STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 174,	)	CASE 18752-U-04-4765
	)	DECISION 9495-A - PECB
Complainant,	)	
	)	CASE 19045-U-04-4847
vs.	)	DECISION 9496-A - PECB
	)	
KING COUNTY,	)	CASE 19151-U-05-4866
	)	DECISION 9497-A - PECB
Respondent.	)	
	)	DECISION OF COMMISSION
	)	

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

Trish K. Murphy, Attorney at Law, for the employer.

These cases come before the Commission on a timely appeal filed by King County (employer) seeking review and reversal of the Findings of Fact, Conclusions of Law, and Order issued by Examiner J. Martin Smith.[1] Teamsters Local 174 (Teamsters 174) supports the Examiner's decision.

ISSUES PRESENTED

1. Was the employer obligated to bargain the decision, and effects of the decision, to install additional surveillance cameras at its work locations where the Teamsters 174 represented employees?

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[1] *King County*, Decision 9495 (PECB, 2006).

2. If the employer was obligated to bargain either the decision or the effects of its decision, did Teamsters 174 waive its right to bargain?

3. Was the employer obligated to bargain the decision, or the effects of the decision, to use previously installed cameras for purposes of employee discipline?

We affirm the Examiner's ultimate conclusion that the employer failed to bargain the decision, and the effects of its decision, to install certain surveillance cameras in its workplace. Although this factual record establishes that Teamsters 174 waived its right to bargain the decision, and the effects of the decision, that the surveillance cameras installed in spring 2004 had on the truck drivers and transfer station operators, Teamsters 174 made a timely request for bargaining about the issue for the scale house operators once it represented them. Additionally, we also find that the employer was required to bargain a change in the use of cameras from observing customers to surveillance of employees for purposes of discipline. We affirm the Examiner's issued remedial order.

PERTINENT FACTS

The factual situation presented by this case is complex and a thorough recitation is needed to assist in explaining our ultimate conclusion. During the events involved in these proceedings, Teamsters 174 represented certain groups of employees who work in the employer's solid waste division. That division is responsible for the acceptance and disposal of solid waste. Eleven sites are operated by the division, although it appears from the record that employees represented by Teamsters 174 did not work at all eleven locations.

Since at least 1994, video cameras have been installed in a limited capacity at some of the employer's work sites. These cameras were primarily installed in the "scale houses" and were pointed at the cashier's location and the gates to the property. Prior to 2004, there is no indication that these cameras were used to discipline the "truck driver" and "transfer station operator" classifications which were represented by Teamsters 174.

Between 2001 and 2003, Service Employee International Union, Local 925 (SEIU 925) represented the "scale house operators." The collective bargaining agreement between SEIU 925 and the employer expired December 31, 2003.

In May of 2003, the employer informed the various bargaining representatives of employees who worked in the solid waste division that it wanted to install additional cameras. The employer made this statement during discussions with the various unions about numerous changes to the collective bargaining agreements that the employer desired. The record does not clearly indicate whether SEIU 925 was a party to these negotiations. George Raffle, who at the time was Teamsters 174's lead negotiator, informed the employer that his union desired to discuss operational issues first, and then turn to the issue of cameras. The employer's lead negotiator, Bob Railton, agreed, and the record indicates that no further discussion regarding video cameras occurred for some time. Negotiations between the parties subsequently broke down.

On October 9, 2003, Railton sent an e-mail to many of the bargaining representatives of the employees in the solid waste division, including Teamsters 174, stating that the employer was looking to install cameras in the first quarter of 2004 and that the cameras would be used to "investigate suspicious activity, trespassing,

vandalism, theft, or other safety and security matters."[2] The e-mail informed Teamsters 174 that it had until October 27, 2003, to request bargaining, otherwise the employer would conclude that bargaining had been waived.

The following fact is in dispute: Teamsters 174 claims that Raffle, who died before the hearing, informed Railton that Teamsters 174 requested bargaining regarding the cameras. Prior to his death, Raffle signed an affidavit claiming that he did so. Railton testified that he was never contacted by Raffle, and that Anthony Murrietta, a union official, stated on October 20, 2003, that he had no problem with the installation of the cameras, which led Railton to inform his superiors to move forward with the project. Murrietta did not testify at the hearing.

