Island County, Decision 11946-A (PECB, 2014)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ISLAND COUNTY DEPUTY SHERIFF'S GUILD, Complainant, vs. ISLAND COUNTY, Respondent.	CASE 25552-U-13-6539 DECISION 11946-A - PECB DECISION OF COMMISSION

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

Prosecuting Attorney Gregory M. Banks, by *Jacquelyn M. Aufderheide*, Special Deputy Prosecuting Attorney, for the employer.

This case presents the issues of (1) did the employer violate its duty to engage in collective bargaining by failing to provide the union with requested information either (a) by not responding to the information request in a timely manner or (b) by not providing the union with information responsive to the union's information request, and (2) is the union entitled to attorney's fees based on the employer's appeal. As set forth below, we determine that (1) the employer failed to provide the union with information in a timely manner, (2) the employer failed to provide the union with responsive information maintained by the Auditor's Office, and (3) the union is not entitled to attorney's fees on appeal.

ISSUE 1: Did the employer violate its duty to engage in collective bargaining by failing to provide the union with requested information either (a) by not responding to the information request in a timely manner or (b) by not providing the union with information responsive to the union's request?

ANALYSIS

Legal Standard

The duty to bargain requires a public employer and the exclusive bargaining representative to bargain in good faith over grievance procedures, wages, hours, and working conditions. RCW 41.56.030(4).

The duty to bargain includes an obligation to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992). The flow of information between the parties must continue during the parties' preparation for interest arbitration. *City of Clarkston (IAFF, Local 2299)*, Decision 3246 (PECB, 1989).

In evaluating information requests, the Commission considers 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). Failure to provide relevant information upon request constitutes a refusal to bargain unfair labor practice. *University of Washington*, Decision 11414-A (PSRA, 2013).

Communication is essential to fulfilling the obligation to provide information. Upon receiving a relevant information request, the receiving party must provide the requested information or engage in negotiations about the information request. *City of Yakima*, Decision 10270-B (PECB, 2011); *Seattle School District*, Decision 9628-A (PECB, 2008); and *Port of Seattle*, Decision 7000-A (PECB, 2000). During those negotiations, the receiving party must timely explain why it does not think the information request is relevant or clear. *Pasco School District*, Decision 5384-A (PECB, 1996).

The obligation to communicate about the information request continues once the responding party begins gathering responsive information. The responding party must communicate with the requesting party to ensure that the information being gathered is the type of information that

has been requested. *Kitsap County*, Decision 9326-B (PECB, 2010), *citing City of Seattle*, Decision 10249 (PECB, 2008), *remedy aff'd*, Decision 10249-A (PECB, 2009).

The requirement to communicate continues even after the responding party provides information to the requesting party. After receiving a response, if the requesting party does not believe the information provided sufficiently responds to 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). Delay in providing requested information can constitute an unfair labor practice. *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988). One factor to be considered when determining whether a delay constitutes an unfair labor practice is the preparation required for the response. *City of Seattle*, Decision 10249 (PECB, 2008), *remedy aff'd*, Decision 10249-A (PECB, 2009). If the response will be delayed due to the time required to prepare the response, such a delay must be communicated.

Application of Standards

Did the employer violate its duty to engage in collective bargaining by failing to provide the union with requested information or by not responding to the information request in a timely manner?

The employer's response to the union's July 2, 2012 information request was not timely.

The Island County Deputy Sheriff's Guild (union) made an extensive and detailed request for information under Chapter 41.56 RCW and Chapter 42.56 RCW, the Public Records Act, on July 2, 2012. At that time, Island County (employer) committed to working on the union's request.

