Lake Washington School District, Decision 11913 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 46, Complainant, vs. LAKE WASHINGTON SCHOOL DISTRICT, Respondent.	CASE 25345-U-12-6485 DECISION 11913 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On December 14, 2012, the International Brotherhood of Electrical Workers, Local 46 (union) filed an unfair labor practice complaint against the Lake Washington School District (employer).

The union represents a bargaining unit of approximately eight employees for the purposes of collective bargaining, including the Electronics Technician/Audio Visual positions of interest in this case. The union is a member of the Lake Washington School District Trades Bargaining Council (Council). The employer is a school district serving approximately 25,000 students. The employer and the Council are parties to a collective bargaining agreement (CBA), effective August 16, 2012, through August 15, 2015. Neither party disputed the application of the prior CBA, effective August 16, 2008, through August 15, 2011, to the issues raised in the present complaint. *See* RCW 41.56.123.

The union's complaint alleged the employer refused to bargain in violation of RCW 41.56.140(4) when it provided a June 6, 2012 notice to the union that all Electronics Technician/Audio Visual positions within its bargaining unit would be eliminated effective June

29, 2012, and subsequently posted a job posting on June 20, 2012,[1] for a position of Technical Solutions Analyst. The union asserts that as the Technical Solutions Analyst position is outside of its bargaining unit and is performing work historically performed by the Electronics Technician/Audio Visual position, the employer is "skimming" bargaining unit work.

The employer asserts that the complaint is untimely under RCW 41.56.160(1), that the employer did not unlawfully skim bargaining unit work, and that the union's use of this agency's unfair labor practice process is improper because the dispute is of a contractual nature to be resolved through the grievance procedure of the parties' CBA.

On December 19, 2012, the Unfair Labor Practice Manager issued a Preliminary Ruling and Deferral Inquiry, and provided the employer 21 days to file an answer. On January 9, 2013, the employer filed an answer to the complaint, which included the following: "The District does not request a deferral to arbitration."

A hearing was conducted on June 11, 2013, before Examiner Page A. Garcia. The parties timely filed post-hearing briefs.

ISSUES PRESENTED

1. Was the union's complaint timely filed within the statute of limitations provided under Chapter 41.56 RCW?

2. Did the employer skim bargaining unit work previously performed by the Electronics Technician/Audio Visual positions, without providing an opportunity for bargaining?

3. Does the union's complaint fail by its usage of the Commission's unfair labor practice procedures rather than resolution through the parties' collective bargaining agreement?

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[1] The record reflects that the District's Human Resources office sent the Technical Solutions Analyst job posting to the Office Manager at each District school and posted the job posting on SearchSoft on June 19, 2012. The position description indicates the posting opened June 19, 2012, and closed July 6, 2012.

The Examiner finds that the union's complaint was untimely under RCW 41.56.160(1). As the complaint is untimely, a discussion of the merits of the skimming allegation is unnecessary.[2] As for the forum of this dispute, the employer had the opportunity to request a deferral to arbitration in its answer and chose not to make such a request.

APPLICABLE LEGAL STANDARD

Timeliness of Complaint

"[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 six-month statute of limitations begins to run when the complainant knows or should know of the violation. 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). The timeliness of a complaint is intricately bound to the violation itself under RCW 41.56.160. *King County*, Decision 6772-A (PECB, 1999).

To date, the Commission has adopted the National Labor Relations Act (NLRA) Section 10(b) timeliness standards found in *U.S. Postal Service Marina Center,* 271 NLRB 397 (1984) where the focus is the date of unequivocal notice of an allegedly unlawful act, rather than on the date the act's consequences became effective. *City of Bellingham,* Decision 10907-A (PECB, 2012). Subsequent National Labor Relations Board (NLRB) decisions adopted by this Commission limited the strict threshold to "clear and unequivocal" notice and placed the burden of showing such notice on the party asserting such an affirmative defense. *See City of Bellingham,* Decision 10907-A. Unequivocal notice of a decision, also termed the "triggering event," requires that a party communicate enough information about the decision or action to allow for a clear understanding. *City of Bellingham,* Decision 10907-A, *citing Community College District 17 (Spokane),* Decision 9795-A (PSRA, 2008). The only exception to the strict enforcement of the six-month statute of limitations is when the complainant had no actual or constructive notice of the acts or events which are the basis of the charges. *City of Bellingham,* Decision 10907-A,

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[2] See *City of Bellevue,* Decision 9343-A (PECB, 2007). The Commission determined that as the complaint was untimely, it was unnecessary for the examiner to consider the merits of the remaining issues.

citing City of Pasco, Decision 4197-A (PECB, 1994). The time when a complainant has actual 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).

