STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS, LOCAL 174, Complainant,	)	CASE 18957-U-04-4823
vs.	)	DECISION 9204-A - PECB
KING COUNTY, Respondent.	)	DECISION OF COMMISSION

Schwerin Campbell Barnard, by *Dmitri Iglitzin*, Attorney at Law, for the union.

Trish K. Murphy, for the employer.

This case comes before the Commission on a timely appeal filed by King County (employer) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Claire Nickleberry (formerly Collins).[1] Teamsters, Local 174 (union) supports the Examiner's decision.

ISSUES PRESENTED

1. Whether the employer committed an unfair labor practice when it utilized global positioning system (GPS) devices installed in its vehicles for disciplinary matters without first bargaining the effects that the installation of the global positioning system devices may have on mandatory subjects of bargaining.

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[1] *King County*, Decision 9204 (PECB, 2006).

2. Whether the employer failed to provide necessary and pertinent collective bargaining information to the union regarding the installation of the global positioning system devices in company vehicles and any resulting disciplinary action resulting from the installation of those systems.

For the reasons set forth below, we reverse the Examiner's decision that the employer was required to bargain the effects that the installation of the global positioning system (GPS) devices may have had on mandatory subjects. In this case, the union's complaint was filed more than six months after the employer notified the union of its intent to install the GPS devices into its vehicles. However, we affirm the Examiner's decision that the employer failed to comply with the union's request for necessary and pertinent collective bargaining information. We amend the Examiner's decision accordingly.

ANALYSIS

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and

inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - Bargaining Over the GPS Devices

The Bargaining Obligation

The parties in this case bargain collectively under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The duty to bargain is defined in RCW 41.56.030(4), as follows:

> "Collective bargaining" means . . . to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions . . . .

That duty is enforced on employers through RCW 41.56.140(4) and unfair labor practice proceedings under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270(1)(a). The burden to establish affirmative defenses lies with the party asserting the defense. WAC 391-45-270(1)(b).

The parties' collective bargaining obligations require that the status quo be maintained regarding all mandatory subjects of bargaining, except where such changes are made in conformity with the collective bargaining obligation or the terms of a collective bargaining agreement. *City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991); *Spokane County Fire District 8*, Decision 3661-A (PECB, 1991).

The duty to bargain requires a party proposing a change involving a mandatory subject of collective bargaining to: (1) give notice to

the other party; (2) provide opportunity to request bargaining on the subject; (3) bargain in good faith, if requested, and (4) reach an agreement or impasse before implementing the change. *See, for example, South Kitsap School District*, Decision 472 (PECB, 1978) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *City of Vancouver*, Decision 808 (PECB, 1980).

In determining whether a particular matter is a mandatory subject of collective bargaining, the Commission initially determines whether such a matter directly impacts the wages, hours, or working conditions of bargaining unit employees. *Lower Snoqualmie Valley School District*, Decision 1602 (EDUC, 1983). Managerial decisions that only remotely affect terms and conditions of employment, and decisions that are predominantly "managerial prerogatives," are classified as permissive subjects. *IAFF Local 1052 v. PERC*, 113 Wn.2d 197, 200.

While management decisions concerning permissive subjects need not be bargained to impasse, an employer still may have an obligation to bargain the impacts/effects that such decision has on employee wages, hours, and working conditions. *See Grays Harbor County*, Decision 8043-A (PECB, 2004).

Waiver of Bargaining Rights by Inaction

The "waiver by inaction" defense is apt where appropriate notice of a proposed change has been given, and the party receiving notice does not request bargaining in a timely manner. *See City of Yakima*, Decision 1124-A (PECB, 1981) (union responded to notice of a bargaining opportunity with a public information campaign, but never requested bargaining); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995) (union filed a grievance under a

collective bargaining agreement, but never requested bargaining). The key ingredient in finding a waiver by inaction by a union is:

> [A] finding that the employer gave adequate notice to the union. Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. If the employer's action has already occurred when the union is given notice, the notice would not be considered timely and the union will be excused from the need to demand bargaining on a fait accompli.

Washington Public Power Supply System, Decision 6058-A (PECB, 1998) (footnotes omitted).

Six Month Statute of Limitations

The statute of limitations for filing an unfair labor practice complaint under the Public Employees' Collective Bargaining law (PECB) is six months from the date of occurrence. RCW 41.56.160(1). The six-month statute of limitations begins to run when the complainant should know an adverse employment decision was made. *See City of Bremerton*, Decision 7739-A (PECB, 2003); *see also City of Seattle*, Decision 7278-A (PECB, 2001), *citing Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

In *Emergency Dispatch Center*, the statute of limitations began to run when a schedule was posted on a bulletin board, not the date that it was effective. In *City of Seattle*, the statute of limitations began to run when a seniority list was issued, not six months later when it was actually used. In *City of Seattle*, Decision 5930 (PECB, 1997), the union had notice that the fire department was creating a new safety division and reallocating personnel. The union argued unsuccessfully that the statute of limitations was tolled as the parties continued to bargain over the effects. The only exception to the strict enforcement of the six-

month statute of limitations is where the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Pasco,* Decision 4197-A (PECB, 1994).

A complaint may be dismissed by an examiner as untimely even where the employer has not raised timeliness as a defense. Filing a complaint within the time limits is a matter of subject matter jurisdiction. *Clark v. Selah,* 53 Wn. App. 832 (1989); *Stewart v. Omak School District,* 108 Wn. App. 1049 (2001); *Malpica v. Mary M. Knight School District 311,* 93 Wn. App. 1084 (1999). A jurisdictional issue may be raised sua sponte by a court at any time. *Hanson v. Murphy,* 121 Wn. 2d 552 (1993). *See also Acosta v. Artuz,* 221 F.3d 117 (2nd Cir. 2000); *Herbst v. Cook,* 260 F.3d 1039 (9th Cir. 2001); *Kiser v. Johnson,* 163 F.3d 326 (5th Cir. 2001).

Application of Standard

The Examiner found that the union waived its right to bargain the decision to install the GPS devices by inaction, but found that the union made a timely request for effects bargaining. Based upon what the Examiner found as a timely request for bargaining, she then found the employer committed an unfair labor practice when it refused to bargain with the union.[2]

The employer asserts that the Examiner erred by not finding that this Commission lacks jurisdiction over this case since the union failed to file its unfair labor practice complaint within six

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[2] The union chose not to appeal that portion of the Examiner's decision. Therefore, we need not decide whether the employer was obligated to bargain the *decision* to install the GPS devices, and need only to decide whether the employer was obligated to bargain, upon request, the *effects* of its decision to install the devices.

months of the employer's action. This record demonstrates the following sequence of events:

- On March 25, 2003, Robert Railton, the chief spokesman for the employer's negotiating team, sent an e-mail to Anthony Murietta, the union's local president at that time, informing him that the employer intended to install GPS devices on the employer's solid waste vehicle fleet.[3] The employer invited the union to contact the employer either by phone or e-mail to bargain the issue, but asked that contact be made by April 9, 2003. Railton's letter also stated that if he did not hear from the union, he would conclude that the union had not identified a bargaining obligation, or that the union waived its right to bargain the issue.

- On May 9, 2003, George Raffle, the previous union shop steward, contacted the employer requesting to bargain the impacts of the decision to install the GPS devices. The employer informed Raffle that the union already waived its rights to bargain the effects.

- On December 10, 2003, Raffle, still acting as shop steward, filed an unfair labor practice complaint on behalf of the union alleging that the employer failed to bargain the effects of its decision to install the GPS devices. In the complaint, docketed by the agency staff as case 18078-U-03-4640, the union specifically alleged that the GPS devices could impact employee discipline.

- On December 12, 2003, Unfair Labor Practice Manager Mark S. Downing issued a deficiency notice in case 18078-U-03-4640

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[3] The e-mail was addressed to all unions who represented employees in the employer's workplace.

citing several defects in the union's complaint, including failure to provide a concise statement of facts and alleging that the employer committed a contract violation, and provided the union with an opportunity to cure the defects in the complaint. The union declined to do so and, on April 5, 2004, the Unfair Labor Practice Manager dismissed the complaint as procedurally defective. *King County*, Decision 8492 (PECB, 2004).

- On September 9, 2004, David Allison, the union's business agent, sent a letter to Theresa Jennings, director of the solid waste division, regarding the GPS devices. The union's letter stated that it wished to meet and discuss the installation and use of the GPS devices. The letter also asked for certain information, including which vehicles the devices were installed on, what communications surrounded the installation of these devices, and any instances where information obtained from the GPS devices was used either in the formulation or verification of employee discipline. The employer informed the union that it needed to discuss the matter with Railton, and not Jennings. On October 18, 2004, the union sent an identical request to Railton.

- On October 27, 2004, Railton responded by informing the union that he believed the employer had already satisfied its bargaining obligation, but offered to meet with the union to discuss the matter. However, Railton specifically noted that any meeting would not be for the purpose of bargaining over the GPS devices.

The union filed its complaint in the instant case on November 2, 2004.[4]

The Six Month Statute of Limitations Tolled

This record clearly demonstrates that on March 25, 2003, the employer placed the union on notice that it intended to install GPS devices. The employer also provided the union an opportunity to bargain both the decision and any impacts identified by the union that the decision could have on mandatory subjects of bargaining, but required the union to make such requests by April 9, 2003. The record also demonstrates that the employer considered the union's request for bargaining as untimely and that it intended to implement use of the GPS devices.

Important to our analysis is the union's May 9, 2003 request for effects bargaining and the December 10, 2003 unfair labor practice complaint. With respect to that request for effects bargaining, the union made its demand and the employer responded by denying the union's request. The union was then free to assert its rights under Chapter 41.56 RCW by filing an unfair labor practice complaint, which it filed on December 10, 2003.[5]

With respect to that unfair labor practice complaint, although the Unfair Labor Practice Manager found the complaint procedurally defective under WAC 391-45-050, the complaint nevertheless clearly

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[4] The employer attempted to introduce the instant complaint into evidence to complete the record. This was unnecessary. All documents filed with this Commission in association with an unfair labor practice complaint become part of the record.

[5] The fact that the complaint in case 18078-U-03-4640 may have been filed beyond the six-month statute of limitations is irrelevant to the analysis of the instant complaint.

demonstrates that the union objected to the installation of the GPS devices since "anything to do with potential discipline needs to be bargained with the [u]nion." It is therefore patently clear that, as of December 10, 2003, the union had notice of the employer's decision, and identified employee discipline as one potential mandatory subject that could be impacted by the employer's decision.[6]

The instant complaint essentially attempts to get a "second bite of the apple" to bargain the impacts of the employer's decision to install the GPS devices. The union filed this complaint on November 2, 2004, almost nineteen months after Railton notified the union that the employer wanted to install GPS devices, and eighteen months after Raffle requested effects bargaining. The Examiner erred in not finding that the union's complaint was time barred by the statute of limitations.

ISSUE 2 - Duty to Provide Information

Under both federal and state law, the duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. RCW 41.56.030(4); *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967); *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd, City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the

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[6] Longstanding Commission precedents recognize employee discipline as a mandatory subject of bargaining. *City of Yakima*, Decision 3503-A (PECB, 1990), *aff'd*, 117 Wn.2d 655 (1991).

collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999). In *City of Bellevue*, Decision 3085-A, this Commission stated that if "at any time, an employer has acquired information that it believes is relevant on the question of comparable wages, hours and conditions, it has the duty to disclose that information, *upon request*, during the course of negotiations." (emphasis added).

Duty to Furnish Information in a Timely Manner

Neither party disputes that information regarding employee discipline is information that could be important and relevant to the collective bargaining process or administration of the parties' collective bargaining agreement.[7] Thus, the only question before us is whether the employer satisfied the union's request for information, and whether it did so in a timely manner.

This record demonstrates that the union's September 9, 2004 letter to Director Jennings also contained a request for the following information:

- upon which vehicles the GPS devices were installed, and what dates the installation occurred;
- what communications, if any, occurred between the employer and the union regarding installation of the devices;
- other than a June 28, 2004 oral warning issued to Beauchamp, what instances of employee discipline or correction were issued utilizing information in whole or in part obtained from

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[7] The employer declined to challenge the Examiner's determination that the requested information was important and relevant collective bargaining information. Decision 9204, Findings of Fact 8 and 9.

or verified by the GPS devices, including written documentation; and

- identification of the disciplinary or corrective action known as "letters of expectation," including the date on which the employer started using these letters, and for copies of any such letters that had been issued to employees.

