STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant,	)	CASE 12335-U-96-2918
vs.	)	DECISION 5542-C - PECB
SEATTLE SCHOOL DISTRICT, Respondent.	)	DECISION OF COMMISSION

Schwerin, Burns, Campbell & French, by Cheryl A. French, Attorney at Law, appeared on behalf of the union.

Karr Tuttle Campbell, by Lawrence B. Ransom, Attorney at Law, and Tracy M. Miller, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by the employer, seeking to overturn a decision issued by Examiner Pamela G. Bradburn.[1]

BACKGROUND

The Seattle School District (employer) and International Union of Operating Engineers, Local 609 (union), are parties to a collective bargaining agreement in effect from 1994 through 1997, covering the employer's custodial engineers and gardeners. The employees involved in this proceeding were members of that bargaining unit.

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[1] Seattle School District, Decision 5542-B (PECB, 1997).

The union filed a complaint charging unfair labor practices on February 20, 1996, alleging it had requested the employer provide information regarding allegations of misconduct made against four employees, that such information was necessary to conduct its own investigation of events, and that the employer violated its duty to bargain in good faith pursuant to RCW 41.56.140(1) and (4), by failing to provide the requested information. Allegations with regard to two of the employees were dismissed under WAC 391-45-110, but allegations regarding Brian Cassin and Patrick Laing were found to state causes of action.[2]

The parties waived their right to a formal hearing, and submitted the matter to Examiner Bradburn on stipulated facts and exhibits filed on October 18, 1996. The parties stipulated that the exhibits submitted were intended to show:

> (1) [W]hat communications were had between the District and Local 609 regarding requests or exchanges of investigatory information, (2) what information was provided, and (3) when the information was provided.

The parties did not stipulate to the truth or accuracy of the information provided, and did not submit material to prove or rebut the merits of pending grievances or to prove the truth or falsity of the underlying allegations against either employee.

Stipulated Facts in Regard to Brian Cassin

On October 12, 1995, the employer excluded Cassin from his usual place of work, with pay. That status was confirmed by a letter dated October 13, 1994, in which the employer stated:

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[2] Seattle School District, Decision 5542 (PECB, 1996).

> This letter is to confirm that you have been placed on administrative leave with pay due to allegations of inappropriate conduct toward a student at Concord Elementary School. You will continue on this status until an investigation looking into this matter is completed. You are directed not to visit Concord or any other school district facility. You are further directed not to discuss this matter with any school district employee or any students. We will notify you when the district investigation is completed. ...

A notation on the copy stipulated in evidence indicates it was hand delivered.

On October 16, 1995, union Business Manager Dale Daugharty wrote to the principal of Concord Elementary School, to the manager of Buildings and Grounds of Seattle Public Schools, and to the director of the employer's Human Resources Department, stating the following:

> In order to properly administer the collective bargaining agreement and represent the affected members of the bargaining unit by thoroughly investigating allegations that have been raised relating to the conduct of Mr. Brian Cassin, I need access to the following material as soon as possible. ...
>
> - All documents (including transcriptions of telephone conversations) upon which any decision was made alleging inappropriate conduct toward a student;
> - All witness statements;
> - All student, staff, and/or citizen complaints;
> - Any portion of Mr. Cassin's file which shows past counseling, discipline, or practice;
> - The rule or rules which are involved in any forthcoming discipline;

- Records of others involved in similar offenses.
- All supervisor's notes or records regarding this employee.

Daugharty asked that he be able to review the material "no later than Tuesday, October 17, 1995 at 2:00 PM ...".

By letter of October 16, 1995, the employer's executive director of human resources informed Daugharty that:

> On August 21, 1995, the General Counsel's office advised you that it is inappropriate for the District to provide you with this type of information unless and until disciplinary action is taken. I therefore, at this time, respectfully decline to provide the information that you have requested.

The "general counsel's" advice referred to in that letter was contained in an August 21, 1995 letter to Daugharty regarding a union request for information about another employee. In that letter, the employer's assistant general counsel had stated:

> As I am sure you are aware, the employee ... has not yet been the subject of any disciplinary action. In fact, I understand that he just met with Employee Relations Administrator Ava Greene Davenport today, and she has not yet come to a conclusion whether the allegations against him merit any discipline. Unless and until such time that a disciplinary action is in fact imposed, there is no basis for a grievance. Without an existing grievance, the District cannot submit the information you are requesting under the aegis of your stated obligation to "administer the collective bargaining agreement and represent the affected members of the bargaining unit". The District's position has been consistently adhered to in prior

> situations, as in the case of [an employee] where a similar request for information was made when the discipline was yet inchoate.
>
> Please be advised, however, that if a formal disciplinary action is in fact imposed in [this] case and a grievance filed, your request will immediately be reinstated and responded to as appropriate.

On October 19, 1995, Daugharty wrote to the director of human resources, again requesting "all of the information listed in my ... letter of October 16, 1995" and "all information that led to the decision to put Mr. Brian Cassin on administrative leave on October 12, 1995." Daugharty also stated that "Mr. Cassin feels that he is being unjustly punished for allegations that are unclear and non-specific." That letter also stated:

> Any refusal to furnish the requested information is tantamount to a denial of procedural due process and in effect prohibits this union from fairly representing Mr. Cassin. Once again, the District's position does not allow us to evaluate or investigate the validity of the charges against a member.
>
> Mr. Cassin has been in treatment for an injury on the job for the last 3 years. The stress that any extended administrative leave causes may bring about irreparable damage.

