STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY JUVENILE DETENTION GUILD, Complainant, vs. KING COUNTY, Respondent.	CASE 139012-U-24 DECISION 14134 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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On May 20, 2024, the King County Juvenile Detention Guild (union or guild) filed an unfair labor practice (ULP) complaint against King County (employer or county) with the Public Employment Relations Commission (Commission or Agency). A hearing was conducted on January 22 and 23, 2025, at King County offices. The union filed a post-hearing brief on March 14, 2025, and the employer filed a post-hearing brief on March 17, 2025, to complete the record.[1] [2]

[1] At the hearing, the Examiner set the filing date for the post-hearing briefs for March 14, 2025. While the employer emailed its post-hearing brief at 4:58 p.m. on March 14, 2025, to Lufkin and the Examiner, it failed to send the brief to filing@perc.wa.gov, as required under WAC 391-08-120. Upon the Examiner's direction after the close of business hours on March 14, 2025, the employer emailed its brief to Lufkin, the Examiner, and filing@perc.wa.gov on March 17, 2025. As the union did not raise objections to the employer's late filing after being afforded an opportunity to do so, the Examiner accepted the employer's post-hearing brief.

[2] At the hearing the employer requested to file up to a 35-page post-hearing brief, the union did not raise an objection, and the Examiner allowed the 35-page post-hearing brief limit for both parties.

ISSUES

The issues as framed by the June 13, 2024, cause of action statement include,

> 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)] within six months of the date the complaint was filed by:
>
> 1. Unilaterally changing the working conditions of the essential functions of the position of Juvenile Detention Officer without providing the union an opportunity for bargaining?
>
> 2. Unilaterally changing the working conditions for sick employees with respect to mandatory overtime without providing the union an opportunity for bargaining?

The employer violated RCW 41.56.140(4) by failing to provide notice to the union of the decision or to bargain the effects of the decision to add voluntary and mandatory overtime to the overtime (OT) restrictions forms. Accordingly, on the first allegation, the employer did not meet its statutory obligation to bargain mandatory effects of the permissive decision, or, upon impasse, proceed to interest arbitration over the mandatory effects as required by RCW 41.56.430–.470.

Because the union's second allegation was not timely filed within the statute of limitations, the employer did not violate RCW 41.56.140(4). Even if the Commission were to find the complaint timely, the union failed to establish a consistent past practice that was known to all parties and mutually accepted. This allegation is denied.

BACKGROUND

The union is the exclusive bargaining representative for all full-time and regular part-time Juvenile Detention Officers (JDOs) in the juvenile division of the King County Department of Adult and

Juvenile Detention (DAJD).[3] The positions are considered "uniform personnel" and are therefore subject to interest arbitration under RCW 41.56.030(14).

The juvenile division of the DAJD operates out of the Judge Patricia Clark Children and Family Justice Center and runs a 24-hour, seven-day per week detention facility with male and female detainees ages 12 to 17. As of February 2024, the juvenile division housed about 44 juvenile detainees, but that number can fluctuate depending on superior court sentencing. Juvenile detainees are sentenced for allegations of crimes causing some type of harm to a person or property, such as robbery or murder, and are all considered high risk. Juveniles charged with allegations of less serious or non-violent crimes are usually not sentenced to the juvenile detention facility.

The JDOs are assigned to five, eight-hour shifts per week with two consecutive days off. The three shifts are 0700 to 1500, 1500 to 2300 (swing shift), and 2300 to 0700 (graveyard). The JDOs are responsible for creating and maintaining a safe, secure environment for juveniles to ensure their care and programming needs, as well as access to a health clinic internally with a registered nurse or transport to a medical facility. Programming includes overseeing educational and recreational opportunities provided by volunteers and contractors and directly providing programs and groups for fostering pro-social behavior. The juvenile division is also required to provide the juvenile detainees with access to educational programming delivered through Seattle Public Schools and volunteers.

There are a total of seven units, and each unit is staffed with two JDOs. The staffing ratio is one staff for every eight detained juveniles. Additional JDO staffing is required for central control, admits and visitation release, break relief rovers, the health clinic, and court runners. JDO staffing needs vary every day. At the time of the hearing, the juvenile division was staffed with 92 JDOs, with 5 additional JDOs arriving after orientation completion. Of the 92, approximately 30 JDOs are still in probationary status, which does not afford them the same rights as a career service JDO,

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[3] *King County*, Decision 13201 (PECB, 2020).

such as being allowed to bid their shift or access to the Family Medical Leave Act (FMLA or FML).

In 2020, the county announced that the juvenile detention facility was going to be closed, and staff took other county positions, took promotions, or resigned. Around that time, the number of JDOs dropped to approximately 72. When staffing ratios are reduced due to insufficient staffing or decreased juvenile detainees, the juvenile division shuts down units or transitions into modified programming where the juvenile detainees are held in their rooms and only come out for limited and minimal programming. Modified programming is an absolute last resort as it poses difficulties to both the detainees and staff. In such cases, the detainees can begin to "act[] out," the JDOs are challenged to get detainees to return to their rooms, and major incidents may occur impacting the safety of the detainees and staff. Multiple witnesses testified to some juvenile detainees having gang affiliations, which requires the separation of those youth into different areas.

Mandatory Overtime in the DAJD Code of Conduct and the Parties' Collective Bargaining Agreement

The parties' most recent collective bargaining agreement (CBA) was effective January 1, 2021, through December 31, 2024. The employer's assignment of mandatory overtime has been a long-standing expectation of JDOs.

Sections 9.9 and 9.10 of the parties' CBA address the application of and release of JDOs from mandatory overtime. The common vernacular used by the parties for when the employer assigns mandatory overtime is that the JDO is being "mandatoried." JDOs may be mandated to participate in trainings or meetings outside of their regular shift or prior to or immediately following their regular shift. The JDO at the top of the reverse seniority mandatory overtime list is the first JDO directed to perform mandatory overtime that day. When a JDO is "mandatoried" and works the mandatory overtime shift, they are assigned to the bottom of the reverse seniority mandatory overtime list. A "mandatoried" JDO may coordinate a split overtime shift with a volunteer, and the department is to make good faith efforts to approve such a split.

Section 9.10.B of the CBA provides each JDO with one mandatory overtime pass per calendar year. Use of the pass will excuse them from performing the assigned mandatory overtime, and the CBA specifies five criteria for the JDO to use the pass. Employees who fail to stay for mandatory overtime as directed without an approved use of a pass are subject to discipline. Article 9.10.B.6 provides, "Grievances of this sub-section shall be limited to Step 3 of the grievance procedure." Step 3 of the grievance process under section 12.3.C of the CBA requires a meeting with the Office of Labor Relations (OLR) within 30 calendar days after the Step 2 department director's written response. After a Step 3 hearing, OLR must issue a written response to the union within 30 calendar days.

The parties also bargained the DAJD Code of Conduct, which applies to both the adult and juvenile divisions. A violation of the DAJD Code of Conduct by a JDO can result in what the employer at one point referred to as "verbals," but this practice has since evolved into the issuance of letters of corrective counseling (LOCCs). When issuing an informal LOCC, or a formal disciplinary action, for refusal to work mandatory overtime when directed, the employer will normally cite section 1.00.105, Conduct Unbecoming of the Code of Conduct.

Application of the Code of Conduct and CBA to JDO Mandatory Overtime Refusal

If a JDO advises their supervisor that they are sick or ill during their regular shift and need to leave before their shift is over, they are allowed to use sick leave as provided in the CBA. If, however, a JDO refuses mandatory overtime and advises they are sick or ill without having taken sick leave during their regular shift, they are required to follow the staff report process identified above.

While testimony varied on the historical nature of mandatory overtime, the record reflects that at least since 2003, if a JDO refused a mandatory overtime assignment, they either had to provide appropriate documentation to their supervisor or be subject to disciplinary action. When a JDO refuses to perform mandatory overtime as directed by a supervisor, the standard practice is for the JDO to submit a written staff report by the end of their shift to their supervisor. The supervisor then reviews the staff report and completes the "actions for resolution," giving a recommendation on what level of discipline, if any, the JDO should receive for refusing mandatory overtime. The chief then reviews the supervisor's recommendation and forwards the document to the director

who makes the final decision on what discipline should be administered. The director's decision is then returned to the supervisor who meets with the JDO to explain the final outcome.

The record reflects a history of the employer administering formal discipline to JDOs who refused to perform mandatory overtime due to illness.[4] Three JDOs who claimed they were not feeling well and could not perform mandatory overtime between 2004 and 2018 were administered a one-day suspension. Around 2019, the employer began to administer the lower level of non-disciplinary actions, the LOCCs.