Analysis

On June 6, 2012, the employer provided a letter to the union's business representative, Shannon Hagen, advising that effective June 29, 2012, the employer intended to eliminate the current Electronics Technician/Audio Visual classification. The letter detailed technological advances as the main reason why the operational needs of the employer no longer justified its maintenance of the classification. Of particular import to this decision are the following sentences in the June 6 letter:

> Accordingly, the District has determined that the basic hardware repair tasks presently performed by the employees in this [Electronics Technician/Audio Visual] classification can readily be covered by existing Technology Department personnel incidental to their software diagnostics work. The District does not intend to subcontract out work that is presently performed by the Electronics Technician/Audio Visual classification.

At the time of the June 6, 2012 letter, the "existing Technology Department personnel" referenced in the notice were the Technical Support Specialists, and Technical Analysts I and II. The former positions are part of a bargaining unit represented by the Service Employees International Union (SEIU); the latter positions, while not clearly indicated by the record whether they were part of another bargaining unit, were not part of the union's bargaining unit.

During the 2010-2011 school year the employer reorganized the Technology Department and created interim Technical Analysts I and II positions. These positions were considered the second tier above the Technical Support Specialists (SEIU). Two Technical Support Specialists became Technical Analysts I and II between 2010 and 2011. With a second reorganization during the 2011-2012 school year, the employer selected a Technical Analyst I and a Technical Analyst II to begin doing the work of two Technical Solutions Analyst positions.

On June 19, 2012, the employer posted a job opening for a Technical Solutions Analyst position. The union alleges that many of the "essential functions" and "required knowledge, skills and abilities" listed in the Technical Solutions Analyst job posting were duties performed by the Electronics Technicians. Hagen testified that prior to her work experience with the union, she trained in MCSE certification,[3] tested out of A+ network hardware and software, and worked in the information technology field. That experience, combined with her discussions with affected bargaining unit members, she testified, assisted her in reviewing the work orders of the Electronics Technician/Audio Visual classification compared with the Technical Solutions Analyst position job posting and work orders. Two more Technical Solutions Analyst positions were filled from outside candidates based on the June 19, 2012 job posting. The Technical Solutions Analyst positions are not part of the union's bargaining unit.[4] Also, Hagen's testimony implies that the Technical Solutions Analyst position is not represented by any union.

As a business representative for the union, Hagen acted as an agent for, and had a defined role within, the union at the time of the issues under dispute.[5] Hagen's testimony regarding how she interpreted the June 6, 2012 employer notice is key:

> A. In June they sent me a letter saying that they were considering not backfilling the position of two of my members that had planned on retiring. And then moving that work to another group that wasn't represented.

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3 The MCSE website (http://www.microsoft.com/learning/en-us/mcse-certification.aspx), visited on October 17, 2013, distinguishes the "new" Microsoft Certified Solutions Expert (MCSE) certification and the "old" Microsoft Certified System Engineer (MCSE) certification. However, it is not clear from the record which certification Hagen was referring to in her testimony.

4 The record is unclear whether the Technical Solutions Analyst position is part of any bargaining unit. However, the Examiner notes that the job postings for the Electronics Technician and Technical Solutions Analyst, open April 12, 1999, and June 19, 2012, respectively, differ in that the former clearly indicates "Union Membership or Representation Fee Required" directly beneath the hourly rate, while the latter is silent as to union membership requirements. Further, Randall Wood, Technical Operations Manager, testified that the employer created the Technical Solutions Analyst position in the spring of 2012 because the district "decided to make the change because our union employees were retiring."

