike patrol premium as well as the 2007 Bike Patrol Premium Pay MOU. Carlson testified, and her contemporaneous notes concerning the parties' August 29, 2012, and October 3, 2012, negotiation meetings show that the employer had consistently notified the union that it was seeking to eliminate the 2007 Bike Patrol Premium Pay MOU and the contractual bike patrol premium language.

The employer could not have known that the union was responding to its proposals to eliminate the contractual bike patrol premium and the 2007 Bike Patrol Premium Pay MOU without ever having discussed the issue with its own affected members. It is not the duty of employer's bargaining team to attempt to determine what the union's bargaining team understands, or does not understand nor which members it has spoken to or chosen to include in negotiations. In this case, the union's bargaining team made the independent decision to not contact, nor include on its team, any of its members that would be impacted by the elimination of the bike patrol premium.

The union further asserts that even though the employer consistently sought to eliminate the bike patrol premium in the contract as well as the 2007 Bike Patrol Premium Pay MOU, it had no duty to make any inquiries into the issue. Instead, the union asserts, without citation to statute or legal precedent, that the employer nonetheless "had an affirmative obligation to disclose that information without being asked." As the union, itself, makes clear in its own brief, the employer and all of the affected union members were well aware that the premium pay had been altered in February 2012. Neither the facts nor any cited legal authority support the union's contention that the employer had *any* duty, let alone an "affirmative obligation," to assist the union's bargaining team in its understanding, preparation, or response to the employer's proposals.

Conclusion

Based upon the totality of the presented facts and evidence, the union failed to present a preponderance of evidence to meet its burden of proving that the statute of limitations should be tolled beginning in February 2012. The evidence showed the employer made no attempt to conceal that union members were receiving an alternate form of bike patrol premium pay beginning in February 2012. Not only did the evidence not show any attempt at concealment of the practice, the union's own admissions and evidence, show that the practice was open and commonly known. Further, the union failed to prove the genesis of the alternative premium pay was the result of illegal circumvention of the union versus the bargained for provisions of the 2007 Bike Patrol Premium MOU. Finally, when proposals concerning the two, distinct bike patrol premiums were made by the employer during bargaining, the union's negotiating team undertook no steps to review and/or discuss the bike patrol issue with potentially impacted members.

The February 2012 change to the alternate premium pay was the triggering event in this case. The evidence presented did not identify a specific date in February 2012, thus the triggering date of March 1, 2012, will be used to determine the date on which the union must have filed its complaint to have been timely under the six month statute of limitations. To have been timely, the union must have filed its unilateral change complaint on, or before, August 1, 2012. The union's complaint was filed on August 19, 2014. The union's unilateral change complaint was thus untimely under RCW 41.56.160(1) and is therefore DISMISSED.

ISSUE 3: The employer did not unilaterally change employee compensation on February 20, 2014, by discontinuing its practice of paying Bicycle Officers on the DET Team overtime pay for days on which the officers actually rode bicycles, without providing an opportunity for bargaining.

Applicable Legal Standards and Application of Standards

A party to a collective bargaining relationship commits an unfair labor practice under RCW 41.56.140(4) if it imposes a new term or condition of employment, or meaningfully changes existing wages, hours or working conditions of bargaining unit employees, without having first exhausted any bargaining obligations it has under Chapter 41.56 RCW. *Whatcom County*, Decision 7288-A, *citing City of Tacoma*, Decision 4539-A; *Kitsap County Fire District 7*, Decision 2872. An employer's bargaining obligation prior to changing mandatory terms or conditions of employment are to: (1) give notice to the union; (2) provide an opportunity for bargaining prior to making a final decision; (3) bargain in good faith, upon request; and (4) bargain to agreement or impasse concerning any mandatory subjects of bargaining. *Skagit County*, Decision 8746-A (PECB, 2006), *see also City of Walla Walla*, Decision 12348-A (PECB, 2015) (addressing interest arbitration eligible employees).

