STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 286, Complainant, vs. PUYALLUP SCHOOL DISTRICT, Respondent.	CASE 27095-U-15 DECISION 12551 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On March 12, 2015, the International Union of Operating Engineers Local 286 (union) filed a complaint with the Public Employment Relations Commission alleging unfair labor practices against the Puyallup School District (employer). On April 1, 2015, the Unfair Labor Practice Manager issued a preliminary ruling finding causes of action to exist. The agency assigned the complaint to Examiner Page A. Garcia, who conducted a hearing on September 24 and October 9, 2015. The parties filed timely post-hearing briefs to complete the record.

ISSUES

The issues presented are as follows:

Issue 1: Was the complaint timely filed under RCW 41.56.160(1)?

Issue 2: Did the employer discriminate in violation of RCW 41.56.140(1) [and if so, commit derivative interference in violation of RCW 41.56.140(1)] by no longer allowing Danielle (Donnie) McKay to work as a driver trainer assistant[1] in reprisal for protected union activities?

Issue 3: Did the employer refuse to bargain in violation of RCW 41.56.140(4) [and if so, commit derivative interference in violation of RCW 41.56.140(1)] by unilaterally changing the past practice of allowing driver trainer assistants to take time off during the summer and then return to work as driver trainer assistants during the school year, without providing an opportunity for bargaining?

The complaint is untimely under RCW 41.56.160(1). The employer gave the complainant clear and unequivocal notice of the actions giving rise to the discrimination and refusal to bargain allegations on July 28, 2014. The complaint was filed on March 12, 2015. To be timely, the complaint should have been filed no later than January 28, 2015. The union's argument that the union or employee lacked knowledge of the employer's clear and unequivocal July 28, 2014, notice lacks credibility and merit. Because the complaint is untimely, a discussion of the merits of the discrimination allegation, Issue 2, is unnecessary.[2] Unlike interference or discrimination allegations, for which employees have standing to pursue unfair labor practice complaints, individual employees lack standing to bring "refusal to bargain" allegations.[3] Even if the statute of limitations period for the refusal to bargain allegation were tolled to account for when the union received or could have reasonably received the employer's notice, the union failed to establish a past practice.

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1 The complaint and preliminary ruling identified the position as "substitute driver trainer," but the record reflects the parties refer to this position as the "driver trainer assistant."

2 *See City of Bellevue*, Decision 9343-A (PECB, 2007). The Commission determined that because the complaint was untimely, it was unnecessary for the examiner to consider the merits of the remaining issues. *See also infra* note 10.

3 *See South Whidbey School District*, Decision 11134-A (EDUC, 2011).

BACKGROUND

The bargaining unit consists of school bus drivers employed by the Puyallup School District. The union and the employer are parties to a collective bargaining agreement (CBA) effective from September 1, 2014, through August 31, 2017. Protracted negotiations occurred from the spring of 2013 until September 9, 2014, when the parties reached a tentative agreement of that CBA.[4]

As of 2015 the employer had seven bus drivers who were certified to work as driver trainer assistants. In order to become a driver trainer assistant, a bus driver must take a two-week certification course and an examination as required by the Office of Superintendent of Public Instruction. The driver trainer assistants fill in for the driver trainer and provide training to new substitute bus drivers. Some training is conducted at the time of midday runs during the school year, and other training is conducted in the summer months. There are two components to the training: classroom time and behind-the-wheel training. Under the previous CBA, driver trainer assistants earned an additional two percent of their base hourly wage for this extra work. Under the 2014-2017 CBA, driver trainer assistants earn an additional two dollars per hour for this extra work. The selection and maintenance of driver trainer assistants is not specified in the CBA or in a written employer policy. The additional compensation of the driver trainer assistants, per testimony, is specified in the parties' CBA.