On October 21, 2003, Teamsters 174 filed a petition for investigation of a question concerning representation seeking to replace SEIU 925 as the exclusive bargaining representative of the scale operators. In January 2004, Teamsters 174 was certified as the exclusive bargaining representative of the scale house operators. *King County*, Decision 8348 (PECB, 2004).[3]

When negotiations resumed in February 2004, Railton raised three issues: hours of operation, video cameras, and global positioning system monitoring. A witness called by Teamsters 174 testified that Theresa Jennings, director of the Solid Waste Division, stated during these negotiations that she did not understand concerns

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[2] Exhibit 17. The e-mail does not include SEIU 925 in the list of addressees.

[3] We take administrative notice of Case 17931-E-03-2894. Neither party to this proceeding mentioned this fact or addressed its impact on the issues before us.

regarding the cameras since they would not be used for employee discipline or surveillance. Two bargaining unit members testified that Railton and Assistant Operations Manager Thea Severn said again at a March 2004 meeting that the cameras would be used for security with regard to customers, and not employee discipline.

In April 2004, the employer began installing cameras at three transfer stations: Cedar Hills, Vashon, and Enumclaw. Teamsters 174 filed a grievance over the matter, which was denied on the basis of timeliness. In June 2004, the employer issued an invitation for bid to install a second set of additional cameras at Cedar Hills, and Teamsters 174 once again filed a grievance claiming the matter had to be bargained before the cameras could be installed. The employer denied the grievance again, on timeliness. Teamsters 174 filed these complaints, as follows:

- On August 9, 2004, Teamsters 174 filed its first complaint, Case 18752-U-04-4765, alleging the employer unilaterally installed a first set of additional surveillance cameras in the spring of 2004 without satisfying its bargaining obligation.

- On October 27, 2004, Teamsters 174 filed its second complaint, Case 19045-U-04-4847, alleging that the cameras installed in the spring of 2004 were now being used for disciplinary matters.

- On January 25, 2005, Teamsters 174 filed its third complaint, Case 19151-U-05-4866, alleging that the employer was going to install a second set of cameras without satisfying its bargaining obligation.

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). 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).

ANALYSIS

Applicable Legal Standards

The basic question that must be answered is whether the employer had an obligation to bargain the decisions, or the effects of its decisions, to install the cameras. An employer considering changes affecting mandatory subjects of bargaining must give notice and an opportunity to bargain to the exclusive bargaining representative of its employees prior to making a decision to implement those changes. *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

A public employer owes its represented employees a duty to bargain personnel matters, including wages, hours, and working conditions. RCW 41.56.030(4). The Commission decides when the duty to bargain exists. WAC 391-45-550. Two principal considerations are: (1) the extent to which managerial action impacts the wages, hours, and

working conditions of employees, and (2) the extent to which managerial decisions are deemed essential managerial prerogatives. *International Association of Fire Fighters, Local 1052 v. PERC (Richland)*, 113 Wn.2d 197, 200 (1989). The Supreme Court held in *Richland*, "[t]he scope of mandatory bargaining is limited to matters of direct concern to employees." The *Richland* Court also stated that "managerial decisions that only remotely affect 'personnel matters,' and decisions that are predominantly 'managerial prerogatives,' are classified as nonmandatory subjects." *Richland,* 113 Wn.2d at 200.

When a subject, such as a technological change, relates to both conditions of employment and managerial prerogatives, the Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. *See Kitsap County*, Decision 8402-A (PECB, 2007). The inquiry focuses on which characteristic predominates. *Richland*, 113 Wn.2d at 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). A union that fails to timely request bargaining over a decision, or the effects of the decision, after receiving adequate advance notice from the employer waives its right to bargain. *City of Edmonds*, Decision 8798-A (PECB, 2005).

Video Cameras

In *Snohomish County*, Decision 9687 (PECB, 2007), an examiner ruled that the installation of cameras to document actions for disciplinary purposes are "investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct" that have been found to be mandatory subjects of

bargaining. *Snohomish County*, Decision 9678, quoting *Colgate-Palmolive Co.*, 323 NLRB 82 (1997).[4] Furthermore, a change in these methods has "serious implications for [the] employees' job security, which in no way touches on the discretionary 'core of entrepreneurial control'." *Snohomish County*, Decision 9678 quoting *Colgate-Palmolive Co.*, 323 NLRB 82. Thus, the bargaining obligation changes depending on how the surveillance camera is to be used by the employer.

Examiner's Analysis - Spring 2004 Cameras

The Examiner found that the employer's interests in safety and security regarding customers outweighed the employees' concerns regarding a change to working conditions.[5] The Examiner also found that the employer committed an unfair labor practice by failing to respond to Teamsters 174's request to bargain the effects of its decision. Teamsters 174 did not appeal this determination.

