Kitsap County, Decision 11869 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFF'S GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 25227-U-12-6459 DECISION 11869 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cline and Associates, by *James M. Cline*, Attorney at Law, for the union.

Prosecuting Attorney Russell D. Hauge, by *Jacquelyn M. Aufderheide*, Chief Civil Deputy Prosecuting Attorney, for the employer.

On October 17, 2012, the Kitsap County Deputy Sheriff"s Guild (union) filed a complaint with the Public Employment Relations Commission charging unfair labor practices against Kitsap County (employer). A preliminary ruling was issued for the complaint on October 25, 2012, finding a cause of action for employer refusal to provide relevant collective bargaining information requested by the union.

The case was assigned to Examiner Kristi L. Aravena and a hearing was held on March 6 and 7, 2013. The parties filed post-hearing briefs to complete the record.

ISSUES

1. Should the Examiner strike the portion of the union's brief that exceeds 25 pages?

2. Did the employer fail or refuse to provide relevant collective bargaining information requested by the union related to adjusted time records?

3. Did the employer fail or refuse to provide relevant collective bargaining information requested by the union related to the parties' interest arbitration hearing?

4. Should an extraordinary remedy of attorney fees be awarded to the union?

The union's brief was more than 25 pages in length and did not comply with WAC 391-45-290(2). The portion of the union's brief that exceeds 25 pages is stricken from the record. Based on the testimony, exhibits, and arguments contained in the parties' post-hearing briefs, I find the employer failed or refused to provide relevant collective bargaining information requested by the union concerning adjusted time records. The employer did not provide e-mails or signed time sheets that would have been responsive to the union's request. The employer also failed or refused to provide relevant collective bargaining information requested by the union regarding the parties' interest arbitration hearing. The employer made a good faith effort to produce the requested budget documents and health insurance records. However, the employer did not provide requested wage and compensation data prior to the interest arbitration hearing. I do not find the record sufficient to warrant an extraordinary remedy of attorney fees for the union.

LEGAL STANDARDS

Duty to Provide Information

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. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information necessary to the administration of the parties' collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999). Failure to provide relevant information upon request constitutes a refusal to bargain unfair labor practice. *University of Washington*, Decision 11414-A (PSRA, 2013); *University of Washington*, Decision 11499-A (PSRA, 2013).

Upon receiving a relevant information request, the receiving party must provide the requested information or notify the other party if it does not believe the information is relevant to collective

bargaining activities. *Seattle School District*, Decision 9628-A (PECB, 2008). If a party perceives that a particular request is irrelevant or unclear, the party is obligated to communicate its concerns to the other party in a timely manner. *Pasco School District*, Decision 5384-A (PECB, 1996). If the requesting party does not believe the provided information sufficiently responds to the intent and purpose of the original request, the requesting party has a duty to contact the responding party and engage in meaningful discussions about what type of information the requestor is seeking. *Kitsap County*, Decision 9326-B (PECB, 2010). The parties are expected to negotiate any difficulties they encounter with information requests. *Port of Seattle*, Decision 7000-A (PECB, 2000); *City of Yakima*, Decision 10270-B (PECB, 2011); *University of Washington*, Decision 11499-A.

Parties must be prompt in providing relevant information. Unreasonable delay in providing necessary information may constitute an unfair labor practice. *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988); *University of Washington*, Decision 11499-A.

When responding to an information request, an employer has an obligation to make a reasonable good faith effort to locate the requested information. *Seattle School District*, Decision 9628-A (PECB, 2008); *University of Washington*, Decision 11499-A.

Extraordinary Remedy

In creating the Commission, the Legislature expressed its intention to provide uniform and impartial adjustment and settlement of complaints, grievances, and disputes arising from employer-employee relations and to provide efficient and expert administration of public labor relations to ensure the public of quality public services. RCW 41.58.005. When the Legislature enacted Chapter 41.80 RCW,[1] the Legislature granted the Commission the power to remedy unfair labor practices.

> RCW 41.80.120 Unfair labor practice procedures -- Powers and duties of commission. (1) The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a

1 The employer and union are covered by a different statute, Chapter 41.56 RCW. The provisions of RCW 41.56.160 are identical to the language of RCW 41.80.120.

> complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. This power shall not be affected or impaired by any means of adjustment, mediation, or conciliation in labor disputes that have been or may hereafter be established by law.
>
> (2) If the commission determines that any person has engaged in or is engaging in an unfair labor practice, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purpose and the policy of this chapter, such as the payment of damages and the reinstatement of employees.

Fashioning remedies is a discretionary act of the Commission. *Public Utility District 1 of Clark County*, Decision 2045-B (PECB, 1989); *State – Corrections*, Decision 11060-A (PSRA, 2012). The statutes the Commission administers are remedial in nature, and those "provisions should be liberally construed to effect its purpose." *Local Union No. 469, International Association of Fire Fighters v. City of Yakima,* 91 Wn.2d 101, 109 (1978); *University of Washington*, Decision 11499-A.

The Commission's authority to fashion remedial orders has included awards of attorney fees and interest arbitration. *Municipality of Metropolitan Seattle (METRO),* 118 Wn.2d 621, 633 (1992). "Agencies enjoy substantial freedom in developing remedies." *Id.* at 634. The Commission has authority to issue appropriate orders that, in its expertise, the Commission "believes are consistent with the purposes of the act, and that are necessary to make [its] orders effective unless such orders are otherwise unlawful." *Id.* at 634-5. *See also Snohomish County*, Decision 9834-B (PECB, 2008); *University of Washington*, Decision 11499-A.

