University of Washington, Decision 11499 (PSRA, 2012)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON FEDERATION OF STATE EMPLOYEES, Complainant, vs. UNIVERSITY OF WASHINGTON, Respondent.	CASE 24344-U-11-6238 DECISION 11499 - PSRA FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Younglove & Coker, P.L.L.C., by *Edward Earl Younglove III*, Attorney at Law, for the union.

Robert M. McKenna, Attorney General, by *Mark K. Yamashita*, Assistant Attorney General, for the employer.

On October 21, 2011, the Washington Federation of State Employees (union) filed an unfair labor practice complaint against the University of Washington (employer). The union alleged the employer refused to bargain and derivatively interfered with employee rights in violation of RCW 41.80.110(1)(e) and (1)(a) when it failed to provide requested investigatory notes to the union and then used them in a grievance arbitration hearing without prior notice or production. A preliminary ruling was issued on October 26, 2011, finding causes of action to exist. Examiner Guy Otilio Coss held a hearing on February 21, 2012. The parties submitted post-hearing briefs to complete the record.

ISSUE

Did the employer refuse to bargain and derivatively interfere with employee rights by failing to provide requested investigatory notes to the union and then using them in the grievance arbitration hearing without prior notice or production?

The union made a clear request for relevant information from the employer that was directly related to the performance of the union's obligation in representing its bargaining unit member in grievance arbitration. The employer did not articulate, nor negotiate with the union over, any objections to producing the requested information. The employer did not provide the requested, relevant information to the union. Accordingly, the employer refused to bargain and derivatively interfered with employee rights by failing to provide the investigatory notes upon request and in using them in a grievance arbitration hearing without prior notice or production.

APPLICABLE LEGAL STANDARDS

The duty to bargain under the Public Employees' Collective Bargaining Act is defined in RCW 41.56.030(4) as follows:

> "Collective bargaining" means . . . to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit . . . .

"Collective bargaining is a process of communication, not a game of hide and seek." City *of Bellevue v. International Ass'n of Fire Fighters, Local 1604,* 119 Wn.2d 373, 384-385, 831 P.2d 738, 743-744 (1992). The Commission in *City of Bremerton* laid out the duty to provide information as follows:

> Under both federal and state precedent, the duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *City of Bellevue*, Decision 3085-A (PECB, 1989), *affirmed*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant for the purpose of contract negotiations, but also encompasses information necessary to the administration of the collective-bargaining agreement.
>
> Requested information necessary for processing contractual grievances, including that necessary to decide whether to proceed with a grievance or arbitration, must be provided by employers. In *Acme Industrial Co., supra*, the Court strongly endorsed requiring the employer to supply information to the union which would

> aid the union in "sifting out unmeritorious claims" in the grievance process. See, also, *City of Seattle*, Decision 3066 (PECB, 1988), affirmed, Decision 3066-A (PECB, 1988).
>
> The courts and the NLRB use a discovery-type standard to determine relevancy of the requested information:
>
> > [T]he goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened".
>
> *Pennsylvania Power and Light Company*, 301 NLRB 1104 (1991) at p. 1105, citing *Acme Industrial Co., supra*, at 438.
>
> Where the circumstances surrounding a union's request are reasonably calculated to put the employer on notice of a relevant purpose, the employer may be obligated to furnish the requested information. Information pertaining to employees in the pertinent bargaining unit has been held to be presumptively relevant.

City of Bremerton, Decision 6006-A (PECB, 1998) (Footnotes omitted).

The duty to provide information does not compel a party to create records that do not exist; however, a party does have an obligation to make a reasonable good faith effort to locate the information requested. *Seattle School District*, Decision 9628-A (PECB, 2008). The duty to locate the requested information also includes a duty to communicate with the requesting party to ensure that the information being gathered is the type of information that is being sought through its request. *See City of Seattle*, Decision 10249 (PECB, 2008), *aff'd, City of Seattle*, Decision 10249-A (PECB, 2009). A party may not refuse to respond to an ambiguous or overbroad request, but rather that party is required to request clarification and/or comply to the extent that the request clearly asks for necessary and relevant information. *Kitsap County,* Decision 9326-B (PECB, 2010), citing *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

The duty to provide relevant information is "derived from the duty to bargain in good faith, and it extends beyond the period of contract negotiations. The obligation applies, for example, to interest arbitration proceedings, and to requests for information necessary for the representation of bargaining unit members in processing grievances to enforce the terms of negotiated contracts.

In evaluating information requests, the Commission and the courts consider whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative." *City of Bellevue*, Decision 4324-A (PECB, 1994). "Where the circumstances surrounding a union's request are reasonably calculated to put the employer on notice of a relevant purpose, the employer may be obligated to furnish the requested information. Information pertaining to employees in the pertinent bargaining unit has been held to be presumptively relevant." *City of Bremerton*, Decision 6006-A (PECB, 1998)

ANALYSIS

The employer imposed discipline on bargaining unit member Troy Jones (Jones) for alleged misconduct and the union filed a grievance seeking to have that discipline overturned. On December 23, 2009, the union requested, among other things, the production of all "investigatory notes, documents, and records used by management to reach the conclusion that corrective action was necessary and that final counseling was the appropriate level of discipline" in relation to the grievance.

The employer responded to the union's document production request on January 6, 2010. The document production included notes taken by several individuals during investigation meetings concerning Jones' discipline. In conformity with their grievance procedure, the parties proceeded to their arbitration hearing on June 16, 2011. At that hearing the employer offered two exhibits consisting of notes taken by one of its investigators, Donna Schmidt (Schmidt) taken during investigatory meetings held on June 16, 2009, and November 10, 2009. At the hearing, the union objected that Schmidt's notes had not been provided to the union pursuant to its December 23, 2009 request for information.

In its answer, the employer admits that it received the union's information request on December 23, 2009. While claiming the request was in some way unclear, the employer nevertheless admits in its post-hearing brief that Schmidt's notes were encompassed in the union's request. In fact it provided the investigatory meeting notes of all of the investigators with the exception of Schmidt. At the time of the union's request, the employer did not indicate to the union that it felt

the request was unclear or otherwise qualify its document production as being incomplete and the union had no reason to believe it was not complete. The employer further admits that Schmidt's notes on the Jones investigation were relevant, stating that "[t]here is no question that the notes at issue were relevant to the grievance." Finally, the employer admits in its answer and in its post-hearing brief that Schmidt's notes were not produced to the union pursuant to the December 23, 2009 request and that the first time the union was made aware of their existence was during the arbitration hearing on June 16, 2011.

The employer claims that the failure to provide these requested and relevant documents was not willful and did not prejudice the union in processing Jones' grievance. The employer's primary investigator concerning the allegations that led to Jones' discipline was Assistant Director of Facility Services Scott Spencer (Spencer). Spencer credibly testified that he had not intentionally nor willfully omitted Schmidt's investigatory notes and that the failure to produce them was inadvertent. Inadvertence and/or the lack of prejudice to a requesting party, however, is not a defense to a failure to provide relevant, requested information. The Commission directly addressed such defenses in the *City of Bremerton*:

> In the case now before us, the employer fundamentally misinterprets the duty to provide information. That duty does not depend upon the results of an arbitrator's decision, or upon the requested information actually being accepted into evidence by an arbitrator. The existence of the duty does not depend on the objections being made in arbitration, on whether a party is prejudiced, or on whether a party would have prepared differently if it had known of the content of the requested files. An unfair labor practice can be committed long before a case goes to arbitration, and even before a written grievance is filed. Once an act or event occurs which gives rise to a potential grievance, a union representing the affected employee(s) has a right to request information. A party does not have to wait until an arbitration hearing to find out relevant information, or to obtain information that could lead to other relevant information.

City of Bremerton, Decision 6006-A (PECB, 1998). Accordingly, the employer's defense of non-willful inadvertence and/or non-prejudice to the union is rejected.

The union has asked for the extraordinary remedy of attorney's fees in this case. As discussed above, the employer's failure to produce Schmidt's investigatory meeting notes is found to have

been inadvertent and non-willful. The Commission and the Washington State Supreme Court have held that an award of attorney's fees by the Commission was appropriate "where necessary to make its order effective." *City of Seattle*, Decision 4164-A (PECB, 1993), citing, *Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621 (1992). Under the particular facts of this case, no such extraordinary remedy is required to effectuate this order.

Conclusion

The union's request for information was clear and encompassed Schmidt's investigatory meeting notes taken by Schmidt on June 16, 2009, and November 10, 2009. The information requested by the union was made in a collective bargaining context and directly related to the performance of the union's obligation as the exclusive bargaining representative in processing Jones' grievance. Schmidt's investigatory meeting notes concerned the investigation and resultant discipline of the grievant, Jones, and were therefore relevant. The employer did not articulate, nor negotiate with the union over, any objections to producing the requested information. The employer did not provide the requested, relevant information to the union. Accordingly, the employer refused to bargain in violation of RCW 41.80.110(1)(e), and derivatively interfered in violation of RCW 41.80.110(1)(a) by failing to provide the Schmidt investigatory notes upon request and by using them in a grievance arbitration hearing without prior notice or production.

FINDINGS OF FACT

1. The University of Washington (employer) is an employer within the meaning of RCW 41.80.005(8).

2. The Washington Federation of State Employees (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. On December 23, 2009, the union requested production of all "investigatory notes, documents, and records used by management to reach the conclusion that corrective action was necessary and that final counseling was the appropriate level of discipline" concerning bargaining unit member Troy Jones.

4. In response to the union's document production request on January 6, 2010, the employer provided investigatory notes taken by several investigators concerning the discipline of Troy Jones.

5. At Jones' grievance arbitration on June 16, 2011, the employer offered two exhibits consisting of notes taken by investigator, Donna Schmidt, during investigatory meetings held on June 16, 2009, and November 10, 2009. These investigatory meeting notes had not been provided to the union pursuant to the information request described in Finding of Fact 3.

6. Schmidt's notes were encompassed by the information request made by the union on December 23, 2009.

7. Schmidt's notes were relevant and directly related to the performance of the union's obligation as the exclusive bargaining representative in processing Jones' grievance.

8. Schmidt's notes were not produced to the union and the first time the union was made aware of their existence was during Jones' grievance arbitration hearing on June 16, 2011.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW and Chapter 391-45 WAC.

2. By failing or refusing to provide information requested by the union, as described in Findings of Fact 5, the employer refused to bargain and violated RCW 41.80.110(1)(e) and (a).

ORDER

The University of Washington, 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 in violation of RCW 41.80.110(1)(e), and derivatively interfering in violation of RCW 41.80.110(1)(a) by failing to provide relevant documents upon request by the union and using them at grievance arbitration hearings without prior notice or production.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:

   a. Give notice to and, upon request, negotiate in good faith with the Washington Federation of State Employees, before failing to provide relevant documents upon request by the union and/or using requested, relevant documents at grievance arbitration hearings without prior notice or production.

   b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission 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.

   c. 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.

d. 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 him with a signed copy of the notice he provides.

ISSUED at Olympia, Washington, this 2nd day of October, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

GUY OTILIO COSS, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

CASE 24344-U-11-6238
DECISION 11499 - PSRA

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

STATE LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist an employee organization (union)**
- **Bargain collectively with your employer through a union chosen by a majority of employees**
- **Refrain from any or all of these activities except you may be required to make payments to a union or charity under a lawful union security provision**

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING AND RULED THAT THE *UNIVERSITY OF WASHINGTON* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY refused to bargain in violation of RCW 41.80.110(1)(e), and derivatively interfered in violation of RCW 41.80.110(1)(a) by failing to provide relevant documents upon request by the union and using them at a grievance arbitration hearing without prior notice or production.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL give notice to and, upon request, negotiate in good faith with the Washington Federation of State Employees, before failing to provide relevant documents upon request by the union and/or using requested, relevant documents at grievance arbitration hearings without prior notice or production.

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.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUDFIELD

CASE NUMBER:	24344-U-11-06238	FILED:	10/20/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
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DETAILS:	Troy Jones				
COMMENTS:					

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