STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 587, Complainant, vs. KING COUNTY, Respondent.	CASE 23106-U-10-5882 DECISION 10940 - PECB FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER

The Rosen Law Firm by *Jon Howard Rosen,* Attorney at Law, for the union.

Daniel T. Satterberg, King County Prosecuting Attorney, by *Susan N. Slonecker*, Senior Deputy Prosecuting Attorney, for the employer.

The Amalgamated Transit Union, Local 587 (union), filed a complaint charging unfair labor practices against King County (employer) on March 12, 2010. The complaint was found to have a cause of action for interference with employee rights in violation of RCW 41.56.140(1) and refusal to bargain in violation of RCW 41.56.140(4) by its unilateral change in the policy concerning personal electronic devices without providing an opportunity to bargain.

Examiner Emily Martin held a hearing on July 7, 2010, in Seattle, Washington. The parties filed post-hearing briefs by September 14, 2010.

ISSUES

1. Is the compliant timely as to the unilateral change allegation?

2. Did the employer refuse to bargain the policy concerning personal electronic devices?

I find that the employer's announcement of a new personal electronic device policy occurred more than six months prior to the union filing its complaint of unfair labor practices. The allegation is untimely for events that occurred more than six months before the complaint was filed. Those untimely portions of the allegation are dismissed. However, as the parties continued to meet about the policy within the six month period of the filing of the complaint; the bargaining behavior within the statute of limitations is separately assessed.

After examining the evidence concerning the parties' actions during bargaining, I find that the employer did not refuse to bargain. The employer met with the union and it made some changes to the policy after learning of the union's concerns. After that meeting, the union gave no indication that it wanted further negotiations about the policy and it did not invoke mediation.

ISSUE 1 - Timeliness of the Complaint

Legal standard

In order to be considered timely, a party must file its complaint within six months of the act happening or the party receiving knowledge of the action. RCW 41.56.160(1).

Analysis

On August 19, 2009, the employer notified all of its managers of a new cell phone use policy, which was to be effective immediately. The new policy was referred to as the personal electronic device policy and it defined a PED as any device having an on/off switch. It listed, as examples, cell phones, Bluetooth earpieces, pagers, mp3 players, and video game players. The policy also required that PEDs be:

- Turned off.
- Stowed out of sight.
- Stowed off "your person" when signing in for work.
- Be used only when the coach is safely parked.

The policy detailed that failure to properly stow a PED would result in a suspension on the first occurrence and termination on the second occurrence. It concluded, "This is a zero tolerance policy!"

The employer notified Union President Paul Bachtel of the new PED policy the same day it notified its managers. On August 26, 2009, the union made a demand to bargain of the employer about the new policy.

The union filed this unfair labor practice complaint on March 12, 2010. Given the six month statute of limitation, the only employer's actions that can be reviewed are those that happened on or after September 12, 2009. The allegations concerning the unilateral change which occurred before September 12, 2009 are therefore dismissed because they are in violation of the statute of limitation, RCW 41.56.160(1).

Duty to Bargain – Employer Obligations – Union Obligations

ISSUE 2 - Did the employer refuse to bargain the policy concerning personal electronic devices?

Legal standard

If an employer desires to make a mid-contract change in either wages, hours or working conditions, it must give notice to the union giving sufficient time for the union to engage in meaningful bargaining. "Notice must be given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties." *Lake Washington Technical College*, Decision 4721-A (PECB, 1995). Once the union has timely notice, it must then make a demand to bargain of the employer about the mandatory subject. "The Commission does not find waivers by inaction easily, and only where the union fails to request bargaining for the employer to consider." *Lake Washington Technical College*, cited in *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998).