Danielle (Donnie) McKay has worked for the employer for 18 years as a substitute bus driver and bus driver. McKay also worked as a driver trainer assistant from 2010 to 2014. McKay testified that under the previous CBA the two percent incentive she earned as a driver trainer assistant, based on her wages, was thirty-nine cents per hour. Kim Parker, Union President, and Sandra Karppinen, a former bus driver and driver trainer assistant, testified that McKay was active in union meetings and bargaining unit employees viewed her as a resource for union-related questions. McKay took a more active, official role in the union when she spoke before the

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[4] Neither party offered a copy of the previous or current CBA as evidence at the hearing. A copy of the parties' September 9, 2014, tentative agreement of its successor CBA, effective 2014-2017, was attached to the union's complaint as Exhibit A. The employer's answer acknowledged that Exhibit A was the document ratified by union members and the employer's board of directors.

Puyallup School Board on August 4, 2014, and when she was selected as a union board member in January 2015. Testimony also indicates that McKay participated in informational picketing with other bus drivers at employer locations in the summer of 2014.

At the in-service training for the 2012-2013 school year, Director of Transportation Cathy McDaniel gave a demonstration on e-mail usage and encouraged bus drivers to check their work e-mail frequently.

On November 18, 2013, McKay sent an e-mail from her personal e-mail account to her immediate supervisor, Tammy Sutton, as follows:

> I am writing to let you know that I don't want to help train this next class. The responsibility, liability, stress and time it takes to train our drivers has become an issue for me. I feel my certificate as a driver trainer is worth more than .39 cents an hour. My total differential pay for my check in Oct. totaled 20.00 dollars. I feel my time and effort to do training is worth more than driver wages. I would much rather do my job as a driver at the pay I am receiving. . . .

McKay testified that after sending the November 18, 2013, e-mail, her key hook was "tagged" to see McDaniel.[5] McKay reported to McDaniel's office and they discussed the November 18 e-mail. McKay testified that McDaniel stated she was not aware the driver trainer assistants were only making two percent over their hourly wage and that she would see what she could do.

McKay continued to work as a driver trainer assistant after the November 18, 2013, e-mail for at least two training classes held between December 2013 and February 2014.

On April 11, 2014, Sutton sent an e-mail to McKay and Gloria Earl, another bus driver and driver trainer assistant. The e-mail advised them of the summer class dates, indicated Sutton would start the class on July 7, 2014, and stated that McKay and Earl's first day training would be July 16, 2014. The e-mail asked for confirmation that this plan would work for each of them. On April

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[5] According to several drivers' testimony, it is common practice in the bus shop for drivers to receive messages through the tagging system. If a driver needs to receive a message, a tag with the name of the person whom the driver needs to report to is placed on the driver's key hook for the driver to see when the driver picks up or returns bus keys.

15, 2014, McKay responded from her personal e-mail account, "Yes these dates will work for me. I am available to work extra if needed also."

Before the end of the 2013-2014 school year, in June 2014, Sutton and McKay had a conversation about the summer training. Both Sutton's and McKay's testimony confirm that Sutton advised McKay it would just be the two of them for the July 2014 training because Earl was not available. Sutton's and McKay's testimony conflicted on the rest of the conversation. Sutton testified that when she asked for confirmation that McKay was still available for the July 2014 training, McKay responded, "Yes, I am." When asked on direct examination about the June conversation and her response to Sutton, McKay responded, "I don't recall." Shortly thereafter on direct examination, McKay testified she told Sutton she would "get back with her." I find Sutton's testimony on this matter more credible than McKay's.

The last day of the 2013-2014 school year was June 20, 2014.[6] On the evening of Sunday, June 22, 2014, McKay sent an e-mail from her work e-mail account to McDaniel and Sutton. McKay accessed her work e-mail account from home. The June 22 e-mail read:

> I need to take a hiatus from training during this time that the bus drivers do not have a contract. I will be supporting my Brothers and Sisters until the contract is ratified. I am sorry for any problems this has caused but my first priority is with the bus drivers. Your understanding in this matter would be appreciated.