"Appropriate remedial orders" are those necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective. *METRO*, 118 Wn.2d 633. The standard remedy for an unfair labor practice violation includes: ordering the offending party to cease and desist and, if necessary, to restore the status quo; make employees whole; post notice of the violation; publicly read the notice; and order the parties to bargain from the status quo. *State – Corrections*, Decision 11060-A (PSRA, 2012); *City of Anacortes*, Decision 6863-B (PECB, 2001); *University of Washington*, Decision 11499-A. Requiring an employer to read a copy of the notice at a meeting of its governing body has become part of the standard remedy in an unfair

labor practice hearing. *Seattle School District*, Decision 5542-C (PECB, 1997); *University of Washington*, Decision 11414 (PSRA, 2012), *aff'd*, Decision 11414-A (PSRA, 2013); *City of Yakima*, Decision 10270-A (PECB, 2011); *Port of Seattle*, Decision 7000-A (PECB, 2000); *University of Washington*, Decision 11499-A. Deviation from the standard remedy, including not ordering a portion of the standard remedy, is an extraordinary remedy. *University of Washington*, Decision 11499-A.

Extraordinary remedies are used sparingly, and ordered only when a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. *State – Corrections*, Decision 11060-A; *Seattle School District*, Decision 5542-C; *University of Washington*, Decision 11499-A. The Commission is not authorized to issue remedies that are punitive. *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce County*, Decision 1840-A (PECB, 1985); RCW 41.56.160; *University of Washington*, Decision 11499-A. When asked to review an extraordinary remedy that has been properly explained in an examiner's decision, the Commission generally will not disturb a remedial order that is consistent with the purposes of Chapter 41.80 RCW. *State – Corrections*, Decision 11060-A, *citing METRO*, 118 Wn.2d 621. An extraordinary remedy is not appropriate when a standard remedy will suffice. *University of Washington*, Decision 11499-A.

Deviations from the standard remedy, such as not ordering a portion of the standard remedy, attorney fees, and interest arbitration are extraordinary remedies.

Attorney Fees

RCW 41.56.160 is the statutory basis for a remedial order, including an award of attorney fees. *State ex rel. Washington Federation of State Employees v. Board of Trustees*, 93 Wn.2d 60, 69 (1980). An award of attorney fees should not be commonplace; it should be reserved for cases in which a defense to an unfair labor practice charge can be characterized as frivolous or meritless. *State ex rel. Washington Federation of State Employees*, 93 Wn.2d at 69. "The term 'meritless' has been defined as meaning groundless or without foundation." *Id.* Attorney fees are appropriate in cases in which the employer engages in a pattern of bad faith bargaining. *Lewis County v. PERC*, 31 Wn. App. 853 (Div. 2, 1982), *review denied*, 97 Wn.2d 1034 (1982); *University of Washington*, Decision 11499-A.

The authority granted to the Commission by the remedial provision of the statute has also been interpreted to authorize an award of awarded attorney fees. Attorney fees can be granted (1) if such an award is necessary to make the Commission's orders effective, and (2) the defense to the unfair labor practice charge was meritless or frivolous, or the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. *Lewis County*, Decision 644-A (PECB, 1979), *aff'd, Lewis County v. PERC*, 31 Wn. App. 853 (1982); *METRO*, Decision 2845-A (PECB, 1988), *aff'd, METRO*, 118 Wn.2d 621 (affirming the Commission's authority to order interest arbitration); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd, Pasco Housing Authority v. PERC*, 98 Wn. App. 809 (2000) (affirming the Commission's order of attorney fees when such an order was necessary to make the order effective, the defenses were frivolous, and the violations evidenced a pattern of bad faith conduct); *Spokane County Fire District 9*, Decision 3773-A (PECB, 1992) (attorney fees awarded for a frivolous appeal) *reversed on other grounds International Association of Fire Fighters, Local 2916 v. Public Employment Relations Commission*, 128 Wn.2d 375 (1995); *University of Washington*, Decision 11499-A.

ANALYSIS

The union represents two bargaining units of employees in the Kitsap County Sheriff's Office. One unit consists of all full-time and regular part-time fully commissioned uniformed deputy sheriffs. The second unit consists of all full-time and regular part-time commissioned uniformed corporals and sergeants. The employer and union are parties to a single master collective bargaining agreement (CBA) covering both bargaining units. The parties entered into a CBA effective from January 1, 2008, through December 31, 2009.

After the parties were unable to reach an agreement on a successor CBA, they requested mediation services from the Commission. After a period of mediation, issues still remained in dispute between the parties and the Executive Director certified the unresolved issues for interest arbitration under RCW 41.56.430 *et seq.* The parties selected Howell Lankford as their arbitrator and scheduled an interest arbitration hearing for October 23, 2012.

The union filed its unfair labor practice complaint on October 17, 2012. On February 27, 2013, arbitrator Lankford issued an award establishing employees' terms and conditions of employment for three contract years: 2010, 2011, and 2012. The interest arbitration award applied to both bargaining units.

ISSUE 1 - Motion to Strike Attachments to the Union's Brief

The Commission has adopted a rule concerning the length of briefs filed by parties in unfair labor practice proceedings. WAC 391-45-290 states:

> (2) A party filing a brief under this section must limit its total length to twenty-five pages (double-spaced, twelve-point type), unless:
>
> (a) It files and serves a motion for permission to file a longer brief in order to address novel or complex legal and/or factual issues raised by the objections;
>
> (b) The hearing examiner grants such a motion for good cause shown; and
>
> (c) A motion for permission to file a longer brief may be made orally to the hearing examiner at the end of the administrative hearing, and the hearing officer has the authority to orally grant such motion at such time.

The employer argues the attachments to the union's brief, labeled Footnotes 132-136, should be stricken because they have no relevance to the current case and are offered in an attempt to unfairly discredit the employer and prejudice the Examiner. The employer also claims this information serves as new evidence which could have been offered during the hearing.

