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-A - PECB DECISION OF COMMISSION

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RCW 41.56.160(1) prohibits the Commission from processing an unfair labor practice complaint for events occurring more than six months before a party filed the complaint. This case comes before the Commission on the Amalgamated Transit Union, Local 1576's (union) appeal of Examiner Sean Leonard's decision finding the union's complaint untimely. *Community Transit*, Decision 12797 (PECB, 2017). The issue before the Commission is whether the union's complaint was timely.

The union represents employees at Community Transit (employer). Section 9.3.C of the parties' collective bargaining agreement allowed employees to take up to 15 unpaid union business leave days per year. In August 2015, September 2015, and November 2015, the employer communicated to the union that it would enforce Section 9.3.C. In August 2015, September 2015, February 2016, and May 2016, the union asked the employer to waive Section 9.3.C. The employer denied the union's requests. When the employer denied an employee's request for unpaid union business leave in excess of 15 days in November 2015, the union had unequivocal

notice that the employer was enforcing Section 9.3.C. The union did not file an unfair labor practice complaint alleging that the employer refused to bargain until August 2, 2016.

We affirm the Examiner's decision that the unfair labor practice complaint was untimely.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews 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). The Commission reviews factual findings for substantial evidence in light of the entire record. 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. *Public Employment Relations Commission v. City of Vancouver*, 107 Wn. App. 694, 703 (2001); *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B. 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). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-Tran (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

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 a 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 is a jurisdictional issue that the Commission may raise at any time. *City of Brier*, Decision 10013-A (PECB, 2009); *City of Bellevue*, Decision 9343-A (PECB, 2007).

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 understanding. *City of Renton*, Decision 12563-A (PECB, 2016). 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. *City of Renton*, Decision 12563-A.

The statute of limitations is a legal question, which we review de novo. *Bilanko v. Barclay Court Owners Association*, 185 Wn.2d 443, 448 (2016), *citing Goodman v. Goodman*, 128 Wn.2d 366, 373 (1995).

Application of Standards

The union asserted that the employer did not adequately plead the statute of limitations as an affirmative defense. On appeal, the union argued that the refusal to bargain and interference allegations were timely. The union asserted that the employer's November 2015 notice that it would not waive Section 9.3.C was equivocal because in 2016 the employer continued to approve union business leave in excess of 15 days. On the interference claim, the union argued that the employer could not have interfered with employee rights until the employees requested, and the employer denied, unpaid union business leave beyond 15 days. Therefore, the union asserted that the employer interfered with employee rights by telling the union on July 15, 2016, that the employer would not grant unpaid union business leave beyond 15 days. We disagree and affirm the Examiner.

The union filed a complaint on August 2, 2016, and an amended complaint on August 23, 2016. The Commission's unfair labor practice manager issued a preliminary ruling on August 24, 2016. The employer filed an answer on September 6, 2016. In its answer, the employer pled the statute of limitations as an affirmative defense. The union filed a motion for clarification of the preliminary ruling on September 28, 2016. In response, the unfair labor practice manager amended the preliminary ruling and gave the employer the option to amend its answer. The employer did not file an amended answer.

On appeal, unchallenged findings of fact are verities. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014).[1] The Examiner's findings of fact stand. We review de novo whether the union's complaint was timely.

Employees entered their leave requests, including for unpaid union business leave, in an electronic scheduling system called the daybook. A manpower scheduling supervisor approved or denied the requests. As with any other type of leave, the employees were able to request time off regardless of whether they had expended their entitlements. The union had taken the position that the employer should not manage unpaid union business leave. Thus, assuming the union was monitoring employees' unpaid union business leave, the employer had not been tracking unpaid union business leave. As a result, a few employees took unpaid union business leave in excess of the 15 days the union and employer had agreed to in the collective bargaining agreement.

Employee Bruce Kurjiaka took or scheduled 19 unpaid union business days in 2014, 29 unpaid union business days in 2015, and 16 unpaid union business days in 2016. It was Kurjiaka's requests that led the employer to discover in August 2015 that employees were taking more unpaid union business leave than the employer and union had agreed to in the collective bargaining agreement.

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[1] The union's notice of appeal generally asserted error, citing pages 2, 7, and 8 of the decision, and appealed Conclusion of Law 2 and Footnote 1. A notice of appeal "shall identify, in separate numbered paragraphs, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error." WAC 391-45-350(3).

Two other employees took or scheduled unpaid union business leave beyond the contractual 15-day limit. In 2008, an employee took 18 days of unpaid union business leave. In 2016, employee Eric Sullivan scheduled 16 days of unpaid union business leave. In May 2016, the employer directed Sullivan to cancel the days in excess of 15.

On August 14, 2015, Labor Relations Manager Sara Burnett e-mailed Union President Kathleen Custer and notified her of the employer's intent to adhere to the language in Section 9.3.C limiting an employee's unpaid union business leave to 15 days per year. Burnett and Custer discussed Section 9.3.C at the August 20, 2015, labor-management meeting. Before the meeting, Custer had asked the employer to waive the 15-day limitation. Burnett told Custer that the employer would enforce the 15-day limitation.