On July 28, 2014, McDaniel replied to McKay's June 22, 2014, e-mail and sent a courtesy copy to Sutton.[7] McDaniel's reply was sent to McKay's work e-mail account and read:

> I understand your desire to support your fellow bus drivers, however, I do not understand your decision to abandon your duties as a driver trainer's assistant, particularly, after you had told Tammy that you would be available to assist her during the summer. We rely on our driver trainer assistants to assist Tammy with

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6 McKay testified under cross-examination that she sent the June 22, 2014, e-mail two days after school got out.

7 McDaniel and Sutton were attending a conference in Yakima when they received McKay's June 22, 2014, e-mail. McDaniel testified that after receiving McKay's June 22 e-mail, she consulted with Sutton and Corine Pennington, her direct supervisor. McDaniel testified that later she consulted Amie Brandmire, Chief Human Resources Officer, for advice.

> our substitute drivers to ensure they are getting sufficient behind the wheel driving time. This is the 2nd time you have unexpectedly withdrawn your services at times when you were needed.
>
> We appreciate the service and support you have given us over the past 3 years as a trainer, however, as a result of your lack of availability when needed, we will no longer use you as a driver trainer's assistant.

Two months after the 2014-2015 school year started, in November 2014, McKay "started to wonder" why she hadn't been offered an opportunity to train and asked Sutton about it. Sutton forwarded McDaniel's July 28, 2014, e-mail to McKay on November 5, 2014, and indicated, "Here is the response from Cathy." McKay testified that November 5, 2014, was the first time she saw McDaniel's July 28, 2014, e-mail.

ANALYSIS

Issue 1: Timeliness

Applicable Legal Standard

"[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 period begins to run when the complainant knew or should have known of the violation. *City of Bellevue*, Decision 9343-A (PECB, 2007), *citing City of Bremerton*, Decision 7739-A (PECB, 2003). The start of the six-month period, also called the triggering event, occurs when a potential complainant has "actual or constructive notice of" the complained-of action. *Lake Washington School District*, Decision 11913-A (PECB, 2014), *citing Emergency Dispatch Center*, Decision 3255-B (PECB, 1990).

The Commission has emphasized that the six-month statute of limitations period begins at the time the employer provides clear and unequivocal notice to the complainant. Unequivocal notice of a decision requires that a party communicate enough information about the decision or action to allow for a clear understanding. Statements that are vague or indecisive are not adequate to put a party on notice. *City of Bellevue*, Decision 10830-A (PECB, 2012), *citing Community College District 17 (Spokane)*, Decision 9795-A (PSRA, 2008).

In order to be clear and unambiguous, the notice must contain specific and concrete information regarding the proposed change. The six-month clock begins to run when a party gives clear and unambiguous notice of its intent to implement the action in question. *Emergency Dispatch Center*, Decision 3255-B. 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 Pasco*, Decision 4197-A (PECB, 1994).

The timeliness of the complaint is a threshold question in any unfair labor practice case. If a complaint is not timely, the Commission does not have jurisdiction to remedy it. *City of Bellevue*, Decision 9343-A, *citing Clark v. Selah School District*, 53 Wn. App. 832 (1989); *Stewart v. Omak School District*, 108 Wn. App. 1049 (2001); *Malpica v. Mary M. Knight School District*, 93 Wn. App. 1084 (1999). "The [six-month statute of limitations] has been strictly enforced, even when settlement negotiations are occurring." *City of Bremerton*, Decision 7739-A. The burden of proof to establish when the complainant learned of the issue giving rise to the unfair labor practice lies with the complainant, not the respondent. *City of Pasco*, Decision 4197-B (PECB, 1999). 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).

Application of Legal Standard

The employer provided clear and unequivocal notice of the action it was taking by its July 28, 2014, e-mail. In *City of Bremerton*, Decision 12198 (PECB, 2014), the examiner ruled that the employer's memorandum of an upcoming change to health care benefits, rather than the effective date of the change, was the "triggering event" for a unilateral change allegation. The examiner drew a comparison with *Emergency Dispatch Center*, Decision 3255-B, where an October notice of a change in practice was the critical event, rather than the January effective date of the change. *City of Bremerton*, Decision 12198, *citing Emergency Dispatch Center*, Decision 3255-B. The examiner distinguished the application of the statute of limitations to a unilateral change in practice versus a "skimming" allegation where the Commission has found that implementation, not notice,

is the "triggering event." *City of Bremerton*, Decision 12198, *citing Lake Washington School District*, 11913-A.