On October 19, 1995, the union filed a grievance protesting the employer's refusal to provide "information on who made the allegations, what the allegations are and specifically what happened that warrants discipline."

Union and employer representatives held a meeting on November 2, 1995, during which Cassin was advised of the specific allegations against him and the names of some adult witnesses. The union asserted that placing Cassin on administrative leave constituted

discipline without cause in violation of the collective bargaining agreement, and that the employer's refusal to provide the requested information was a violation of both the collective bargaining agreement and statutory requirements to provide information. The union requested a copy of any witness statements and investigative reports, but the employer did not provide the requested documents.

At a Step I grievance hearing, the union repeated its request for information. In a November 16, 1995 letter denying the grievance, the employer commented on the union's requests for information and expressed severe displeasure over the union's contact with various sources to request information. The employer reiterated its position that it must "protect the integrity of the investigative process by not providing the information requested unless or until a disciplinary action has been imposed".

At the union's suggestion, Cassin was returned to work on November 16, 1995, in an interim assignment as a gardener at Memorial Stadium. He was to remain in that status pending the conclusion of the investigation.

In submitting the grievance to Step II on November 27, 1995, the union again requested "all information that led to the decision to discipline the grievant" and stated its position that "any member sent home from work has been disciplined. To be placed on Administrative Leave with pay is discipline."

On November 30, 1995, the union sent a request for information to the employer's general counsel. That request was similar to the requests it had sent to three different employer officials on October 16, 1995. At the Step II grievance hearing held on January 10, 1996, the union repeated its request for information.

By letter of February 2, 1996, the employer denied the grievance and stated:

> I did not provide witness statements or other investigative material in the district's file because the District's investigation of this matter had not been concluded and no disciplinary action had been taken against Mr. Cassin. I did, however, share with you the specific allegations against Mr. Cassin and the names of some of the witnesses. ... We do not believe administrative leave is discipline since no written documents are placed in Mr. Cassin's personnel file, he suffers no loss in pay or benefits, and this does not diminish any seniority rights he may have.

The grievance on the refusal to provide information was referred to arbitration in January of 1996.

By letter of February 5, 1996, the employer terminated Cassin's employment. The union filed a grievance protesting that discharge, and the employer denied that grievance.

By letter of February 6, 1996 to the employer's general counsel, the union requested the information which the employer used to reach its decision to discharge Cassin. The union requested:

1. All communications between Principal Claudia Allan, District Administrators and any other investigator used in this incident.
2. All statements or information supplied by Ms Anne Hendrickson, Lunchroom Manager.
3. Any statement by any eye witness that saw Mr. Cassin pin a student against a wall.
4. Names and statements of individuals who claim Mr. Cassin had came to work [sic] smelling of alcohol.

5. The actual allegations that led to the decision to terminate Mr. Cassin.
6. The report of the private investigator who was hired to investigate the incident, and a copy of the service contract with the investigator.
7. Statements of adult women who allege that Mr. Cassin followed them around the building.
8. A copy of the direct testimony that the female students provided about Mr. Cassin's conduct.
9. Statement of the adult who witnessed the actions reported by the Students.

By a letter to the employer's attorney on February 8, 1996, the union's attorney requested information relating to the employer's decisions concerning Cassin.

In mid-February of 1996, after Cassin's discharge, the employer provided the union with some information. That material included: Investigative reports dated October 26, 1995 and November 30, 1995; statements of employees and students; and a statement of the principal of the elementary school.

Around March 6, 1996, the employer provided some additional information to the union. The employer's attorney provided more documents under cover of a letter dated April 24, 1996, as well as explanations for the failure to provide other requested items.

Stipulated Facts in Regard to Patrick Laing

Patrick Laing was excluded from his usual place of work, with pay, on December 13, 1995, following an altercation between Laing and his supervisor. A letter of January 4, 1996 confirmed that status,

and invited Laing to schedule a meeting and to bring legal counsel or union representation with him.

The employer interviewed Laing on January 9, 1996, regarding the incident. Union representatives were present at that meeting.

By letter to the employer's general counsel on January 10, 1996, the union requested records, statements, notes and reports "in order to fulfill our obligation to represent Mr. Laing ...", and "per the collective Bargaining Agreement ...".

On January 24, 1996, the employer interviewed a witness to the December 13 incident, and permitted a union representative to attend the interview.

By letter of February 6, 1996, the employer discharged Laing. The union filed a grievance regarding Laing's discharge on February 8, 1996, and the employer denied the grievance.

On March 8, 1996, the employer provided some of the information requested by the union. Additional information was provided at a Step II grievance hearing held on April 24, 1996.[3]

The Examiner's Ruling

Examiner Bradburn issued her Findings of Fact, Conclusions of Law, and Order on January 3, 1997.[4] Due to an inadvertent omission, she issued a corrected version of her decision on January 10, 1997,

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[3] The grievance protesting Laing's discharge was referred to arbitration on June 6, 1996.