The union argues the attachments to its brief are relevant to the issue of remedy. The attachments were not offered as evidence in support of the underlying unfair labor practice claim, rather they were cited for the question of whether attorney fees should be awarded. The union argues that the attachments are not new evidence because they are located in existing Commission files.

WAC 391-45-270(2) states:

> Once a hearing has been declared closed, it may be reopened only upon the timely motion of a party upon discovery of new evidence which could not with reasonable diligence have been discovered and produced at the hearing.

The union's brief was 25 pages in length but also included 52 pages of footnotes labeled attachments 132-136. Included in the attachments were multiple e-mails sent between David Gedrose, the Commission's Compliance Officer, the employer, and the union. The attachments also included correspondence from the employer to Gedrose regarding compliance for other cases. Those e-mails and other correspondence are new evidence which could have been produced at the hearing. Although the union argues the attachments do not go to support the underlying unfair labor practice claim, but rather address the issue of remedy, the union could have offered them as evidence at the hearing. There was other testimony and evidence offered at the hearing for the purpose of remedy but the union chose not to offer these attachments until filing their brief.

In order to file a brief longer than 25 pages, WAC 391-45-290(2) requires a party to file a motion with the examiner for permission to file a longer brief. The examiner has discretion to grant the motion. The union did not file any such motion in this case. The union's brief was more than 25 pages in length and did not comply with WAC 391-45-290(2). The portion of the union's brief that exceeds 25 pages, namely attachments 132-136, is stricken from the record. I will not consider the overlength portion of the union's brief.

ISSUE 2 - Adjusted Time Information Request

Declaration of Karen Brezler

On May 17, 2013, at 4:20 P.M., the employer filed its post-hearing brief. Two minutes after filing its brief, the employer filed a Declaration of Karen Brezler. The union then filed a Motion to Strike the Declaration on May 20, 2013. Brezler was a witness at the hearing. Her Declaration concerned events that allegedly occurred after the hearing. I responded by e-mail on May 22, 2013, striking the Declaration based on WAC 391-45-270 (2). I re-affirm my previous ruling striking the Declaration from the record. The criteria for reopening the hearing has not been met. Brezler's Declaration will not be considered.

Adjusted Time Issue

In an effort to update their timekeeping system, the employer decided to move to a new system called KRONOS. The union and employer were negotiating various components of the

KRONOS system including overtime. One of the issues related to overtime was how to handle adjusted time. Adjusted time is where an employee is allowed to work on their day off or different hours during their work day, then adjusts their time on that day or another day. Adjusted time is given at straight time and not the overtime rate. Although adjusted time is not recognized in the parties' CBA, it is a longstanding practice between the parties.

On January 13, 2012, the union made an information request to the employer for the last five years of:

- All known instances of adjusted time including the date and purpose.
- All known instances that a deputy sheriff worked outside of his/her normal working hours without compensation (for these purposes adjusted time should not be considered as compensation). This would include deputies assigned as instructors or trainees attending mandatory training such as SWAT, EVOC, Firearms Training, Yearly In-Service or any other form of training that would be required to maintain proficiency in any assigned specialty unit or for the agency to maintain or seek accreditation. This request would also include instances such as deputies working collateral duties such as Marine Patrol, Traffic, K-9, and events associated with those assignments such as demonstrations and extra patrols, including specialty events such as the Kitsap County Fair, Whaling Days, and other such events.
- Any instances where a deputy sheriff has been denied overtime or compensatory time off and offered only adjusted time.
- All current and past records utilized to track used and accrued adjusted time including when the adjusted time was earned and when it was used. The union is aware that Detectives and some patrol supervisors maintained records such as these.

Lieutenant Katherine Collings wrote a letter on January 20, 2012 to Deputy Sheriff Jay Kent, union president, giving an anticipated timeline of eleven months to complete the information request.

Karen Brezler, a support staff employee in the Dissemination Unit, Public Records, of the Sheriff's Office, wrote a letter on February 2, 2012 to Kent. Brezler was looking for keywords

to use in an e-mail search for documents responsive to the union's information request. The letter stated which key words the employer would use and welcomed Kent to add or substitute other words. Kent did not respond to the letter; however, the letter did not require him to do so. Kent testified he was in agreement with the words the employer chose and did not feel he needed to respond.

After having conversations with other deputy sheriffs, Kent became aware that deputies were concerned about the employer searching their e-mail for items that may be responsive to the union's information request. Deputies felt some personal items may be disclosed on e-mails related to adjusted time so Kent told the employer he was not interested in documents from the deputies, just from sergeants and above. On May 15, 2012, Collings wrote a memo to file regarding Kent's request. She noted Kent was not concerned about documents the deputies had but was interested in what the sergeants and administration had regarding his information request.

On June14, 2012, Collings sent a letter to Kent documenting a conversation they had where Kent stated that he was not concerned about the related documents deputies had in their possession, but was interested in documents held by sergeants and administrative personnel. Collings testified to the same information. Kent testified he had the conversation with Collings when he picked up the partial response to his information request on May 22, 2012. He told Collings he was no longer interested in documents the deputy sheriffs may have individually and the employer could abandon that search, but that he was interested in documents for the rank of sergeant and above. Kent believed that Collings understood their conversation and that the employer would continue to look through the e-mails related to adjusted time for those responsive to the union's request. I credit Kent's testimony on this matter.