The union requested the information be provided on "a rolling basis, as documents are available."[1] Indeed, the union recognized the complexity of its request and offered to work with the employer on an efficient way to deliver the records.[2] Later on the day of the request, the union reiterated that it would like to receive the information on a rolling basis as information

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1 Exhibit (Ex.) 7, p. 1.
2 Ex. 7, p. 5.

became available. The union clarified that it did not "need everything by next week or next month." The union suggested the parties discuss a reasonable production schedule once the employer began gathering information. The union further offered, "[o]nce we have an arbitrator determined and a date set, we can work backwards from there as to when we'll need the records."[3]

The parties did not share an understanding of when the information was to be produced. The union requested the employer provide the information as it became available. The employer thought the arbitration date was the date to work from. However, the employer never communicated this understanding to the union. The duty to bargain includes a duty to communicate. The duty to communicate is especially helpful when one party requests information. In this case, the parties began with an initial misunderstanding of when the union wanted the information. The employer never communicated a timeline for when it would provide information.

The employer promptly provided information that its negotiator, Robert Braun, thought the union could use immediately, the employer's proposal and comparators. After providing the union with some of the requested information, the employer did not communicate with the union about the union's remaining requests. The union reminded the employer on four occasions, August 10, 31, September 1 and 3, 2012, that the union was waiting for an additional response.[4] On September 3, 2013, the employer responded that it "has been and continues to prepare its response."[5]

The employer's September 3, 2012 response is not the type of communication that satisfies the duty to bargain and provide information. The employer neither indicated to the union what steps it was taking to respond to the request nor provided the union with a timeline for the response.

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3 Ex. 7, p. 6.
4 Ex. 7, pp. 10, 12-13, 15, and 16-21.
5 Ex. 7, p 17.

Receiving no further response to its information request, the union began pursuing its rights under the Public Records Act. The union filed a public records act lawsuit on November 15, 2012.

Human Resources Director Melanie Bacon did not ask Budget Director Elaine Marlow if Marlow had responsive documents until sometime in November. While the exact date of Bacon's request to Marlow is unclear, the fact that Marlow was not asked for responsive documents is evidence that the employer delayed responding to the union's information request. It is noteworthy that the employer did not call Bacon to testify in this matter.

The employer provided the union with a response to its request for information on November 19, 2012 and a supplemental response on November 29, 2012. This response came over four months after the union's request for information.

Conclusion

When presented with a relevant request for information, an employer has a duty to provide the requested information in a timely manner. Parties are expected to communicate and negotiate about any difficulties that arise when complying with the duty to request information. The union requested information in July 2012. The employer initially provided some information; however, the employer did not respond to the remainder of the information request until November 2012. While the union's request was extensive, the employer did not object to the request as burdensome, did not provide any information to the union about when it would have a response, did not discuss its understanding of when the union wanted to receive information, and did not provide information in a timely manner. Had the employer communicated with the union about the efforts it was taking to fulfill the request, communicated a timeline for fulfilling the request, or negotiated the scope of the request, a four month delay might not be as significant. However, in a case in which there was no communication about the employer's response, a four month delay coupled with a lack of communication is a refusal to bargain by failing to provide information. The employer's delay in providing information was an unfair labor practice. We affirm the Examiner's conclusion that the employer failed to provide requested information in a timely manner.

Did the employer violate its duty to engage in collective bargaining by not providing the union with information responsive to the union's request?

The union's information request and the employer's response.

On July 2, 2012, the union submitted an information request to the employer's negotiator. The union sought 31 categories of information, including:

20. Any reports, memorandum or other internal or external communications regarding revenue projections from 2007 to the current time;
21. Any reports, memorandum or other internal or external communications regarding revenue receipts from 2007 to the current time;
22. Any reports, memorandum or other internal or external communications regarding expenditures from 2007 to the current time.

On November 19, 2012, Bacon responded to the union's information request.[6] The employer's response to items 20, 21, and 22 was, "[t]he Budget Director believes there may be several thousand documents that might be related to this request. These documents are available for the [union's] inspection in the office of the Budget Director."[7]

In November or December 2012, the employer provided budgets from 2005-2013.[8] In December 2012, the employer and union began discussing the outstanding requests. Union counsel James Cline requested a conference call with Budget Director Elaine Marlow to discuss the types of documents available for the union to inspect.

