STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1576, Complainant, vs. COMMUNITY TRANSIT, Respondent.	CASE 128359-U-16 DECISION 12797 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Michael Subit, Frank Freed Subit & Thomas LLP, for the Amalgamated Transit Union, Local 1576.

Shannon E. Phillips, Attorney at Law, Summit Law Group PLLC, for Community Transit.

On August 2, 2016, the Amalgamated Transit Union, Local 1576 (union) filed an unfair labor practice complaint against Community Transit (employer). The union filed an amended complaint on August 23, 2016. The Commission's unfair labor practice manager issued a preliminary ruling on August 24, 2016, finding that the union's amended complaint stated a cause of action for employer refusal to bargain. The employer filed an answer to the complaint on September 6, 2016. On September 28, 2016, the union filed a motion for clarification and partial reconsideration of the preliminary ruling. The unfair labor practice manager ruled on the union's motion and issued a corrected preliminary ruling on November 1, 2016, adding a cause of action for employer interference with employee rights. A hearing was conducted on June 9, 2017. Each party filed a post-hearing brief.

ISSUES

The substantive issues in this case, as framed by the corrected preliminary ruling, are as follows:

1. Did the employer refuse to bargain in violation of RCW 41.56.140(4) by unilaterally changing a past practice of approving unpaid union business leave in excess of 15 working days per year, without providing the union with an opportunity for bargaining?

2. Did the employer interfere with employee rights in violation of RCW 41.56.140(1) by informing employees shortly before the beginning of contract negotiations that the employer would not authorize unpaid union business leave in excess of 15 working days per year?[1]

I find that the union's unilateral change allegation is not timely. The employer unequivocally announced its intent to enforce the contractual 15-day limit on unpaid union business leave—and began enforcing the limit—more than six months before the union's complaint was filed.

For the same reasons, the union's interference charge is untimely. The interference charge was not filed within six months of the date that the union received notice that the employer would not authorize unpaid union business leave in excess of 15 working days per year.

BACKGROUND

The employer provides public transit services in Snohomish County. The union has had a collective bargaining relationship with the employer since at least 1977. The bargaining unit comprises a variety of employees, including coach operators, dispatchers, and maintenance employees.

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[1] In its post-hearing brief, the union appears to argue that the employer committed a "refusal to meet" violation. The preliminary ruling stated that the issues for hearing were limited to allegations of independent interference and "unilateral change" violations. "Unilateral change" and "refusal to meet" are distinct causes of action. *King County*, Decision 6994-B (PECB, 2002). There was no motion to amend per WAC 391-45-070 to add a "refusal to meet" allegation. Accordingly, only the issues framed by the preliminary ruling will be considered. *Central Washington University*, Decision 12588-B (PSRA, 2016), *aff'd*, Decision 12588-C (PSRA, 2017).

Additionally, the union's brief exceeded 25 pages. WAC 391-45-290(2) limits briefs to 25 pages, and the union did not request leave to exceed this limit. Therefore, the portions of the union's brief beyond 25 pages are stricken and are not considered.

The union also attached an arbitration award to its brief without filing a motion under WAC 391-45-270(2). Although the arbitration award is part of the official record in this matter, it has not been considered.

Collective Bargaining Agreement Provision

The January 1, 2013, through December 31, 2016, collective bargaining agreement was in effect at the time of the events at issue in this case. The pertinent provision in the agreement provided as follows:

> Section 9.3 Union Business Leave. The Employer agrees to allow leave for bona fide Union business in the following categories:
>
> . . .
>
> C. Unpaid Union Leave. An employee may be relieved from work for union business other than that described in Section 9.3. Such leave will not be considered hours worked, but the employee will continue to earn or accrue benefits and seniority. Aggregated time off shall not exceed 15 working days per year.

Language effectively identical to that found in Article 9.3.C of the 2013–2016 collective bargaining agreement has been in place since 2005. Provisions for unpaid union business leave have existed in different forms since 1982. In the 1982–1984 agreement, the limit for unpaid union business leave was 12 days. In the 1994–1997 agreement, the limit increased to 15 days.

