STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON POLICE OFFICERS' GUILD, Complainant, vs. CITY OF RENTON, Respondent.	CASE 26695-U-14 DECISION 12563-A - PECB DECISION OF COMMISSION

James M. Cline and *Jordan L. Jones*, Attorneys at Law, Cline & Casillas, for the Renton Police Officers' Guild.

Sofia D. Mabee, Attorney at Law, Summit Law Group PLLC, for the City of Renton.

The Renton Police Officers' Guild (union) filed an unfair labor practice complaint alleging that the City of Renton (employer) circumvented the union between November 2011 and February 2012 by negotiating with employees to change the premium paid to bicycle patrol officers; unilaterally changing employee compensation in March 2012 by changing the premium paid to bicycle patrol officers; and unilaterally changing employee compensation on February 20, 2014, by eliminating the premium paid to bicycle patrol officers. Examiner Guy Otilio Coss issued a decision dismissing the complaint after concluding, based on the facts before him, that the union did not prove by a preponderance of the evidence that the employer circumvented the union between November 2011 and February 2012, that the union's allegation of a unilateral change to employee wages in 2012 was untimely, and that the employer did not unilaterally change employee compensation in January 2014.[1] The union filed a timely appeal.

[1] *City of Renton*, Decision 12563 (PECB, 2016).

The issues before the Commission are:

1. Did the employer unilaterally change employee compensation in March 2012 by changing the premium paid to bicycle patrol officers?

2. Did the employer circumvent the union between November 2011 and February 2012 by then Deputy Chief Tim Troxel negotiating directly with bargaining unit employees over changing the premium paid to bicycle patrol officers?

3. Did the employer unilaterally change employee compensation on February 20, 2014, by discontinuing the bicycle patrol premium after signing the collective bargaining agreement?

We affirm the Examiner's decision dismissing the unfair labor practice complaint. The burden to prove that the statute of limitations should be tolled rested with the union, and the union did not meet its burden of proof. The union's allegation that the employer unilaterally changed employee compensation in 2012 is untimely. The union did not prove by a preponderance of the evidence that the employer circumvented the union between November 2011 and February 2012. The union's allegation that the employer unilaterally changed employee compensation on February 20, 2014, is untimely. The employer acted in conformity with the negotiated agreement when it stopped paying the bicycle patrol premium in January 2014.

BACKGROUND

The employer deployed officers on bicycles. The parties negotiated a premium pay for bicycle patrol officers. Under Article 6, Section E of the 2006–2008 collective bargaining agreement, all bicycle patrol officers received a three percent year-round premium.

In 2007, the employer formed its Special Operations Division. Within that division were the Directed Enforcement Team (DET) and the Special Enforcement Team. Officers assigned to

bicycle patrol and Special Weapons and Tactics (SWAT) are part of the DET. Most of the bicycle patrol officers are members of SWAT.

As a result of the reorganization, the employer and union entered into a Memorandum of Understanding (MOU) for bicycle officer compensation on June 20, 2007. The MOU provided that the two officers then assigned to bicycle patrol would continue to receive a three percent premium as provided in the 2006–2008 collective bargaining agreement. The parties agreed that additional officers may be assigned as bicycle patrol officers for the summer months, and the additional officers would also be paid a three percent premium for the summer months. The MOU identified the summer months as July 1 through September 30, 2007, and June 1 through September 30, 2008. If any additional bicycle patrol officers were assigned to bicycle patrol outside of the summer months, they would be compensated "½ hour overtime/compensatory time for each workday assigned to Bike Patrol. In order to be eligible for the ½ hour additional compensation, officers must be on the bike for four (4) hours out of that workday." The MOU was effective July 1, 2007, but did not include an end date.

The parties negotiated a one-year collective bargaining agreement for 2009. The 2009 collective bargaining agreement changed the bicycle patrol premium language of Article 6, Section E. The language provided that officers assigned to bicycle patrol would receive a premium:

> 6. Bicycle Officer* 3.0% per month
>
> . . .
>
> * The Bicycle Officer premium listed above shall be paid to the one (1) current member of Bicycle patrol. At the conclusion of that Officer's current four-year assignment, the full-time Bicycle patrol premium will no longer exist. Officers temporarily assigned to Bicycle patrol will receive the premium only during those times when actually assigned, i.e. fair weather months, special emphasis projects, etc.