JDOs' Application for and Use of Family Medical Leave Act and King County Family Medical Leave (KCFML)

The exception to facing possible corrective counseling or disciplinary action occurs when JDOs have been granted accommodations to perform limited or no mandatory overtime, which is a practice that has been in place since at least 2016 based on documented medical restrictions through the FMLA or KCFML.

When a JDO requests Americans with Disabilities Act, FMLA, or KCFML workplace accommodations, they are provided the form labeled "Essential Functions of the Position," to be completed by a health care provider and the employee. The form, created around 2008 or 2009, documents the serious health condition or conditions that preclude the JDO from performing the essential functions of their position. It is five pages in total, contains eight essential functions of the JDO position, and asks for the medical provider to opine whether the employee can fully perform the functions and to provide objective, measurable restrictions. The column adjacent to the described essential functions list bulleted "Skills & Abilities Required" to fulfill that function.

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[4] The Examiner refuses to engage in semantics, as suggested by the parties' briefs, about whether "feeling physically and/or emotionally exhausted" meets the standard of reporting "sick" or "ill." The basic definitions of the words "sick" and "ill" in the dictionary support both or either of those conditions. *Merriam-Webster*, accessed on May 17, 2025, at https://www.merriam-webster.com/.

The first essential function on the form reads, "Come to work on a regular and reliable basis, work under direct supervision, perform work duties under stressful conditions and have contact with individuals that may be aggressive and/or confrontational." The skills and abilities for this essential function includes five bullet points, the first one reading, "The ability to work regularly and ability to work an 8-hour shift, including working multiple shifts."

Employer's Creation of Two Additional Follow-Up Forms Regarding a JDO's Ability to Perform Voluntary or Mandatory Overtime

Since at least January of 2023, the employer has solicited additional clarification from employees' health care providers regarding how the employee's health condition impacts their ability to work mandatory overtime.[5] If the provider's initial documentation indicates that the employee can perform voluntary overtime, but not mandatory, or limits the amount of mandatory overtime, based on the employee's serious health condition, the employer sends out the "DAJD Overtime Restrictions" form, which may be supplemented by the "DAJD Overtime Restrictions: Health Care Provider Follow Up, Additional Clarification Needed Form." For simplicity's sake, both forms will be referred to as OT restrictions forms going forward. The former form asks the medical provider to determine restrictions on a JDO's ability to perform voluntary and/or mandatory overtime, including effective and end dates of the restriction(s) and number of hours outside of their regular shift, if any. The latter form contains two inquiries: (1) how the employee's serious health condition directly relates to the employee's ability to work mandatory overtime "as required for their job" and (2) why the medical condition only impacts the employee's ability to perform mandatory overtime but permits voluntary overtime at the employee's discretion.

The union narrows the scope of the application of "essential function" to that defined by the essential functions form. While the union does not refute that mandatory overtime has been a long-standing JDO position requirement, it argues that "working multiple shifts" under the first essential function does not contemplate mandatory overtime. The union does not explain how it

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[5] There is no indication in the record, nor did the employer argue, that the union knew or should have known of the follow up regarding voluntary or mandatory overtime prior to the statute of limitations.

distinguishes position requirements from essential functions but does conflate those two concepts in its citation to Commission case law. *See infra p. 19.*

The employer conversely broadens the scope of "essential function" to include the long-term JDO position requirement of mandatory overtime. Further, the employer interprets the term "working multiple shifts" on the essential functions form to be inclusive of mandatory overtime.

The employer offered by way of example the U.S. Department of Labor's health care provider certification form for FMLA. This form clearly articulates, "The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier."

The employer's Human Resources Policy 2022-0001, titled "Reasonable Accommodation in Employment for Individuals with Disabilities," and issued on March 3, 2022, defines "Essential Function" as "any fundamental job duty of a position an employee *must be able to perform*, with or without reasonable accommodation." (emphasis added).

Andre Chevalier, Senior Labor Negotiator, testified that appendix A contains the only reference he's aware of related to "essential functions" and that the parties have never bargained the definition of essential functions, disability accommodations or processes, or the FMLA process.

Jason Smith, the guild president, testified that the essential functions form has been in place for approximately 16 years. On cross-examination, Smith recalled that the employer had at one point provided the guild notice regarding an updated version of the essential functions form.

By providing the union notice regarding updates to the essential functions form, the Examiner gleans that at the very least, the employer invited the union to raise concerns about changes (i.e., some form of bargaining). A February 13, 2023, internal employer email corroborates that the employer recognized the content of the essential functions form to be a bargaining subject. The email's subject line reads, "Essential Functions for CO [Corrections Officer] & JDO," and is designated "High" importance. DAJD HR Manager Cheryl Macoleni implored two labor

negotiators, one being Chevalier, to re-engage in bargaining with the union in order to update the essential functions form:

> Good afternoon, David & Andre,
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> I am not sure if you are familiar with the history of these documents or not, but it is my understanding that our Essential Functions Form for the Corrections Officer position was last updated in 1997. The one for the Juvenile Detention Officer was updated more recently, but is still lacking the overtime piece. I know in the last 2 bargaining sessions we have attempted to get this updated on the adult side but were not able to get it past the Guild. We now want to make a push again, to get these *both* updated and we want to include the need to work Mandatory Overtime as an Essential Function.
>
> We do reference overtime in our CO Job Posting, which I have also attached[6]: . . .
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> From the JDO Job Posting:
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> - Must be willing and able to work mandatory overtime as required to meet operational needs.
>
> This is a supplemental question that we use for screening out applicants who answer "No"
>
> * 13. If required for the position you are seeking, are you willing to [document undecipherable] overtime? [ ] Yes [ ] No.
>
> How can we go about initiating this change with the Guilds?

(emphasis added).

Smith also testified that the union was not aware of the OT restrictions forms being sent by the employer to JDOs' health care providers.

The union asserted it first became aware of the use of the OT restrictions forms when it received copies of the forms that the employer provided to JDO Nghia Pham. Smith testified that the employer had never provided notice of these additional forms and that the parties had never

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[6] Union exhibit 7 includes a partially illegible document with partial sentences and questions from what appears to be the JDO position announcement. *See also* Employer (Er.) Ex. 29.

bargained their use. Wilena Montgomery, Senior HR Analyst, testified that the first OT restrictions follow-up form was created in approximately 2022 and that the form itself was not bargained with the union. Montgomery, however, clarified that she does not engage in bargaining.

Pham's medical provider signed the first "DAJD Overtime Restrictions" form on January 30, 2024. On February 5, 2024, Montgomery sent an email to Pham requesting they obtain additional information from their medical provider regarding the provider's recommended overtime restriction. Attached to the email was the "DAJD Overtime Restrictions: Health Care Provider Follow Up, Additional Clarification Needed" form, also dated February 5, 2024.

The Union's Demands to Bargain

On February 5, 2024, Lufkin sent an email to Chevalier demanding to bargain the unilateral changes the union described as (1) mandatory overtime being an essential function of the JDO position and (2) mandatory overtime being limited to up to four assignments per week. Lufkin's email also requested that the county restore the status quo during bargaining and provide proper notice of any proposed changes. The email further advised the county that under the CBA's article 12.6, the email served as notice of the union's intent to file a ULP complaint regarding this change.

Chevalier replied to Lufkin on February 5, 2024, and asked if the demand to bargain was "the exact same fact pattern and issues on the adult side from [Lufkin's] perspective." Lufkin responded, "Almost but not quite. The 4 times a week thing – even if mot [mandatory overtime] was essential – is still an independent unilateral change and is not present on the adult side. . . ."

Chevalier provided a more detailed response to Lufkin on February 15, 2024, regarding the February 5 demand to bargain. In the email, the county agreed that the maximum number of mandatory overtime assignments of four per week would be removed from the essential function follow-up form.[7] Chevalier indicated this change should resolve the union's concern on that

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[7] The parties have lumped the essential functions form and the two OT restrictions forms into one category of essential functions forms. The Examiner has distinguished the two different types for purposes of clarification and analysis.

matter.[8] The county, asserting that mandatory overtime had always been an essential function of the JDO position and therefore part of the status quo, offered four different points in addition to expressing several interests of the county. Finally, the county offered in its email to meet with the union.

Lufkin responded later that evening and stated that the county's email did not indicate an agreement to rescind the unilateral change nor bargain in good faith. The union's email further opined, "A meeting does not seem to be a productive use of our time given the County's refusal to bargain. . . ."

On February 13, 2024, Smith sent an email to Chevalier and included Lufkin. The email indicated the union was demanding to bargain and stated that the employer had "changed the past practice of not providing staff an automatic LOCC and/or discipline for staff refusing MOT while they are sick."