On December 13, 2012, the employer made its budget books available to the union. The employer provided a box of documents containing line item details. The union declined those

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6 Ex. 7, pp. 60-63.
7 Ex. 7, pp. 60-63.
8 Ex. 6.

documents.[9] That day, the union requested the Auditor's monthly financial reports for 2005-2012. The employer provided the union the Auditor's reports.[10]

On February 8, 2013, Cline, the union's financial expert Stan Finkelstein, employer attorney Jacquelyn Aufderheide, Auditor Anne LaCour, and Marlow participated in a conference call. The union narrowed the budget portion of its information request to:

1. Budget information for 2012 back to 2007 identifying on a fund by fund basis the revenues and expenditures for each fund, budgeted versus actual; including the starting and ending balances.
2. Fund balance information for each of the county's funds for 2012 back to 2007 in the same order as that proscribed under 1. above.
3. All email and formal reports among and between the County Treasurer, the County and the county budget officer and the County Commissioners regarding revenue, expenditures and fund balances during the course of each of the years 2012 back to 2007 relating to the General Fund and the Road Fund.
4. All information, email or otherwise, describing the *fund balances* for each of the county's funds as of the close of business for each of the year's [sic] 2012 back to 2007.
5. Updates on all the previously disclosed financial records, noting, for example that we are in receipt of the November 2012 budget officer report but have not received the December or thereafter reports.
6. Finally, it is my understanding that we had requested information regarding the extent of Road Fund diversions to the Sheriff's Office for the years 2012-2007.[11]

On February 12, 2013, Aufderheide wrote to Cline.[12] Aufderheide asserted that documents responsive to request number 1 were offered to Cline on December 13, 2012, and Cline rejected the documents. The employer reiterated that the documents were still available for inspection and copying. On December 13, 2012, documents responsive to number 2 were offered, and still

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9 Ex. 7, p 91; Tr. 79:8-80:10.
10 Ex. 7, pp. 91-99, 136-160, 164-188, 244-270, 303-329, and 471-497.
11 Ex. 7, p. 114-115.
12 Ex. 7, p. 161-162.

available. Aufderheide told Cline those documents contained the beginning and ending fund balances for major funds and the information was available in the employer's audited financial reports. Aufderheide informed Cline that the employer did not budget fund balances.

On February 13, 2013, Marlow wrote to Cline.[13] Marlow clarified that the employer's budgets for 2007 through 2012 continued to be available for inspection in her office, or the union could pick up the copies that were in her office, and records including fund balances, revenues, expenditures, cash balances, financial statements, trial balances, and detailed reports of the employer's funds from 2007 through 2012 were available for inspection in her office.[14] Marlow wrote, "[t]he County does not budget beginning and ending fund balance nor does the County budget cash balances."[15]

In response to numbers 2, 3, and 4, the employer had "records including fund balances, revenues, expenditures, cash balances, financial statements, trial balances and detail reports for all County funds for the years 2007-2012" available for the union to inspect.[16] Marlow specified that the employer's audited financial statements for 2007-2011 contained revenue and expenditure totals, including cash and fund balance amounts for the General Fund and County Road Fund. The employer's 2012 financial statements were being prepared by the Auditor and would be available by the end of May. Marlow directed Cline to the Washington State Auditor's website as an alternative place to locate the information.