The Examiner rejected the employer's waiver by inaction defense. The employer claimed Teamsters 174 failed to respond to Railton's October 9, 2003 e-mail, setting a deadline to request bargaining, and therefore the union waived its right to bargain. The Examiner rejected this defense, finding that the two week period given to Teamsters 174 was inadequate to negotiate the effects of the employer's decision.

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[4] This Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the National Labor Relations Act where, as in this case, the language of the two statutes is similar.

[5] In his decision, the Examiner inadvertently states that these cameras were installed in 2003. The cameras at issue were actually installed in 2004, but we find this error harmless to the overall analysis.

Employer's Argument on Appeal

The employer argues that it had no obligation to bargain the installation of additional surveillance cameras. Because cameras were present in the employer's facilities at issue, the placement of additional cameras did not constitute a material, substantial change to the terms and conditions of employment. The employer claims that Teamsters 174 failed to demonstrate how the placement of the cameras impacted employees. Additionally, the employer argues that even if it did have an obligation to bargain the change, Teamsters 174 waived its right to bargain when it failed to respond to Railton's letter.

Application of Standards

We agree with the Examiner's analysis and conclusions that the employer had an obligation to provide Teamsters 174 with notice and an opportunity to bargain only the effects that the decision to install the first additional set of cameras had on terms and conditions of employment.[6] This record demonstrates that although the employer previously installed surveillance cameras in 1994, the use of those cameras was limited to showing customers' vehicles entering or leaving the employer's facilities, and that the first set of additional cameras were initially to be used in a similar manner. It is clear from the testimony that the employer never gave Teamsters 174 notice that the 1994 cameras were used to discipline bargaining unit employees.

For example, Jennings testified that the existing cameras were used to verify customer transactions. The testimony also demonstrates that Railton originally stated to Teamsters 174 during bargaining that the new cameras would not be used for discipline.

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[6] Those cameras were installed at the Cedar Hills landfill, and the Enumclaw and Vashon transfer station facilities.

We accept that the employer's initial use of cameras for security purposes did not rise to a level which necessitated bargaining about the decision to install the cameras. Thus, this record supports the Examiner's conclusion that while the employer had legitimate safety and security concerns, relieving it of its obligation to bargain the original decision to install the cameras, the new purpose for the cameras, employee discipline, impacted terms and conditions of employment.

Waiver by Inaction

Although the Examiner correctly found that the employer had an obligation to inform the union of its decision and provide an opportunity to request bargaining, the employer nevertheless argues that the Examiner erred by not finding that Teamsters 174 waived its bargaining rights by inaction. Specifically, the employer claims that Railton's October 9, 2003 e-mail was a clear solicitation for bargaining over the issue, and Teamsters 174 failed to timely respond to the deadline set forth in that e-mail.

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).

Here, the Examiner found that the failure of Teamsters 174 to respond to Railton's October 9, 2003 letter did not operate as a waiver. We disagree. Teamsters 174 waived its right to bargain the effects of the decision to install the video cameras with respect to the truck drivers and transfer station operators it represented at the time, but not the scale house operators, whom it did not represent until 2004.

The Examiner found that the "two-week period given the union to negotiate the effects of the video cameras [was] inadequate to meet the employer duty to bargaining in good faith." We disagree with the Examiner that the employer only provided a two-week period to bargain the effect of the cameras. Railton's e-mail states:

> If [the unions] believe there are bargainable issues that you'd like to address with the [employer], please contact me by [close of business] October 27, 2003. If I do not hear from you by 5pm on the 27th, I will conclude that [the unions] do not have an issue to bargain or that you are waiving your bargaining rights, if such right exists.

Thus, Railton's e-mail is only soliciting timely demands for bargaining, not requiring that bargaining be completed by the specified date.

Furthermore, based upon the specific facts of this case, we find that the employer's tactic of setting a deadline for the union to request bargaining was not in violation of its obligation to bargain in good faith. At the time that Railton sent his e-mail,

bargaining between the parties had been on hiatus for several months, and the parties were not actively meeting. Thus, the only method for the employer to make a change to an existing practice was to inform the union of its intent, and provide an opportunity for bargaining. The employer did so in this case, and there is conflicting evidence on this record as to whether Teamsters 174 provided a timely response.[7]

Because we have conflicting statements and no guidance from the Examiner on credibility, we must conclude that Teamsters 174 failed to carry its burden of proving that it made a timely demand for bargaining. Thus, this record supports the employer's contention that Teamsters 174 waived its bargaining rights, but this finding must be limited to only those employees it actually represented at the time of the pertinent events, which were the truck drivers and transfer station operators.