On February 16, 2024, Chevalier emphasized that the county was not rescinding its position that mandatory overtime was already an existing essential function of the JDO job. In addition to expanding on the employer's interests and a graph depicting overtime hours, the county reiterated its willingness to meet and have "constructive dialogue" on the two demands to bargain and several grievances.

That same morning, Lufkin responded to Chevalier expressing the union's willingness to engage in dialog. Lufkin added, "I do not read your email to indicate that the County is willing to engage in bargaining on the unilateral changes previously asserted. If I misunderstood, and you wish to engage in bargaining, please do let me know and we can get something scheduled ASAP."

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[8] Neither the employer's answer to the instant ULP complaint, filed July 8, 2024, nor the record itself indicate whether the employer in fact removed the "maximum number of mandatory [overtime] assignments of (4) four per week" provision from the essential functions form (OT restrictions form) as of the complaint's filing date.

The parties ultimately met on February 21, 2024, and Chevalier recapped the meeting in an email dated March 12, 2024. Chevalier stated that the purpose of the meeting was to discuss the union's demand to bargain the JDO mandatory overtime refusals (i.e., the union's demand to bargain filed February 13, 2024, by Smith). The email does not provide any discussions related to the February 5 demand to bargain (the essential functions form alleged changes to include mandatory overtime), nor does the record in total provide an indication that the parties met before the May 20, 2024, ULP complaint filing regarding that allegation.

ANALYSIS

Applicable Legal Standard(s)

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. *Spokane County*, Decision 13510-B (PECB, 2022) (citing *Municipality of Metropolitan Seattle (METRO)*, Decision 1356-A (PECB, 1982)). 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. *Spokane County*, Decision 13510 (PECB, 2022), *aff'd Spokane County*, Decision 13510-B (citing *Emergency Dispatch Center*, Decision 3255-B (PECB, 1990)).

An exception to the strict enforcement of the statute of limitations exists where the complainant had no actual or constructive notice of the acts or events that are the basis of the charges. *City of Bellevue*, Decision 9343-A (PECB, 2007). 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); *City of Renton*, Decision 12563-A (PECB, 2016). Processing a related grievance does not toll the six-month statute of limitations. *King County*, Decision 3558-A (PECB, 1990). The party seeking an exception to the six-month statute of limitations bears the burden of proof. *City of Renton*, Decision 12563-A.

Refusal to Bargain Allegations

Chapter 41.56 RCW requires public employers to bargain with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining. RCW 41.56.030(4). The law limits the scope of mandatory subjects to those matters of direct concern to employees. *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission* (*City of Richland*), 113 Wn.2d 197, 200 (1989). Unless a union clearly waives its right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer must give a union sufficient notice of possible changes affecting mandatory subjects of bargaining and, upon union request, bargain in good faith.

"Whether a particular subject is mandatory or nonmandatory is a question of law and fact to be determined by the [Commission] and is not subject to waiver by the parties by their action or inaction. . . . [A] party which engages in collective bargaining with respect to a particular issue does not and cannot confer the status of a mandatory subject on a nonmandatory subject." WAC 391-45-550; *see also City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017).

The Commission applies a balancing test on a case-by-case basis to determine whether an issue is a mandatory subject of bargaining. In deciding whether a duty to bargain exists, there are two principal considerations: (1) the extent to which managerial action impacts the wages, hours, and working conditions of employees and (2) the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. *City of Richland*, 113 Wn.2d at 203; *Kitsap County v. Kitsap County Correctional Officers' Guild*, 193 Wn. App. 40, 372 P.3d 769 (2016), *review denied by Kitsap County v. Kitsap County Correctional Officers' Guild*, 186 Wn.2d 1003, 380, 390 P.3d 445 (2016). The inquiry focuses on which characteristic predominates. *Id.* The Supreme Court has explained that "[t]he scope of mandatory bargaining thus is limited to matters of direct concern to employees" and that "[m]anagerial decisions that only remotely affect 'personnel matters', and decisions that are predominantly 'managerial prerogatives', are classified as nonmandatory subjects." *City of Richland*, 113 Wn.2d at 200.

The application of the *City of Richland* test contains nuance and is not strictly black and white. Bargaining subjects fall along a continuum where one case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive. The decision focuses on which characteristic predominates. *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A.

A complaint alleging a unilateral change must 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). A past practice is a course of dealing 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. *Id.* (citing *City of Pasco*, Decision 4197-A (PECB, 1994)). To be an established past practice, the practice must be consistent, known to all parties, and mutually accepted. *Whatcom County*, Decision 7288-A; *Snohomish County*, Decision 8852-A (PECB, 2007).

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 to a good faith impasse concerning any 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)).

The Commission focuses on the circumstances as a whole and on whether an opportunity for meaningful bargaining existed. *Washington Public Power Supply System*, Decision 6058-A (PECB, 1998). If the employer's action has already occurred when the employer notifies the union (a *fait accompli*), the notice would not be considered timely, and the union will be excused from the need to demand bargaining. *Id.* If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining that could influence the employer's planned course of action and the employer's behavior does not seem inconsistent with a willingness to bargain, if requested, then a *fait accompli* will not be found. *Id.* (citing *Lake Washington Technical College*, Decision 4721-A (PECB, 1995)).

For a unilateral change to be unlawful, the change must have a material and substantial impact on employees' terms and conditions of employment. *Kitsap County*, Decision 8893-A (PECB, 2007) (citing *King County*, Decision 4893-A (PECB, 1995)). No violation exists where there is no change to an established past practice. *Id.*

Failure to Bargain Effects

The bargaining obligation applies to a decision on a mandatory subject of bargaining as well as the effects or impacts of that decision but only applies to the effects of a managerial decision on a permissive subject of bargaining. *Port of Seattle*, 11763-A (PORT, 2014) (citing *Central Washington University*, Decision 10413-A (PSRA, 2011); *City of Kelso (Kelso I)*, Decision 2120-A (PECB, 1985); *City of Kelso (Kelso II)*, Decision 2633-A (PECB, 1988)). An employer must bargain the effects of the permissive decision on mandatory subjects of bargaining. *Wenatchee School District*, Decision 3240-A (PECB, 1990). For example, while an employer has no duty to bargain concerning a decision to reduce its budget, the effects of such decisions could constitute mandatory subjects of bargaining. *Id.*

An employer is not required to delay implementation of a decision on a permissive subject of bargaining while impact or effects bargaining occurs. *Port of Seattle*, Decision 11763-A (citing *City of Bellevue*, Decision 3343-A (PECB, 1990); *Federal Way School District*, Decision 232-A (EDUC, 1977)). An employer cannot refuse to commence effects bargaining until after the permissive decision is implemented. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

When the effects are sufficiently foreseeable before implementation of a permissive decision, a bargaining obligation can arise. *Port of Seattle*, Decision 11763-A (citing *Spokane County Fire District 9*, Decision 3661-A).

Application of Standard(s)

Scope of the Hearing

The Complaint, the Amended Cause of Action Statement, and the Post-Hearing Brief

The corrected cause of action statement in this case was issued on June 13, 2024, finding the two ULP allegations enumerated herein to frame the scope of the hearing. The cause of action statement clearly cites the governing WAC for cause of action statements—WAC 391-45-110.

The statement of facts section of the union's ULP complaint distinguished, in bold font, two separate allegations, which ultimately formed the two allegations found in the June 13 cause of action statement.[9] Separately, the union's complaint listed 14 separate statutory ULP allegations and derivative violations under the legal claims section, of which two mirrored the statement of the facts bolded sections.[10] [11] Had the union wished to pursue the 12 ULP allegations not included in the June 13 cause of action statement, it could have sought clarification from the person who issued the cause of action statement. WAC 391-45-110(2)(b). There is no indication in the record to suggest that the union availed itself of that provision.

The union also had the opportunity for further "bites of the apple" by looking to other agency rules. Amendments to ULP complaints are allowed prior to the appointment of an Examiner upon motion. WAC 391-45-070(2)(a). An amendment to a ULP complaint is not allowed after the start of the hearing, except to conform the pleadings to evidence that is received without objection before the close of the hearing. WAC 391-45-070(2)(c). While the union filed this case on May 20, 2024, it did not amend its complaint prior to the opening of the hearing. Nor did the union

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9 Union (Un.) compl., section II.(a–b).

10 Un. compl., section III.3.1.(a–n).

11 Similarly, in the related adult corrections unit ULP case, *King County Corrections Guild v. King County*, the union's complaint pled one allegation in bold under its statement of facts, section II(a); that bolded subsection formed the first allegation in the cause of action statement. Under the complaint's legal claims section, the union listed nine separate statutory ULP allegations and derivative violations. Two of those allegations were added to the cause of action statement, for a total of three allegations that moved forward to hearing. The King County Corrections Guild is represented by the same firm that represents the bargaining unit in the instant case. *King County*, Decision 13920-A (PECB, 2024) (on appeal before the Commission at the time the instant decision was issued).

make a motion to conform the pleadings to evidence that was received without objection during the hearing or prior to the close of the hearing.