The collective bargaining provisions of Chapter 41.56 which provide for mediation and interest arbitration for uniform personnel apply to transit employees. RCW 41.56.492. The purpose of

the mediation and interest arbitration provisions is to avoid strike of certain employees because the services that they provide are vital to the public welfare and safety. RCW 41.56.430. Under RCW 41.56.492(1), "If no agreement has been reached ninety days after commencement of negotiations, either party may demand that the issues in disagreement be submitted to a mediator. . . ." Since these bargaining personnel qualify for interest arbitration, if the parties do not reach agreement in mediation, the union can tell the employer that it is going to assert its right to advance the issue to interest arbitration. "If an agreement has not been reached following a reasonable period of negotiations and mediation, and the mediator finds that the parties remain at impasse, either party may demand that the issues in disagreement be submitted to an arbitration panel for a binding and final determination. ..." RCW 41.56.492(2).

In *City of Seattle*, Decision 1667-A (PECB, 1983), the Commission ruled that the continuing duty to bargain implies that the process of negotiation and mediation in interest arbitration settings may result in mid-term interest arbitration. The Commission reasoned that there must be a liberal interpretation of the use of interest arbitration since the Washington legislature provided interest arbitration as an alternative to the right to strike. And so, if union representing a bargaining unit of interest eligible employees believes that an impasse has been reached, the union has the option of seeking mediation and ultimately interest arbitration.

Analysis

September 10, 2010 Meeting -

After the employer gave the union notice of the new PED policy on August 19, 2009, and the union made a demand to bargain on August 26, 2009, the parties scheduled a bargaining session on September 10, 2010. At that meeting, the union told the employer that it was sympathetic to the employer's concerns regarding distracted driving, but it felt that the policy was overly broad. It pointed out that the policy affected devices that drivers had had on the dashboard for years. For example, a flashlight is an electronic device with an on/off switch. Another example is a radio that a transit driver might place on the dashboard of a Metro vehicle.

The union characterized the changes as too harsh and a major departure from the existing policy. Under the new policy, a failure to properly stow a PED would result in a suspension on the first

occurrence and termination on the second occurrence. In comparison, the existing policies had considered the use of a personal audio device, such as a radio, a minor infraction, and a more gradual progressive discipline process had been used. The employer's previous procedures document, entitled the Transit Operating Procedures, had classified listening to personal audio or visual device while operating Metro vehicle as failure to follow directive, a minor infraction. The parties' collective bargaining agreement listed minor infractions such as "willful failure to follow other procedures or directives," and "traffic code violations" and progressive discipline for minor infractions ranged from an oral reminder for the first minor infraction to discharge for the fifth minor infraction.

September 17, 2009 Meeting -

The parties met again on September 17, 2009. The employer produced a revised PED policy that addressed certain concerns that the union had raised at their earlier meeting. The revised policy lowered the level of discipline for using a PED while at work, from a major infraction for the first violation to a serious infraction in most cases and allowed employees to have an electronic device on their person as long as it was turned off.

The parties discussed whether the revisions were sufficient. Employer witnesses testified that they believed that the union was satisfied with the revisions. They also thought that the union indicated that the bargaining process had worked and that the revised policy was acceptable. Bachtel told the bargaining table that, in his opinion, the policy was reasonable, but that the union would have to decide whether "it was worthy of pursuit." Bachtel believed that the employer had "gone as far as it would go." Bachtel told the employer that he reserved the right to file a grievance or an unfair labor practice if a bargaining unit member was disciplined under the new policy.

Parties' Conduct after September 17th -

The employer issued a new, revised PED policy on September 23, 2010. The revised policy concluded: "Violations of this policy will be investigated and may result in discipline up to, and including, discharge. In most situations, a first violation will be considered a serious infraction." No one from the union contacted the employer for further negotiations. The union did not

request mediation from the Commission, nor did it propose that the issue be certified for interest arbitration.

The Employer Met its Bargaining Obligation

Bachtel testified that he believed that Transit Operations Manager James O'Rourke was not willing to bargain any further after September 17, 2009. It was Bachtel's belief that the employer had gone as far as it "could go." As stated above, at this juncture, Bachtel believed and stated that the union could either live with the change in policy or that it would file an unfair labor practice or a grievance. Bachtel testified that he did not request further bargaining after September 17, 2009. Bachtel's comment is similar to the comment analyzed in *Lake Washington Technical College* Decision 4721-A (PECB, 1995). In that case, a union official stated that if the employer made the changes to the policy "they were out of compliance with the contract therefore I would have to take action." That statement was found not to be sufficient to indicate that the union wished to continue to bargain. Likewise, Batchel's statement about filing a grievance or an unfair labor practice is insufficient to indicate that more bargaining was desired. In fact, it seems to indicate that the bargaining is done and that if there are further problems a different process will be utilized.