Based on Collings and Kent's May 22, 2012 conversation, the employer began looking through the e-mails related to adjusted time. Collings testified the search terms elicited somewhere between 700 and 800 e-mails. Neither Collings nor any of her staff communicated to the union that they had identified 700-800 possible responsive records. Collings testified it was her error in not reminding her staff to do that. The e-mails were kept on a server with some of them being identified as possibly responsive. Collings also noted in her June 14, 2012 letter to Kent that the

employer had leave request forms available for the union to look through in the employer's fiscal office. She told Kent he was welcome to view the leave request forms and receive copies of those the union needed. Collings noted in her letter that if she did not get a response, the employer would look through the leave request forms and provide those that were responsive to the union's information request. After receiving no response from the union, Collings searched the leave request forms for six months in 2007 and did not find anything responsive to the adjusted time request. Although the records request was for a full five years of records, after finding nothing responsive in that six months of leave slips, Collings felt that was a reasonable search and did not look at the other four-and–a-half year period.

On January 7, 2013, Collings sent Kent an e-mail closing the union's information request related to adjusted time records. She said the employer provided documents on May 22, 2012 and after searching further, had not found any other responsive documents. Collings did not mention the 700-800 e-mails the employer had found as a result of its keyword search. Collings noted in her e-mail that Kent had modified his request by not asking for documents held by or generated by union members and that he was not interested in an e-mail search due to the number of e-mails that might be generated from employees including union members. This directly contradicts the memo to file Collings wrote on May 15, 2012, where she noted that Kent was not concerned about documents the deputies had but was interested in what sergeants and administration had. Collings testified she wrote that portion of the e-mail based on a conversation she had with Brezler, where Brezler said that Kent told her he did not want any e-mails. Brezler testified that Kent told her he was not interested in looking at the e-mails anymore. Brezler did not document this communication with Kent even though it is the department's practice to do so. Brezler could not think of another instance in which she had a verbal modification of an information request but did not document the conversation in writing.

Kent testified that at no time did he tell the employer he was not interested in e-mails. Ending the e-mail search would not make sense for the union because some of the most pertinent information related to the adjusted time issue might be found in the e-mails. I credit Kent's testimony on this matter. Not only did Collings' January 7, 2013 e-mail contradict earlier communication from the employer, it was sent to an incorrect e-mail address for Kent. The

employer had previously sent multiple communications to Kent's correct e-mail address but somehow sent this very critical e-mail to an incorrect e-mail address.

Kent did not receive Collings' January 7, 2013 e-mail closing his information request until March 6, 2013, the first day of hearing in this case. Deputy Sheriff Andy Aman contacted Brezler before the hearing to ask one last time about the status of the union's information request. Brezler told him the information request had been closed per Collings' January 7, 2013 e-mail to Kent. Aman asked Brezler if he could get a copy of that e-mail.

Collings reactivated the search for e-mails at some point. During testimony, Collings said she directed Brezler to continue processing the 700-800 e-mails one or two days prior to the present unfair labor practice hearing. Later in Collings' testimony, she said her memory had been refreshed and she had restarted the search on the day after the January 7th e-mail she sent to Kent. Collings testified she restarted the search on an off chance she was in error that the union did not want e-mails any longer. Brezler testified she resumed her search for e-mails about the time Collings sent the e-mail to Kent closing out the information request on January 7, 2013. For Collings to direct staff time to process e-mails rather than contacting Kent to confirm whether or not he wanted the e-mails does not pass the reasonableness test. It would have been much easier for Collings to ask Kent whether or not he still wanted the e-mails. If he did not want the e-mails as the employer claims, Collings should have noted that change to the file as protocol called for. She did not do that. Rather, she directed staff to go through e-mails that she testified the union did not want. Collings' testimony on this matter is not credible.

Besides the e-mails, the union was also waiting to receive time sheets. Collings testified that all time sheets for deputies were provided to the union. However, the union received unsigned time sheets, but no signed ones. Collings testified that a portion of the time sheets are signed and that some signed time sheets existed from the past five years. Those signed time sheets have not been produced.

Conclusion

I find that the employer did not provide all of the information the union requested in their January 13, 2012 information request. The employer did not provide e-mails or signed time

sheets that would have been responsive to the union's request. The adjusted time information requested by the union was relevant information needed by the union for the proper performance of its duties in the collective bargaining process. The employer did not notify the union that the employer believed the information was not relevant to collective bargaining activities. The employer did not indicate to the union that the employer believed the union's information request was irrelevant or unclear. The employer failed or refused to provide relevant collective bargaining information requested by the union, in violation of RCW 41.56.140(4) and (1).

ISSUE 3 - Interest Arbitration Information Request

In preparation for the parties' October 23 interest arbitration hearing, on September 2, 2012 the union made a request for eighteen separate categories of information. The employer responded on September 10, 2012, indicating that they would try to meet the union's request to have all the information provided by October 4, 2012 or provide a timetable of when the union could expect the information. The employer's response indicated whether the employer had responsive documents or whether they needed more clarifying information. On September 12, 2012, the union clarified two of their information requests.

Correspondence was exchanged between the parties until the interest arbitration hearing which responded to and clarified the union's information request. On September 20, 2012, Jim Cline, union attorney, sent a letter to Deborah Boe, Deputy Prosecuting Attorney, regarding the status of each item and what the union was still waiting on. The employer responded on September 24, 2012. For some of the items, Boe said the employer did not have a duty to provide because the documents were the employer's work product prepared in anticipation of litigation. Boe stated that if there were records responsive to the union's request that were attorney work product, she would let Cline know when that was determined and provide a complete explanation to the union.

On October 3, 2012, Boe sent an e-mail to the union stating most of the records they had requested were available for pickup. She also mentioned the mutual need for a pre-hearing conference call to discuss issues prior to the interest arbitration hearing including pending information requests. The union responded on October 4, 2012, asking for clarification on what

documents were being produced. Cline indicated he was fine with a pre-hearing conference call but stated he would be filing a motion with the arbitrator if the union's information request was not fully addressed. Boe responded on the same day with a list of what information the employer was providing. Most of the information was being loaded on a thumb drive while some of the health care items were placed in boxes for the union's review.