During negotiations for the 2013–2016 agreement, the union proposed eliminating the language that limited unpaid union business leave to 15 days per year. The proposed change was not adopted, and the 15-day limit remained in the collective bargaining agreement.

The Unpaid Union Business Leave Issue

While dealing with a request for time off from union executive board member Bruce Kurjiaka in August 2015, Manager of Transportation Operations Colleen Baumann discovered that he had taken more than 15 days of unpaid union business leave during the year. She communicated this to Labor Relations Manager Sara Burnett. Baumann and Burnett had not been aware prior to August 2015 that any employee had taken more than 15 days of unpaid union business leave in a single year. Burnett looked into Kurjiaka's records and discovered that he had also taken more than 15 days of unpaid union business leave in 2014.

Burnett e-mailed union president Kathleen Custer on August 14, 2015, communicating what the employer had learned about Kurjiaka. Burnett told Custer that the employer was concerned because Kurjiaka had taken unpaid union business leave in excess of what the contract allowed. Burnett informed Custer that the employer intended to follow the contract language and limit unpaid union business leave to 15 days per year.

Burnett spoke with Custer on August 19, 2015. Custer asked that the employer waive the provision of the contract regarding the 15-day limit. Custer informed Burnett that Kurjiaka had cancelled his upcoming unpaid union business leave. Nonetheless, Kurjiaka took additional days of unpaid union business leave on August 31 and September 9, 10, and 11, 2015.

On September 25, 2015, Burnett e-mailed Custer, stating she had learned that Kurjiaka had taken more unpaid union business leave. Burnett said, "There must have been some kind of communication lapse after our emails last month with [Kurjiaka] and the manpower scheduling supervisor." Burnett told Custer that the employer wanted to follow the limit contained in the collective bargaining agreement and that "[t]he manpower scheduling supervisor [would] not approve any further Union Business days for [Kurjiaka] the remainder of the year."

Following Burnett's September 25 e-mail, no union members took unpaid union business leave beyond the 15-day limit for the remainder of the year. Sometime between September 25 and November 12, 2015, Kurjiaka put in a request to take unpaid union business leave on November 16, 2015, and the request was initially granted. On November 12, 2015, the manpower scheduling supervisor denied the previously approved leave, and Kurjiaka was not able to take unpaid union business leave on November 16.

In February 2016, Custer contacted Burnett, stating that the union wanted to discuss the unpaid union business leave issue. Burnett asked Custer to send a proposal.

On May 26, 2016, Custer, Burnett, and Director of Administration Geri Beardsley met to discuss the unpaid union business leave issue. At the meeting, Custer expressed concern that imposing a limit of 15 days on unpaid union business leave would hinder the executive board members' ability to be involved in negotiations. Custer asked for a waiver from the limit for the executive board

members as needed to engage in collective bargaining and said that the union was also open to other options. Burnett and Beardsley said they would discuss the union's request with management.

Around July 13, 2016, the employer cancelled unpaid union business leave scheduled by executive board member Eric Sullivan based on the 15-day limit. On July 16, 2016, Kurjiaka was also denied a request for unpaid union business leave based on the limit.

On July 20, 2016, Custer sent a letter to Burnett, asserting that enforcement of the limit would "impede the Union's ability to conduct [its] business related to bargaining a new contract." Custer said that if the parties could not resolve the issue, the union would file an unfair labor practice charge. Burnett responded on July 29, 2016, stating that the employer would not agree to waive the limit.

On August 2, 2016, the union filed the unfair labor practice complaint in this matter.

ANALYSIS

The employer argues that the union's complaint is untimely. If the complaint is untimely, then the union's complaint must be dismissed and the merits of its allegations cannot be addressed.

Applicable Legal Standards

"[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 a complaint concerning the alleged wrong could be filed. *City of Renton*, Decision 12563-A (PECB, 2016); *Municipality of Metropolitan Seattle*, Decision 1356-A (PECB, 1982).

The statute of limitations begins to run when a potential complainant first has notice of the adverse action. For notice to trigger the statute of limitations, the notice must be clear and unequivocal. 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. To be clear and unambiguous, notice must contain specific and concrete information regarding the proposed change. *City of Renton*, Decision 12563-A.