The union did not argue that the employer failed to provide clear or unequivocal notice by its July 28, 2014, e-mail or that the employer failed to provide notice directly to the union. Rather, the union rests its argument that the complaint was timely filed under the six-month statute of limitations based on McKay's assertion that she did not receive the notice until November 5, 2014.

The employer argues that the triggering event in this case is McDaniel's July 28, 2014, e-mail to McKay. In the alternative, the employer insists that McKay should have at least checked her e-mail at the August 2014 in-service training leading up the 2014-2015 school year or during the first two weeks of school.

McKay's assertion that she was unaware of the employer's July 28, 2014, e-mail until November 5, 2014, is not credible. Given the March 12, 2015, filing date, only allegations of events that occurred on or after September 12, 2014, would be timely under the six-month statute of limitations. *See Tumwater School District (Tumwater Office Professionals Association)*, Decision 12409-A (PECB, 2016). Given the totality of the evidence, it is more than reasonable to conclude the complainant knew or should have known of the alleged violations well before November 5, 2014, and sometime between July 28, 2014, and September 11, 2014.

The 2014-2015 school year started on September 3, 2014.[8] On direct examination McKay testified there was a class being conducted when she resumed her bus driving duties in September. McKay did not recall when the second training class began, but she recalled she was not offered an opportunity to participate:

> Q: When you returned in September, did you resume your regular duties as a bus driver?
> A: Yes.
> Q: Did you plan to continue working as a trainer as well?

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[8] As indicated in the employer's answer to the complaint. Neither party offered evidence indicating otherwise at the hearing.

A: Yes.
Q: Were you offered the opportunity to participate in the first training class that year?
A: No.
Q: Did that seem unusual to you?
A: Well, there was a training class, I believe, going on when I resumed my duties as a bus driver. So that—no, that didn't—wasn't unusual, and the contract hadn't been ratified at that point. So that was not unusual at that point.
Q: And do you recall when the next class began?
A: No.
Q: Were you offered the opportunity to participate in that class?
A: No.

The employer held three training classes between June 22, 2014, the date of McKay's e-mail, and October 1, 2014, the date of the successor CBA's ratification by the union:[9] (1) June 28, 2014, to July 2014; (2) July 7, 2014, to August 2014; and (3) September 22, 2014, to October 2014.

McKay testified that she talked to Sutton after she "started to wonder why [she] had not been asked." When asked on direct examination when she talked to Sutton, McKay replied, "Sometime in November is what it's apparently showing that that's when I talked to her."

McKay testified that after sending the June 22, 2014, e-mail to McDaniel and Sutton, she accessed her work e-mail account from home and checked for a response almost daily for the next three weeks. When asked on cross-examination about checking her work e-mail either at the August 2014 in-service training or when the 2014-2015 school year started, McKay testified:

> I had no reason to believe when I turned—returned to work, since I never received a response, as far as I knew, that I had any need to check my e-mail. . . . I had no reason to believe that there was a response that—at that time. It was—too much time had gone by. I assumed that they had accepted my decision to support my brothers and sisters.

McKay allegedly did not check her work e-mail account upon returning to work for the August 2014 in-service training. McKay allegedly did not check her work e-mail account after the school

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9 As indicated in the union's complaint. Neither party offered evidence indicating otherwise at the hearing.

year started on September 3, 2014. McKay allegedly did not check her work e-mail account after the parties reached a tentative agreement of the 2014-2017 CBA on September 9, 2014. Nor did she talk to McDaniel or Sutton about resuming as a driver trainer assistant at any time between the August 2014 in-service training and September 9, 2014. With her knowledge of the CBA and increasingly active union involvement, McKay could reasonably recognize that a tentative agreement provided a glimmer of hope that the parties would recommend approval and ratification of the negotiated successor CBA.