As noted, the June 13, 2024, statement provided for two causes of action. The union's post-hearing brief attempts to argue eight separate unilateral changes. The cause of action statement limits the cause(s) of action before an Examiner and the Commission. WAC 391-45-110(2)(b). As such, the Examiner is limiting her analysis to the two ULP allegations outlined in the June 13 statement.

The Complaint and Amended Cause of Action Statement Put the Employer on Notice that the Union was Alleging a Refusal to Bargain Both the Decision and the Impacts of the Decision

The union's complaint includes references to the effects of including mandatory overtime in conjunction with the essential functions form. Specifically, the union alleged that it was not provided notice of a change in how medical restrictions related to how overtime operated (i.e., effects) nor an opportunity to bargain that topic. Further, the union alleged the employer's unilateral changes to the "essential functions of the position constituted a *fait accompli* to decision making."

In *Port of Seattle*, Decision 11763-A, the Commission found similar phrasing in the union's complaint (failure to provide notice or opportunity to bargain; presenting the union with a *fait accompli*) to be sufficient to have put the employer on notice that the union was alleging the employer refused to bargain both the decision and the impacts of the decision. *Port of Seattle*, Decision 11763-A.

Second, the cause of action statement determined there were sufficient alleged facts for the ULP allegation of whether the employer unilaterally changed the working conditions of the essential functions of the position of JDO without providing the union an opportunity for bargaining. The Commission determined in *Port of Seattle* that the phrase "without providing an opportunity for bargaining" in the cause of action statement was broad enough to encompass decision and effects bargaining. *Id.* Therefore, like the *Port of Seattle*, the county had sufficient notice through both

the union's complaint and the Agency's cause of action statement of the allegations forming the scope of the hearing.

Issue 1: Did the Employer Unilaterally Change the Working Conditions of the Essential Functions of the Position of Juvenile Detention Officer Without Providing the Union an Opportunity for Bargaining?

The crux of the employer's arguments defending the first ULP allegation were already pre-baked into the February 13, 2023, email from Macoleni to Chevalier. The employer wished to add overtime and mandatory overtime as "essential functions" on the medical provider follow-up forms. In other words, the employer was already aware of the union's objections to this addition and knew that it must be bargained with the union. The record, however, fails to establish any type of notice to the union that the employer intended to affirmatively make those changes. The union did not become aware of the addition of overtime and mandatory overtime until it received copies of JDO Pham's documents on February 5, 2024.

> *Are the Additions of Voluntary and Mandatory Overtime to the Essential Functions Medical Provider Follow-Up (OT Restrictions) Forms a Mandatory Subject of Bargaining?*

Applying the *City of Richland* balancing test, the Examiner finds the addition of voluntary and mandatory overtime inquiries to the OT restrictions forms to be a permissive subject of bargaining. The union strongly encourages the Examiner to rely on *King County*, Decision 13920-A (on appeal before the Commission at the time the instant decision was issued). Specifically, the union asserts that the same analysis used by the Examiner in that case should apply to this case, resulting in a finding that the employer's addition of mandatory overtime to the essential functions form (OT restrictions forms) was a mandatory subject of bargaining. However, the Examiner in that case clearly articulated his interpretation of the union's complaint and the cause of action statement regarding the "essential functions of the job [of corrections officers]" to mean a change in practice to medically separating correctional officers (i.e., the adult division) who could no longer perform mandatory overtime and had exhausted their FML leave. *Id.* And the medical separation of those

employees was itself the mandatory subject that the employer failed to provide notice to the union of and bargain about. *King County*, Decision 13920-A.

In the instant case, based on the totality of the record, including the union's post-hearing briefing, the Examiner finds that the addition of voluntary or mandatory overtime follow-up inquiries to the essential functions form is the "subject" to evaluate. As noted, voluntary and mandatory overtime have long been JDO position requirements that the employer communicates to applicants and new hires, and it is reinforced through periodic employer messaging.

The union argues that this case is akin to *City of Seattle* in that any change impacting an ongoing condition of employment becomes subject to the obligation to bargain. *City of Seattle*, Decision 8916 (PECB, 2005). The union distinguishes the instant case from *City of Seattle*, however, by noting that no employee in *City of Seattle* lost their dispatcher position due to the change in pre-employment essential function requirements and ongoing requirements that dispatchers become radio certified. *Id.* The union contrasts that with the "new potential outcome" of job loss, based on the employer's medical separation of a corrections officer in the adult division who failed to meet the essential function of performing mandatory overtime after that was added to the form. *Id.*

The employer provides several interests in relation to the impact of FMLA-exempt JDOs who are unable to perform mandatory overtime. In 2011, only two JDOs had FMLA-related overtime restrictions. As of November 2023, that number climbed to 30 JDOs out of a staff of nearly 90. As noted, the facility is a seven-day, 24-hour operation, and the influx of juvenile detainees is not within the employer's control. Many of the youth detained in the facility have been sent to the facility for serious and violent crimes. In early 2024, the juvenile division had about 44 youths in custody. To maintain staff to youth ratios, as well as other required services for the youth (education, regular and emergency health care, and social and physical activities), large amounts of overtime are required to operate the facility. Absent sufficient staffing coverage, the facility has to convert to modified staffing which then raises safety concerns impacting the youth, JDOs, and public.

Applying the *City of Richland* test, the Examiner finds that the expressed interests of the employer's entrepreneurial control outweigh the employees' terms and conditions of employment. *City of Richland,* 113 Wn.2d at 203. While mandatory overtime in itself has long been deemed a mandatory subject of bargaining, the addition of mandatory overtime to the essential functions form is a permissive subject of bargaining. This is especially true in light of the fact that mandatory overtime was *already* a long-established position requirement. Its inclusion on the form was more of a management prerogative given the weighted interests.

No Notice to the Union

As a permissive subject of bargaining, the employer was not required to give notice and bargain to impasse over its *decision* to add voluntary and mandatory overtime to the essential functions form. It did, however, have to give notice of its decision to the union, and as the union is an interest arbitration bargaining unit, it must bargain the mandatory effects of the permissive decision to agreement or impasse. *Port of Seattle*, Decision 11763-A. If the parties reach impasse, they proceed through the statutory interest arbitration process as required by RCW 41.56.430–.470. *Id.*

While the employer did not have to bargain to impasse the decision to include mandatory overtime to the OT restriction forms, it still had to give notice of its decision and bargain upon request any impacts to mandatory effects. In this case, the employer did not provide the union notice of its decision to include mandatory overtime on the forms. Further, the employer was already aware that this topic raised concerns and was subject to bargaining with the union based on its internal February 13, 2023, email.

The union filed its demand to bargain the same day it learned of the changes to the forms, February 5, 2024. The one meeting that occurred after the demand to bargain only involved the issuance of LOCCs to sick employees who refused mandatory overtime. Between February 5 and February 16, 2024, the parties engaged in back-and-forth email discussions about the inclusion of mandatory overtime on the form. No resolution was reached prior to the filing of the ULP complaint. In essence, the employer failed to bargain the mandatory effects of the decision to add mandatory overtime to the OT restrictions forms. As such, the employer did not meet its statutory obligation

to bargain mandatory effects of its permissive decision, or, upon impasse, proceed to interest arbitration over the mandatory effects.

Issue 2: Did the Employer Unilaterally Change the Working Conditions for Sick Employees with Respect to Mandatory Overtime Without Providing the Union an Opportunity for Bargaining?

Issue 2 Was Not Timely Filed Under the Statute of Limitations

The timeliness of the complaint is a threshold question in any ULP 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*, 53 Wn. App. 832 (1989)); *Stewart v. Omak School District*, 108 Wn. App. 1049 (2001); *Malpica v. Mary M. Knight School District 311*, 93 Wn. App. 1084 (1999). 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 employer's post-hearing brief argues that even if there was a change to the status quo of assigning mandatory overtime to sick employees, the union knew of the employer's stance when it filed a grievance on May 23, 2023, well before the six-month statute of limitations. The grievance asserted that the employer's issuance of a LOCC to a JDO who refused mandatory overtime due to illness was a violation of sick leave law, past practice, and other policies and laws.