Later on October 4, 2012, the union sent a letter to Boe regarding those requests that the employer had inadequately responded to. The union's letter noted the reasons for the employer not producing the requested information was that the employer either claimed it did not yet have the information, or items were subject to attorney-client privilege and/or were protected under attorney work product. The union again invited the employer to agree to a mutual date to exchange information. The union was still requesting these items:

#2 - All factors used to support the comparable jurisdictions proposed by the employer as well as any and all data which relates to those factors.

#3 - All reports, documents and information relating to terms and conditions of employment for those comparators including wages, all other forms of compensation, and terms and conditions of employment on the issues certified for interest arbitration.

#4 - Any wage, total compensation and net wage analysis or comparisons the employer had prepared.

#12 - Any reports and memorandum created by the budget office from January 1, 2012 to the present.

#13 - Any calculations or reports prepared concerning the costs of the union proposal or any other cost analysis.

#14 - Health insurance consultant reports and correspondence concerning the deputy sheriff plan from 2004 to current.

#15 - All financial analysis of the deputy sheriff health insurance plan and health insurance premiums in the possession of the employer for 2004 to current.

Boe responded again on October 4, 2012, asking how the union could object to information it had not picked up yet. She requested the union review the documents the employer was providing before deciding they were insufficient. She also offered to have a telephone conference the following week to discuss a mutual exchange of exhibits. Boe claimed the union's statement that the union had been inviting the employer to agree to a mutual date to exchange information but that the employer had not responded was completely inaccurate. Boe stated that at this time, the employer estimated there were about 100 pages of exhibits they were preparing that were exempt as attorney work product while they were still in draft form.

Cline replied to Boe on October 5, 2012 stating the union was not objecting to documents that were promised, just those Boe indicated the employer would not produce. Cline indicated that if the employer was now abandoning their work product claims and proposing to mutually exchange information, that would be a shift in position.

Boe responded on October 5, 2012, with a more specific response to the items from the information request the union claimed were still missing:

#2 - The employer has no new comparability data.

#3 - The thumb drive has responsive records including CBAs of comparators.

#4, #13 - Wage and costing analyses are among the draft exhibits that are protected attorney work product.

#12 - The thumb drive has responsive records as well as the employer's website.

#14, #15 - These records have been provided. In addition, there are three boxes of medical consultant records Cline indicated he would review on Monday, October 8, 2012.

On October 14, 2012, Cline sent an e-mail to Arbitrator Lankford regarding information Lankford had requested and to set up a pre-hearing conference call. Cline discussed the status of the union's information request and noted that although the employer indicated to the Arbitrator they were in agreement for a mutual exchange of documents, this would be a change in the employer's previous position. Cline suspected that what the employer really meant was they

were in agreement with exchanging documents on the day of the hearing and not before. The union restated its intention to prepare a motion in limine prohibiting the employer from producing records at the hearing that it had withheld from the union.

On October 14, 2012, the union sent the employer a chart indicating the status of the union's information request. The union also asked for plan summaries and rate sheets for the All County plan for 2004 to current. Boe responded on October 15, 2012 in an effort to clear up items she believed the employer had already produced and to provide additional health care coverage information. The union responded that the documents Boe was referring to were the agreements. What the union was looking for was how much each employee would pay for employee, employee and spouse, etc. rates and then how much the employer would pay. Boe responded with additional rate information. The union replied that they were still missing the 2012 rate sheets for any/all plans offered. The union also believed they were missing a Premera summary sheet for 2012. Multiple e-mails were exchanged between the union and Boe trying to clarify the union's request. On October 16, 2012, union attorney Kelly Turner sent Boe an updated chart indicating the status of the union's information request.

Boe responded that the union's request for the All County plan back to 2004 was submitted less than two weeks before the interest arbitration hearing; however, the employer provided 2010 - 2012 anyways. The union responded on October 16, 2012 that the information request concerning the All County plan summaries and rates was a simple request the employer should be able to locate in 20 - 30 minutes. The union also let the employer know they were preparing an unfair labor practice complaint so any mitigation the employer wanted to present ahead of the complaint would need to be provided today.

On October 17, 2012, the union identified items that were still missing from its information request. The relevant items were:

A. Budget Records

- The union claimed the employer failed to provide budget office monthly status reports. The employer produced these on October 18, 2012 after finding out on the October 17 pre-hearing conference call with Arbitrator Lankford they were no longer listed on their

website. I credit the employer's testimony that they believed the reports were listed on their website.

B. Wage and Compensation Reports

- The union claimed they were missing outstanding comparability data to the extent the employer was going to take into consideration new CPI information. The employer responded on September 24, 2012 that they did not have any new data regarding comparables to supply to the union. Boe testified she did not know some of the numbers came out midyear so she did not know the demographic data had changed. I credit her testimony on this matter.
- The union claimed the employer only provided the raw data for comparators through collective bargaining agreements and other third hand information gathered from their comparators. No wage analysis was provided.

C. Health Insurance Records

- The union claimed the employer failed to provide annual plan summaries or annual rate sheets or any financial analysis of health care costs. The summaries and rate sheets were produced on October 18, 2012 as a result of the conference call.

The parties had a 4 P.M. phone conference on October 17, 2012 with Arbitrator Lankford to discuss, among other things, the items the union did not feel the employer had responded to in their information request. The union filed the present unfair labor practice complaint at 4:05 P.M., while the conference call was occurring. After the conference call, the parties sent e-mails clarifying agreements made during the conference call. Boe noted in her e-mail to Cline that the employer could not agree to exchange exhibits until the exhibits were completed, and they would not be completed until Monday, October 22, 2012, likely in the afternoon. The interest arbitration hearing began on October 23, 2012 and no exhibits were exchanged prior to the hearing.