[4] Seattle School District, Decision 5542-A (PECB, 1997).

which included a "Notice" for the employer to post.[5] The Examiner found the employer committed unfair labor practices after it completed its investigations of Cassin and Laing, by withholding relevant information needed by the union to perform its collective bargaining duties and responsibilities, by failing to explain its concerns over providing the requested information during its investigations, and by failing to negotiate an appropriate accommodation of interests with the union. The Examiner ordered the employer to compensate Cassin and Laing in wages and benefits as if they had continued to be employed during the periods the arbitrations of their discharge grievances were delayed by the unfair labor practice proceeding.

On January 30, 1997, the employer petitioned for review, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The employer has maintained throughout this controversy that the duty to provide information does not arise until a time when employees are formally disciplined. The employer argues that the Commission lacks jurisdiction over pre-disciplinary requests for information, and that the Commission should defer to dispute resolution provisions of the collective bargaining agreement with regard to the pending grievance over Cassin's situation. Claiming that all relevant information has been supplied, the employer argues that the Commission's jurisdiction over the unfair labor practice is essentially moot. It contends that confidentiality and privacy interests of child witnesses and witness interference issues outweigh the union's interest in receiving the information

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[5] Seattle School District, Decision 5542-B (PECB, 1997).

before disciplinary action is taken. The employer argues that the information requested by the union was not necessary to the performance of the union's pre-discharge collective bargaining duties. The employer claims it complied with the obligation to negotiate its objections with the union by expressing its concerns. The employer objects to the admissibility of an affidavit of Dale Daugharty which was stipulated as part of the record, and claims the Examiner erred in using "facts" asserted in that affidavit. The employer takes issue with the remedies ordered by the Examiner.

The union argues that the Commission has jurisdiction in this matter, and that the pending grievance concerning Cassin has no bearing on the issue raised in this case. The union contends that its right to information related to its collective bargaining duties must be enforced, regardless of whether formal discipline has been instituted. It argues that administrative leave or the threat of administrative leave is a serious matter, that it only requested relevant information from the employer, and that the employer had an obligation to share its concerns regarding the information request with the union and to negotiate an accommodation. The union urges the Commission to uphold the Examiner's decision.

DISCUSSION

The Duty to Provide Information

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

> Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in

> good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including **wages, hours and working conditions,** which may be peculiar to an appropriate bargaining unit ...

[Emphasis by **bold** supplied.]

That definition is patterned after the National Labor Relations Act (NLRA). Decisions construing the National Labor Relations Act are persuasive in interpreting similar provisions of RCW 41.56. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1981).

Under both federal and state law, 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. National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967); City of Bellevue, Decision 3085-A (PECB, 1989), affirmed, 119 Wn.2d 373 (1992). In Acme, the Court strongly endorsed requiring the employer to supply information to the union which would aid the union in "sifting out unmeritorious claims" in the grievance process.[6] The courts and the NLRB use a discovery-type standard to determine relevancy of the requested information:

> [T]he goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened".

Pennsylvania Power and Light Company, 301 NLRB 1104 (1991) at p. 1105, citing NLRB v. Acme Industrial Co., supra, at 438.

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[6] See, Pasco School District, Decision 5384-A (PECB, 1996).

The obligation extends not only to information that is useful and relevant for the purpose of contract negotiations, but also encompasses information necessary to the administration of the collective-bargaining agreement. Requested information necessary for arguing grievances under a collective-bargaining agreement, including that necessary to decide whether to proceed with a grievance or arbitration, must be provided by an employer. Albertson's, Inc., 310 NLRB 1176 (1993).[7]

The Jurisdiction of the Commission

The Commission's unfair labor practice jurisdiction is defined by Chapter 41.56 RCW, which establishes the Commission as the forum for implementing the legislative goal of peaceful labor-management relations in public employment. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991). Under this chapter, aggrieved parties may bring complaints to the Commission if they believe their rights have been violated. Public Employment Relations Commission v. City of Kennewick, 99 Wn.2d 832 (1983). Because Chapter 41.56 RCW is remedial in nature, its provisions are to be liberally construed to effect its purpose. Public Utility District No. 1 of Clark County v. Public Employment Relations Commission, 110 Wn.2d 114 (1988). Additionally, the courts of this state give great deference to Commission decisions, and to the Commission's interpretation of the collective bargaining statutes. Kennewick, supra; Bellevue, supra.

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[7] In describing the employer's duty to furnish information as applying to labor-management relations during the term of an agreement, the United States Court of Appeals for the Fifth Circuit has said that the duty "continues ... so far as it is necessary to enable the parties to administer the contract and resolve grievances **or disputes**". Sinclair Refining Company v. NLRB, 306 F.2d 569 (5th Cir., 1962).

The Commission has jurisdiction in this case to determine and rule on the union's allegation that the employer has violated its statutory duty to bargain under Chapter 41.56 RCW.