After the employer communicated its intent to adhere to Section 9.3.C, Kurjiaka requested and took four additional days of unpaid union business leave. Upon learning he took the additional time, Burnett e-mailed Custer on September 25, 2015, and communicated that the employer would enforce Section 9.3.C and would not approve any further unpaid union business leave for Kurjiaka in 2015.

The employer instructed manpower scheduling supervisors to deny requests for unpaid union business leave beyond 15 days. In November 2015, Kurjiaka entered another request for unpaid union business leave in the daybook. A manpower scheduling supervisor initially granted the request. However, on November 12, 2015, the manpower scheduling supervisor denied the request. Kurjiaka did not take additional unpaid union business leave in 2015.

In February 2016, Custer asked to negotiate unpaid union business leave. Burnett asked the union to make a proposal. The union did not make a proposal, but Burnett, Custer, and Director of Administration Geri Beardsley met on May 26, 2016. During the meeting, Custer asked the employer to waive the 15-day limitation. On July 15, 2016, Burnett responded to Custer's request. The employer was unwilling to waive the 15-day limitation.

When the parties bargained the collective bargaining agreement, the parties agreed to Section 9.3.C's annual 15-day limitation on employees' unpaid union business leave. That language waived the union's right to unlimited unpaid leave for union business, including negotiations. As a partner to the collective bargaining agreement, the union had an obligation to adhere to the agreed-upon language until it was successful in negotiating a change.

The employer did not refuse to bargain when it began enforcing Section 9.3.C of the collective bargaining agreement in the fall of 2015. The parties had negotiated and agreed to the language. The employer had not knowingly agreed to waive the language earlier because the employer believed the union was tracking employees' unpaid union business leave. By communicating its intent to enforce the language in the fall of 2015 and thereafter cancelling leave in excess of 15 days, the employer provided the union with sufficient notice that the employer was enforcing Section 9.3.C. To be timely, the union would have needed to file an unfair labor practice complaint alleging that the employer refused to bargain when it began enforcing Section 9.3.C by May 2016. On August 2, 2016, the union filed its unfair labor practice complaint alleging that the employer unilaterally changed a past practice on July 15, 2016. The union's refusal to bargain complaint was untimely.

The union relied on *Indiana and Michigan Electric Company*, 229 NLRB 576 (1977), and other National Labor Relations Board cases to support the union's assertion that an employer's refusal to allow employees to take unpaid leave to attend negotiations scheduled during work hours is unlawful. In *Indiana and Michigan Electric Company*, the employer interfered with employee rights when it refused to grant union negotiation team members unpaid leave and refused to negotiate during nonwork hours. Unlike this case—where the parties agreed to limit unpaid leave for union business—*Indiana and Michigan Electric Company* and the cases relied upon by the union did not involve language limiting unpaid time off. As framed by the amended preliminary ruling, an issue in this case was employer interference by enforcing contract language. The allegation is not that the employer interfered with employee rights when it refused to grant unpaid union business leave and refused to negotiate during nonwork hours.

We disagree with the union's assertion that an employer commits an unfair labor practice any time it refuses to allow employees to take unpaid leave to attend collective bargaining during work hours. When the union agreed to Section 9.3.C limiting employees' unpaid union business leave, it thereby waived its right to unlimited unpaid leave for union business. The employer did not commit an unfair labor practice when it enforced the language of the parties' collective bargaining agreement.

Custer asked the employer to waive the 15-day limitation in August 2015, September 2015, February 2016, and May 2016. Custer's request to negotiate the issue in February 2016 and her renewed request for the employer to waive the language in May 2016 did not reset the statute of limitations. Parties are not required to bargain mid-term language that is contained in a collective bargaining agreement. While a party is free to ask its counterpart to waive contract language, a party's refusal neither creates a new cause of action nor resets the triggering event. The union knew no later than November 2015 that the employer was enforcing Section 9.3.C.

Finally, the union appealed the Examiner's decision to exclude an arbitration award that the union appended to its post-hearing brief. The Examiner understood the union to be attempting to enter additional facts and excluded the arbitration award for failure to comply with WAC 391-45-270(2). If a party seeks to enter any factual evidence after the hearing, then the party must comply with WAC 391-45-270(2). We affirm the Examiner's decision to exclude the arbitration award.

CONCLUSION

The union's unfair labor practice complaint was untimely. The employer provided unequivocal notice to the union in November 2015 that the employer intended to enforce Section 9.3.C. When the employer communicated its intent to enforce the language and followed through, the union should have known the employer would not grant additional unpaid union business leave in excess of the 15 days the parties had agreed to in the collective bargaining agreement. By responding to the union's request to waive the 15-day limitation, the employer did not create a new triggering

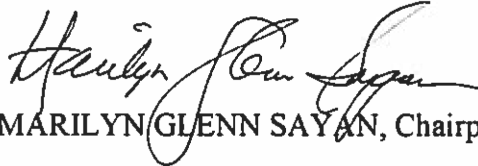
event that would render the union's allegation that the employer interfered with employee rights on July 15, 2016, timely.

ORDER

The findings of fact, conclusions of law, and order issued by Examiner Sean Leonard are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission.

ISSUED at Olympia, Washington, this 23rd day of March, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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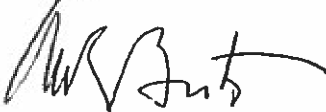

MARK BUSTO, Commissioner

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

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