The pertinent records the union claims they did not receive pursuant to their information request can be broken down into the three categories listed above: budget records, wage and

compensation reports, and health insurance records. I will analyze each individually keeping in mind that these records were requested to help the union prepare for an interest arbitration hearing. Interest arbitration is used to determine the terms of a contract between parties when they cannot negotiate an agreement for themselves. The interest arbitration process is concurrent with, or a continuation of, the collective bargaining process. The Commission in *City of Bellevue*, Decision 3085-A stated:

> The duty to bargain in good faith does not end at the point where contract issues are certified for interest arbitration, nor does it end while interest arbitration proceedings are taking place. Rather, it continues at all times during the interest arbitration process. Although interest arbitration is triggered by the Executive Director's certification under RCW 41.56.450 that an impasse exists, that impasse can be broken at any time. In fact, it is in the public interest that such an impasse be broken, and that the parties proceed, if possible, to a negotiated resolution of their dispute.

The Washington State Supreme Court noted in *City of Bellevue v. International Association of Fire Fighters, Local 1604,* that collective bargaining is a process of communication, not a game of hide and seek. It is imperative throughout the process of negotiations, up to and even during the interest arbitration hearing, for parties to continue sharing relevant information. The sharing of information such as charts and graphs that are being prepared by the parties is an opportunity to see each other's perspective. It is an opportunity to persuade the other side with data regarding a party's position. Sharing data in this way is integral to the process and serves the public's interest of a negotiated resolution to the dispute. Withholding information by claiming work product does the opposite.

A. Budget Records

Aman testified these records were critical for the union's argument before Arbitrator Lankford that the employer's financial condition was better than the employer presented. The union was anticipating an inability to pay argument before the Arbitrator and needed these records to dispute that. The union was looking for the budget office monthly status reports the employer was using to create their drafts and costing analyses.

The employer produced their budget status reports following the October 17, 2012 pre-hearing conference call with Arbitrator Lankford. Boe testified the employer was unaware the reports were no longer posted on its website. When they became aware of that during the conference call, the records were timely produced on October 18, 2012. I credit the employer's testimony on this matter.

There were multiple e-mails exchanged between the parties regarding the budget information request. The employer believed they had produced the monthly status reports the union had requested. The union could have told the employer, prior to the conference call on October 17, 2012, that the reports the employer stated were on its website were not there. It wasn't until the conference call that the employer learned the reports were no longer on the website. After being notified that the reports the union was looking for were not available on the internet, the employer promptly produced the documents. It is true, as the union claims, that the documents were produced after this unfair labor practice complaint was filed and after being directed by the Arbitrator to do so; however, it was only during the October 17 conference call that the employer realized that the records requested were not available on the internet. I credit the employer's testimony on this matter. The employer made continued efforts to clarify what the union was seeking and made a good faith effort to produce the requested monthly status reports.

B. Wage and Compensation Reports

Boe testified that these analyses were either not finished or were work product. The union was interested in drafts but the employer did not want to provide drafts. The October 17 conference call was scheduled in part to talk about a mutual exchange of records before the interest arbitration hearing. Boe testified that the charts went to strategy for the arbitration and the employer did not want to exchange them with the union until the morning of the arbitration hearing. She testified that even if the employer had wage charts in some stage she would have responded that there were no documents responsive to the request because the employer considered those work product. The union requested the employer provide a privilege log for those items they were claiming work product. Boe testified the employer never responded to that request.

The employer never intended to exchange wage and compensation exhibits prior to the hearing. Although they gave the impression they were willing to discuss a date for mutual exchange on their conference call with Lankford, Boe testified the employer would not exchange exhibits until they were completed and the exhibits were not going to be completed until the day of the hearing. Jacquelyn Aufderheide, Chief Civil Deputy Prosecuting Attorney, wrote a letter to Lankford summarizing the employer's understanding of the status of the information request. Aufderheide states in the letter that the employer was willing to agree on a date to exchange exhibits prior to the arbitration hearing on the condition that the exchange was mutual. There was, however, no intent from the employer to do this.

I reject the idea that sharing wage and compensation charts and graphs would reveal the strategy of the employer. Interest arbitration is not an adversarial hearing, rather a production of information on various issues in dispute. Each side has the opportunity to present their position on each issue and show data to backup why they feel their position is warranted. That data should not be anything either side has not seen before. Each side should be sharing such information in mediation before impasse is declared. It is only through persuasive data that parties convince one another that their position has merit. If information is not exchanged, settlement is less likely to occur. One party's data should not be a surprise to the other party in an interest arbitration hearing. This information should willingly be shared throughout the collective bargaining process.

C. Health Insurance Records

The employer claims the health insurance records were produced by October 4, 2012 as promised. The union made a new request on October 14, 2012, for rate sheets and plan summaries for the "All County" plan from 2004 to current. The following day, the employer sent the rate sheets and plan summaries for 2010 - 2012. They said the rest of the request would take 30 days to produce. After being directed by Arbitrator Lankford during the October 17 conference call, the employer was able to produce the records within a day.

The union argues that their request was always inclusive of the rate sheets and plan summaries, however, their e-mail requesting the All County plan from 2004 to current stated it was a

supplemental request. The employer and union exchanged multiple e-mails trying to sort out what the union wanted regarding health care information. The parties seemed to be able to clear up the issue during the conference call on October 17, 2012 and the information was produced the following day. The employer made a good faith effort to produce the requested health insurance records.

Conclusion

The union made an information request on September 2, 2012 for information in preparation for the parties' October 23 interest arbitration hearing. The employer made a good faith effort to produce the requested budget documents and health insurance records. However, the employer did not provide requested wage and compensation data prior to the interest arbitration hearing. Such data was relevant information needed by the union for the proper performance of its duties in the collective bargaining process. The employer failed or refused to provide relevant collective bargaining information requested by the union, in violation of RCW 41.56.140(4) and (1).

