STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BREMERTON PATROLMEN'S ASSOCIATION, Complainant, vs. CITY OF BREMERTON, Respondent.	CASE 10788-U-93-2510 DECISION 5079 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Cline & Emmal, by Stephen Garvey, Attorney at Law, appeared on behalf of the union.

Vandeberg Johnson & Gandara, by William A. Coats, Attorney at Law, appeared on behalf of the employer.

On November 18, 1993, Bremerton Patrolmen's Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The complaint alleged the City of Bremerton had interfered with employee rights and unlawfully refused to bargain by withholding certain documents the union had requested to process a discharged police officer's grievance. A hearing was held before Examiner Pamela G. Bradburn on November 2, 1994. Briefs were filed January 12, 1995.

BACKGROUND

During the period relevant to this case, Delbert McNeal was the employer's police chief and Joseph Hatfield was a captain whose responsibilities included internal investigations.

The Commission's records indicate the union has represented certain employees in the employer's police department since 1985. The employer and union stipulated during the hearing that their

relationship had been strained and combative for a number of years.[1]

The tenure of Police Officer Robert Waldroop has been one point of dispute between the parties. In order to properly assess the parties' rights and obligations with regard to the information at issue here, it is necessary to describe Waldroop's most recent discharge in some detail.

1993 Discharge of Waldroop

On December 10, 1992, the employer received an anonymous report that someone had been assaulted and injured at a residence on Callow Street. Waldroop was dispatched to check on the alleged victim's welfare, but telephoned rather than making a personal visit. When Waldroop was allegedly told there was nothing the police could do, he took no further action. Waldroop's handling of this dispatch was discovered when another officer responded to a second call requesting assistance at Callow Street.[2]

Hatfield began an internal investigation of Waldroop's actions on December 15, 1992. On December 21, 1992, Detective Louis Olan began a criminal investigation into the possible assault on the alleged Callow Street victim.

McNeal held a pre-disciplinary meeting on March 23, 1993 at which Waldroop was represented by union President Roy Alloway and union attorney Brian Fresonke. The transcribed tape of that meeting

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[1] The Commission's docket records show the union filed 13 unfair labor practice charges before the present case. Violations were found in four cases, a finding of no violation was made in one case, seven cases were withdrawn, and the processing of one case has been interrupted by litigation.

[2] These events are referred to as "the Callow Street incident".

shows Fresonke asked McNeal on four separate occasions for the reports Olan was generating in his criminal investigation, as well as other documents. After the pre-disciplinary meeting, McNeal spoke with witnesses to the Callow Street incident, made notes of their responses to his questions, and summarized his thinking about the situation (McNeal's notes). On March 30, 1993, McNeal discharged Waldroop for the Callow Street incident and other alleged misconduct unrelated to the issues involved in this unfair labor practice case.

Waldroop's Grievance and Arbitration

On March 31, 1993, Fresonke wrote McNeal requesting information, including:

> All police reports, witness statements, and all other documents prepared by, or in the possession of, the City of Bremerton and/or the Bremerton Police Department pertaining to the [Callow Street incident], including but not limited to, all documents prepared or compiled by Officer Rawlins and Detective Olan; ...

Hatfield, who had not attended the pre-disciplinary meeting, gave Fresonke the entire internal investigation file on May 7, 1993. Hatfield testified at the unfair labor practice hearing that he then asked if Fresonke wanted any other documents and got a negative response. Hatfield further testified he believed Fresonke had requested only the internal investigation file. As an additional explanation for the employer's failure to produce all the requested information, Hatfield testified he had not known in May, 1993 that McNeal's notes existed, and that Olan's reports did not become part of his internal investigation file because criminal investigations are kept separate from internal investigations.[3]

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[3] Nevertheless, the parties stipulated the union received on May 7, 1993 those reports by Olan that predated Waldroop's discharge.

The union pursued Waldroop's grievance to arbitration before Gary Axon.[4] The employer introduced McNeal's notes and Olan's complete criminal investigation file in its case in chief on the third day of hearing over the union's strenuous objections. A fourth day of hearing was scheduled approximately four weeks later.[5] The union argued McNeal's notes and Olan's reports had been intentionally withheld, thereby denying Waldroop a fair hearing and entitling him to reinstatement, while the employer contended the documents were irrelevant because it was not necessary to determine exactly what had happened at Callow Street. On January 12, 1994, Axon upheld the discharge. Reasoning that Olan prepared his reports after the decision to discharge, that they were given to the union for use at the hearing, and that the employer was basing discipline on Waldroop's failure to respond rather than on what actually happened at Callow Street, Axon refused to find the employer's withholding of the documents denied Waldroop a fair hearing.

POSITIONS OF THE PARTIES

The union argues the employer violated the law by failing to produce documents that were specifically requested, within its control, and necessary to the union's fulfillment of its obligations. The union asserts the criminal investigation reports prepared after Waldroop's discharge were nonetheless relevant because they supported Waldroop's version of his conversation with the alleged Callow Street victim. The union asserts the employer

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[4] Arbitrator Axon had reinstated Waldroop after his first discharge in 1991.

[5] Axon's opinion does not clearly state whether the union's objections caused the delay and scheduling of the fourth day of hearing, or whether a fourth day would have been required to complete the hearing even without the dispute over evidence.

is disingenuous in its claim that the credibility of the citizens involved in the Callow Street incident was irrelevant to its discharge decision, noting the extent of the employer's investigation into the facts of the incident and the testimony in the arbitration.[6] Finally, the union urges the Commission to independently decide whether the withheld documents were relevant to the grievance, and argues that relevance should be determined by the union's theory of its case.

The employer argues its failure to produce the documents at issue was inadvertent and harmless. The employer contends the content of McNeal's notes was available to the union from the internal investigation documents provided on May 17, 1993.[7] The employer asserts the union received the documents at issue almost a month before the final day of arbitration, cross-examined employer witnesses fully about the documents after they were introduced, and did not request a continuance of the arbitration. Finally, the employer urges the Commission to defer to the arbitrator's decision that the contested documents were not relevant to the grievance.

DISCUSSION

The Appropriate Legal Standard

The Commission has held that the statutory bargaining obligation includes a mutual duty to supply, upon request, information reasonably necessary to an employer's or union's performance of its

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[6] The alleged victim and a witness to the Callow Street incident were brought from prison to testify during the employer's case in chief before Axon.

[7] Because nothing in the internal investigation file was prepared by McNeal, the employer appears to be arguing that the persons McNeal contacted were also interviewed during the course of the internal investigation.

statutory responsibilities. City of Bellevue, Decision 4324-A (PECB, 1994).

Several factors must be present for this duty to arise. The request must be clear.[8] The information must be requested for use in the collective bargaining context.[9] The information must relate to the union's performance of obligations arising from its status of exclusive bargaining representative;[10] one of these obligations is processing a grievance.[11] The union must have a genuine need for the requested information.[12] Finally, the duty to provide information requires an employer to articulate, and negotiate with the union over, any objections it has to producing the requested information.[13]

Application of Legal Standard

Timely Request -

The first of two document requests the union made occurred during the pre-disciplinary hearing. Just as in City of Bellevue, supra, the requested documents would be needed only if the information the

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[8] City of Yakima, Decision 1124 (PECB, 1981) (reversed on other grounds); City of Yakima, Decision 1124-A (PECB, 1981).

[9] Highland School District, Decision 2684 (PECB, 1987). An unfair labor practice charge was dismissed because the information was requested for use in a lawsuit; the parties had forsaken the collective bargaining arena for court.

[10] King County, Decision 3030 (PECB, 1988).

[11] City of Bellevue, supra; Pullman School District, Decision 2632 (PECB, 1987).

[12] City of Bellevue, supra. An employer that has given the union sufficient information to meet the due process requirement for a pre-disciplinary meeting has no obligation to provide the entire internal investigation file.

[13] State of Washington, Decision 4710 (PECB, 1994).

union had already received was inadequate for the pre-disciplinary hearing; no such showing has been made in the present case. Accordingly, the first request did not give rise to a duty to provide information.

The second request was made the day after Waldroop's discharge. Although there is some question whether the request predated the grievance,[14] the wording of the request makes it clear the union's intent was to use the information to fulfill its statutory duty of investigating and processing a possible grievance. If the request for information predated the grievance, it can be considered to have continued in effect until the grievance was filed.[15] The second union request for information is timely.

Clear Request -

Fresonke's letter to McNeal, quoted above, identifies the types of documents requested and their authors. The letter requested information "pertaining to the [alleged Callow Street victim] case". It is illogical to read that reference to exclude the criminal investigation, particularly because the letter mentions Olan, whose only connection with the matter was the criminal investigation he was conducting.

Hatfield believed that the union had asked for materials from the employer's internal investigation.[16] Fresonke's letter does not support Hatfield's understanding. The employer is obligated to

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[14] The date of Waldroop's grievance does not appear in the record. Axon's award indicates a grievance was filed.

[15] In Finn Industries, Inc., 314 NLRB 556 (1994), the National Labor Relations Board held that a request for a list of the employer's suppliers and customers continued in effect until, during, and after arbitration of the grievance for which the union had made the request.

[16] No foundation for that belief was suggested, and Fresonke was not called as a witness in the unfair labor practice hearing.

respond as an entity to an information request. The fact that Hatfield did not know McNeal had made notes, for instance, is no defense; McNeal's knowledge of the existence of his notes is imputed to the employer. For the reasons detailed above, the Examiner must conclude the union's information request was clear.

Necessity of Withheld Information -
Two different types of information are involved in this proceeding: (1) McNeal's notes and (2) reports prepared by Olan in the course of his criminal investigation. They require separate consideration.

* McNeal's Notes. McNeal conducted his own investigation of the Callow Street incident to answer questions raised in the pre-disciplinary meeting. He questioned the alleged victim and another person about their recollection of Waldroop's telephone call and the events preceding it. He also questioned the police officer who responded to the second call regarding Callow Street. McNeal made nine pages of handwritten notes of these conversations and of his thoughts regarding the incident, and dictated a three page summary of the situation. McNeal testified at the unfair labor practice hearing that these notes and summary were part of his "working documents". The union did not receive the handwritten notes or the summary until they were offered by the employer as exhibits in the arbitration hearing.

Documents an employer has considered in making a disciplinary decision are presumed necessary to a union representing the grievant, and must be provided upon request. State of Washington, supra. The employer argues that withholding McNeal's notes did not harm the union because the notes duplicated material that was produced as part of the internal investigation file. This argument must be rejected. First, McNeal appears to have questioned two police officers whose statements are not included in the internal investigation file. Second, even if the persons interviewed gave

Hatfield and McNeal the same answers to the same questions,[17] the union was entitled to know that because it may have affected McNeal's evaluation of Waldroop's defense. Finally, the fact that McNeal pursued independent inquiries, and the fruits of his inquiries, must be divulged to the union for it to properly represent its grievant. The record of McNeal's investigation may reveal the level of his satisfaction with the internal investigation, his evaluation of the grievant's arguments at the pre-disciplinary hearing, whether persons' stories changed, and his thought process regarding the discharge decision.

The timing and nature of McNeal's notes suggest they were considered by him in deciding to discipline Waldroop. Furthermore, a summarization of the decision-maker's thoughts when faced with a decision on discipline is, by definition, a document considered by that decision-maker. Accordingly, McNeal's notes should have been provided to the union with the other material on May 7, 1993.

* Olan's Reports. Olan investigated whether a crime had been committed at the Callow Street residence before Waldroop was dispatched. The criminal investigation began before, and continued after, Waldroop was discharged. In the arbitration hearing, the employer offered as exhibits three reports from Olan's criminal investigation that it had not given the union (Olan's reports). Each of these reports post-dated Waldroop's discharge and the May 7, 1993 meeting at which Hatfield gave documents to Fresonke. These reports described Olan's investigational activities and summarized comments of the alleged victim and other witnesses about events at Callow Street both before and after Waldroop was dispatched. One of the reports included the transcript of a taped statement the alleged victim made to Olan on May 17, 1993. The internal investigation file contained this same mix of summaries by

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[17] This is a hypothetical statement; the Examiner has not compared McNeal's notes with the internal investigation file.

police officers of their official actions and transcripts of taped witness statements.

The union argued to the arbitrator, and argues here, that Olan's reports were necessary for credibility inquiries. The Examiner need not determine whether Olan's reports in fact support either the union's or the employer's version of events at the Callow Street residence. The necessity and relevance of requested information are measured prospectively, not in retrospect. In the ordinary course of events, information is requested for future use. Therefore, the decision whether the requested information is reasonably necessary must often be made in a vacuum. That is why the Commission has held that an information request is to be evaluated by "whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative." City of Bellevue, supra (emphasis added). For the same reason, the unfair labor practice charge is not determined by Axon's finding that Olan's reports were irrelevant.[18]

State of Washington, supra, does not decide the relevance of, and the union's need for, Olan's reports; McNeal could not have relied on them in deciding to discharge Waldroop because they were prepared after he made that decision. Pullman School District, supra, suggests that it is the union's theory of its case that determines the possible relevance of, and need for, documents that were not part of the basis for the discipline.[19] In the present

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[18] See, NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), where the United States Supreme Court held the NLRB should immediately determine whether requested information is relevant and useful to a union's grievance, rejecting an argument the NLRB should wait until an arbitrator had decided the grievance.

[19] The Commission found the employer had unlawfully refused to provide records of discipline imposed on bargaining unit members during the five previous years. Production was ordered because the union argued the employer had not fairly applied the just cause standard for discipline.

case, the union was contending that some persons involved in the Callow Street incident were lying about their conversations with Waldroop. It was reasonable for the union to assume Olan would inquire into the extent and nature of the alleged victim's injuries, the truthfulness of his claims about the identity of the assailant, and explore the witness' recollections in some detail over time. Thus, the reports Olan was expected to generate in his criminal investigation were relevant information for purposes of Waldroop's grievance.[20] The employer should have provided each of Olan's reports to the union as it was prepared.

Appropriate Remedy

When an employer is found to have unlawfully refused to bargain, the remedy customarily includes an order to cease and desist from such behavior and posting of a notice. City of Bremerton, Decision 2733-A (PECB, 1987). It is so ordered.

The union argues the Examiner should either reinstate Waldroop or direct that his grievance be arbitrated anew, so that the union gains full advantage of McNeal's notes and Olan's reports. Although the employer violated the law, the union has not shown it suffered any harm because the employer produced McNeal's notes and Olan's reports in August rather than May, 1993. It would clearly be preferable if a party received requested documents before, rather than during, an arbitration. However, the record contains no request by the union for a continuance of the arbitration, or an unsuccessful attempt to recall and requestion any witnesses Olan had interviewed, or any other limitation of the union's ability to fully defend Waldroop in the arbitration. In the circumstances of

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[20] The employer has not argued Olan's reports are excluded, because of confidentiality, from the duty to provide information. Therefore, it is not necessary to address the concerns expressed by the Commission about production of witness statements in City of Bellevue, supra.

this case, the employer's violation caused no lasting injury that must be cured by a restoration of the status quo.

The union has also requested an award of attorney's fees. As the Commission has explained to these parties, an award of attorney's fees "is an extraordinary remedy which is appropriate where necessary to effectuate the order of the Commission, or where defenses are frivolous and without merit." City of Bremerton, supra. Although this is not the employer's first violation of the law, none of the earlier violations have involved the duty to provide information which is at issue in this case.[21] The record reveals an inadvertent violation, apparently caused by an internal failure of communications, which should be easily corrected by the employer in the future. Furthermore, the employer has presented a case of first impression by arguing it is released from an obligation to produce information by an arbitrator's ruling that information is irrelevant. No evidence has been presented to the Examiner that would indicate an extraordinary remedy is necessary in the circumstances of this case.

FINDINGS OF FACT

1. The City of Bremerton is a public employer within the meaning of RCW 41.56.030(1). At all times relevant to this proceeding, Delbert McNeal was the employer's police chief and Joseph Hatfield was a captain in charge of internal investigations.

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[21] Insisting that the union obtain an employee's permission before it could receive information was found to be a refusal to bargain and withdrawal of recognition. City of Bremerton, Decision 3843-A (PECB, 1994). An allegation the employer unlawfully refused to provide information by demanding payment of copying charges was dismissed in the same decision.

2. Bremerton Patrolmen's Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit of police officers of the employer. Robert Waldroop was a member of the union's bargaining unit.

3. After conducting a pre-disciplinary hearing regarding Waldroop on March 23, 1993, McNeal made notes of his own inquiries of various witnesses and summarizing his thinking about the situation. McNeal discharged Waldroop on March 30, 1993, for his handling of an alleged assault, and other alleged misconduct not relevant to this unfair labor practice proceeding.

4. On March 31, 1993, the union's attorney requested all police reports, witness statements, and other documents in the employer's possession dealing with the incidents for which Waldroop was discharged, including any reports prepared by Louis Olan, a detective conducting a criminal investigation of the alleged assault. A grievance challenging Waldroop's discharge was filed at some unknown time.

5. On May 7, 1993, Hatfield gave the union the file of his internal investigation into Waldroop's conduct. Hatfield did not know McNeal's notes existed, and believed the union's request for information was limited to the internal investigation file. By some unknown means and at some unknown time, the union received from the employer the three reports Olan had prepared before the date of Waldroop's discharge.

6. Olan's criminal investigation continued after Waldroop was discharged. The three reports he prepared after that date describe his activities and the comments of witnesses to the alleged assault and Waldroop's handling of it.

7. The employer produced McNeal's notes and Olan's last reports on the third day of the arbitration hearing on Waldroop's grievance. The union had not seen the documents, or known of their existence, until then. A fourth and final day of arbitration occurred four weeks later. The union did not request a continuance or make a record that its late receipt of McNeal's notes and Olan's last reports prevented it from fully defending Waldroop in the arbitration.

8. The union argued Olan's reports were necessary information the employer should have produced because the witnesses to the alleged assault might support Waldroop's version of events. The arbitrator upheld Waldroop's discharge and found McNeal's notes and Olan's last reports irrelevant to the disciplinary decision.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction of this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The City of Bremerton committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4) by failing to provide Bremerton Patrolmen's Association with documents which appeared reasonably necessary for the processing of a grievance, and which had been clearly and timely requested.

ORDER

The City of Bremerton, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to bargain collectively in good faith with the Bremerton Patrolmen's Association, by refusing to provide relevant information requested by the union for its use in representing a bargaining unit member in the processing of a grievance, including information developed by the employer after the grieved decision if that information is relevant to the union's theory of the case.

b. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by 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, promptly provide to the Bremerton Patrolmen's Association relevant information requested by the union for its use in representing a bargaining unit member in the processing of a grievance, including information developed by the employer after the grieved decision if that information is relevant to the union's theory of the case.

b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Notify the above-named 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

d. Notify the Executive Director of the Public Employment Relations Commission, 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 Executive Director with a signed copy of the notice required by this order.

Dated at Olympia, Washington on the 20th day of April, 1995.

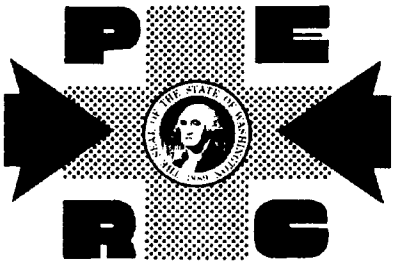
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Pamela G Bradburn

PAMELA G. BRADBURN, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

"APPENDIX"



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT refuse to bargain collectively in good faith with the Bremerton Patrolmen's Association by refusing to provide relevant information requested by the union for its use in representing a bargaining unit member in the processing of a grievance, including information developed by us after the grieved decision if that information is relevant to the union's theory of the case.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

CITY OF BREMERTON

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.