However, with respect to the scale house operators, based upon the fact that the union began representing these employees in January 2004, a different result must be reached. When Teamsters 174 met with the employer in February 2004, it was bargaining on behalf of these employees for the first time, and it reiterated its demand to bargain the issue of the security cameras.[8] The employer rejected Teamsters 174's demand, asserting that it had already waived its right to bargain by its failure to respond to Railton's letter. However, that response ignores the fact that as a new bargaining

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[7] Two witnesses for the employer denied that Raffle, a former bargaining representative for Teamsters 174, requested bargaining. Raffle signed an affidavit before his death saying he had done so.

[8] In fact, the union raised three issues at that time, hours of operation, video cameras, and global positioning system monitoring.

representative for the scale house operators, Teamsters 174 was permitted to request bargaining on all mandatory subjects, including how the cameras impacted the terms and conditions of employment.

Examiner's Analysis - Change in the Use of the Original Cameras and Installation of a Second Set of Additional Cameras

The Examiner found that, with respect to a second set of additional cameras, the focus was on the employees, as opposed to customers, and the cameras would now be used for discipline. Thus, according to the Examiner's analysis, these cameras directly impacted the terms and conditions of employment, and the employer was required to bargain both the decision and the effects of its decision to change to the use of those cameras. Additionally, the Examiner found that the employer failed to bargain its intent to utilize all of the installed cameras, including the cameras installed in spring 2004, for employee discipline.[9]

The employer claims that the Examiner erred by not finding that Teamsters 174 already waived its right to bargain both the decision and the effects of its decision to install these cameras when it failed to respond to Railton's October 9, 2003, solicitation for bargaining. We disagree.

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[9] In the body of his decision, the Examiner does not clearly state that the employer had an obligation to bargain both the decision and the effects of the decision to use the existing 1994 cameras and the cameras installed in spring 2004 for disciplinary purposes. However, in Conclusion of Law 3, the Examiner finds that the employer failed to bargain the decision to use the cameras for disciplinary purposes, and as part of the remedy ordered the employer to cease and desist from using any existing cameras for disciplinary purposes.

As a threshold matter, we reject the employer's argument that Teamsters 174's October 2003 waiver of its bargaining rights regarding surveillance cameras meant that Teamsters 174 had waived its bargaining rights forever. Where an employer wants to make a significant change to an existing term or condition of employment, an employer has an obligation to announce that change, and the union has the right to request bargaining. In *City of Seattle*, Decision 1667-A (PECB, 1984), a union declined to request bargaining each time the city made a change to standby duty schedule, thus waiving its right to bargain each individual change. However, when the employer made a second significant change to the policy, the union requested bargaining. The Commission rejected the employer's waiver by inaction defense, and found the most recent change to be bargainable.

In the case before us, we agree with the Examiner that when the employer decided to use the cameras for employee discipline, that change was substantially different from the previously announced use of the cameras. Teamsters 174 presented testimony that during the initial communications regarding the cameras, the employer consistently communicated to the union that the cameras would not be used for employee discipline. Bob Cooper, a bargaining unit member, testified that Jennings stated at a labor/management meeting in February 2004 that she could not understand the Teamsters 174's concerns about the cameras since they would not be used for discipline. Sue Morrison, another bargaining unit member who was present at that meeting, provided corroborating testimony regarding Jennings' statement. Because this change impacts the terms and conditions of employment, the employer was obligated to provide notice of its intent to use those cameras for employee discipline and, upon request, bargain with the union both the decision to use those cameras for discipline as well as the effects of that decision.

Finally, we also agree with the Examiner that if the employer intends on installing any new cameras in the future that could impact terms and conditions of employment, the employer has an obligation to timely notify Teamsters 174 of its intent to install any additional cameras and, upon request, bargain in good faith that decision and the effects of that decision.

Conclusion and Remedy

In sum, with respect to the cameras installed in the spring of 2004, we reverse the Examiner's decision that the employer was required to bargain the effects of that decision with respect to the transfer station operators and truck drivers. The record demonstrates that the union waived its right for effects bargaining for those employees. However, we affirm the Examiner's decision that the employer is still required to bargain the effects that those cameras had on the terms and conditions of employment for the scale house operators.