McKay allegedly did not check her work e-mail account after the union ratified the 2014-2017 CBA on October 1, 2014.[10] Nor did she talk to McDaniel or Sutton about resuming as a driver trainer assistant at that time. Per McKay's own testimony and logic, once the successor CBA was ratified, she would have been offered an opportunity to participate as a driver trainer assistant. As of October 1, 2014, McKay's concerns about low differential pay identified in her November 18, 2013, e-mail were answered—driver trainer assistant pay more than quadrupled from thirty-nine cents to two dollars per hour. McKay had knowledge of, and increasing participation in, her union's activities. Yet it supposedly still took McKay over a month *after* the union ratified the 2014-2017 CBA to ask Sutton on November 5, 2014, why she hadn't been offered an opportunity to participate in a training class. Such suppositions are simply not credible.[11]

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10 *See supra* note 9.

11 While notice of the employer's actions giving rise to the allegations in this case was e-mailed directly to McKay on July 28, 2014, she claims to have not seen the e-mail until November 5, 2014—over three months later. Shortly thereafter, McKay contacted Union President Kim Parker about the July 28 e-mail. Even if the examiner suspended belief in the November 5 receipt date, Parker did not advise the union representative, Margaret Englund, of the alleged violations until "late December or early January," nearly two months after McKay allegedly first saw the employer's e-mail. Englund did not contact McDaniel to discuss the issue until "early February," approximately six months after the employer's July 28 e-mail and three months after McKay advised Parker.

Union witnesses Parker and Karppinen testified that McKay was viewed as a leader for the union, so much so that people thought she was on the union board before she was elected. Both testified that McKay could answer fellow employees' questions about the CBA. As such, an argument that McKay didn't know to advise her union of the alleged possible violations in the July 28, 2014, employer e-mail is not persuasive.

This is even more true if McKay, with her familiarity with the CBA, thought that the union would want to file a grievance rather than an unfair labor practice complaint. Grievance procedures usually have much shorter filing time frames than the six-month statute of limitations in the applicable collective bargaining statute, Chapter 41.56 RCW.

Much testimony was devoted to the irregularity in which the bus drivers check their work e-mail. The parties raised arguments over whether bus drivers checking work e-mail was mandatory or aspirational. The union pointed to testimony that "tagging" is the common communication method in the bus shop. Those arguments are moot given this particular set of facts. McKay sent the June 22, 2014, e-mail from her work e-mail account which she accessed *from home* during summer break. She checked her work e-mail account *from home* "practically daily" for the next three weeks during summer break. The manner in which she chose to communicate and to expect a response was via her work e-mail account. That she allegedly didn't check her work e-mail account again for over three months and instead expected to be "tagged" at the bus shop stretches any plausible argument for timely filing of the complaint.

More sympathy could be had for tolling the six-month statute of limitations period had the union introduced credible evidence that McKay didn't discover the employer's July 28, 2014, e-mail until the beginning of the 2014-2015 school year and advised her union representative shortly thereafter.

Issue 3: Duty to Bargain and Unilateral Change

Applicable Legal Standard

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Seattle*, Decision 11588-A (PECB, 2013), *citing International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). The determination as to whether a duty to bargain exists is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4) and (1); *Vancouver School District*, Decision 11791-A (PECB, 2013).

Wages, hours, and working conditions of bargaining unit employees are characterized as mandatory subjects of bargaining. *Federal Way School District*, Decision 232-A, *citing NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342; RCW 41.56.030(4). When subjects relate to both conditions of employment and managerial prerogatives, the Commission uses a balancing test to determine whether a particular matter is a mandatory subject of bargaining on a case-by-case basis. The inquiry focuses on which characteristic predominates. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d at 200; *Yakima County*, 10204-A (PECB, 2011).

The duty to bargain requires that an employer give notice and provide an opportunity for good faith bargaining prior to implementing any change of past practices concerning the wages, hours, and working conditions of bargaining unit employees. *Kitsap County*, Decision 8292-B (PECB, 2007), *citing Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990). The burden of proof lies with the union when it charges an employer with making unilateral changes to mandatory subjects of bargaining. WAC 391-45-270(1)(a).