As discussed extensively in the previous section, the employer notified the union during bargaining of its desire to end bike patrol premium pay in all forms when it proposed to eliminate *any and all* reference to bike patrol premium pay that existed between the parties, *i.e.*, the contract language and the 2007 Bike Patrol Premium MOU language. Carlson's credible testimony and contemporaneous notes show that this notice was made to the union both verbally and in writing during bargaining meetings on August 29, 2012, and October 3, 2012.

Although the union was mistaken during bargaining about certain components of the employer's proposal, they were not mistaken about the employer's desired outcome that all bike patrol premium pay would be eliminated in the parties' 2013-2015 contract. Coleman admits that the union's bargaining team mistakenly believed that (1) only one person was receiving bike patrol premium pay under a grandfathering section, and (2) no other form of bike patrol pay was being paid to members of their bargaining team. Thus, the only outcome the union could have

understood would be the result of agreeing to the employer's proposal was that, upon ratification of the successor agreement, no union members would be receiving bike patrol premium pay in any form. While they were mistaken as to how this outcome was to occur, due to their inaction in investigating the employer's proposals, they were clearly aware that the outcome would be exactly what it was: the elimination of bike patrol premium pay to any union member in any form.

The union's bargaining team tentatively agreed to the elimination of both the contractual language and the MOU language on two occasions. The first tentative agreement that included the elimination of bike patrol premiums was not ratified by the union membership. There was no allegation made by the union during further bargaining or at the hearing that the bike patrol issue contributed to the tentative agreement's failure to pass. The second tentative agreement also included the elimination of all bike patrol premiums by eliminating the contractual language as well as the 2007 Bike Patrol Premium MOU. The union's membership voted to ratify the agreement and both parties signed the agreement on January 13, 2014. In early January 2014 per the bargained for terms and conditions of their new collective bargaining agreement, the employer ceased paying, in any form, bike patrol premiums for officers performing bike patrol duties.

Conclusion

The union was notified of, and agreed to, the elimination of bike patrol premiums in all forms. During bargaining with the employer, the union accepted, ratified, and signed a new agreement that eliminated bike patrol premium language in the parties' contract as well as in the parties' 2007 Bike Patrol Premium MOU. The employer met its Chapter 41.56 RCW bargaining obligation with the union on the issue. The union's complaint charging that the employer unilaterally changed employee compensation by discontinuing its practice of paying Bicycle Officers on the DET Team overtime pay for days on which the officers actually rode bicycles, without providing an opportunity for bargaining is therefore DISMISSED.

FINDINGS OF FACT

1. The City of Renton is a public employer within the meaning of RCW 41.56.030(12).

2. The Renton Police Guild is a bargaining representative within the meaning of RCW 41.56.030(2).

3. Prior to 2007 the employer had a bike patrol program that officers were placed in on a four year rotation basis. Officers assigned to the bike patrol received year round three percent premium pay as provided for in the parties' 2006-2008 collective bargaining agreement.

4. In 2007 the parties bargained over the DET program which was to include various specialties such as Special Weapons and Tactic (SWAT) as well as incorporating the existing bike patrol. At this time, officers assigned to bike patrol were to continue to receive the year round three percent premium pay provided for in the parties' 2006-2008 collective bargaining agreement.

5. In June 2007 the parties came to an agreement concerning bike patrol premiums and executed an MOU (2007 Bike Patrol Premium MOU) addressing bike patrol premium pay for employees assigned to the DET who performed bike patrol. The 2007 Bike Patrol Premium MOU contained two provisions, or sections. The first section provided that those employees currently in a four year rotation assignment per the terms of the 2006-2008 collective bargaining agreement would be "grandfathered" and continue to receive the year round three percent premium pay provided for in that agreement. The second section provided that all other officers would receive one half hour of overtime/compensatory time premium for all days during identified months (*i.e.*, the spring/summer months, generally) and, when outside of those identified periods, on days when the officer was on bike patrol for more than four hours.