The Deferral to Arbitration Argument -

RCW 41.56.160 vests the Commission with considerable discretion in the processing of unfair labor practice cases. Pierce County, Decision 1671-A (PECB, 1984). Early in its history, the Commission ruled that deferral to arbitration is a matter of policy, rather than a matter of law, and that agreements between parties cannot restrict the jurisdiction of the Commission. City of Seattle, Decision 809-A (PECB, 1980).

The Commission reviewed and restated its policy on deferral to arbitration in City of Yakima, Decision 3564-A (PECB, 1991). In that case, the Commission identified the types of cases appropriate for deferral by stating:

> This Commission has taken a conservative approach, limiting "deferral" to situations where an employer's conduct at issue in a "unilateral change" case is **arguably protected or prohibited by an existing collective bargaining agreement.** ... The goal of "deferral" in such cases is to obtain an arbitrator's interpretation of the labor agreement, to assist this Commission in evaluating a "waiver by contract" defense which has been or may be asserted in the unfair labor practice case.[8]

[Emphasis by **Bold** supplied.]

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[8] The Commission's policy is based on the approach of the National Labor Relations Board, which has also exercised its discretion to harmonize its statutory unfair labor practice jurisdiction with the grievance arbitration process, while using a less restrictive approach than this Commission.

In City of Yakima, the Commission further outlined the conditions for "deferral". As a discretionary, rather than mandatory, policy of the Commission, deferral is ordered only where it can be anticipated that the delay in processing of an unfair labor practice case will yield an answer to the question that is of interest to the Commission in resolving the unfair labor practice case. In that regard, the Commission identified the following preconditions to deferral: (1) the existence of a contract; (2) an agreement to accept an arbitration award as "final and binding"; and (3) no dispute between the parties concerning arbitrability.

Thus, deferral to arbitration may be appropriate in "unilateral change" unfair labor practice cases, where disputed employer conduct is arguably protected or prohibited by an existing collective bargaining agreement, and the legislative policy favoring grievance arbitration can be implemented by leaving the interpretation of the contract to an arbitrator. Arbitrators have no particular expertise in other issues, however, and the Commission does not defer "interference", "domination", or "discrimination" allegations, or other types of "refusal to bargain" charges, where the dispute is not susceptible to resolution through contractual grievance proceedings. Port of Seattle, Decision 3294-B (PECB, 1992). See, also, City of Pasco, Decision 3804-A (PECB, 1992) and City of Kelso, Decision 2633-A (PECB, 1988).

In the case now before us, the Commission is called upon to determine whether the employer has met its statutory responsibility to provide requested information. The fact that any such violation might tend to prejudice the union's pursuit of a remedy through grievance arbitration provides an additional reason to refuse deferral. This case is one which fits squarely within the Commission's precedent as an unfair labor practice case.

The employer nevertheless argues that an interpretation of the collective bargaining agreement is necessary to a determination of whether the employer had a duty to provide information prior to the discharges of the employees involved. In particular, it argues that Article V of the parties' collective bargaining agreement allows the employer "to ... terminate, suspend, transfer, ... demote, or discipline employees for proper cause", and that the Commission cannot determine whether the investigative files are relevant to the union's processing of grievances until an arbitrator has ruled that the employer must have "cause" to place an employee on administrative leave with pay pending investigation. The employer contends that the requests at issue in this case were made at a time when it had not taken any action which, under the contract, would require it to demonstrate "cause". The employer mistakenly equates the "cause" provision of the collective bargaining agreement with the statutory duty to provide information.

The issue before the Commission concerns the duty to bargain and the duty to provide information under RCW 41.56.030 and 41.56.140(4). The obligation of the employer to provide information to the union arises from a determination that the union needs information to represent members of the bargaining unit, not from an interpretation of the collective bargaining agreement. Whether the employer must have "cause" to place an employee on administrative leave is a contract interpretation matter unnecessary to the determination of relevancy of the requested information and the statutory unfair labor practice case. To protect its separate statutory and contractual rights, a union may well need to file both a grievance and an unfair labor practice

complaint concerning a particular incident.[9] The deferral policy is not a tool by which respondents can avoid determinations as to whether they committed an unfair labor practice. City of Yakima, supra.

Mootness -

The employer suggests that all of the relevant requested information has been provided in relation to the discharge grievances, and that the union was not prejudiced by the refusal to provide information while the investigations were in process. Its suggestion that the exercise of jurisdiction by the Commission in this case would yield nothing is without merit. Because we are making a statutory ruling on whether an unfair labor practice was committed, neither the resolution of the situation which gave rise to the unfair labor practice allegation nor the fact that the employer later furnished the requested information made the alleged violation of the statute moot. Shelton School District, Decision 579-B (EDUC, 1984); City of Seattle, Decision 3329-B (PECB, 1990); and Bates Technical College, Decision 5140-A (PECB, 1996). If the employer has committed a violation of the statute, the union is entitled, at a minimum, to an order that the employer cease and desist from such conduct in the future.

The Information Requests in This Case

The employer properly notes that requested information must be relevant and necessary to some collective bargaining duty. It goes on to argue that a union's duty to investigate potential grievances does not arise until disciplinary action is taken, and that the

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[9] An arbitrator's role is limited to the application or interpretation of matters contained in the collective bargaining agreement. RCW 41.56.122(2).

information requested in this case was not necessary to the performance of the union's collective bargaining duties until Cassin and Laing were actually discharged. The employer claims that the reasons given by the union for its requests did not give rise to the duty to provide the information, and it cites Pasco School District, Decision 5384-A (PECB, 1996), as precedent for requiring more than an "abstract potential relevance" with respect to requested information.