A complainant alleging a unilateral change violation must prove the following four elements:

1. The existence of a relevant status quo or past practice.
2. That the relevant status quo or past practice was a mandatory subject of bargaining.
3. That notice of and an opportunity to bargain the proposed change was not given.
4. That there was an actual change to the status quo or past practice.

Val Vue Sewer District, Decision 8963 (PECB, 2005); *City of Tukwila*, Decision 10536-A (PECB, 2010).[12] *See also Wenatchee School District*, Decision 11138 (PECB, 2011), *aff'd*, Decision 11138-A (PECB, 2012).

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[12] Examiner's Order adopted by the Commission under *City of Tukwila*, Decision 10536-B (PECB, 2010), with a modified Order defining the *status quo ante* for the bargaining unit employees affected by the employer's unilateral act.

A past practice exists when the parties acknowledge a mutually accepted, long-standing employment practice. *Kitsap County*, Decision 8292-B. To establish a past practice, a party must prove the following two elements: (1) an existing prior course of conduct and (2) an understanding by the parties that the conduct was known and mutually accepted by the parties as the proper response to the circumstances. *City of Pasco*, Decision 9181-A (PECB, 2008).

An employer contemplating a change in a mandatory subject of bargaining must give adequate notice to the union prior to making a decision in order to allow for a reasonable opportunity to bargain. If the employer fails to do so and then implements the decision, the employer risks presenting the action as a *fait accompli*—a decision that has already been made or an action that has already occurred. *City of Edmonds*, Decision 8798-A (PECB, 2005). In determining whether a *fait accompli* has occurred, the Commission focuses on the circumstances as a whole and whether the employer provided a meaningful opportunity to bargain. *Clover Park Technical College*, Decision 8534-A (PECB, 2004).

Application of Legal Standard

Even if the Examiner were to determine that the "triggering event" for the unilateral change allegation didn't occur until the union had actual or constructive notice,[13] either when McKay told Parker or when Parker told Englund, the union's complaint fails to establish a past practice.

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[13] The Examiner notes that the employer's July 28, 2014, e-mail only provided notice to McKay. As an individual, McKay could have notice of an alleged adverse action and pursue an unfair labor practice complaint alleging discrimination based on her participation in protected union activity. As such, the analysis of the discrimination allegation ceases with the finding that the complaint was untimely.

By contrast, refusal to bargain allegations under RCW 41.56.140(4) can only be raised by an employee organization or an employer. Individual employees do not have standing to bring such allegations. *See South Whidbey School District*, Decision 11134-A. However, the union did not raise the argument that notice was not afforded to the union for the refusal to bargain and unilateral change allegation at hearing or in its post-hearing brief. As the union's brief only references the employer's "longstanding practice," that is where the Examiner begins her analysis.

For the purposes of notice in a unilateral change allegation, it is recognized that a union member's knowledge of an employer's actions does not necessarily confer that knowledge to the union. *See State – Corrections*, Decision 11025-A. However, given McKay's lack of credibility as to when she received the employer's July 28, 2014, e-mail, the statute of limitations should not be tolled to accommodate more than six weeks between July 28, 2014, and September 11, 2014.

The first element of *Val Vue Sewer District*, Decision 8963, for unilateral change allegations requires that a complainant establish the existence of the relevant status quo or past practice.

Generally, the past practices of the parties are properly utilized to construe provisions of an agreement that may reasonably be considered ambiguous or where the contract is silent as to a material issue. A past practice may also occur where, in a course of the parties' dealings, a practice is acknowledged by the parties over an extended period of time, becoming so well understood that its inclusion in a collective bargaining agreement is deemed superfluous. *Whatcom County*, Decision 7288-A (PECB, 2002), *citing City of Pasco*, Decision 4197-A.

The union did not raise arguments specific to the unilateral change allegation at hearing or in its post-hearing brief. However, in discussing the employer's knowledge of McKay's alleged protected union activity, the union asserts the employer's "longstanding practice" was to offer all drivers who maintained a valid state certification the opportunity to work as driver trainer assistants, subject only to the number of new drivers that needed to be trained.