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. 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. The doctrine of equitable tolling requires the exercise of reasonable diligence on the part of the complainant. The party asserting that equitable tolling should apply bears the burden of proof. 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. *Id.*

Application of Standards

Unilateral Change Allegation

The employer first notified the union that it intended to enforce the 15-day limit on unpaid union business leave on August 14, 2015. On September 25, 2015, the employer informed the union that Kurjiaka had been able to take additional unpaid union business leave by mistake and that further unpaid union business leave for Kurjiaka would not be approved for the rest of the year. Although the August 14 e-mail may have been viewed with some ambiguity as to whether it was communicating a final decision or merely a desire, the September 25 e-mail unequivocally communicated that a decision to enforce the 15-day limit had been made and would be implemented.

The union does not dispute that on November 12, 2015, Kurjiaka was denied unpaid union business leave because of the 15-day limit. At the very latest, by November 12, 2015, the union was on clear notice that the employer was enforcing the 15-day limit.

Following the employer's announcement of its decision to follow the contract, the union asked the employer for a waiver and sought to discuss the issue. The union raised objections to the 15-day limit throughout 2015 and 2016. These actions did not toll the statute of limitations for filing an unfair labor practice charge. The employer did not at any time agree to the waiver or otherwise

suggest that it was changing course from the decision it had made. Although parties are certainly encouraged to try to work out issues, the union allowed over six months to pass without a resolution.

In *King County*, Decision 3558-A (PECB, 1990), the Commission ruled that the statute of limitations is strictly applied even while parties attempt to resolve the underlying dispute. The Commission stated, "[S]ix months is ample time to either resolve a dispute or recognize that no agreement on a resolution will be forthcoming." Once the union received unequivocal notice of the change in 2015, it was incumbent on the union to file a timely complaint if it wished to preserve its right to challenge the decision through unfair labor practice proceedings before the Commission. There is no evidence of deception or concealment of facts that would have tolled the statute of limitations. The union's August 2, 2016, complaint is untimely as to the unilateral change allegation.

Interference Allegation

In its complaint, the union alleged that the employer's "decision to enforce, on the eve of contract negotiations with [the union], the 15 working day cap on unpaid union business leave" constituted unlawful interference.

The employer unequivocally communicated its decision to enforce the contractual 15-day limit on unpaid leave for union business by November 2015 at the very latest. The union's request that the employer waive the limit as specifically applied to collective bargaining negotiations (as opposed to elections, organizing, or other general purposes) demonstrates that the union understood that unpaid union business leave taken for collective bargaining would count toward the 15-day limit. If the union wanted to challenge the decision to enforce the limit on unpaid union business leave, the union would have needed to file a charge within six months of the employer's decision. The union's August 2, 2016, complaint is untimely as to the interference allegation.

Having failed to file a timely challenge to the enforcement of the arguably once dormant 15-day limit, the limit must be considered an active provision of the collective bargaining agreement. Therefore, there is a contractual waiver of any claim that the enforcement of the provision constitutes interference. *See State – Corrections*, Decision 9421 (PSRA, 2006) (finding employer

action was permitted by collective bargaining agreement and therefore could not constitute interference).

CONCLUSION

The union did not file a complaint within six months of receiving unequivocal notice of the employer's decision to enforce the contractual 15-day limit on unpaid union business leave. The union's complaint is untimely and is therefore dismissed.

FINDINGS OF FACT

1. Community Transit is a public employer within the meaning of RCW 41.56.030(12).

2. The Amalgamated Transit Union, Local 1576 (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit that comprises a variety of employees, including coach operators, dispatchers, and maintenance employees.

3. The employer and union were parties to a collective bargaining agreement effective from January 1, 2013, through December 31, 2016.

4. Section 9.3 of the collective bargaining agreement provided that employees could take up to 15 days of unpaid union business leave per year.

5. In August 2015, the employer discovered that a union executive board member, Bruce Kurjiaka, had taken more than 15 days of unpaid union business leave in 2015.