The employer places more reliance upon Pasco School District than that precedent will bear. The allegation in that case was that the employer failed to provide information about a supervisor, who was not a member of the bargaining unit, in response to a union's request for information. While the Executive Director dismissed the complaint as failing to state a cause of action, the Commission remanded the case for a full evidentiary hearing, based on the union having sufficiently (if thinly) related its request to potential grievances on behalf of former subordinates of the supervisor. The Commission there outlined pertinent case law, and explained the burdens of the parties, but did not apply an "abstract potential relevance" test to the facts of that case. In any case, the case now before the Commission is markedly distinguished from Pasco by the fact that the requests at issue here were clearly made concerning bargaining unit employees.[10] The usefulness of that case as precedent in this context is limited.

As the exclusive bargaining representative of the employer's custodial engineers and gardeners under RCW 41.56.080, the union represents all members of that bargaining unit with respect to

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[10] Information pertaining to employees in the pertinent bargaining unit is presumptively relevant. Pasco School District, and cases cited therein.

their "wages, hours and working conditions". Both Cassin and Laing were placed on what the employer characterizes as "administrative leave with pay". Even if the employer does not consider "administrative leave with pay" to be official disciplinary action and the employees' "wages" were not affected, their "hours" and their "working conditions" were clearly impacted by their exclusion from their usual places of work. The sudden jolt of a suspension was sufficient to move the situation out of the "abstract potential relevance" category urged by the employer into an actual change of circumstances where the union was entitled to pursue its rights as exclusive bargaining representative of the affected employees.

We find the employer substantially changed the "hours" and "working conditions" of Cassin and Laing, and that its actions triggered the duty to provide information. The fact that Cassin and Laing were paid has little bearing on the effect of the event itself. The employees were prohibited from going to work, neither could depend on returning to work in the future, and conditions were imposed on their continued employment. The hours of work for both employees dropped dramatically, from a full schedule to no hours at all. They lost opportunities to work overtime. Both faced serious allegations, which could result in further action against them and place their job security in further jeopardy.

Under Acme Industrial, supra, the union only needs to show that the requested information is probably relevant.[11] An existing grievance or a discharge is not a prerequisite to the union's need for information to properly represent its members. We infer from the record in this case that requested information was, at a minimum, "probably" relevant to the union's need to represent its members. When the employer provided the requested information, it was long

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[11] See, Square D Electric Company, 266 NLRB 795 (1983).

after the time the union was called upon to provide effective representation to Cassin and Laing, who had an interest in the union's representation as soon as they were suspended. The union was neither bound by the employer's characterization of the employees' status as "administrative leave with pay", nor precluded from filing a grievance to challenge that status.[12] The requested information could certainly have been helpful to the union to potentially "sift out unmeritorious claims" before a grievance was filed, or to otherwise work with the employer on related issues to attempt to resolve any disputes. The employer prevented the union from effectively carrying out its function of representing employees in the bargaining unit.

The employer cites City of Bellevue, Decision 4324-A (PECB, 1994), as precedent for requiring that there be a grievance in process before an employer is obligated to respond to an information request from a union. A close reading of that decision indicates, however, that the reason the Commission dismissed the unfair labor practice charge in that case was unrelated to grievance processing. The union in that case had sought information to prepare for an anticipated due process hearing,[13] and the sole question before the Commission in that case was whether the duty to provide information under Chapter 41.56 RCW arose at that time. The Commission held that it did not, because the interests at stake when the issues arise exclusively from the constitutional due process context are

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[12] In City of Bellevue, Decision 3084 (PECB, 1989), a union was entitled to information in order to determine whether to initiate a grievance.

[13] The purpose of such a hearing was to comply with the decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), where the Supreme Court of the United States held that public employees cannot be deprived of a property right in their employment without a due process hearing.

not within the realm of the collective bargaining process or the Commission's jurisdiction. As the Examiner stated in her decision in this case: "[T]he Commission mentioned the lack of a pending grievance solely to address and correct [a] mistaken belief that a grievance had been filed before the request for investigative files was made."[14] In the case at hand, the request for information relates to far more than just preparation for a Loudermill hearing.

The employer argues that the union has made no showing that the information provided by the employer was inadequate for the performance of the union's duties before it discharged Cassin and Laing. Since the union received no information in response to its early requests, the information received was clearly inadequate. We agree with the Examiner that the allegations against the employees were serious in nature, and would warrant "heavy discipline" if sustained. The record reveals no source of the requested information other than the employer. The employer had a duty to provide information.

Duty to Negotiate Concerns and Objections

The employer argues that it informed Cassin and Laing as to the reasons for its actions almost immediately after they were placed on "administrative leave", and it seems to urge us to consider that communication as sufficient to fulfill any obligation it might have to provide information. The duty to bargain exists between the employer and union, however, not between the employer and individual employees.