The employer's post-hearing brief argues that the designation and use of a particular driver in a driver trainer assistant role is a decision that has never been bargained by the parties, is not regulated by the CBA, and has always been at the sole discretion of the driver trainer or director of transportation. The employer avers that summer training classes have not been required work for driver trainer assistants and that they have not been removed from the opportunity to conduct subsequent training after notifying the employer that they were unavailable for summer work. The distinction, the employer argues, is that McKay agreed to perform summer training and then backed out of doing so.

Michelle Ball, a substitute driver and bus driver for the employer from 1995 to 2010, was the driver trainer from 2008 to 2010. She repeatedly described the driver trainer assistant position as "voluntary." Ball also indicated that at least two former driver trainers conducted the trainings without the assistance of driver trainer assistants. When asked on cross-examination how she would have handled a planned training for which driver trainer assistants weren't available, Ball

stated she would have a back-up plan. Absent a back-up plan, Ball stated she would provide the training herself.

Karppinen testified on cross-examination that merely because a bus driver obtained certification to train, there was no expectation that the driver would actually be used as a trainer by the employer. Further, Karppinen agreed that the use of a certificated driver trainer assistant by the employer was totally at the discretion of the driver trainer or the director of transportation.

On cross-examination, McKay affirmed that the assignment of training was at management's discretion. Englund also testified on cross-examination that driver training is extra work and the assignment of driver trainer assistants to conduct training is at the discretion of the driver trainer.

The union failed to establish that the employer maintained a consistent practice which would create any kind of enforceable expectation of the parties. *Edmonds Community College*, Decision 10250-A (CCOL, 2009). The union did not establish a past practice that the driver trainer assistants were allowed to "take time off during the summer" and then return as driver trainer assistants during the school year. Although there were examples provided of driver trainer assistants choosing to not participate in training during the summer and returning to that "extra work" in the fall, the union did not establish that there was conduct mutually accepted by the parties. *See id.* There were driver trainers who chose to conduct trainings without the assistance of any driver trainer assistants. The assignment or non-assignment of conducting these trainings was purely at management's discretion, and there was no consistent course of conduct. *Id.* Because no consistent past practice exists that creates any kind of enforceable expectation between the parties, the remaining elements of *Val Vue Sewer District* do not need to be discussed. The employer did not refuse to bargain a change in past practice and did not commit an unfair labor practice. *Id.*

CONCLUSION

The Examiner finds that the complaint alleging discrimination and unilateral change was not timely filed within the statute of limitations period. The employer provided clear and unequivocal

notice on July 28, 2014, and the receiving employee, McKay, failed to act upon or acknowledge receipt of that notice until November 5, 2014. McKay's testimony of when she received the July 28, 2014, e-mail substantially lacked credibility. The July 28, 2014, e-mail was the triggering event for purposes of calculating the six-month statute of limitations period.

Even if the statute of limitations period for the refusal to bargain allegation were tolled to account for when the union received or could have reasonably received the employer's notice, the union still failed to establish that the employer maintained a consistent past practice which would create any kind of enforceable expectation of the parties. Absent an enforceable expectation, the employer did not refuse to bargain a change in past practice.

FINDINGS OF FACT

1. The Puyallup School District is a public employer within the meaning of RCW 41.56.030(12).

2. The International Union of Operating Engineers Local 286 is a bargaining representative within the meaning of RCW 41.56.030(2) for a bargaining unit of bus drivers employed by the Puyallup School District.

3. The union and the employer are parties to a collective bargaining agreement (CBA) effective from September 1, 2014, through August 31, 2017.

4. Protracted negotiations occurred from the spring of 2013 until September 9, 2014, when the parties reached a tentative agreement of the successor CBA.

5. As of 2015 the employer had seven bus drivers who were certified to work as driver trainer assistants.

6. The selection and maintenance of driver trainer assistants is not specified in the CBA or in a written employer policy. The additional compensation of the driver trainer assistants is specified in the parties' CBA.

7. Danielle (Donnie) McKay has worked for the employer for 18 years as a substitute bus driver and bus driver. McKay also worked as a driver trainer assistant from 2010 to 2014.

8. McKay was active in union meetings and bargaining unit employees viewed her as a resource for union-related questions.

9. At the in-service training for the 2012-2013 school year, Director of Transportation Cathy McDaniel gave a demonstration on e-mail usage and encouraged bus drivers to check their work e-mail frequently.

10. The last day of the 2013-2014 school year was June 20, 2014.

11. On the evening of Sunday, June 22, 2014, McKay sent an e-mail from her work e-mail account to McDaniel and her immediate supervisor, Tammy Sutton. McKay accessed her work e-mail account from home. The June 22 e-mail read:

> I need to take a hiatus from training during this time that the bus drivers do not have a contract. I will be supporting my Brothers and Sisters until the contract is ratified. I am sorry for any problems this has caused but my priority is with the bus drivers. Your understanding in this matter would be appreciated.

12. After sending the June 22, 2014, e-mail to McDaniel and Sutton, McKay accessed her work e-mail account from home and checked for a response almost daily for the next three weeks.

13. On July 28, 2014, McDaniel replied to McKay's June 22, 2014, e-mail and sent a courtesy copy to Sutton. McDaniel's reply was sent to McKay's work e-mail account and read:

> I understand your desire to support your fellow bus drivers, however, I do not understand your decision to abandon your duties as a driver trainer's assistant, particularly, after you had told Tammy that you would be available to assist her during the summer. We rely on our driver trainer assistants to assist Tammy with our substitute drivers to ensure they are getting sufficient behind the wheel driving time. This is the 2nd time you have unexpectedly withdrawn your services at times when you were needed.

> We appreciate the service and support you have given us over the past 3 years as a trainer, however, as a result of your lack of availability when needed, we will no longer use you as a driver trainer's assistant.

14. The employer provided clear and unequivocal notice of the action it was taking by its July 28, 2014, e-mail.

15. The 2014-2015 school year started on September 3, 2014.

16. The parties reached a tentative agreement of the 2014-2017 CBA on September 9, 2014.

17. McKay "started to wonder" why she hadn't been offered an opportunity to train after the 2014-2015 school year started and asked Sutton about it in November 2014.

18. Sutton forwarded McDaniel's July 28, 2014, e-mail to McKay on November 5, 2014, and indicated, "Here is the response from Cathy."

19. McKay's testimony that November 5, 2014, was the first time she saw the employer's July 28, 2014, e-mail substantially lacked credibility.

20. Michelle Ball, who was the driver trainer from 2008 to 2010, repeatedly described the driver trainer assistant position as "voluntary." Ball also indicated that at least two former driver trainers conducted the trainings without the assistance of driver trainer assistants. If driver trainer assistants weren't available, Ball would have a back-up plan. Absent a back-up plan, Ball stated she would provide the training herself.

21. Sandra Karppinen, a former bus driver and driver trainer assistant, explained that merely because a bus driver obtained certification to train, there was no expectation that the driver would actually be used as a trainer by the employer. Karppinen agreed that the use of a certificated driver trainer assistant by the employer was totally at the discretion of the driver trainer or the director of transportation.

22. McKay affirmed that the assignment of training was at management's discretion.

23. Union representative Margaret Englund affirmed that driver training is extra work and the assignment of driver trainer assistants to conduct training is at the discretion of the driver trainer.

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 7 through 19, the unfair labor practice complaint filed by the union on March 12, 2015, was not timely under RCW 41.56.160(1).

3. As described in Findings of Fact 6, 13, and 20 through 23, the employer's action did not constitute a change from an established past practice, and therefore the employer did not refuse to bargain or violate RCW 41.56.140(4) or (1).

ORDER

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

ISSUED at Olympia, Washington, this 7th day of March, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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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RECORD OF SERVICE - ISSUED 03/7/2016

DECISION 12551 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 27095-U-15

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