On October, 18, 2004, the union made a second request to Railton for this information. The employer responded on October 27, 2004 claiming that the employer had already met its obligations to bargain with respect to the GPS devices, and asserted that the union waived its bargaining rights. The employer also included a copy of the e-mail correspondence between Raffle and Railton indicating that Railton believed that the union waived its right to bargain the issue, and included a document indicating the purpose for the GPS systems and information regarding when the GPS systems were installed and in which vehicles they were installed.

Application of Standards

We begin our analysis clarifying which request operates as the union's formal request for information. The Examiner found that the employer failed to provide the information to the union in a timely manner. On appeal, the employer argues that the Examiner overlooked the fact it was actively compiling the information for the union, and that only fifteen days separated the union's October 18, 2004 request and the filing of its November 3, 2004 complaint. We disagree with the employer's version of the facts.

It is clear from the October 14, 2004 e-mail correspondence between Railton and Terri Hanson that Hanson was "still in the process of gathering the information that [Allison] requested in his letter[.]" Thus, it is also clear that the employer must have

considered the union's September 9, 2004 letter to be a request for information. The employer's attempt on appeal to characterize the union's October 18, 2004 letter as the union's first request for information is not supported by the evidence.

Having established the date of the union's request, we next turn to whether the employer satisfied the union's information request in a timely manner. We find that the evidence supports the Examiner's findings that the employer failed to provide the information to the union in a timely manner.

The employer's October 27, 2004 response to the union's information request only provides certain documents regarding correspondence between the employer and union about the bargaining process over the GPS devices. It also provides copies of the unfair labor practice complaint filed by Raffle, as well as a copy of the subsequent dismissal of that complaint.

However, the employer's response not only lacks any information regarding the union's request for information about the GPS devices being utilized in employee discipline, it also fails to provide any information about the "letters of expectation" that the union requested. This lack of information is compounded by the fact that Railton's letter fails to even comment upon this aspect of the union's request. The tone of the October 27, 2004 letter focuses only on the bargaining aspect of the GPS devices, and does not mention the union's information request except in passing. Thus, we find support for the Examiner's conclusion that the union considered the employer's October 27, 2004 letter to be its only response to the union's request.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

The Findings of Fact issued by Examiner Claire Nickleberry are AFFIRMED and adopted as the Findings of Fact of the Commission, except Finding of Fact 6, which is amended as follows:

6. The union did have knowledge that the global positioning system devices were going to be used for surveillance and/or to create a foundation for discipline.

AMENDED CONCLUSIONS OF LAW

The Conclusions of Law issued by Examiner Claire Nickleberry are AFFIRMED and adopted as the Conclusions of Law of the Commission, except Conclusion of Law 2, which is amended as follows:

2. The employer did not have a duty to bargain the effects of its decision to install global positioning system devices in its fleet of vehicles. The union had actual knowledge of the employer's decision more than six months prior to the filing of its complaint, and is therefore time barred by RCW 41.56.160.

AMENDED ORDER

King County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to provide information necessary and important collective bargaining information to Teamsters, Local 174 concerning instances where GPS devices in vehicles used

by employees in the solid waste division were used to verify employee discipline and the issuance of "letters of expectation."

b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Provide information requested by Teamsters, Local 174 regarding the effects of the GPS installation and the "corrective and/or disciplinary" tool known as a Letter of Expectation.

b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto. Such notices shall be duly signed by an authorized representative of the employer, and shall remain posted for 60 days. Reasonable steps shall be taken by the employer to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice attached to this order into the record at a regular, public meeting of the King County Council and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, the 14th day of November, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

COLLECTIVE BARGAINING

PERC

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to provide information requested by Teamsters, Local 174 regarding the effects of the GPS installation and the "corrective and/or disciplinary" tool known as a Letter of Expectation.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL provide information requested by Teamsters, Local 174 regarding the installation of the global positioning devices in the employer's vehicles, including any documents relating to discipline based upon information obtained from the global positioning devices. We will also provide Teamsters, Local 174 information regarding the "corrective and/or disciplinary" tool known as a Letter of Expectation.

WE WILL read the notice attached to this order into the record at a regular, public meeting of the King County Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ KING COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.