The union's brief encourages the Examiner to rely on National Labor Relations Board (NLRB) and PERC case law to support its position that the six-month "clock" could not begin to run until the employer gave clear and unambiguous notice of its intent to implement the action in question. The union asserts that the employer's exhibit 5[12] (the May 23, 2023, union grievance and September 1, 2023, employer Step 2 response) should not be considered unequivocal notice as it

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[12] The union's brief names "Resp. Exh. 7." However, employer exhibit 7 is a string of emails from 2019 related to Smith's refusal of mandatory overtime based on planned vacation leave starting the following day. The brief's description of the exhibit in question provides sufficient reference to quoted portions of employer exhibit 5. *See* Un. Br. at 24.

does not intend a change in working conditions, what the change consists of, nor is a "venue typical of labor relations notifications."

By way of example, the union's brief cites *City of Bellingham* and asserts that the Commission looked to the NLRB when the Commission explained it would "focus on the date of the unequivocal notice of an allegedly unlawful act, rather than on the date the act's consequences became effective."[13]

The union's reliance on *City of Bellingham* to support the instant case, however, is misplaced. There the Commission found that the police chief's verbal communication to the union's president and vice president about developing layoff plans was sufficient to establish the "triggering event" for the running of the statute of limitations. *City of Bellingham*, 10907-A. The police chief's communication to the local union leaders was approximately three weeks prior to the "look-back" date of the union's filed complaint, and thus, was affirmed by the Commission as untimely. *Id.*

Smith filed a grievance against the employer on behalf of JDO Chester Simmons on May 23, 2023, citing article 7 (sick leave) of the CBA as one of the violated provisions. The grievance was based on the employer issuing Simmons a LOCC based on code of conduct violations for refusing mandatory overtime due to parental priorities on December 29 and 30, 2022.

If there was a change to the parties' past practice of allowing sick employees to be excused from performing mandatory overtime, the "triggering event" of the employer's change to that practice was at the very least on September 1, 2023, when the employer issued its step 2 response.[14] In its Step 2 response, the employer summarized the Step 2 meeting where Lufkin and Smith were present on behalf of the union and then DAJD Director Allen Nance and Macoleni represented the

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[13] Un. Br. at 3 (citing *City of Bellingham*, Decision 10907-A (PECB, 2012)). It appears the union is citing directly from the NLRB case cited by the Commission, rather than the Commission's specific findings. *See City of Bellingham*, Decision 10907-A (citing *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996))

[14] Lufkin and Smith were cc'd on the May 18, 2023, LOCC. As the LOCC does not specify that Simmons refused mandatory overtime due to personal or familial illness at that time, the Examiner relies instead on the September 1, 2023, Step 2 response and corroborating testimony.

employer. The Step 2 response points out that Smith argued at the meeting that "there is a long-standing past practice that if you are sick or need to care for a sick family member that you are excused from Mandatory Overtime, which was not followed in this case." After the Step 2 meeting, per response, the employer followed up with leave management, who confirmed Simmons' daughter did have a medical condition for which he would need FMLA in order to care for her. Simmons was allowed two weeks to submit the FMLA paperwork but did not provide it or communicate with leave management.

During cross-examination, Smith equivocally testified that at the time of the grievance he did not recall Simmons indicating his daughter was sick. However, Smith affirmed that when the union filed the May 23, 2023, grievance, it cited the CBA's sick leave provision and the Washington Family Care Act. Simmons left employment at the facility, and the union did not advance the grievance to Step 3.

The county courtesy copied Lufkin and Smith on the LOCC, they were both present at the Step 2 hearing, and they both received the Step 2 response. Both Lufkin and Smith are experienced labor advocates. Smith testified that he had been involved with the guild for 16 years and the guild's president for 12 years. The Step 2 response provided sufficient detail that a tenured advocate, using reasonable diligence, should have discovered the cause of action, and therefore the Examiner finds that the September 1, 2023, Step 2 response served as constructive notice. *See U.S. Oil & Refining Co. v. State Department of Ecology*, 96 Wn.2d at 92; *City of Renton*, Decision 12563-A. The employer's Step 2 response also reflects that at no point did it retrench from its position.

Based on these considerations, the Examiner finds the union's second allegation untimely under the six-month statute of limitations.

The Union Failed to Prove That a Past Practice in Fact Existed between the Parties

Even if the Commission were to find the union's second allegation timely, the union failed to establish a consistent past practice that was known to all parties and mutually accepted. *See Whatcom County*, Decision 7288-A; *Snohomish County*, Decision 8852-A.

Where a unilateral change is alleged, 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) (citing *Municipality of Metropolitan Seattle* (*METRO*, Decision 2746-B). Overtime, including mandatory overtime, has long been held by this Commission to be a mandatory subject of bargaining. *Snohomish County*, Decision 9291-A (PECB, 2007) (finding that mandatory overtime considered both wages and working conditions); *City of Yakima*, Decision 11352-A (PECB, 2013); C*ity of Everett*, Decision 11241-A (PECB, 2013). The Examiner finds that the mandatory overtime in this instance is a mandatory subject of bargaining in that it impacts both wages and working conditions.

Joint exhibits admitted to the record reflect that the policy regarding refusal to perform mandatory overtime has evolved over time. The main thread related to the allegation, however, appears consistent in this evidence in that a JDO's refusal to perform mandatory overtime could lead to disciplinary action, absent "adequate verification" of a medical reason or a pre-planned personal appointment. Both parties' witnesses testified that the practice of medical verification for one-day instances changed at some point after 2015 due to a change in the law.

Employer witnesses testified that at some point during an upper management transition within the juvenile division and around the time of the COVID-19 pandemic, there was a "pause" in administering any form of LOCCs or discipline for refusals to perform mandatory overtime. Belenda Wilson, chief of operations for juvenile detention since 2023, testified that part of the pausing was due to a "pile up" of staff reports with supervisor recommendations that had not been reviewed by the interim director at the time. In 2022, Jeneva Cotton was hired as the director and reviewed the pile of reports and recommendations. As the pile had been sitting for two to three months, Cotton decided not to administer any LOCCs or discipline, as they were in essence stale.

Prior to April 2022, when the parties' 2021-2024 CBA was fully executed, the parties' guiding principles regarding mandatory overtime assignments and exceptions were articulated through policies, procedures, the CBA, and memoranda of agreement (MOA). After the 2021-2024 CBA was ratified by both parties, human resources sent out an email on April 4, 2022, encapsulating the highlights of changes and implementation dates. The email, addressed to a DAJD listserv and

DAJD leaders and administrators, was also courtesy copied to Lufkin and Smith. One bulleted item in the email specifies, "Overtime (OT) and mandatory overtime (MOT) will be administered in accordance with Article 9.10 of the new CBA. Any prior policies, procedures, and memorandum of agreements (MOA) related to MOT *will be sunset*." (emphasis added).

Neither party presented bargaining history, notes or otherwise, that would contradict or refute the April 4, 2022, "sunset" email. The parties have continued, however, to operate under the additional application of the DAJD Code of Conduct. Article 9.10 discusses mandatory trainings and meetings outside an employee's scheduled shift, release from mandatory overtime assignment, splitting a mandatory overtime shift with a volunteer, one annual mandatory overtime pass per calendar year, and a mandatory overtime list. The mandatory overtime pass section, 9.10.B, specifies, "Employees who fail to stay for mandatory overtime as directed without an approved use of a pass shall be subject to discipline." The section continues with five criteria for pass usage.

The union bears the burden of proof establishing that a past practice existed allowing employees to refuse mandatory overtime assignments if they were sick without facing a LOCC or discipline. The union's witnesses all testified that they believed that to be the practice.

Two of the witnesses, JDOs Davon Dennis and Roselyn Wachira, were each issued a LOCC for refusing to work mandatory overtime. Each of them indicated the reason they refused the mandatory overtime assignment was due to illness. Dennis testified that since he started working for the employer, he had refused mandatory overtime due to illness "at least maybe five times." On cross-examination Dennis testified that it was "[his] understanding" that refusal to work mandatory overtime was a violation of the code of conduct "unless you were sick or ill." Dennis stated he gained the understanding from other staff and JDOs that "if you're feeling sick, there's a possibility of not getting a letter of corrective counseling for being sick and refusing mandatory overtime." Dennis also indicated that supervisors possibly advised him of the same, but when questioned could not recall which supervisors might have stated that.

Wachira testified that she had a couple of instances where she refused to work mandatory overtime due to a medical condition and based on her refusals, there were two instances where she was

issued LOCCs. The employer rescinded the first LOCC based on her stated medical condition. The second LOCC was issued on June 28, 2024, after the ULP complaint filing date, and was based on Wachira's refusal to perform mandatory overtime due to the same health condition. Because Wachira failed to follow the parties' agreed steps regarding her health condition and mandatory overtime after her first LOCC, the employer denied the grievance.