Article 6, Section E remained unchanged from the 2009 collective bargaining agreement until the parties negotiated the 2013–2015 collective bargaining agreement.

In February 2012, a change was made in how bicycle patrol officers were paid. Bicycle patrol officers began submitting time sheets for one half hour of overtime for each day they rode their bicycles for more than four hours. The employer paid the employees consistent with their requests. This half hour of overtime was an alternative premium to the three percent identified in the collective bargaining agreement. The employer temporarily paid officers both the half hour and three percent premiums. However, when the officers brought the overpayment to the employer's attention, the employer stopped paying the three percent premium.

On August 29, 2012, the employer and union began negotiating a successor collective bargaining agreement. President Mark Coleman, Officer Bill Judd, and Officer Peter Montemayor represented the union. Administrator for Human Resources and Risk Management Nancy Carlson, Police Chief Kevin Milosevich, Commander Charles Karlewicz, Human Resources Manager Cathryn Laird, and Brian Sandler represented the employer.

At the August 29, 2012, negotiations meeting, the employer and union began exchanging proposals. The employer proposed deleting the June 20, 2007, MOU. During the discussion, Judd asked "if there was anybody still affected by this section," referring to the language grandfathering in the bicycle patrol premium. The Chief responded that one employee was affected by the language.

At their October 3, 2012, meeting, the parties discussed the bicycle patrol premium. The employer proposed eliminating the bicycle patrol premium in Article 6, Section E and deleting the June 20, 2007, MOU. The employer's notes from the October 3, 2012, meeting detail that the parties discussed eliminating the bicycle patrol premium. The employer clarified that no officer worked as a bicycle officer year round. The employer confirmed that bicycle patrol officers who were assigned to bicycle patrol were affected in the summer months. The union agreed to delete the bicycle patrol premium contained in Article 6, Section E.

In the fall of 2013, the parties reached a tentative agreement on a 2013–2015 collective bargaining agreement. The agreement included eliminating the bicycle patrol premium and the June 20, 2007,

MOU. The union's negotiating team provided the bargaining unit with a red-lined version of the collective bargaining agreement showing the changes agreed to in negotiations. The union membership did not ratify the agreement. However, the elimination of the contractual bicycle patrol premium and the June 20, 2007, MOU was not the reason the bargaining unit did not ratify the tentative agreement.

In November and December 2013, the employer and union negotiated a second tentative agreement. On December 9, 2013, the employer presented a proposal identifying the premiums it would pay. The parties initialed a tentative agreement that day. A premium for bicycle patrol officers was not included in the list of premiums. The union provided the second tentative agreement to the membership. The bargaining unit ratified the agreement. On January 13, 2014, the parties signed the 2013–2015 collective bargaining agreement.

In January 2014, the employer stopped paying the bicycle patrol premium. As bargaining unit members came to realize they no longer received a bicycle patrol premium, they raised the issue with the employer. DET Sergeant Russell Radke raised the issue with the Special Operations Division Commander and Deputy Chief Ed VanValey. On January 17, 2014, Radke e-mailed Judd about the bicycle patrol premium. Judd also spoke to VanValey in January about the bicycle patrol premium.

On January 17, 2014, the parties had a labor-management meeting. Coleman, Officer Corey Jacobs, and Officer Ralph Hyett attended on behalf of the union. Milosevich and VanValey attended on behalf of the employer. The employer told the union that the bicycle patrol officers did not seem to know that their premium pay had been negotiated out of the collective bargaining agreement and would not continue.

By at least January 17, 2014, the union knew the employer would no longer pay a premium to bicycle patrol officers. In January 2014, Judd and Coleman had a conversation about unwittingly negotiating away the premium received by bicycle patrol officers. Coleman placed the issue of bicycle patrol pay on the agenda for the February 20, 2014, labor-management meeting.

Between January and February 20, 2014, Coleman learned that the employer had been compensating the bicycle patrol officers with an alternative form of compensation other than that specified in the 2010–2012 collective bargaining agreement. Coleman learned about the bicycle patrol premium prior to the February 20, 2014, labor-management meeting.

At the February 20, 2014, labor-management meeting, Coleman asked about the alternative bicycle patrol premium. The union asked to reinstate the premium. The employer said no.

On May 29, 2014, Coleman sent Carlson a letter demanding to "bargain over the decision and the effects of the decision to end" the alternative bicycle patrol premium pay. On June 11, 2014, the employer and union met. Carlson and Milosevich represented the employer. Coleman and Officer Susan Hassinger represented the union. The employer maintained its position that the parties agreed to eliminate all forms of bicycle patrol premium pay during negotiations for the 2013–2015 collective bargaining agreement.

The union filed its unfair labor practice complaint on August 19, 2014.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission reviews conclusions of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the examiner's conclusions of law. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000).

Statute of Limitations

"[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). A cause of action accrues, and the statute of limitations begins to run at the earliest point in time that the complaint concerning the alleged wrong could be filed. *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982), *citing Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616 (1945).

The statute of limitations begins to run when the union first has notice of the employer's action. *Municipality of Metropolitan Seattle*, Decision 1356-A, *citing Durfee's Television Cable Co.*, 174 NLRB 611, 613 (1969). For notice to trigger the statute of limitations, the notice must be clear and unequivocal. *Municipality of Metropolitan Seattle*, Decision 1356-A, *citing Peerless Roofing Co., Ltd. v. National Labor Relations Board*, 641 F.2d 734 (1981). 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. *Community College District 17 (Spokane Community College)*, Decision 9795-A (PSRA, 2008). To be clear and unambiguous, notice must contain specific and concrete information regarding the proposed change.

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). Under the "discovery rule," the statute of limitations does not begin to run until the complainant, using reasonable diligence, would have discovered the cause of action. *U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wn.2d 85, 92 (1981). The doctrine of equitable tolling requires the exercise of reasonable diligence on the part of the complainant. *Adult Residential Care, Inc.*, 344 NLRB 826 (2005). The party asserting equitable tolling should apply bears the burden of proof. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 (2009). To prove that the statute should be tolled, the complainant would need to show deception or concealment of the facts forming the basis of the unfair labor practice complaint and the exercise of diligence by the complainant. *Millay v. Cam*, 135 Wn.2d 193, 206 (1998).

Circumvention

It is an unfair labor practice for an employer to circumvent its employees' exclusive bargaining representative and negotiate directly with bargaining unit employees over mandatory subjects of bargaining. *Royal School District*, Decision 1419-A (PECB, 1982). For a circumvention violation to be found, the complainant must establish that it is the exclusive bargaining representative of the employees and that the employer engaged in direct negotiations with one or more employees concerning a mandatory subject of bargaining. *City of Seattle*, Decision 3566-A (PECB, 1991).

Where an employer's workforce is organized for purposes of collective bargaining, Chapter 41.56 RCW does not preclude direct communications between employers and their union-represented employees. *University of Washington*, Decision 11600-A (PSRA, 2013); *City of Seattle*, Decision 3566-A. Employers retain the right to communicate directly with employees who are represented, provided that the communication does not amount to bargaining or other unlawful activity. *University of Washington*, Decision 10490-C (PSRA, 2011), *aff'd on other grounds*, *University of Washington v. Washington Federation of State Employees*, 175 Wn. App. 251 (2013).

Unilateral Change

As a general rule, an employer has an obligation to refrain from unilaterally changing terms and conditions of employment unless it gives notice to the union; provides an opportunity to bargain before making a final decision; bargains in good faith, upon request; and bargains to agreement or a good faith impasse concerning a mandatory subject of bargaining. *Port of Anacortes*, Decision 12160-A (PORT, 2015); *Griffin School District*, Decision 10489-A (PECB, 2010), *citing Skagit County*, Decision 8746-A (PECB, 2006).

To prove a unilateral change, the complainant must prove that the dispute involves a mandatory subject of bargaining and that there was a decision giving rise to the duty to bargain. *Kitsap County*, Decision 8292-B (PECB, 2007). The complainant must also establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining. *Whatcom County*, Decision 7288-A (PECB, 2002); *City of Kalama*, Decision 6773-A (PECB, 2000); *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)*, Decision

2746-B (PECB, 1990). For a unilateral change to be unlawful, the change must have a material and substantial impact on the terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007), *citing King County*, Decision 4893-A (PECB, 1995).

Issue 1: Did the employer unilaterally change employee compensation in March 2012 by changing the premium paid to bicycle patrol officers?

Application of Standards

The union argued that the Examiner erroneously shifted the burden of proof for an affirmative defense from the employer to the union. The employer argued that the Examiner appropriately placed the burden of proof on the union to prove that the statute of limitations should be tolled.

An assertion that a complaint is untimely is an affirmative defense. The burden to prove an affirmative defense rests with the party pleading the affirmative defense. *City of Walla Walla*, Decision 12348-A (PECB, 2015). The employer pled that the complaint was untimely. There is no dispute that the alleged circumvention and alleged change in compensation took place in 2012. Thus, the employer met its burden of proving that the events forming the basis of the complaint occurred outside of the six-month statute of limitations period.

The union argued that the statute of limitations should be tolled because the employer concealed the agreement to pay an alternative bicycle patrol premium from the union and the union did not know that the employer compensated the bicycle patrol officers with an alternative premium not contained in the collective bargaining agreement. Like the Examiner, we are not persuaded by the union's argument because the union simultaneously argued that the alternative premium was a past practice. To qualify as a past practice, the practice must have been consistent, known by both parties, and mutually accepted. *Whatcom County*, Decision 7288-A. The alternative bicycle patrol premium could not have been both concealed from the union and a past practice. The alternative bicycle patrol premium was not concealed because employees were openly claiming the premium and the employer openly paid the premium.

The union argued that the burden of proof should be placed on the employer to prove constructive knowledge and to do so is "fair and sound policy and law." The union cited *City of Pasco*, Decision 4197-A, for the proposition that the burden of proving knowledge at an earlier date rests with the employer, not the union.[2] While the union conceded that that portion of Decision 4197-A was overruled by a Franklin County Superior Court judge, the union asserted that the Examiner erred in concluding that the Superior Court opinion changed the burden of proof for an affirmative defense when the issue concerned constructive notice.

We agree with the employer that placing the burden to prove an exception to the statute of limitations on the party asserting the exception is consistent with Washington State law on the discovery rule and equitable tolling. Therefore, the burden of proving the statute of limitations should be tolled rests with the party requesting tolling.

The union has not met its burden of proving that the statute of limitations should be tolled. In its complaint, the union alleged that it "learned sometime in early January of 2014 of the existence" of the alternative bicycle patrol premium.[3]

The employer stopped paying the bicycle patrol premium in January 2014. The commander in charge of the DET communicated that to the employees. Judd spoke to VanValey about the bicycle patrol premium pay in January 2014. Judd and Coleman discussed their error in negotiating away the premium in January 2014.

Therefore, we conclude that in January 2014 the union knew that in 2012 the employer changed the bicycle patrol premium. The union's complaint was filed on August 19, 2014. The statute of limitations will not be tolled. The allegation that the employer unilaterally changed the bicycle patrol premium in 2012 was untimely.

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2 Union's Appeal Brief, at 21–22 (June 8, 2016).

3 Amended Complaint, paragraph 1.16 (September 23, 2014).

Issue 2: Did the employer circumvent the union between November 2011 and February 2012 by then Deputy Chief Tim Troxel negotiating directly with bargaining unit employees over changing the premium paid to bicycle patrol officers?

Application of Standards

The union alleged that the employer circumvented the union between November 2011 and February 2012, when Troxel entered into an agreement with then DET Sergeant Todd Frazier to change how bicycle patrol officers were paid. The union alleged it did not learn of the alleged circumvention until June 2014. The Examiner found that the union failed to meet its burden of proving that the employer circumvented the union when the union relied on uncorroborated hearsay testimony to prove its allegations.

Hearsay evidence is admissible in administrative proceedings if it is the type of "evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452(1). An examiner's decision "shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs," including evidence that would be inadmissible in a civil trial. RCW 34.05.461(4). The examiner "shall not base a finding exclusively on such inadmissible evidence unless the [examiner] determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence." *Id.* The weight accorded to hearsay will generally depend upon the degree of independent corroboration that exists for the hearsay statement. *Educational Service District 114*, Decision 4361-A (PECB, 1994).

The union offered one witness's testimony, a written statement from Frazier,[4] and e-mail exhibits explaining the alleged course of events to prove the employer circumvented the union. The union did not call either Frazier or Troxel as witnesses. Rather, the union questioned the witness about conversations between Troxel and Frazier for which the witness was not present. The Examiner sustained the employer's objection to the question and excluded the hearsay testimony. The union bears the burden of proving its allegations; it was the party responsible for presenting sufficient

[4] The union did not appeal the Examiner's ruling rejecting Exhibit 12.

evidence, including calling witnesses, to substantiate its allegations. We affirm the Examiner's decision that the union did not prove by a preponderance of the evidence that the employer circumvented the union between November 2011 and February 2012.

Issue 3: Did the employer unilaterally change employee compensation on February 20, 2014, by discontinuing the bicycle patrol premium after signing the collective bargaining agreement?

Application of Standards

Substantial evidence supports the Examiner's findings of fact on this point. Further, the Examiner relied on his determination that Carlson's testimony and contemporaneous notes were credible. We do not disturb those credibility determinations.

On appeal the union asserted that the employer announced on February 20, 2014, that it was eliminating the bicycle patrol premium and presented the union with a *fait accompli*. The union conceded in its brief that the union and the employer negotiated eliminating the contractual bicycle patrol premium.[5] Contrary to the union's argument that the employer presented the union with a *fait accompli* on February 20, 2014, the employer and union negotiated and agreed to eliminate the bicycle patrol premium paid under the June 20, 2007, MOU and Article 6, Section E.

The employer acted in conformity with the negotiated agreement when it stopped paying the bicycle patrol premium in January 2014. On February 20, 2014, the union asked if the employer would reinstate the premium. The employer responded that it would not reinstate the premium. The union had knowledge in January 2014 that the employer had stopped paying a bicycle patrol premium. The union asking the employer to reinstate the premium and the employer stating that it would not does not restart the statute of limitations. Further, no unilateral change violation will be found when the change is made in conformity with the collective bargaining agreement.

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5 Union's Appeal Brief, at 11.

CONCLUSION

The union's complaint alleging that the employer unilaterally changed employee wages in 2012 is untimely. The union did not meet its burden of proof to toll the statute of limitations. The union did not meet its burden to prove that the employer circumvented the union between November 2011 and February 2012. The union's complaint alleging that the employer unilaterally eliminated all bicycle patrol premiums is untimely. Further, the employer acted in conformity with the collective bargaining agreement when it stopped paying the bicycle patrol premium in January 2014.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Guy Otilio Coss are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 24th day of August, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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DECISION 12563-A - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 26695-U-14

EMPLOYER:	CITY OF RENTON
ATTN:	NANCY CARLSON 1055 S GRADY WAY RENTON, WA 98057 ncarlson@rentonwa.gov (425) 430-7656
REP BY:	SOFIA D. MABEE SUMMIT LAW GROUP PLLC 315 5TH AVE S STE 1000 SEATTLE, WA 98104 sofiam@summitlaw.com (206) 676-7112
PARTY 2:	RENTON POLICE OFFICERS' GUILD
ATTN:	MARK COLEMAN 15 SO GRADY WAY STE 18 RENTON, WA 98057 mcoleman@rentonwa.gov (425) 430-7561
REP BY:	JAMES M. CLINE CLINE & CASILLAS 520 PIKE ST STE 1125 SEATTLE, WA 98101 jcline@clinelawfirm.com (206) 838-8770