The employer asserts that the union was not necessarily entitled to the information in the form requested. While that may be true, the

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[14] Examiner's decision, p. 19.

employer had a duty to make a good faith effort to discuss the requested items with the union, so as to attempt to reach a mutually acceptable compromise or accommodation on the request. The record does not support the employer's assertion that it negotiated the request. A conclusion that the employer fulfilled its duty to negotiate its objections to providing the requested information would require some indication of direct communication of its concerns, willingness to provide information in a different form, and a willingness to compromise on disputed matters. The employer has not made such a showing in this case.

The employer argues that concerns about the union interfering with witnesses justified its refusal to provide information before the employees were discharged, and that the employer's interest in non-disclosure of the names and statements of child witnesses outweighs the union's need for the information. It asserts that the facts of this case support a blanket exception to the production of witness names and statements.

In Detroit Edison Co. v. NLRB, 440 U.S. 106 (1979), the Supreme Court held that an employer may refuse to furnish relevant information requested by a union, if the employer demonstrates a legitimate and substantial business interest or reason for refusing to do so. A good-faith effort to accommodate the union's needs is required, however, to justify an employer's refusal. Square D Electric Company, supra. The NLRB balances a union's need for information against any "legitimate and substantial" confidentiality interests established by the employer, but it does not accept blanket claims of confidentiality such as is urged by the employer here. A party refusing to supply information on confidentiality grounds still has a duty to seek an accommodation:

> When a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.

Pennsylvania Power and Light Company, supra, at p. 1105-1106.

The NLRB found an employer was obligated to furnish requested names and addresses of witnesses to a bus accident in Transport of New Jersey, 233 NLRB 101 (1977),[15] while finding that alleged dangers of union harassment of witnesses were, at most, speculative and were outweighed by the union's need to obtain data. On the stipulated record provided by the parties in this case, any alleged dangers and potential threats to witnesses are clearly speculative and the employer's unsubstantiated concerns are outweighed by the union's need to obtain data when it would be most helpful. The information requested would have been most helpful when the employer changed the employees' hours and working conditions by suspending them under the "administrative leave" terminology.

Had the employer offered to discuss any confidentiality concerns in an effort to accommodate the request, we might be more reluctant to find an unfair labor practice. See, Silver Brothers Company, 312 NLRB 1060, 1062 (1993), where the NLRB ruled that the employer was not obligated to furnish information requested by the union forthwith, but was entitled to discuss confidentiality concerns so as to try to develop mutually agreeable protective conditions for

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[15] The NLRB found the data sought was relevant to a grievance regarding operator discipline, and the information was relevant and necessary to permit the union to make an intelligent judgment on the decision whether to seek arbitration.

disclosure to the union.[16] In the case at hand, witness statements and student complaints were only one type of information requested. While the employer took the position from the beginning that it was "inappropriate" to provide the type of information requested, its stated reasons were always couched in terms of "unless and until disciplinary action is taken". The employer staunchly maintained its position until just prior to the discharge of Cassin, and after the discharge of Laing, notwithstanding having reached those decisions.[17] There is no indication in the record that the employer expressed its confidentiality concerns to the union when it received the request for information, and the employer clearly made no effort to accommodate the request.

The employer urges us to consider policy statements within Vancouver School District v. SEIU, Local 92, 79 Wn.App. 905 (1995), rev.den. 129 Wn.2d 1019 (1996), where the court expressed concern about a school district's obligations to young children in relation to requiring an employer to provide access to child witnesses. Because the Cassin case dealt with allegations of misconduct toward students, the employer argues that it had a duty to protect the

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[16] The NLRB found the employer complied with the law in that case because the employer had written a letter to the union and while it stated that "the union might not be entitled to the information", the employer offered to discuss the information requests.

[17] It was not until the denial following the Step II grievance hearing, by letter of February 2, 1996, three days prior to Cassin's discharge that the employer shared specific allegations and the names of some of the witnesses with the union. It was not until after Laing's discharge that the employer provided some of the requested information to the union. Laing had union representation at a meeting and at an investigative interview with a witness prior to his discharge, but that does not satisfy the employer's obligation to the union in regard to the information request.

students involved from contact with Cassin, and from interrogation by his union, including keeping their identity and statements in confidence until such time as disciplinary action was taken. We need not rule in this case on whether the employer had a legitimate and substantial business interest or reason in refusing to provide some information, or specifically what information should be kept confidential, because the employer itself never advanced those reasons with the union. We hold that the employer's blanket refusal to provide the union with any of the requested information until the discharges constituted an unfair labor practice.[18]

The Affidavit of Dale Daugharty

The parties stipulated that the affidavit of Dale Daugharty and declaration of Ricardo Cruz may be treated as testimony, although the parties did not stipulate to facts asserted in those documents, and did not waive evidentiary objections to that testimony. The Examiner denied the employer's motion to strike the affidavit of Daugharty, and the employer asserts error in that ruling. While claiming that some statements lack foundation, lack personal knowledge, or are irrelevant, the employer additionally asserts that the Examiner mistakenly relied on the truth of the "facts" asserted in the Daugharty affidavit. The employer objects to references to Cassin's mental or emotional state as irrelevant, and

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[18] There may have been some substantial business reason in withholding parts of the information collected. That should have been the subject of negotiations with the union, i.e., the employer could have suggested that the statements be provided with witness names blacked out, could have suggested the parties agree to a restricted use of the information, or could have made other efforts at providing some of the requested information. The concerns urged by the employer on petition for review should have been expressed to the union with a sincere effort to reach accommodation.

claims that Daugharty lacked personal knowledge as to how Cassin and other bargaining unit members were thinking and feeling during the investigation.

We have decided this case on stipulated facts unrelated to the Daugharty affidavit. Where a motion to strike portions of a record relate to matters unnecessary to address, courts decline to rule on the motion to strike. In Re F.D. Processing, 119 Wn.2d 452 (1992). We discuss the issue of the affidavit for the limited purpose of explaining the reason it was unnecessary to the determination of this unfair labor practice case, and to show that any error by the Examiner was harmless.

One portion of the affidavit to which the employer objected was Paragraph 3, which stated:

> In some cases, **the School District will place an employee on administrative leave with pay,** rather than immediately suspending or terminating the employee, while the District makes a decision about the discipline it intends to assess. In my experience, when this occurs, **the District is seriously considering termination of the employee, and almost always assesses some type of discipline.**

[Emphasis by **bold** supplied.]

Another portion to which the employer objected was Paragraph 4, which stated:

> **When the School District places an employee on administrative leave** for the purpose of determining whether to discipline the employee, **it is my practice to immediately request from the District all information it has concerning the allegations** against the

> employee so that I can begin my investigation **to determine if the Union will file a grievance** on behalf of the employee either because of the administrative leave itself, or if discipline is issued.

[Emphasis by **bold** supplied.]

Another portion to which the employer objected was Paragraph 7, in which Daugharty stated:

> **Administrative leave changes the employees' working conditions by removing them from the job.** Other employees, including the school staff they work with and their supervisors, know the employees have been placed on administrative leave due to allegations of misconduct. This influences the way in which staff and supervisors view the employee, even if the allegations are later found not to be true. This can affect an employee's evaluations and opportunity for promotions. Employees who are placed on administrative leave in order for the District to investigate allegations against them are placed in a very stressful situation. They are not working, so they have nothing to distract them from worrying about losing their job. Coworkers make judgments about their guilt or innocence from the allegations when the employee is not there to defend themselves.

[Emphasis by **bold** supplied.]

Treating the affidavit only as showing what communications were had between the parties, and disregarding whether the other matters asserted are true, the Examiner was clearly correct in refusing to strike the affidavit altogether.

While the portions of the affidavit to which the employer objects help to explain the union's position, and the rationale for its actions, those are not matters that the union needed to prove as a

basis for finding a violation in this case. Daugherty's statements that "placement on administrative leave due to allegations of misconduct is disciplinary action" and "administrative leave changes the employee's working conditions by removing them from the job" might be characterized as argument,[19] but we find ample stipulated evidence to independently arrive at a conclusion that the employer's actions constituted a change of employee hours and working conditions that was sufficient to invoke the union's right to information. We would also arrive at the same conclusion based upon our own accumulated experience in employer-employee relationships. RCW 41.58.010(2).

The employer disputes the Examiner's statements that "employer action follows Loudermill hearings as the night does the day", that "employer action begets grievances", and that "on the day Cassin was put on paid leave, both the union and employer had reason to see a Loudermill hearing, employer action, and a grievance looming on the horizon".[20] The employer contends that no other evidence was presented that showed administrative leave with pay pending investigation inevitably leads to employee discipline and grievances, so that the Examiner must have considered the Daugharty affidavit for the truth of the matters asserted. Two responses are indicated:

First, since we conclude, based on other stipulated facts in this case, that the events triggering the duty to provide information were the exclusions of Cassin and Laing from their

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[19] Daugharty's affidavit would be relevant to show that the union pressed forward with its request for information and was attempting to convince the employer of the appropriateness of releasing the information, so as to counter any suggestion of waiver or acceptance by the union.

[20] Page 19 of the Examiner's decision.

usual places of work, much of the employer's argument in regard to the Daugharty affidavit falls by the wayside. The employer's arguments that relate to potential actions after the employees were placed on "administrative leave" have no bearing on our decision here.

Second, while the employer asserts that the investigation could have resulted in returning Cassin and/or Laing to work, that would not have excused the employer's unlawful conduct of refusing to provide the union with the information it requested at the time their hours and working conditions were changed. The specific allegations against Cassin and Laing, which the employer still considers serious, provide basis for a reasonable inference that a full investigation leading to a Loudermill hearing could be anticipated. Additionally, some sort of employer action is naturally expected following a Loudermill hearing, whether negative or positive. While there could be a case where a grievance would not so obviously loom on the horizon after an employee is suspended and a Loudermill hearing is concluded, this was not such a case.