6. The 2007 Bike Patrol Premium MOU did not address duration nor any terms for when, if, or how it would expire.

7. For 2009 the parties bargained a one year collective bargaining agreement mostly rolling over the terms and conditions in their previous contract. Included in Section E(6) of that agreement, is a bike patrol premium pay provision as follows:

6. Bicycle Officer* 3.0% per month.

. . .

*The Bicycle Officer premium listed above shall be paid to the one (1) current member of Bicycle patrol. At the conclusion of that Officer's current four-year assignment, the full-time Bicycle patrol premium will no longer exist. Officers temporarily assigned to Bicycle patrol will receive the premium only during those times when actually assigned, i.e., fair weather months, special emphasis projects, etc.

8. The parties bargained for, and reached agreement on, a collective bargaining agreement covering January 1, 2010, through December 31, 2012. The same bike patrol language included in the 2009 collective bargaining agreement was included in Section E(6) of the 2010-2012 collective bargaining agreement.

9. During the 2009 contract term, officers who performed bike patrol were paid according to the bike patrol premium pay practices contained in the 2009 contract, *i.e*., three percent per month during those months they were assigned to bike patrol duties.

10. During a portion of the 2010-2012 contract term, officers who performed bike patrol were paid according to the bike patrol premium pay practices contained in the 2010-2012 contract, *i.e.*, three per month during those months they were assigned to bike patrol duties.

11. By at least February of 2012, officers assigned to the DET program performing bike patrol duties began to submit time sheets claiming bike patrol premium in the format matching the language contained in the parties' 2007 Bike Patrol Premium MOU: one half hour of overtime/compensatory time on days when the officer was on bike patrol for more than four hours. This was being submitted as an *alternate* form of bike patrol premium and not in *addition to* the premium payment provided for in the parties' collective bargaining agreement.

12. Beginning by at least February 2012 the employer accepted and paid bargaining unit members' time sheets claiming bike patrol premium in the format matching the language

contained in the parties' 2007 Bike Patrol Premium MOU: one half hour of overtime/compensatory time on days when the officer was on bike patrol for more than four hours.

13. The employer did not conceal the alternate bike patrol premium pay practice described in Findings of Fact 11 and 12.

14. On August 29, 2012, the parties met to bargain a successor collective bargaining agreement for the term of 2013-2015. The union bargaining team consisted of Guild President, Officer Mark Coleman, Officer Bill Judd, and Officer Peter Montemayor. The employer's bargaining team consisted of Human Resource Director Nancy Carlson, Police Chief Kevin Milosevich, Commander Charles Karlewicz, Cathryn Laid, and Brian Sandler.

15. At the August 29, 2012, meeting the employer notified the union bargaining team, verbally and in writing that it was seeking to eliminate the 2007 Bike Patrol Premium MOU.

16. At the August 29, 2012, meeting, union bargaining team member Judd asked the employer "if there was anybody still affected by this *section*" and that "[t]he Chief replied that there was one individual." The question concerned the section of the 2007 Bike Patrol Premium MOU language regarding grandfathering employees.

17. At a bargaining meeting on October 3, 2012, the employer notified the union that it was seeking to completely eliminate all bike patrol premiums received by bargaining unit members when it notified the union in writing that it was seeking to eliminate both the bike patrol premium in the contract as well as the 2007 Bike Patrol Premium MOU.

18. During bargaining, the union did not review nor discuss the employer's bike patrol premium proposals identified in Findings of Fact Nos. 14-16 with any of its impacted members.

19. In fall 2013 the parties reached a tentative agreement on all terms and conditions for a 2013-2015 collective bargaining agreement. This tentative agreement included the elimination of the contractual bike patrol premium as well as elimination of the 2007 Bike Patrol Premium MOU.

20. In the fall of 2013 the union presented the parties' tentative agreement to its membership which voted to decline to ratify the contract. The union did not claim that bike patrol premium was an issue in the membership's failure to ratify.