5 *See State-Corrections*, Decision 11025-A, where the Commission remanded the Unfair Labor Practice Manager's dismissal of the union's complaint for lack of timeliness. In that case, the union shop steward's receipt of an employer e-mail was not a triggering event to start the six-month statute of limitations as "her role within the union and the bargaining unit is undefined. . . ." Until a further evidentiary hearing could be held, the Commission found that the statute of limitations was tolled until five months later when the union shop steward forwarded the e-mail to a union executive board member.

> Q. Can you take a look at Exhibit 2 [the June 6 employer notice]. Is this the letter you're referring to?
>
> A. Yes.
>
> Q. So take a moment. What did you understand that letter to mean?
>
> A. That the district didn't wish to backfill the two positions of my members that were retiring. And actually filled in with a retired member which that's a different discussion, but to complete the work until they had retired. And then moved all of that work to, like I said, non represented employees.

The June 6, 2012 notice provided a clear understanding that what basic hardware repair duties remained *could* be subsumed by existing Technology Department personnel. As previously noted, at the time of the notice, the existing personnel in that department were the Technical Support Specialists, and Technical Analysts I and II positions that were not included in the union's bargaining unit. At the very least, the June 6, 2012 notice indicated to the union that it would be losing whatever work was being done by its members to other employees of the same employer, in other words, skimming.

The employer and union held bargaining sessions for their successor CBA during the summer of 2012. The union asks that the Commission find the "triggering event" to be when Director of Human Resources Pat Fowler-Fung and Deputy Superintendent Janene Fogard told Hagen that four Technical Solutions Analyst positions had been filled at the parties' August 22, 2012 bargaining session.[6]

Despite the union's attempts to bargain with the employer after the June 6, 2012 notice in pre and post-grievance settings, having the statute of limitations begin to run when a secondary action occurred, such as the hiring of the Technical Solutions Analysts, "would lead to a slippery slope of arguments about when an act that would start the statute running actually occurs." *City of Bellevue,* Decision 9343-A. The six-month time limitation has been strictly enforced, even

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6 The union also filed a grievance under the parties' CBA regarding the alleged skimming on August 22, 2012.

when settlement negotiations are occurring. In *City of Spokane,* Decision 4937 (PECB, 1994), the Executive Director stated:

> 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.

The Executive Director's statement was cited with approval by the Commission in *City of Bremerton,* Decision 7739-A (PECB, 2003). *See also Community College District 17 (Spokane),* Decision 9795-A.

The union argues that the Examiner should be persuaded by previous Commission decisions, including *Washington Public Power Supply System,* Decision 6058-A (PECB, 1998), and *City of Dayton,* Decision 2111-A (PECB, 1985). In *Washington Public Power Supply System,* an employer memorandum with an unspecified future change to its smoking policy was found insufficient to trigger the statute of limitations; rather, the Commission found the "triggering event" to be seven months later with the employer's letter that included implementation language and a specific effective date. In *City of Dayton,* the Commission found the triggering event to be January 1, 1984 when the employer reduced the wages of a former salaried employee who had been moved into the bargaining unit on May 1, 1983. The union cites the Commission's phrase of a "potential for mischief" if employers are allowed to strategically trigger the statute of limitations simply by sending the union a letter proposing changes at some point in the future. However, the Commission's complete sentence in *City of Dayton* is instructive:

> To rule in favor of the city would create the potential for mischief, allowing management to whipsaw a union by implementing a favorable portion of a package proposal while delaying the implementation of the unfavorable portion for more than six months. So long as the union does not accept the entire package, the employer cannot cut off a union's bargaining rights by deferring implementation of unfavorable portions of a package proposal for six months or more.

In the present case, the June 6, 2012 employer letter does not offer the "carrot" of a "favorable portion" of a package proposal; nor did the employer delay implementation of the "unfavorable portion" for more than six months. Rather, the entire content of the letter offered "unfavorable portions" to the union – it would have at least two bargaining unit positions eliminated and that bargaining unit work would be going to other employees of the employer outside of the union's bargaining unit. Aside from the explanation of the last affected employee in the Electronics Technician position retiring on June 29, 2012, the letter does not contain any "carrot" of a "favorable portion" for the union to grasp onto as a silver lining for its members.