Remedy

Compensation of Complainants -

To deter future violations by the employer or other employers, the Examiner ordered the employer to compensate Cassin and Laing for any period by which their discharge grievances were delayed by this proceeding. RCW 41.56.160 empowers the Commission to issue remedial orders, but a review of Commission records indicates it is unlikely that back pay has ever been ordered for violations involving a refusal to provide information. Some creativity might be appropriate in a case which otherwise meets the criteria for an "extraordinary" remedy, as in Lewis County v. PERC, 31 Wn.App. 853 (Division II, 1982), rev. den., 97 Wn.2d 1034 (1982), but this is not such a case. Extraordinary remedies have been used sparingly,

and are generally ordered only when the defense to an unfair labor practice is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation. See, Mansfield School District, Decision 5238-A (EDUC, 1996), where the Commission imposed attorney fees upon finding a causal connection between a teacher's testimony in previous unfair labor practice proceedings and discriminatory actions against her and her husband.[21] On the other hand, the Commission has denied attorney fees when the employer's defenses were not frivolous. Clark County PUD, Decision 2045-A (PECB, 1989). The employer in this case did not commit a flagrant violation such as occurred in Mansfield. We find no basis on which to conclude the employer's arguments were frivolous or that the employer showed a patent disregard of its good faith bargaining obligation.

While the union may have been delayed in its investigations, there is insufficient evidence to conclude any delay was caused exclusively by the employer, or that it caused undue harm to the employees. There is nothing in the record to indicate that the employer might not have discharged the employees if it had provided information requested by the union. The employees were eventually represented in their grievances against the employer. If they were improperly discharged, they have a chance to be made whole through the arbitration process. Additionally, we are persuaded that compensation during any potential period of delay would be so uncertain as to be speculative. While we seek to impress upon the

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[21] In that case, the employer's anti-union sentiments were blatant and its defenses meritless. See, also, City of Winlock, Decision 4784-A (PECB, 1995), where the Commission reinstated an employee with full back pay where it found strong inferences of union animus in relation to his discharge, and the employer did not produce legitimate reasons for the discharge.

employer the importance of providing information to the union in the future within the mandates of the law, we are satisfied that the statutory purpose of preventing unfair labor practices will be achieved by a cease and desist order and the notice required below.

Reading of the Notice into Public Meeting Record -
The Examiner ordered that the customary notice of the unfair labor practice violation be read into the record of the next public meeting of the Board of Directors of the Seattle School District. Although that remedy may be somewhat novel, the employer does not dispute the order. We fully support the Examiner's approach, as it is prudent that the public be made aware of violations of the law such as occurred in this case.

The Legislature and the courts have indicated a strong public interest in preserving records for public perusal on a long term basis.[22] RCW 42.32.030 reads:

> **Minutes.** The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

That section applies to all public agencies as defined by RCW 42.30.020, and has remained inviolable since 1953.

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[22] In State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), the Supreme Court of the State of Washington held that all collective bargaining agreements must be in writing, and that there was no agreement until it was adopted by the county at an open public meeting of the board of commissioners.

In the case at hand, reading the "Notice" into the record of the next public meeting of the school board would allow for public knowledge of the unfair labor practice. In order to assure that the "Notice" becomes part of the permanent record, we are ordering it to be appended to the minutes of the meeting where it is read. We conclude it appropriate for the remedy to become standard in future cases where unfair labor practices are committed.

NOW, THEREFORE, it is

ORDERED

I. The Findings of Fact issued by Examiner Pamela G. Bradburn are affirmed and adopted as the Findings of Fact of the Commission.

II. The following are substituted for the Conclusions of Law issued by the Examiner:

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The Seattle School District committed unfair labor practices within the meaning of RCW 41.56.140(1) and (4), by withholding relevant information requested and needed by the union to perform its collective bargaining duties and responsibilities, after the employer changed the hours and working conditions of Brian Cassin and Patrick Laing, by failing to explain its concerns over providing the requested information during its investigations to the union, and by failing to negotiate with the union an appropriate accommodation of both their interests in that regard.

III. The following is substituted for the Order issued by the Examiner:

AMENDED ORDER

1. Seattle School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

2. CEASE AND DESIST from:

   a. Refusing to provide relevant information which the International Union of Operating Engineers, Local 609, needs to fulfill its collective bargaining duties and responsibilities.

   b. Failing to explain to the International Union of Operating Engineers, Local 609, any concerns it has about providing requested information and failing to negotiate with the International Union of Operating Engineers, Local 609, for a satisfactory resolution of those concerns and the request.

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

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

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix".

Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

b. Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the Seattle School Board, and append copy thereof to the minutes of such meeting.

c. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by this order.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 5th day of June, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL NOT refuse to timely provide information requested by International Union of Operating Engineers, Local 609, which is relevant and needed by the union to fulfill its collective bargaining responsibilities or duties.

WE WILL NOT fail to voice our concerns over providing relevant information requested by International Union of Operating Engineers, Local 609, and to negotiate a method of providing such information that accommodates the union's and our interests.

WE WILL provide relevant information about an employee suspended with pay pending investigation, upon the request of International Union of Operating Engineers, Local 609.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees, or refuse to bargain with their exclusive bargaining representative, in violation of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

WE WILL read the Notice into the record of the next public meeting of our school board, and append copy thereof to the minutes of such meeting.

DATED: _____

SEATTLE SCHOOL DISTRICT

BY: _____
Authorized Representative

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

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