21. In late November to early December 2013 the employer and union bargained a second tentative agreement. The elimination of the contractual bike patrol premium as well as elimination of the 2007 Bike Patrol Premium MOU.

22. In later November to early December 2013 the union took the second tentative agreement to a vote of its membership which was ratified by the union.

23. The parties signed a complete collective bargaining agreement on January 13, 2014, which included the elimination of the contractual bike patrol premium as well as elimination of the 2007 Bike Patrol Premium MOU.

24. In early January 2014 per the terms of the new collective agreement, the employer ceased paying, in any form, bike patrol premiums for officers performing bike patrol duties.

25. On January 17, 2014, at a labor-management meeting at which Coleman was present, the parties discussed the issue of the cessation of bike patrol premiums per the parties' bargained for agreement.

26. Sometime prior to February 20, 2014, Coleman came to understand that all DET officers who rode bike patrol had been receiving bike patrol premium pay prior to the ratification of the parties' new collective bargaining agreement.

27. Sometime prior to February 20, 2014, Coleman learned that officers had been receiving an alternate form of bike patrol premium since at least February 2012.

28. Sometime prior to February 20, 2014, Coleman learned that the alternate form of bike patrol premiums had been ceased by the employer after the effective date of the parties' 2013-2015 collective bargaining agreement.

29. Prior to February 20, 2012, Coleman put the issues identified in Findings of Fact 24 through 26 on an upcoming labor-management meeting scheduled for February 20, 2014.

30. Coleman discussed the issues identified in Findings of Fact 24 through 26 with Milosevich at a labor-management meeting on February 20, 2014.

31. On May 29, 2014, Coleman sent a letter to Carlson demanding to bargain with the employer over "the decision and effects of the decision to end" the alternate bike patrol premium pay that had begun in February 2012.

32. On June 11, 2014, Coleman and Hassinger met with Carlson and Milosevich to discuss the union's demand to bargain concerning reinstating the alternate bike patrol premium payment. At that meeting, the employer maintained that the union had agreed in bargaining to the elimination of all bike patrol premium pay.

33. On August 19, 2014, the union filed this unfair labor practice complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The union did not meet its burden of proving by a preponderance of the evidenced that the employer circumvented the union by directly dealing with its members in violation of RCW 41.56.140(4) or (1).

3. The union failed to meet its burden of proving by a preponderance of the evidence the statute of limitations should be tolled from February 2012 to February 20, 2014; therefore the union's complaint filed on August 19, 2014, claiming the employer unilaterally

changed employee compensation in February 2012 in violation of RCW 41.56.140(4) or (1) was not timely under RCW 41.56.160(1).

4. As described in Findings of Fact 15 through 32, the employer met its Chapter 41.56 RCW bargaining obligation with the union on the issue of eliminating bike patrol premium pay in any form, and therefore, the employer did not unilaterally change employee compensation in January 2014 in violation of RCW 41.56.140(4) or (1).

ORDER

The complaints charging unfair labor practices filed in the above-captioned matter are dismissed.

ISSUED at Olympia, Washington, this 12th day of April, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

GUY OTILIO COSS, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

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[1] In its brief, the union states that the employer "announced that it was discontinuing an established payment to the bike officers" at a labor-management meeting on February 20, 2014. To the extent that the union's use of the term "announced" is intended to imply that this was the first that it had heard of the alternate form of premium pay and that it had been ended, that implication is rejected.

[2] Pasco Police Officers' Association.

[3] This does not mean that, had the union proven its circumvention/direct dealing claim, its tolling claim would have automatically been proven.

[4] The union attempts to blame the employer for its failure to investigate and resultant misunderstanding of the status of bike patrol payments and the 2007 MOU by claiming they were purposely misled by the employer. However, while it does certainly appear that the union's bargaining team did misunderstand the employer's position, there was no evidence that the employer attempted to purposefully mislead them.