Kitsap Transit, Decision 10627 (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384, Complainant, vs. KITSAP TRANSIT, Respondent.	CASE 22132-U-08-5640 DECISION 10627 - PECB CASE 22133-U-08-5641 DECISION 10628 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Amalgamated Transit Union, Local 1384, by *Rita C. DiIenno,* President/Business Agent, for the union.

Summit Law Group, PLLC, by *Shannon E. Phillips,* Attorney at Law, for the employer.

On November 24, 2008, the Amalgamated Transit Union, Local 1384 (union) filed two unfair labor practice complaints with the Public Employment Relations Commission. On December 3, 2008, Unfair Labor Practice Manager David Gedrose issued deficiency notices for both complaints. The union filed amended complaints in each case on December 24, 2008.[1] Preliminary rulings were issued on January 12, 2009, finding a cause of action in the first complaint for interference and refusal to bargain in violation of RCW 41.56.140(1) and (4), by the employer's unilateral extension of the time frame for removal of discipline from an

[1] The complainant asserts that each complaint applies to two bargaining units (ACCESS and routed.) The Examiner takes notice of the Executive Director's and Commission's decisions in *Kitsap Transit*, Decisions 10234-35 (PECB, 2008) and 10234-35-A (PECB, 2009). In those matters, no dispute was found as to the propriety of the bargaining unit of ACCESS drivers, but the routed driver unit was found inappropriate to the extent it included worker/drivers. No issues were raised here with respect to any impact of those decisions on these complaints.

employee's personnel file. A cause of action for interference and refusal to bargain in violation of RCW 41.56.140(1) and (4) was found in the second complaint regarding the employer's unilateral change concerning the practice for selection of a grievance arbitrator. Examiner Claire Nickleberry held a hearing on these matters on July 8 and 17, 2009, at Bremerton, Washington. The parties filed closing briefs to complete the record in these cases. In its closing brief the employer argued that the complaints were both untimely filed.

The Examiner rules that the union's charges were untimely filed, and therefore it is unnecessary to rule on the merits of the issues presented. The complaints are dismissed.

ISSUES PRESENTED

1. Did the employer extend the time frame for discipline to remain in an employee's personnel file without bargaining with the union?

2. Did the employer unilaterally change the practice for selection of a grievance arbitrator?

3. Did the union waive its right to prosecute these charges by untimely filing the charges?

Whether the complaints were timely filed is a threshold question to consideration of the other issues in this matter. The Examiner therefore considers the timeliness issue first.

APPLICABLE LEGAL STANDARD

The Public Employees' Collective Bargaining Act, RCW 41.56, defines unfair labor practices and sets forth filing timelines. RCW 41.56.160(1) states:

> The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders; PROVIDED, That 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. . . .

In ruling under this statute, the Commission has consistently held that the statute of limitations begins to toll when the complainant knew or should have known of the violation. *City of Bremerton,* Decision 7739-A (PECB, 2003). The clock begins to run when the adverse employment decision is made and communicated to the complainant. *City of Bellevue,* Decision 9343-A (PECB, 2007) citing *Emergency Dispatch Center,* Decision 3255-B (PECB, 1990). The burden of proof to establish when the union learned of the issue giving rise to the unfair labor practice lies with the union, not the employer. *City of Pasco,* Decision 4197-B (PECB, 1999)

Issue 3 - Did the union waive its right to prosecute these charges by untimely filing the charges?

The first complaint, Issue 1, was initially filed by the union on November 24, 2008. On January 17, 2008, Operations Supervisor Dominick Loiacano provided a "Written Reminder" to employee Ron Williams, with a copy to the union, which stated that the period of time discipline would remain in Williams' personnel file had been extended[2] 128 days due to Williams' unpaid leave of absence. Evidence presented at the hearing showed that on February 7, 2008, Operations Manager Kathryn Cregier sent a memo to Rita DiIenno, the union's President/Business Agent, which discussed the "validity of extending" the time frame in which discipline would remain in an employee's personnel file when the employee had incurred an unpaid leave of absence. In that memo, Cregier referred to two other incidences in 1998 and 2003 when the practice was "put into action." She went on to state: "I find that we have followed our procedure where applicable; the practice in this incidence was correctly handled, and there is no need to change the letter in Ron's file." The union responded with a grievance dated February 15, 2008. It asserted, "The union did not negotiate the "exception" contained in the PPCS[3] used presumably twice in the past two years. The language in the contract is clear & unambiguous." This exchange clearly indicates that the union knew about the action taken by the employer by at least February 7, 2008, and yet did not file the unfair labor practice until November 24, 2008, which is well beyond the six month statute of limitations imposed in RCW 41.56.160 (1).

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2 The normal time for a written reminder to remain in the file is a year from the event.

3 The PPCS refers to the Positive Performance Counseling System which is a manual intended to provide guidance and procedures to supervisors in handling employee issues.

The union claims it "did not consider this a notice of management's intention to change a mandatory subject of bargaining, but rather an error in adhering to the contract." The union makes the argument that it really did not know about the employer's intent to make a change to a mandatory subject of bargaining until, during the grievance mediation process, the employer provided a supervisors' manual with language to support its position.