When the evidence demonstrates inconsistent behavior, a past practice does not exist. *Edmonds Community College*, 10250-A (CCOL, 2009); *Puyallup School District*, Decision 12551 (PECB, 2016). In addition to the examples above, the employer also introduced at least three examples of the employer issuing either a LOCC or a one-day suspension to JDOs for refusing mandatory overtime based on the employee advising they were ill: February 23, 2016 (JDO refused due to being "physically and emotionally exhausted"); July 17, 2018 (JDO refused due to being "physically exhausted"); and, May 1, 2023 (JDO refused due to a FMLA condition, but JDO did not have FMLA documentation).[15]

The Commission does not assert jurisdiction to remedy alleged violations of past practices where there is, in fact, no change of practice. *Kitsap County*, Decision 8292-B (citing *King County*, Decision 4893-A; *City of Pasco*, Decision 4197-A). No duty to bargain arises from a reiteration of established policy. *Kitsap County*, Decision 8292-B (citing *Clark County Fire District 6*, Decision 3428 (PECB, 1990); *City of Yakima*, Decision 3564-A (PECB, 1991)). Based on the totality of the evidence presented, the Examiner finds that the union failed to establish a past practice that was consistently applied, known to all parties, and mutually accepted.

CONCLUSION

The employer failed to give notice to the union of its decision to add voluntary and mandatory overtime to the OT restriction follow-up forms. In response to the union's demand to bargain, the union and employer engaged in email exchanges in February 2024. The employer failed to bargain

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[15] *See* Footnote 4.

the mandatory effects of the decision to add voluntary and mandatory overtime to the OT restriction follow-up forms. As such, the employer did not meet its statutory obligation to bargain the mandatory effects of its permissive decision or, upon impasse, proceed to interest arbitration over the mandatory effects.

The union's second allegation is untimely as it was not filed within six months of when it had constructive notice of its perceived change of the issuance of LOCCs to sick JDOs for their refusal to perform mandatory overtime. Even if the Commission were to find the complaint timely, the union failed to establish a consistent past practice that was known to all parties and mutually accepted. As such, the Examiner denies this allegation.

REMEDY

The union's post-hearing brief requests several remedies related to both allegations. As the Examiner is only finding a violation for the first allegation, only the requested remedies related to that allegation and the remedies not being granted are addressed herein. The union seeks an employer "all-staff" email detailing any found unfair labor practices, in addition to the standard remedy of posting and reading into the council's record. The union also seeks to "generally" restore the *status quo ante* for any unlawful labor practices.

Restoring the *status quo ante* when an employer refuses to bargain the mandatory effects of a permissive decision is not the appropriate remedy. In 2014, the Commission clarified the appropriate remedy when an employer refuses to bargain the mandatory effects of a permissive subject by looking to the NLRB's *Transmarine* standard remedy in effects bargaining cases. *Port of Seattle*, 11763-A (citing *Transmarine Navigation Corp. (Transmarine)*, 170 NLRB 389 (1968)).[16] When an employer refuses to bargain the effects of a permissive decision and those effects include a loss of wages, a remedy ordering limited back pay is appropriate. *Id.*

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[16] Decisions construing the National Labor Relations Act (NLRA) are persuasive in interpreting state labor acts, which are similar to the NLRA. *Nucleonics Alliance, Local Union No. 1-369, Etc. v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984).

The *Transmarine* remedy was designed to provide a meaningful remedy when it is difficult to reconstruct the environment in which bargaining would have occurred. When an employer refuses to bargain the effects of a permissive decision, employees are deprived of their statutory bargaining power. Underpinning the remedy is the concept that at times a bargaining order is insufficient to remedy the unfair labor practice. Therefore, to assure that meaningful bargaining occurs and to effectuate the purposes of the law, the *Transmarine* remedy makes employees whole for the losses suffered as a result of the unlawful act and attempts to create "a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the" employer. *Port of Seattle*, 11763-A (citing *Transmarine Navigation Corp.*, 170 NLRB at 390). The *Transmarine* remedy resets the balance and provides an incentive to the parties to bargain in a timely manner. *Entiat School District*, Decision 1361-A (PECB, 1982).

If the bargaining unit employees are eligible for interest arbitration, an employer may not unilaterally implement changes to mandatory subjects of bargaining without bargaining to impasse and obtaining an award through interest arbitration. *Port of Seattle*, 11763-A (citing *Snohomish County*, Decision 9770-A (PECB, 2008)). Interest arbitration is applicable when an employer desires to make a mid-term contract change to a mandatory subject of bargaining. *City of Yakima*, Decision 9062-A (PECB, 2006). When an employer changes a permissive subject of bargaining that impacts mandatory subjects of bargaining, those mandatory impacts may not be changed until the employer and the union either bargain to agreement or bargain to impasse and proceed through the statutory interest arbitration provisions outlined in RCW 41.56.430–.470. *See City of Kelso*, Decision 2633 (PECB, 1988), *aff'd*, Decision 2633-A. For interest arbitration-eligible employees, a back pay remedy for failure to bargain effects of a decision that impacts wages continues until the parties reach agreement or obtain an award from an interest arbitrator. *Port of Seattle*, 11763-A.

The *Transmarine* remedy is appropriate in this case. The employer's decision to add parameters around voluntary and mandatory overtime to OT restrictions forms was a permissive decision. The employer's HR analyst testified that that decision prohibited a JDO's ability to work overtime (voluntary and/or mandatory) for up to three weeks while an employee obtained additional documentation from their medical provider. The employer's restriction on a JDO performing

voluntary and/or mandatory overtime for up to three weeks was implemented sometime after February 5, 2024, according to the employer's HR analyst.

Whether a JDO is precluded from, allowed, or forced to perform voluntary or mandatory overtime during a prescribed period of time (here three weeks) impacts both the working conditions and the wages of the bargaining unit. If a JDO is forced to continue working mandatory overtime despite restrictions ordered by their medical provider, this impacts not only the working conditions for that JDO, but the other officers who work with them. Similarly, if a JDO is prohibited from any or some overtime based on seeking additional documentation, the JDO may miss overtime opportunities, and the remainder of the bargaining unit is impacted by additional mandatory overtime assignments. In both cases, the bargaining unit as a whole is impacted, risking their own safety, as well as that of the juvenile detainees, and the public. Overtime (voluntary or mandatory) is a form of wages and therefore a mandatory subject of bargaining. The safety components described at this juvenile detention facility are also a mandatory subject of bargaining. As such, the employer was obligated to give notice of and bargain the mandatory effects of its permissive decision. As in *Port of Seattle*, it is appropriate here to compensate employees for their lost wages (overtime).

Based on the employer's permissive decision to add voluntary and mandatory overtime to the OT restrictions forms and the change of precluding employees from overtime opportunities after February 5, 2024, the employer shall provide any impacted JDO for their lost overtime opportunities from five days after the date of this decision until the occurrence of the earliest of the following conditions: [17] (1) the employer bargains to agreement with the union over the effects of the decision to add voluntary and mandatory overtime to the two OT restriction follow-up forms; (2) the parties bargain in to bona fide impasse and proceed to interest arbitration as provided in

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[17] The *Transmarine* remedy provided the affected employees back pay from five days of the order until the parties bargained to agreement, the parties bargained to bona fide impasse, the union failed to request bargaining, the union failed to bargain with an employer who was willing to bargain, or the union engaged in bad faith bargaining. *See Port of Seattle*, Decision 11763-A (citing *Transmarine Navigation Corp. (Transmarine)*, 170 NLRB 389).

RCW 41.56.430–.470, the date on which an arbitrator issues an award; (3) the union fails to request bargaining within five business days following the date of this order, or to commence negotiations within five business days of the employer's notice of its desire to bargain with the union; or (4) the union fails to bargain in good faith.

The exception to the above remedy is if a JDO's medical provider limited their ability to perform voluntary or mandatory overtime on their original health care provider certification form and the employer followed the provider's recommendations without additional follow-up.[18] In such cases, these JDOs would not qualify for the remedy herein.

The sum paid to any affected bargaining unit employee of missed overtime opportunities shall not exceed the amount of overtime the employee would have earned from the date the employer implemented the "up to three-week" overtime prohibition (i.e., sometime after February 5, 2024) until the date on which the employer offered to bargain in good faith. However, in no event shall the sum of back pay be less than the affected employees would have earned in overtime for a two-week period. Back pay shall be computed in accordance with WAC 391-45-410.

Requiring the employer to read a copy of the notice at a meeting of its governing body and posting the notice in conspicuous places has long been a standard remedy. Deviation from the standard remedy, either by adding to or removing from, is considered an extraordinary remedy. *University of Washington*, 11499-A (PSRA, 2013). Requiring the employer to send out an "all-staff" email of the ULP violation would be an extraordinary remedy. *Id.* The Examiner denies the request for an "all-staff" email and follows the Commission's order in *Port of Seattle*, incorporating the NLRB *Transmarine* remedy in addition to elements of the Commission's standard remedy. *Port of Seattle*, 11763-A.