In response to number 5, Marlow notified Cline there was no document called a "Budget Office Report." She suggested that he might be requesting the auditor's Monthly Financial Report for December 2012, and provided that document.[17]

The employer provided documents in response to request number 6, including certifications to the County Road Administration Board related the transfer from the Road Fund to the general fund sheriff's budget for traffic enforcement for 2007-2011. The employer included the 2012

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13 Ex. 7, p. 125.
14 Ex. 7, p. 125.
15 Ex. 7, p. 125.
16 Ex. 7, p. 125.
17 Ex. 7, pp. 125, 136-160.

and 2013 certifications of the road levy. Marlow pointed out that the amount of the transfer was shown on line 14.[18]

On February 20, 2013, the employer provided the union the Auditor's financial report for January 2013.[19]

On March 12, 2013, Cline, employer attorney Deborah Boe, and Marlow had a conference call to discuss the information request. The employer explained the budget information was available in budget ordinance, the audited annual report, and in a line by line item detailed budget.[20] Boe asserted that the employer did not have an obligation to create the "intermediate report" the union sought. Boe indicated that the employer would provide documents in response to request number 5 as they were available. Boe confirmed that Cline was satisfied with the employer's response to request number 6.[21]

On March 20, 2013, Cline responded to Boe.[22] Cline asserted that Marlow indicated that intermediate reports existed. Cline asserted that there was a duty to create information.

The employer continued to provide monthly Auditor's reports. On March 19, 2013, the employer provided the Auditor's February 2013 monthly report.[23] On April 18, 2013, the employer provided the March 2013 report.[24] On April 24, the employer provided Auditor's reports from 2010 that it had not previously been able to locate.[25] On May 16, 2013, the employer provided the Auditor's April 2013 monthly report.[26]

On May 31, 2013, the employer provided the updated and current general fund trial balance report.[27]

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18 Ex. 7, pp. 125, 129-135.
19 Ex. 7, pp. 161 and 165-188.
20 Ex. 7, p. 241 paragraph 1.
21 Ex. 7, p. 242.
22 Ex. 7, p. 272.
23 Ex. 7, p. 244-271.
24 Ex. 7, pp. 303-329.
25 Ex. 7, pp. 346-397.
26 Ex. 7, pp. 471-497.
27 Ex. 7, pp. 430-434 and 500-501; Ex 16.

On appeal, the employer's response to the union's request for budget information, and the employer's response to the union's February 8, 2013 request for e-mail communication are at issue.

Did the employer fulfill the union's request for budget information?

The employer provided responsive information, but the union thought the information was incomplete and omitted necessary information.[28] According to Cline, the union started to receive documents, "but they weren't honing in on what was becoming a critical issue to us."[29] The union was interested in knowing "how much money [the employer] had in the bank." The union's financial expert did not find the information the union sought in the information the employer provided. In particular, the union sought information about the employer's fund balances and reserves.

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. *Kitsap County*, Decision 9326-B (PECB, 2010), *citing Seattle School District*, Decision 9628-A (PECB, 2008). The employer explained to the union that the employer did not budget fund balances or cash balances.[30] LaCour explained how to determine the unreserved fund balance from the trial balance information the employer provided.[31]

The employer was only required to provide the responsive information from 2007 through 2012 that it maintained. The employer was not required to create a report that the union believed the employer should have maintained. That the employer did not maintain the type of information the union wanted does not mean the employer failed to provide requested information.

The employer did not engage in a reasonable good faith effort to locate requested information. LaCour was not provided with the union's information request until February 2013. The

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28 Tr. 63:22-65:6.

29 Tr. 71:5-15.

30 Ex. 7, p. 161-162, 125.

31 Ex. 7, p. 165 contained a beginning fund balance for 2013, and p. 172 shows the same information. Ex. 7, p. 430 and Ex. 15 list the unassigned fund balance.

Auditor's Office maintained information responsive to the union's request. LaCour did not know why documents were not provided.[32]

The Auditor's Office used three working papers to prepare the financial statement, according to LaCour, those documents would have included fund balances. The Auditor maintained files that included the restricted fund balances and explained the statutes that restricted the fund balances. Those documents provided more details, but not more information.[33] The Auditor's Office had documents that explained how assignments were made.[34] The employer did not provide the information the Auditor's Office maintained.