The legal standard regarding timely filing of unfair labor practices is "knew or should have known." The filing and/or processing of a grievance does not extend the six month statute of limitations. *King County Fire District 16,* Decision 9659-A (PECB, 2007) The union clearly knew of the employer's action and its reasons when it received Cregier's February 7, 2008 memo, and arguably even earlier when it received a copy of the January 17, 2008 discipline letter issued to Williams. The processing of the grievance and the ongoing collective bargaining proposals being exchanged during this period of time have nothing to do with the fact that the union was aware of the employer's action more than nine months prior to its filing of this unfair labor practice complaint.

The second complaint, Issue 2, was also initially filed on November 24, 2008. This issue also involves the Williams grievance. While the grievance was being processed, Williams (who had been charged with a preventable accident) filed an appeal, the charge was overturned, and all discipline was removed from his personnel file. Jeff Cartwright, Human Resources Director, notified the union of the appeal decision on February 20, 2008. DiIenno responded the same day, indicating that the union thought the grievance process should proceed regarding the time extension issue. In an e-mail dated March 6, 2008, Cartwright indicated to the union that there could no longer be a grievance since the issue being grieved no longer existed. He stated that the employer considered the matter closed. The union disagreed, and claimed that the grievance should proceed because there had been no resolution of the question of extending the time that discipline remained in the personnel file. On March 28, 2008, the union requested grievance mediation. The dialogue continued throughout April 2008. It is clear that the union knew of the employer's position regarding this grievance as early as March 6, 2008, over eight months prior to the charges being filed.

The six month statute of limitations has been strictly enforced, even when settlement discussions are occurring. As noted in *Community College District 17 (Spokane),* Decision 9795 (PSRA, 2007):

> While the union's efforts to resolve these issues with the employer are commendable, the fact of making those settlement efforts does not absolve the union of compliance with the statute of limitations. To the contrary, a party faced with delays or avoidance by the opposite party to a dispute may well need to file a timely unfair labor practice complaint to protect its rights, even if settlement negotiations are ongoing. *City of Spokane,* Decision 4937 (PECB, 1994) See also *Spokane County,* Decision 2167-A (PECB, 1985).

On May 5, 2008, Richard Hays, Kitsap Transit Executive Director, sent a letter to DiIenno which stated in part:

> Thus, even as to this practice, there remains no matter in controversy to submit to arbitration. Arbitration is not available whenever the Union desires to take an issue involving an employer practice to an arbitrator when there is no active application of that practice currently in dispute. Given the closure of the Williams matter, Kitsap Transit respectfully declines your desire to move this matter to arbitration.

This letter clearly serves the union notice and states the employer's position to decline to participate in arbitration. Even though other exchanges took place regarding this issue prior to this letter, the letter clarifies and leaves no doubt as to the employer's intent. This notice was provided to the union more than six months prior to the filing of the complaint.

CONCLUSION

The charges filed in both of these issues were untimely and violate the six month statute of limitations in RCW 41.56.160. The complaints are dismissed on that basis.

FINDINGS OF FACT

1. Kitsap Transit is a "public employer" within the meaning of RCW 41.56.030 (1).

2. Amalgamated Transit Union, Local 1384 is a "bargaining representative" within the meaning of RCW 41.56.030 (3).

3. On January 17, 2008, Operations Supervisor Dominick Loiacano sent a written reminder to Williams and the union that indicated the time written discipline would remain in Williams' personnel file had been extended 128 days due to Williams' unpaid leave of absence.

4. On February 7, 2008, Operations Manager Kathryn Cregier sent an e-mail to Rita DiIenno, business agent for the union, responding to DiIenno's question regarding the validity of extending the time line of Williams' discipline.

5. On February 15, 2008, DiIenno filed a grievance on Williams' behalf regarding the time extension issue.

6. On February 20, 2008, Jeff Cartwright, Human Resource Director, notified the union that Williams' appeal was successful and that discipline would be removed from his personnel file.

7. On March 5, 2008, DiIenno forwarded the grievance to Richard Hayes, Executive Director, for further processing.

8. On March 6, 2008, Cartwright responded to the union that the employer considered the matter closed.

9. On May 5, 2008, Hayes replied to DiIenno that the employer declined to participate in arbitration because there was currently no dispute before the parties.

10. On November 24, 2008, the union filed an unfair labor practice complaint on the time extension issue. The union was aware of the employer's action on that issue by at least February 7, 2008, more than nine months prior to its filing the unfair labor practice.

11. On November 24, 2008, the union filed an unfair labor practice complaint on the grievance arbitration issue. The union knew of the employer's position on this issue by at least March 6, 2008, over eight months prior to its filing the unfair labor practice.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391.45 WAC.

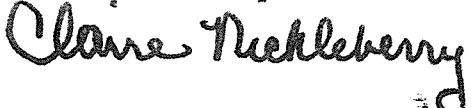
2. The complaints in this case were not timely filed under RCW 41.56.160.

ORDER

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

ISSUED at Olympia, Washington, this 18th day of December, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CLAIRE NICKLEBERRY, 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.