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[18] *See* Tr. 296-297.

FINDINGS OF FACT

1. King County is a public employer within the meaning of RCW 41.56.030(13).

2. King County Juvenile Detention Guild is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of juvenile detention officers (JDOs).

3. At the time of filing the unfair labor practice complaint, the employer and union were parties to a collective bargaining agreement effective January 1, 2021, through December 31, 2024.

4. The positions are considered "uniform personnel" and are therefore subject to interest arbitration under RCW 41.56.030(14).

5. The juvenile division of the DAJD operates out of the Judge Patricia Clark Children and Family Justice Center and runs a 24-hour, seven-day per week detention facility with male and female detainees ages 12 to 17.

6. As of February 2024, the juvenile division housed about 44 juvenile detainees, but that number can fluctuate depending on superior court sentencing.

7. Juvenile detainees are sentenced for allegations of crimes causing some type of harm to a person or property, such as robbery or murder, and are all considered high risk.

8. The JDOs are assigned to five, eight-hour shifts per week with two consecutive days off. The three shifts are 0700 to 1500, 1500 to 2300 (swing shift), and 2300 to 0700 (graveyard). The JDOs are responsible for creating and maintaining a safe, secure environment for juveniles to ensure their care and programming needs, as well as access to a health clinic internally with a registered nurse or transport to a medical facility.

9. There are a total of seven units, and each unit is staffed with two JDOs.

10. The staffing ratio is one staff for every eight detained juveniles.

11. Additional JDO staffing is required for central control, admits and visitation release, break relief rovers, the health clinic, and court runners. JDO staffing needs vary every day.

12. At the time of the hearing, the juvenile division was staffed with 92 JDOs, with 5 additional JDOs arriving after orientation completion. Of the 92, approximately 30 JDOs are still in probationary status, which does not afford them the same rights as a career service JDO, such as being allowed to bid their shift or access to the Family Medical Leave Act (FMLA or FML).

13. In 2020, the number of JDOs dropped to approximately 72.

14. When staffing ratios are reduced due to insufficient staffing or decreased juvenile detainees, the juvenile division shuts down units or transitions into modified programming where the juvenile detainees are held in their rooms and only come out for limited and minimal programming.

15. Modified programming is an absolute last resort as it poses difficulties to both the detainees and staff. In such cases, the detainees can begin to "act[] out," the JDOs are challenged to get detainees to return to their rooms, and major incidents may occur impacting the safety of the detainees and staff.

16. Some juvenile detainees have gang affiliations, which requires the separation of those youth into different areas.

17. The employer's assignment of mandatory overtime has been a long-standing expectation of JDOs.

18. Sections 9.9 and 9.10 of the parties' CBA address the application of and release of JDOs from mandatory overtime.

19. The common vernacular used by the parties for when the employer assigns mandatory overtime is that the JDO is being "mandatoried."

20. JDOs may be mandated to participate in trainings or meetings outside of their regular shift or prior to or immediately following their regular shift.

21. The JDO at the top of the reverse seniority mandatory overtime list is the first JDO directed to perform mandatory overtime that day. When a JDO is "mandatoried" and works the mandatory overtime shift, they are assigned to the bottom of the reverse seniority mandatory overtime list.

22. Section 9.10.B of the CBA provides each JDO with one mandatory overtime pass per calendar year. Use of the pass will excuse them from performing the assigned mandatory overtime, and the CBA specifies five criteria for the JDO to use the pass. Employees who fail to stay for mandatory overtime as directed without an approved use of a pass are subject to discipline.

23. The parties also bargained the DAJD Code of Conduct, which applies to both the adult and juvenile divisions.

24. A violation of the DAJD Code of Conduct by a JDO can result in what the employer at one point referred to as "verbals," but this practice has since evolved into the issuance of letters of corrective counseling (LOCCs).

25. When issuing an informal LOCC, or a formal disciplinary action, for refusal to work mandatory overtime when directed, the employer will normally cite section 1.00.105, Conduct Unbecoming of the Code of Conduct.

26. If a JDO advises their supervisor that they are sick or ill during their regular shift and need to leave before their shift is over, they are allowed to use sick leave as provided in the CBA.

27. If a JDO refuses mandatory overtime and advises they are sick or ill without having taken sick leave during their regular shift, they are required to follow the staff report process identified above.

28. Since at least 2003, if a JDO refused a mandatory overtime assignment, they either had to provide appropriate documentation to their supervisor or be subject to disciplinary action.

29. When a JDO refuses to perform mandatory overtime as directed by a supervisor, the standard practice is for the JDO to submit a written staff report by the end of their shift to their supervisor.

30. The supervisor then reviews the staff report and completes the "actions for resolution," giving a recommendation on what level of discipline, if any, the JDO should receive for refusing mandatory overtime.

31. The chief then reviews the supervisor's recommendation and forwards the document to the director who makes the final decision on what discipline should be administered.

32. The director's decision is then returned to the supervisor who meets with the JDO to explain the final outcome.

33. The record reflects a history of the employer administering formal discipline to JDOs who refused to perform mandatory overtime due to illness.

34. Three JDOs who claimed they were not feeling well and could not perform mandatory overtime between 2004 and 2018 were administered a one-day suspension.

35. Around 2019, the employer began to administer the lower level of non-disciplinary actions, the LOCCs.

36. The exception to facing possible corrective counseling or disciplinary action occurs when JDOs have been granted accommodations to perform limited or no mandatory overtime, which is a practice that has been in place since at least 2016 based on documented medical restrictions through the FMLA or KCFML.

37. When a JDO requests Americans with Disabilities Act, FMLA, or KCFML workplace accommodations, they are provided the form labeled "Essential Functions of the Position," to be completed by a health care provider and the employee. The form, created around 2008 or 2009, documents the serious health condition or conditions that preclude the JDO from performing the essential functions of their position. It is five pages in total, contains eight essential functions of the JDO position, and asks for the medical provider to opine

whether the employee can fully perform the functions and to provide objective, measurable restrictions. The column adjacent to the described essential functions list bulleted "Skills & Abilities Required" to fulfill that function.

38. The first essential function on the form reads, "Come to work on a regular and reliable basis, work under direct supervision, perform work duties under stressful conditions and have contact with individuals that may be aggressive and/or confrontational."

39. The skills and abilities for this essential function includes five bullet points, the first one reading, "The ability to work regularly and ability to work an 8-hour shift, including working multiple shifts."

40. Since at least January of 2023, the employer has solicited additional clarification from employees' health care providers regarding how the employee's health condition impacts their ability to work mandatory overtime.

41. If the provider's initial documentation indicates that the employee can perform voluntary overtime, but not mandatory, or limits the amount of mandatory overtime, based on the employee's serious health condition, the employer sends out the "DAJD Overtime Restrictions" form, which may be supplemented by the "DAJD Overtime Restrictions: Health Care Provider Follow Up, Additional Clarification Needed Form."

42. The former form asks the medical provider to determine restrictions on a JDO's ability to perform voluntary and/or mandatory overtime, including effective and end dates of the restriction(s) and number of hours outside of their regular shift, if any.

43. The latter form contains two inquiries: (1) how the employee's serious health condition directly relates to the employee's ability to work mandatory overtime "as required for their job" and (2) why the medical condition only impacts the employee's ability to perform mandatory overtime but permits voluntary overtime at the employee's discretion.

44. The essential functions form has been in place for approximately 16 years.

45. The employer had at one previous point provided the guild notice regarding an updated version of the essential functions form. By providing the union notice regarding updates to the essential functions form, the employer invited the union to raise concerns about changes (i.e., some form of bargaining).

46. An internal employer email dated February 13, 2023, recognized the content of the essential functions form to be a bargaining subject. The email's subject line reads, "Essential Functions for CO [Corrections Officer] & JDO," and is designated "High" importance. DAJD HR Manager Cheryl Macoleni implored two labor negotiators, one being Chevalier, to re-engage in bargaining with the union in order to update the essential functions form:

> Good afternoon, David & Andre,
>
> I am not sure if you are familiar with the history of these documents or not, but it is my understanding that our Essential Functions Form for the Corrections Officer position was last updated in 1997. The one for the Juvenile Detention Officer was updated more recently, but is still lacking the overtime piece. I know in the last 2 bargaining sessions we have attempted to get this updated on the adult side but were not able to get it past the Guild. We now want to make a push again, to get these *both* updated and we want to include the need to work Mandatory Overtime as an Essential Function.
>
> We do reference overtime in our CO Job Posting, which I have also attached . . .
>
> From the JDO Job Posting:
>
> - Must be willing and able to work mandatory overtime as required to meet operational needs.
>
> This is a supplemental question that we use for screening out applicants who answer "No"
>
> * 13. If required for the position you are seeking, are you willing to [document undecipherable] overtime? [ ] Yes [ ] No.
>
> How can we go about initiating this change with the Guilds?