6. Labor Relations Manager Sara Burnett e-mailed union president Kathleen Custer on August 14, 2015, communicating what the employer had learned about Kurjiaka. Burnett told Custer that the employer was concerned because Kurjiaka had taken unpaid union business leave in excess of what the contract allowed. Burnett informed Custer that the employer intended to follow the contract language and limit unpaid union business leave to 15 days per year.

7. Burnett spoke with Custer on August 19, 2015. Custer asked that the employer waive the provision of the contract regarding the 15-day limit. Custer informed Burnett that Kurjiaka had cancelled his upcoming unpaid union business leave.

8. Kurjiaka took additional days of unpaid union business leave on August 31 and September 9, 10, and 11, 2015.

9. On September 25, 2015, Burnett e-mailed Custer, stating she had learned that Kurjiaka had taken more unpaid union business leave. Burnett said, "There must have been some kind of communication lapse after our emails last month with [Kurjiaka] and the manpower scheduling supervisor." Burnett told Custer that the employer wanted to follow the limit contained in the collective bargaining agreement and that "[t]he manpower scheduling supervisor [would] not approve any further Union Business days for [Kurjiaka] the remainder of the year."

10. Following Burnett's September 25 e-mail, no union members took unpaid union business leave beyond the 15-day limit for the remainder of the year. Sometime between September 25 and November 12, 2015, Kurjiaka put in a request to take unpaid union business leave on November 16, 2015, and the request was initially granted. On November 12, 2015, the manpower scheduling supervisor denied the previously approved leave, and Kurjiaka was not able to take unpaid union business leave on November 16.

11. In February 2016, Custer contacted Burnett, stating that the union wanted to discuss the unpaid union business leave issue. Burnett asked Custer to send a proposal.

12. On May 26, 2016, Custer, Burnett, and Director of Administration Geri Beardsley met to discuss the unpaid union business leave issue. At the meeting, Custer expressed concern that imposing a limit of 15 days on unpaid union business leave would hinder the executive board members' ability to be involved in negotiations. Custer asked for a waiver from the limit for the executive board members as needed to engage in collective bargaining and said that the union was also open to other options. Burnett and Beardsley said they would discuss the union's request with management.

13. Around July 13, 2016, the employer cancelled unpaid union business leave scheduled by executive board member Eric Sullivan based on the 15-day limit. On July 16, 2016, Kurjiaka was also denied a request for unpaid union business leave based on the limit.

14. On July 20, 2016, Custer sent a letter to Burnett, asserting that enforcement of the limit would "impede the Union's ability to conduct [its] business related to bargaining a new contract." Custer said that if the parties could not resolve the issue, the union would file an unfair labor practice charge. Burnett responded on July 29, 2016, stating that the employer would not agree to waive the limit.

15. On August 2, 2016, the union filed the unfair labor practice complaint in this matter.

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. Based upon Findings of Fact 6 through 15, the union's unfair labor practice complaint is untimely 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 27th day of November, 2017.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

SEAN M. LEONARD, 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

MARILYN GLENN SAYAN, CHAIRPERSON
MARK E. BRENNAN, COMMISSIONER
MARK R. BUSTO, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 11/27/2017

DECISION 12797 - PECB has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 128359-U-16

EMPLOYER: COMMUNITY TRANSIT

REP BY: SHANNON E. PHILLIPS
SUMMIT LAW GROUP PLLC
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2682
shannonp@summitlaw.com
(206) 676-7092

SARA BURNETT
COMMUNITY TRANSIT
7100 HARDESON RD
EVERETT, WA 98203
sara.burnett@commtrans.org
(425) 348-7140

PARTY 2: AMALGAMATED TRANSIT UNION LOCAL 1576

REP BY: MICHAEL SUBIT
FRANK FREED SUBIT & THOMAS LLP
705 2ND AVE STE 1200
SEATTLE, WA 98104-1798
msubit@frankfreed.com
(206) 682-6711

KATHLEEN CUSTER
AMALGAMATED TRANSIT UNION LOCAL 1576
2810 LOMBARD AVE STE 203
EVERETT, WA 98201
kcusterpres@atu1576.org
(425) 259-4544