David Levin, labor negotiator for the employer, testified how the meeting of the 17th ended from his point of view: "Because I know that as we left the bargaining session on the 17th, there was an understanding that our bargaining process had been completed, and that this was the policy that was going to go out the door." Levin described "it was a very warm feeling at the end of that bargaining session that we had just accomplished something together." The union did not act to further negotiations after the September 17, 2009 meeting.

The union did not give the employer notice that it desired to bargain after the September 17, 2009 session. Instead, the parties both behaved as if bargaining had been completed. Therefore, the employer did not commit an unfair labor violation when they assumed that the bargaining over the new PED procedure was completed and moved forward with that understanding.

FINDINGS OF FACT

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

2. The Amalgamated Transit Union, Local 587, represents a bargaining unit of transit employees employed by King County, and is a "bargaining representative" within the meaning of RCW 41.56.030 (3).

3. The unit is eligible for interest arbitration under RCW 41.56.492.

4. On August 19, 2009, the employer notified all of its managers and the union of a policy regarding the use of the personal electronic devices by bargaining unit employees who operated Metro vehicles. This policy changed the way that employees would be disciplined if they used devices such as cell phone or radios while driving a vehicle.

5. The union demanded bargaining about the new policy. The first negotiation session was held on September 10, 2009

6. After the first negotiation session, the employer modified the new policy to take into account some of the concerns that the union expressed.

7. The parties meet for a second bargaining session on September 17, 2009. After this meeting the union did not request further negotiations or mediation or attempt to move the issue to interest arbitration.

8. While the union had placed the employer on notice that it might file a grievance or unfair labor practice regarding the PED policy, it did not request further bargaining on the issue.

CONCLUSIONS OF LAW

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

2. The allegations concerning the unilateral implementation of the PED policy were not timely filed, pursuant to RCW 41.56.160(1), and therefore are dismissed.

3. By its actions as described in the above Findings of Fact, the employer did not refuse to bargain in good faith the changes in its PED policy and did not violate RCW 41.56.140(4).

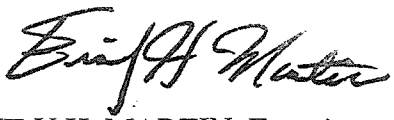
4. By its actions as described in the above Findings of Fact, the employer did not interfere with employee rights in violation of RCW 41.56.140(1) when it implemented and bargained a new policy on employee use of PEDs.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 16th day of December, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



EMILY H. MARTIN, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 12/16/2010

The attached document identified as: DECISION 10940 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23106-U-10-05882	FILED:	03/12/2010	FILED BY:	PARTY 2
DISPUTE:	ER UNILATERAL				
BAR UNIT:	TRANSIT BUS				
DETAILS:	PED Policy				
COMMENTS:					

EMPLOYER: KING COUNTY
ATTN: JAMES JOHNSON
500 4TH AVE STE 450
SEATTLE, WA 98104-2372
Ph1: 206-205-5321 Ph2: 206-296-8556

REP BY: SUSAN N SLONECKER
KING COUNTY
KING CO ADMIN BLDG
500 4TH AVE STE 900
SEATTLE, WA 98104
Ph1: 206-296-8820

PARTY 2: ATU LOCAL 587
ATTN: PAUL BACHTEL
2815 2ND AVE STE 230
SEATTLE, WA 98121-1261
Ph1: 206-448-8588 Ph2: 800-847-4696

REP BY: JON ROSEN
THE ROSEN LAW FIRM
705 2ND AVE STE 1200
SEATTLE, WA 98104
Ph1: 206-652-1464 Ph2: 206-682-6711