(emphasis added).

47. The union first became aware of the use of the OT restrictions forms on or around February 5, 2024, when it received copies of the forms that the employer provided to JDO Nghia Pham.

48. The employer failed to give notice that it affirmatively intended to make changes to the essential functions form by adding the two OT restrictions follow-up forms.

49. On February 5, 2024, Lufkin sent an email to Chevalier demanding to bargain the unilateral changes the union described as (1) mandatory overtime being an essential function of the JDO position and (2) mandatory overtime being limited to up to four assignments per week. Lufkin's email also requested that the county restore the status quo during bargaining and provide proper notice of any proposed changes.

50. Chevalier replied to Lufkin on February 5, 2024, and asked if the demand to bargain was "the exact same fact pattern and issues on the adult side from [Lufkin's] perspective." Lufkin responded, "Almost but not quite. The 4 times a week thing – even if mot [mandatory overtime] was essential – is still an independent unilateral change and is not present on the adult side. . . ."

51. Chevalier provided a more detailed response to Lufkin on February 15, 2024, regarding the February 5 demand to bargain. In the email, the county agreed that the maximum number of mandatory overtime assignments of four per week would be removed from the essential function follow-up form. Chevalier indicated this change should resolve the union's concern on that matter. The county, asserting that mandatory overtime had always been an essential function of the JDO position and therefore part of the status quo, offered four different points in addition to expressing several interests of the county. Finally, the county offered in its email to meet with the union.

52. Lufkin responded later that evening and stated that the county's email did not indicate an agreement to rescind the unilateral change nor bargain in good faith. The union's email further opined, "A meeting does not seem to be a productive use of our time given the County's refusal to bargain. . . ."

53. On February 13, 2024, Smith sent an email to Chevalier and included Lufkin. The email indicated the union was demanding to bargain and stated that the employer had "changed the past practice of not providing staff an automatic LOCC and/or discipline for staff refusing MOT while they are sick."

54. On February 16, 2024, Chevalier emphasized that the county was not rescinding its position that mandatory overtime was already an existing essential function of the JDO job. In addition to expanding on the employer's interests and a graph depicting overtime hours, the county reiterated its willingness to meet and have "constructive dialogue" on the two demands to bargain and several grievances.

55. That same morning, Lufkin responded to Chevalier expressing the union's willingness to engage in dialog. Lufkin added, "I do not read your email to indicate that the County is willing to engage in bargaining on the unilateral changes previously asserted. If I misunderstood, and you wish to engage in bargaining, please do let me know and we can get something scheduled ASAP."

56. The parties ultimately met on February 21, 2024, and Chevalier recapped the meeting in an email dated March 12, 2024. Chevalier stated that the purpose of the meeting was to discuss the union's demand to bargain the JDO mandatory overtime refusals (i.e., the union's demand to bargain filed February 13, 2024, by Smith).

57. The February 21, 2024, email does not provide any discussions related to the February 5 demand to bargain (the essential functions form alleged changes to include mandatory overtime), nor does the record in total provide an indication that the parties met before the May 20, 2024, ULP complaint filing regarding that allegation.

58. The addition of voluntary and mandatory overtime inquiries to the OT restrictions forms in this case are a permissive subject of bargaining.

59. In 2011, only two JDOs had FMLA-related overtime restrictions. As of November 2023, that number climbed to 30 JDOs out of a staff of nearly 90.

60. Absent sufficient staffing coverage, the facility has to convert to modified staffing which then raises safety concerns impacting the youth, JDOs, and public.

61. Smith filed a grievance against the employer on behalf of JDO Chester Simmons on May 23, 2023, citing article 7 (sick leave) of the CBA as one of the violated provisions. The grievance was based on the employer issuing Simmons a LOCC based on code of conduct violations for refusing mandatory overtime due to parental priorities on December 29 and 30, 2022.

62. If there was a change to the parties' past practice of allowing sick employees to be excused from performing mandatory overtime, the "triggering event" of the employer's change to that practice was at the very least on September 1, 2023, when the employer issued its Step 2 response.

63. The Step 2 response points out that Smith argued at the meeting that "there is a long-standing past practice that if you are sick or need to care for a sick family member that you are excused from Mandatory Overtime, which was not followed in this case."

64. The September 1, 2023, Step 2 response provided sufficient detail that a tenured advocate, using reasonable diligence, should have discovered the cause of action, and therefore served as constructive notice to the union.

65. The assignment of mandatory overtime to a JDO is a mandatory subject of bargaining in its impacts to both wages and working conditions.

66. Between 2016 and 2023, there are at least three examples of the employer issuing either a LOCC or a one-day suspension to JDOs for refusing mandatory overtime based on the employee advising they were ill.

67. During an upper management transition within the juvenile division and around the time of the COVID-19 pandemic, there was a "pause" in administering any form of LOCCs or discipline for refusals to perform mandatory overtime.

68. Part of the pausing was due to a "pile up" of staff reports with supervisor recommendations that had not been reviewed by the interim director at the time.

69. The union failed to establish a past practice of allowing an ill JDO to refuse mandatory overtime and not be subject to a LOCC or disciplinary action that was consistently applied, known to all parties, and mutually accepted.

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 on findings of fact 1 through 52, and 54 through 60, the employer refused to bargain the effects of its decision to add voluntary and mandatory overtime to the OT restrictions forms in violation of RCW 41.56.140(4) and derivatively interfered in violation of RCW 41.56.140(1) by unilaterally prohibiting JDOs from working voluntary or mandatory overtime for up to three weeks while the JDO obtained additional documentation from their medical provider.

3. Based on findings of fact 1 through 11, 17 through 36, 53, 56, and 61 through 69, the employer did not refuse to bargain and did not violate RCW 41.56.140(4) when it issued letters of corrective counseling to employees for their refusals to perform mandatory overtime based on illness and the JDOs' conditions are not otherwise protected under state or federal law.

ORDER

King County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Failing or refusing to provide King County Juvenile Detention Guild notice and opportunity to bargain the impacts of its decisions affecting bargaining unit employees' wages, hours, or working conditions by adding voluntary and mandatory overtime to the OT restrictions forms.

b. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of chapter 41.56 RCW:

a. Upon request, bargain in good faith with the King County Juvenile Detention Guild concerning the mandatory effects on bargaining unit employees of King County's decision to add voluntary and mandatory overtime to the OT restrictions forms.

b. Based on the employer's permissive decision to add voluntary and mandatory overtime to the OT restrictions forms and the change of precluding employees from overtime opportunities after February 5, 2024, the employer shall provide overtime pay to any impacted JDO for their lost overtime opportunities from five days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the employer bargains to agreement with the union over the effects of the decision to add voluntary and mandatory overtime to the two OT restriction follow-up forms; (2) the parties bargain to bona fide impasse and proceed to interest arbitration as provided in RCW 41.56.430–.470, the date on which an arbitrator issues an award; (3) the union fails to request bargaining within five business days following the date of this order, or to commence negotiations within five business days of the employer's notice of its desire to bargain with the union; or (4) the union

fails to bargain in good faith.[19] The sum paid to any affected bargaining unit employee of missed overtime opportunities shall not exceed the amount of overtime the employee would have earned from the date the employer implemented the "up to three-week" overtime prohibition (i.e., sometime after February 5, 2024) until the date on which the employer offered to bargain in good faith. However, in no event shall the sum of back pay be less than the affected employees would have earned in overtime for a two-week period. Back pay shall be computed in accordance with WAC 391-45-410.

c. Preserve and, within 14 days of a request, make available for examination and copying all payroll records, social security payment records, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

d. Contact the compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Read the notice provided by the compliance officer into the record at a regular public meeting of the King County Council, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

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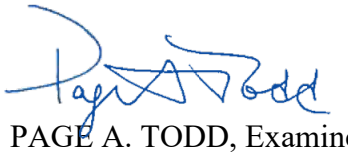
[19] The exception to the above remedy is if a JDO's medical provider limited their ability to perform voluntary or mandatory overtime on their original health care provider certification form and the employer followed the provider's recommendations without additional follow-up. In such cases, these JDOs would not qualify for the remedy herein.

f. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the compliance officer.

g. Notify the compliance officer, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply with this order, and at the same time provide the compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 13th day of June, 2025.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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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.