ISSUE 4 – Remedy

In its brief, the union argues for an extraordinary remedy of attorney fees. The union argues the employer was willfully indifferent to its obligation to provide information and stalled in its response to the union's adjusted time information request. In addition, the union points to a recent pattern of conduct by the employer.

The Commission uses the extraordinary remedy of attorney fees sparingly. *Pasco Housing Authority*, Decision 5927-A (PECB, 1997), *aff'd, Pasco Housing Authority v. PERC*, 98 Wn. App. 809 (2000). Commission orders awarding attorney fees have usually been based on a repetitive pattern of illegal conduct or on egregious or willful bad acts by the respondent. *Western Washington University*, Decision 9309-A (PSRA, 2008); *City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *State – Corrections*, Decision 11060-A (PSRA, 2012). Attorney fees can be granted: (1) if such an award is necessary to make the Commission's orders effective, and (2) the defense to the unfair labor practice charge was

meritless or frivolous, or the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligations. *University of Washington*, Decision 11499-A.

While the union points to a recent pattern of administrative errors, there is no evidence of repeated defiance by the employer to produce requested records that would justify an extraordinary remedy of attorney fees. Because a standard remedy is sufficient to remedy the employer's unfair labor practice violations and because there is no pattern of conduct showing the employer's patent disregard of its good faith bargaining obligation, no such extraordinary remedy of attorney fees is required to effectuate this order.

FINDINGS OF FACT

1. Kitsap County (employer) is a public employer within the meaning of RCW 41.56.030(12).

2. Kitsap County Deputy Sheriff's Guild (union) represents two bargaining units of employees in the Kitsap County Sheriff's Office. One unit consists of all full-time and regular part-time fully commissioned uniformed deputy sheriffs. The second unit consists of all full-time and regular part-time commissioned uniformed corporals and sergeants.

3. The employer and union entered into a collective bargaining agreement (CBA) effective from January 1, 2008 through December 31, 2009. The CBA covers both bargaining units.

4. After the parties were unable to reach an agreement on a successor CBA, they requested mediation services from the Commission. After a period of mediation, issues still remained in dispute between the parties and the Executive Director certified the unresolved issues for interest arbitration under RCW 41.56.430 *et seq.* The parties selected Howell Lankford as their arbitrator and scheduled an interest arbitration hearing for October 23, 2012.

5. On January 13, 2012, the union made an information request to the employer regarding adjusted time records.

6. Lieutenant Katherine Collings wrote a letter on January 20, 2012 to Deputy Sheriff Jay Kent, union president, giving an anticipated timeline of eleven months to complete the information request.

7. Karen Brezler, a support staff employee in the Dissemination Unit, Public Records, of the Sheriff's Office, wrote a letter on February 2, 2012 to Kent. Brezler was looking for keywords to use in an e-mail search for documents responsive to the union's information request.

8. After having conversations with other deputy sheriffs, Kent became aware that deputies felt some personal items may be disclosed on e-mails related to adjusted time so Kent told the employer he was not interested in documents from the deputies, just from sergeants and above. On May 15, 2012, Collings wrote a memo to file regarding Kent's request. She noted Kent was not concerned about documents the deputies had but was interested in what the sergeants and administration had regarding his information request.

9. On June14, 2012, Collings sent a letter to Kent documenting a conversation they had where Kent stated that he was not concerned about the related documents deputies had in their possession, but was interested in documents held by sergeants and administrative personnel. Kent testified he had the conversation with Collings when he picked up the partial response to his information request on May 22, 2012.

10. Based on Collings' and Kent's May 22, 2012 conversation, the employer began looking through the e-mails related to adjusted time. Collings testified the search terms elicited somewhere between 700 and 800 e-mails.

11. Collings also noted in her June 14, 2012 letter to Kent that the employer had leave request forms available for the union to look through in the employer's fiscal office.

After receiving no response from the union, Collings searched the leave request forms for six months in 2007 and did not find anything responsive to the adjusted time request. Although the records request was for a full five years of records, after finding nothing responsive in that six months of leave slips, Collings felt that was a reasonable search and did not look at the other four-and-a-half year period.

12. In preparation for the parties' October 23, 2012 interest arbitration hearing, on September 2, 2012 the union made a request for eighteen separate categories of information.

13. The employer responded on September 10, 2012, indicating that they would try to meet the union's request to have all the information provided by October 4, 2012 or provide a timetable of when the union could expect the information.

14. On September 12, 2012, the union clarified two of their information requests.

15. On September 20, 2012, Jim Cline, union attorney, sent a letter to Deborah Boe, Deputy Prosecuting Attorney, regarding the status of each item and what the union was still waiting on.

16. The employer responded on September 24, 2012. For some of the items, Boe said the employer did not have a duty to provide because the documents were the employer's work product prepared in anticipation of litigation.

17. On October 3, 2012, Boe sent an e-mail to the union stating most of the records they had requested were available for pickup. She also mentioned the mutual need for a pre-hearing conference call to discuss issues prior to the interest arbitration hearing including pending information requests.

18. The union responded on October 4, 2012, asking for clarification on what documents were being produced. Cline indicated he was fine with a pre-hearing conference call but stated he would be filing a motion with the arbitrator if the union's information request

was not fully addressed. Boe responded on the same day with a list of what information the employer was providing. Later on October 4, 2012, the union sent a letter to Boe regarding those requests that the employer had inadequately responded to. Boe responded again on October 4, 2012 requesting the union review the documents the employer was providing before deciding they were insufficient. She also offered to have a telephone conference the following week to discuss a mutual exchange of exhibits. Boe stated that at this time, the employer estimated there were about 100 pages of exhibits they were preparing that were exempt as attorney work product while they were still in draft form.

19. Cline replied to Boe on October 5, 2012 stating the union was not objecting to documents that were promised, just those Boe indicated the employer would not produce. Cline indicated that if the employer was now abandoning their work product claims and proposing to mutually exchange information, that would be a shift in position. Boe responded on October 5, 2012 with a more specific response to the items from the information request the union claimed were still missing.

20. On October 14, 2012, Cline sent an e-mail to Arbitrator Lankford regarding information Lankford had requested and to set up a pre-hearing conference call. On the same day, the union sent the employer a chart indicating the status of the union's information request. The union also asked for plan summaries and rate sheets for the All County plan for 2004 to current.

21. Boe responded on October 15, 2012 in an effort to clear up items she believed the employer had already produced and to provide additional health care coverage information.

22. Multiple e-mails were exchanged between the union and Boe trying to clarify the union's request. On October 16, 2012, union attorney Kelly Turner sent Boe an updated chart indicating the status of the union's information request. Boe responded that the union's request for the All County plan back to 2004 was submitted less than two weeks before

the interest arbitration hearing; however, the employer provided 2010 - 2012 anyways. The union responded that the information request concerning the All County plan summaries and rates was a simple request the employer should be able to locate in 20 - 30 minutes.

23. On October 17, 2012, the union identified items that were still missing from its information request. The parties had a 4 P.M. phone conference on October 17 with Arbitrator Lankford to discuss, among other things, the items the union did not feel the employer had responded to in their information request. The union filed the present unfair labor practice complaint at 4:05 P.M. on October 17, while the conference call was occurring. After the conference call, the parties sent e-mails clarifying agreements made during the conference call. Boe noted in her e-mail to Cline that the employer could not agree to exchange exhibits until the exhibits were completed, and they would not be completed until Monday, October 22, 2012, likely in the afternoon.

24. The employer produced their budget status reports on October 18, 2012, following the October 17 pre-hearing conference call with Arbitrator Lankford.

25. The interest arbitration hearing began on October 23, 2012. No exhibits were exchanged by the parties prior to the hearing.

26. On January 7, 2013, Collings sent Kent an e-mail closing the union's information request related to adjusted time records. She said the employer provided documents on May 22, 2012 and after searching further, had not found any other responsive documents. Collings did not mention the 700-800 e-mails the employer had found as a result of its keyword search.

27. Collings reactivated the search for e-mails at some point. During testimony, Collings said she directed Brezler to continue processing the 700-800 e-mails one or two days prior to the present unfair labor practice hearing. Later in Collings' testimony, she said

her memory had been refreshed and she had restarted the search on the day after the January 7th e-mail she sent to Kent.

28. On February 27, 2013, Arbitrator Lankford issued an award establishing employees' terms and conditions of employment for three contract years: 2010, 2011, and 2012. The interest arbitration award applied to both bargaining units.

29. Kent did not receive Collings' January 7, 2013 e-mail closing his information request until March 6, 2013, the first day of hearing in this case.

30. Collings testified that all time sheets for deputies were provided to the union. However, the union received unsigned time sheets, but no signed ones. Collings testified that a portion of the time sheets are signed and that some signed time sheets existed from the past five years.

31. On May 17, 2013, two minutes after filing its post-hearing brief, the employer filed a Declaration of Karen Brezler. Brezler was a witness at the hearing. Her Declaration concerned events that allegedly occurred after the hearing.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The union's brief was more than 25 pages in length and did not comply with WAC 391-45-290(2). The portion of the union's brief that exceeds 25 pages, namely attachments 132-136, are stricken from the record.

3. The Declaration of Karen Brezler does not meet the criteria for reopening a hearing based on WAC 391-45-270 (2). Brezler's Declaration is stricken from the record and will not be considered.

4. As described in Findings of Fact 5 through 11, 26, 27, 29, and 30, the employer failed or refused to provide relevant collective bargaining information requested by the union concerning adjusted time records, in violation of RCW 41.56.140(4) and (1).

5. As described in Findings of Fact 12 through 25, and 28, the employer failed or refused to provide relevant collective bargaining information requested by the union concerning wage and compensation data prior to the parties' interest arbitration hearing, in violation of RCW 41.56.140(4) and (1).

ORDER

Kitsap 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 relevant collective bargaining information requested by the union.

   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. Give notice to and, upon request, negotiate in good faith with the Kitsap County Deputy Sheriffs Guild, before failing or refusing to provide relevant collective bargaining information requested by the union.

   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. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Kitsap County Board of County Commissioners, 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.

d. 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.

e. 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 16th day of September, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kristi Aravena

KRISTI ARAVENA, 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 25227-U-12-6459
DECISION 11869 - PECB

COLLECTIVE BARGAINING
PERC
STATE OF WASHINGTON

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 *KITSAP COUNTY* COMMITTED AN UNFAIR LABOR PRACTICE AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY failed or refused to provide relevant collective bargaining information requested by the Kitsap County Deputy Sheriff's Guild concerning adjusted time records, and wage and compensation data prior to the parties' October 23, 2012 interest arbitration hearing.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL give notice to and, upon request, negotiate in good faith with the Kitsap County Deputy Sheriff's Guild before failing or refusing to provide relevant collective bargaining information requested by the union.

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

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

RECORD OF SERVICE - ISSUED 09/16/2013

The attached document identified as: DECISION 11869 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY/S/ ROBBIE DUFFIELD

CASE NUMBER:	25227-U-12-06459	FILED:	10/17/2012	FILED BY:	PARTY 2
DISPUTE:	ER PROVIDE INFO				
BAR UNIT:	LAW ENFORCE				
DETAILS:	25350-S-12-0333				
COMMENTS:					

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