The union had the burden to prove that the employer did not provide information responsive to the union's information request or prove that the information provided was non-responsive. If the information was non-responsive, the union had an obligation to communicate to the employer how the information was non-responsive, prove that it communicated to the employer that the information was non-responsive, and prove that the employer had responsive information the employer did not provide.

The union presented an extensive record of its information requests, responses to the information requests, and communication about the requests. Despite that evidence, the union did not provide a cogent breakdown of how the information provided by the employer was non-responsive or documents the employer maintained that were not provided. From the record, we can only conclude that the union carried its burden only to show that the employer did not provide information maintained by the Auditor's Office.

Did the employer fulfill the union's request for e-mail and formal reports among certain employer officials?

On February 8, 2013, the union requested all e-mail messages between Marlow and Chief Deputy Auditor Anne LaCour and the Commissioners for the period 2007 through 2013. In a

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32 Tr. 368-369.
33 Tr. 364-366.
34 Tr. 367.

February 11, 2013 e-mail, the union clarified that it was seeking e-mail and reports among and between LaCour, Marlow, and the County Commissioners regarding revenue, expenditures, and fund balances from 2007 through 2012 relating to the General Fund and the Road Fund as well as all information, including e-mail, describing the fund balances for each of the county's funds at the close of each year from 2007 to 2012.[35]

The evidence of what e-mail documents were produced was limited to Marlow's testimony, and, in impeachment of that testimony, limited pages of the deposition she gave in the union's public records act lawsuit; Cline's testimony; and the letters transmitting the responses to the union. The Examiner concluded that Marlow's testimony was unreliable and contradictory to testimony she gave in response to a deposition for the union's Public Records Act lawsuit. The Examiner found, "Much of Marlow's testimony is not credible."

By May, the union had received e-mail messages from 2010 through the first 45 days of 2013.[36] Those e-mail messages included attachments. At the time of the unfair labor practice hearing, the union had received only e-mail messages Marlow sent or received. The union asserted it had not received e-mail messages among and between the County Commissioners.

The final installment of responsive e-mail messages was available June 13, 2013.[37] The employer requested payment for copies prior to the union providing information. The hearing took place on June 25 and July 25, 2013. At the time of Marlow's testimony on July 25, 2013, the union had not picked up the final installment of requested e-mail messages.

The union did not carry its burden to show that it had not received all of the documents responsive to its request for e-mail and formal report information. At the time of the hearing, the union was yet to pick up documents that had been available for inspection since June 13, 2013. Therefore, it is impossible to know what information was included in the final installment of records and impossible to conclude that the employer failed to provide the requested e-mail and formal report information.

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35 Ex. 7, p. 114.
36 Tr. 93:1-6.
37 Ex. 7, p. 499.

Conclusion

In a failure to provide information request case, the complainant bears the burden of establishing that the employer failed to provide responsive information. The union proved that the employer did not provide documents maintained by the Auditor's Office that were responsive to the union's request. At the time of the hearing, the union had not picked up e-mail gathered in response to its February 8, 2013 request for information. Because the union had neither picked up nor reviewed the documents, it is not possible to conclude that the employer failed to provide information.

ISSUE 2: Is the union entitled to attorney's fees based on the employer's "meritless" appeal?

CONCLUSION

Attorney's fees are an extraordinary remedy to be awarded in the rarest of circumstances. Attorney's fees may be appropriate when an appeal is frivolous or meritless. In this case, a question existed about whether the employer fulfilled its duty to provide information. Therefore, the employer's appeal was not meritless or frivolous. The union is not entitled to attorney's fees on appeal.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact and Conclusions of Law issued by Examiner Claire Nickleberry are AFFIRMED and Adopted as the Findings of Fact and Conclusions of Law of the Commission.

The Order is modified:

Island 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. The employer shall provide the union with all documents the Auditor's Office maintains that are responsive to the union's July 2, 2012 and February 8, 2013 information requests.

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

   c. 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.

   d. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Island 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.

e. 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.

f. 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 8th day of July, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ MAJEL C. BOUDIA

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