The union urges this agency to consider three NLRB decisions from the 1983 to 1993 time period finding that the statute of limitations for skimming allegations does not begin to run until the employer actually transfers bargaining unit work out of the unit, not when the employer gives notice of its intent to do so (*i.e.* the August 22, 2012 date). The Supreme Court of the State of Washington has ruled that decisions construing the NLRA, while not controlling, are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984). However, none of the NLRB decisions set forth by the union have been cited in Commission decisions addressing the statute of limitations. The record in the present case does not present a unique set of facts that would warrant an expansion of the Commission's current application of NLRA Section 10(b) precedents to RCW 41.56.160(1) cases. *See City of Bellingham,* Decision 10907-A.

CONCLUSION

The June 6, 2012 employer letter to the union's business representative, Hagen, provided clear and unequivocal notice specifying the action the employer was taking and the action's effective date, June 29, 2012. The notice clearly indicated to the union that employees outside of its bargaining unit would be taking over the duties of the union's bargaining unit members whose positions were being eliminated. There was absolutely no ambiguity in the employer's June 6, 2012 notice and that is the "triggering event" by which to start the statute of limitations for the union's skimming complaint. The union's complaint was not timely filed within the statute of limitations provided in RCW 41.56.160(1).

FINDINGS OF FACT

1. Lake Washington School District is a public employer within the meaning of RCW 41.56.030(12). The employer is a school district serving approximately 25,000 students.

2. International Brotherhood of Electrical Workers, Local 46, is a bargaining representative within the meaning of RCW 41.56.030(2). The union represents a bargaining unit of approximately eight employees for the purposes of collective bargaining, including the Electronics Technician/Audio Visual positions of interest in this case. The union is a member of the Lake Washington School District Trades Bargaining Council.

3. The employer and the Council are parties to a collective bargaining agreement, effective August 16, 2012, through August 15, 2015. Neither party disputed the application of the prior CBA, effective August 16, 2008, through August 15, 2011, to the issues raised in the present complaint. *See* RCW 41.56.123.

4. On June 6, 2012, the employer provided a letter to the union's business representative advising that effective June 29, 2012, the employer intended to eliminate the current Electronics Technician/Audio Visual classification.

5. Of particular import to this decision are the following sentences in the June 6, 2012 letter:

> Accordingly, the District has determined that the basic hardware repair tasks presently performed by the employees in this [Electronics Technician/Audio Visual] classification can readily be covered by existing Technology Department personnel incidental to their software diagnostics work. The District does not intend to subcontract out work that is presently performed by the Electronics Technician/Audio Visual classification.

6. At the time of the June 6, 2012 letter, the "existing Technology Department personnel" referenced in the notice were the Technical Support Specialists, and Technical Analysts I and II. The former positions are part of a bargaining unit represented by the Service

Employees International Union (SEIU); the latter positions were not part of the union's bargaining unit.

7. The June 6, 2012 employer letter to the union's business representative, Shannon Hagen, provided clear and unequivocal notice specifying the action the employer was taking and the action's effective date, June 29, 2012. The notice clearly indicated to the union that employees outside of its bargaining unit would be taking over the duties of the union's bargaining unit members whose positions were being eliminated.

8. On June 19, 2012, the employer posted a job posting for a Technical Solutions Analyst position. The Technical Solutions Analyst position is not part of the union's bargaining unit.

9. During the 2010-2011 school year the employer reorganized the Technology Department and created interim Technical Analysts I and II positions. These positions were considered the second tier above the Technical Support Specialists (SEIU). Two Technical Support Specialists became Technical Analysts I and II between 2010 and 2011. With a second reorganization during the 2011-2012 school year, the employer selected a Technical Analyst I and a Technical Analyst II to begin doing the work of two Technical Solutions Analyst positions. Two more Technical Solutions Analyst positions were filled from outside candidates based on the June 19, 2012 job posting.

10. On December 14, 2012, the union filed an unfair labor practice complaint against the employer.

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. As described in Findings of Fact 4 through 10, the unfair labor practice complaint filed by the union on December 14, 2012, was not timely under RCW 41.56.160(1).

ORDER

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

ISSUED at Olympia, Washington, this 23rd day of October, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Page A Garcia

PAGE A. GARCIA, 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

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	25345-U-12-06485	FILED:	12/14/2012	FILED BY:	PARTY 2
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BAR UNIT:	OPER/MAINT				
DETAILS:	25640-S-13-0345				
COMMENTS:					

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