With respect to the employer's decision to use the existing cameras for employee discipline, we affirm the Examiner's findings and conclusion that the employer is obligated to notify Teamsters 174 of its intent to use those cameras for employee discipline and, upon request, to bargain the decision itself as well as the effects that the decision has on mandatory subjects.

Finally, we find that the Examiner did not exceed his remedial authority when he ordered the employer to cease and desist from using the cameras for disciplinary purposes until the employer negotiates with the union. The longstanding remedy in cases where a party unilaterally changes a term or condition of employment without first satisfying its bargaining obligation is to restore the status quo ante, and direct the offending party to bargain in

good faith with the employees' exclusive bargaining representative before making such change. *Federal Way School District*, Decision 232-A (EDUC, 1977). That is exactly what the Examiner ordered in this case. The Examiner's remedial order stands as issued.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. King County is a "public employer" within the meaning of RCW 41.56.030(1).

2. Teamsters Union Local 174 is an exclusive bargaining representative within the meaning of RCW 41.56.030(3).

3. Teamsters 174 represented the truck driver and transfer station operator classifications.

4. King County operates a solid waste collection and disposal system. The system includes the Cedar Hills landfill and the Enumclaw and Vashon transfer stations.

5. In 1994, the employer installed fixed-position video cameras at eight of the transfer stations. More cameras were installed in 2003. All the cameras were positioned for safety and security reasons. The cameras were aimed to view particular areas, but not with an end of watching any particular behavior of the employees.

6. During contract negotiations in May 2003, the employer and the union discussed, but never reached agreement, about the use of

video cameras capturing and recording misconduct by employees at the work site or the installation of new cameras.

7. On October 9, 2003, the employer sent an e-mail to bargaining representative leaders, including Teamsters 174, stating that the employer was "looking to install" additional video cameras in the first quarter of 2004 at sites at Cedar Hills, Enumclaw, and Vashon. The employer gave the union until October 27 to request bargaining on the new cameras or the effects of the installations.

8. Prior to January 2004, Service Employees International Union, Local 925 represented the scale house operator classification. The collective bargaining agreement between King County and Service Employees International Union, Local 925, covering the scale house operators expired December 31, 2003.

9. On January 8, 2004, the Public Employment Relations Commission certified Teamsters 174 as the exclusive bargaining representative of the scale house operators.

10. On February 11, 2004, Teamsters 174 reiterated its demand to bargain installation of any additional video cameras. No bargaining occurred.

11. New video cameras were installed at the Cedar Hills, Enumclaw, and Vashon facilities on or after April 1, 2004.

12. On July 26, 2004, union Business Representative Dave Allison wrote a formal demand to bargain about the installation of a second set of additional cameras at the Cedar Hills, Enumclaw, and Vashon facilities.

13. On July 30, 2004, the employer responded that the union had waived its bargaining rights in October 2003. The employer declined to discuss the issues further.

14. In October 2004, the employer informed Teamsters 174 that the video cameras would be used for employee discipline.

15. Union attorney Dmitri Iglitzin requested specific information from the employer about the cameras and the bid documents on November 19, 2004. On December 9 and again on December 13, 2004, the union asked for certain documents related to the bid and cameras.

16. Between November 19, 2004, and January 2005, the employer supplied the union with all the information it requested.

AMENDED 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. By its decision to install video cameras at certain refuse transfer stations and landfills in spring 2004 to improve safety for members of the public and security for its own operations, the employer did not violate RCW 41.56.140(4). Teamsters 174 waived its right to bargain the effects that the decision to install cameras had on the terms and conditions of employment for the truck driver and transfer station operator classifications.

3. By its decision to install video cameras at certain refuse transfer stations and landfills in spring 2004 to improve

safety for members of the public and security for its own operations, the employer violated RCW 41.56.140(4) by refusing to bargain with Teamsters 174 regarding the effects that the decision to install cameras had on the terms and conditions of employment for the scale house operator classifications.

4. By its decision to use video from the cameras as evidence in employee discipline matters, the employer violated RCW 41.56.140(4) and (1) by refusing to bargain with Teamsters 174 regarding both that decision and the effects that the decision had on the terms and conditions of employment.

5. The employer supplied the union with the information that Teamsters 174 requested regarding the post-April 2004 installation of video cameras.

ORDER

The Order issued by Examiner J. Martin Smith is AFFIRMED and ADOPTED as the Order of the Commission.

Issued at Olympia, Washington, the 10th day of September, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner