Seattle School District, Decision 5542-A (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	CASE 12335-U-96-2918 DECISION 5542-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

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

On February 20, 1996, the International Union of Operating Engineers, Local 609, filed with the Public Employment Relations Commission a complaint alleging the Seattle School District had violated RCW 41.56.140(1) and (4) by refusing to timely give the union information about four bargaining unit members the employer was considering disciplining or had disciplined. The Executive Director's April 3, 1996 letter informed the union of possible defects in the allegations about two of the employees and invited an amended complaint.[1] After review of the amended complaint filed on April 17, 1996, only the allegations regarding Brian Cassin and Patrick Laing were found to state causes of action.[2] The parties waived their right to a formal hearing pursuant to Chapter 391-45

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[1] This review and notice of possible deficiencies complies with the requirements of the Administrative Procedure Act, RCW 34.05.419(2).

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

WAC and submitted the matter to Examiner Pamela G. Bradburn on stipulated facts and exhibits. On November 8, 1996, the final stipulations and briefs were received and the file closed.

Questions Presented

This unfair labor practice complaint presents several questions of first impression for this agency:

(1) May an employer lawfully wait until after it imposes discipline to give a union (a) information that caused the employer to put a bargaining unit employee on paid administrative leave pending an investigation, and (b) information resulting from that investigation?

(2) May an employer's obligation to provide information about a suspended employee facing possible discipline be triggered before a grievance is filed?

Brief Answer

Under the circumstances of this case, the employer violated RCW 41.56.140(1) and (4) when it refused the union's clear requests for relevant information just because discipline had not yet been imposed on two suspended employees, or grievances filed challenging the discipline. Under the facts of this case, the union was entitled to the employer's reasons for suspending the employees at least by the time the employer finished its investigations, which was no more than three weeks after the suspensions. This clarification of the employer's legal obligations under the collective bargaining law is in no way intended to diminish the employer's right to put employees on paid administrative leave in appropriate circumstances or to interfere with the employer's obligations to take such action to protect students and fellow employees. However, the employer may not slight its collective bargaining obligations while meeting its other responsibilities.

SUMMARY OF RELEVANT FACTS

Collective Bargaining Agreement

The union represents a bargaining unit of Seattle School District employees classified as custodial engineers and gardeners. The union and employer have negotiated a collective bargaining agreement for the period from September 1, 1994 through August 31, 1997 ("the Agreement"). The Agreement grants the employer the right "to hire, terminate, suspend, transfer, promote, demote, or discipline employees for proper cause." It also states "[t]he District has the responsibility to provide an explanation to the employee and Union representative prior to changes in rules, procedures, practices, and methods."[3]

The Agreement includes a typical grievance procedure which can be initiated by an individual employee or by the union on behalf of three or more employees. The parties have included language in their grievance procedure which encourages all people with information that may be relevant to a grievance to contact either the grievant and/or the employer, and assuring them no reprisal will result.[4] The grievance procedure ends in final and binding arbitration.[5]

Situation of Brian Cassin

Bargaining unit member Brian Cassin was sent home by his principal on October 12, 1995, with no explanation except that he was on paid administrative leave. The employer's human resources director confirmed Cassin's status in writing on October 13, 1995, saying it

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[3] Exhibit 1, Article V.A.1, D.

[4] Exhibit 1, Article XVII.D.1.

[5] None of the grievances mentioned below had been arbitrated by the time the parties submitted this case.

was "due to allegations of inappropriate conduct toward a student" of the elementary school where Cassin worked. The union sent identical information requests to various employer officials on October 16, 1995. On the same date the employer responded that it was not obliged to provide information before disciplining an employee and that the union had no right to represent Cassin or other affected bargaining unit members without a grievance.

Cassin grieved three days later, claiming his paid leave status was discipline and challenging the employer's refusal to provide the information upon which its decision was based ("Cassin's pre-discharge grievance"). The union repeated its requests for information at each step of the grievance process, but received no information as a result of this grievance.

An outside investigator gave his report to the employer on October 26, 1995. It focused on Cassin's work at the school in general and on his early October behavior toward female students. Three witness statements describing Cassin's behavior toward female students accompanied this report; all were dated October 12, 1995.

Cassin and the union first learned the specific allegations and the names of some adult witnesses at the pre-disciplinary meeting held three weeks after Cassin was put on paid leave.[6] The union repeated its informational requests to the employer in November

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[6] The parties did not identify this as the due process meeting commonly known as a Loudermill meeting, but I infer from its timing and apparent content that it was. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), held that public employees granted a property right in continued employment by a civil service system were entitled to notice of charges and an opportunity to respond before being discharged. Public sector employers and unions assume public employees covered by collective bargaining agreements are entitled to the same protection.

1995, and in January and February 1996.[7] The employer discharged Cassin on February 5, 1996, and he filed a grievance the next day. Not until late February, about four and one-half months after Cassin's paid leave began, did the employer give the union any information it had requested.[8] The employer gave the union more information on April 24, 1996.

Situation of Patrick Laing

An unidentified employer official sent bargaining unit member Patrick Laing home on paid administrative leave on December 13, 1995. The first explanation of this action occurred on January 4, 1996, when Laing had been on paid leave for 22 days; the employee relations administrator confirmed Laing's status and said it was because "a witness alleges that [on December 13, 1995] you had Mr. Nguyen [Laing's supervisor] in a head lock". This allegation was discussed in detail during an apparent Loudermill meeting on January 9, 1996.[9] Union representatives were present then and at the employer's later interview of a witness to the incident.

The union made a written information request to the employer on January 10, 1996. The union received no reply. The employer discharged Laing on February 6, 1996, and he grieved two days later. On March 8, 1996, approximately 12 weeks after placing Laing on paid leave and one month after discharging him, the employer gave the union some of the information it had requested

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[7] Apparently recognizing the obligation to provide information runs both ways, the union gave information it had developed about Cassin to the employer in December 1995.

[8] From November 16, 1995, until his discharge, Cassin worked as a gardener at a stadium that is not connected with any school. This arrangement resulted from union-employer discussions.

[9] As with Cassin, I infer this was a Loudermill meeting from its timing and content.

January 10, 1996. Additional information was turned over to the union on April 24, 1996.

Concerns About Affidavit

With the stipulated facts and exhibits, the parties submitted an affidavit by the union's business manager and a declaration by the employer's human resources director. The employer has asked that portions of the union business manager's affidavit describing other persons' thoughts and feelings be stricken as hearsay, that his assessment of the employer's intentions be stricken for lack of foundation, and that his opinion on the merits of Cassin's pre-discharge grievance be stricken as irrelevant.

During a telephone conference call I initiated to discuss my questions after reviewing the stipulated facts and exhibits, both counsel agreed their purpose in providing the affidavit and declaration was to set out each party's public policy reasons and concerns underlying its position in this dispute. The employer's counsel confirmed the union business manager was in a position to know reactions and concerns of bargaining unit members. I declined to strike any of the union business manager's affidavit, but advised counsel I would take it only as an explanation of the union's rationale for its actions. This opinion is not changed by further argument in the employer's briefs.

UNION'S CONTENTIONS

The union argues that paid leave changes an employee's working conditions enough to trigger the employer's obligation to provide the information supporting its action. Recognizing that previous decisions have mentioned pending grievances, the union contends the Commission has never explicitly tied the obligation to provide information to the existence of formal discipline; if such a

connection is required, the union notes Cassin grieved his placement on paid leave. The union sees no relevant distinction between its right to information in order to process an existing grievance, and its right to information to decide whether to file a grievance in the first place, particularly where discipline was foreseeable because of serious allegations against Cassin and Laing. Finally, the union asserts the employer's unreasonable delay in providing information affected witnesses' recall and thus hampered the union's ability to conduct its own investigation.

Expecting an argument the employer had to keep its investigations confidential, the union notes the employer failed to share this concern with the union and negotiate a resolution according each side's interests proper weight. If interests are to be balanced, union asserts its need for accurate and immediate information should over-ride the employer's concerns. Responding to an affirmative defense that arbitrators should decide such cases rather than the Commission, the union asserts the Commission has previously rejected the argument.

EMPLOYER'S CONTENTIONS

The employer challenges the Commission's jurisdiction over this matter on two general grounds. First, the employer argues the union sought the requested information solely for use in the employees' Loudermill hearings, a context in which the employer notes the Commission refuses to enforce the duty to provide information. Second, the employer contends submission of the grievances to arbitration deprives the Commission of jurisdiction.

If the Commission finds it has jurisdiction over the union's claims, the employer argues alternatively the union failed to prove access to the full investigatory files was necessary before Cassin and Laing were discharged. The employer contends any right to

information triggered by Cassin's pre-discharge grievance would be limited to the issue of whether paid leave was discipline, which could only be decided by an arbitrator. It would be inappropriate to permit a union to create a right to information by filing a grievance over the employer's refusal to provide that information. Finally, the employer argues its ability to conduct a thorough, objective investigation would be hampered by a requirement of contemporaneous disclosure to the union.

Responding to the union's interpretation of precedent, the employer notes the Commission has never held that an employer must divulge investigatory files before imposing discipline. If the Commission were to so hold in this case, the employer contends the information should be limited to that which is necessary to adequate pre-disciplinary representation (such as a summary of the charges and of the supporting evidence), rather than the requested investigative files. The employer also notes the union never claimed paid administrative leave changed Laing's and Cassin's working conditions until after the partial order of dismissal was issued.[10]

JURISDICTION NOT IMPAIRED BY PENDING ARBITRATION

The employer's argument that pending grievance arbitration deprives the Commission of jurisdiction to entertain and decide the issues presented by this case must be considered first.[11] The United States Supreme Court, National Labor Relations Board, and Commission Examiners have all rejected claims that the pendency of arbitration on a grievance's merits precludes a ruling on whether

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[10] Seattle School District, supra.

[11] The argument that the union's intent was to enforce constitutional rights is inextricably intertwined with the issue of whether the union requested the information for use in a collective bargaining context, and is discussed below, beginning at page 17.

an employer unlawfully withheld information related to that grievance. I am comfortable in this company and conclude the Commission has properly exercised jurisdiction in this matter.

In NLRB v. Acme Industrial Co., 385 U.S. 432 (1967), the Supreme Court held the NLRB had jurisdiction to decide a refusal to provide information unfair labor practice charge although the request related to a grievance that had been submitted to final and binding arbitration.[12] The Supreme Court noted the NLRB would only be determining the probability that the requested information would be relevant to the grievance and therefore should have been provided to the union.

The NLRB, for its own part, will not defer refusal to provide information unfair labor practice charges to arbitration. U.S. Postal Service, 302 NLRB 918 (1991). It has considered at length the same type of argument the employer makes about Cassin's pre-discharge grievance (i.e., that an arbitrator must first decide whether paid administrative leave is discipline and whether the collective bargaining agreement requires the employer to give the union information during its investigation of Cassin, before the Commission can decide the unfair labor practice allegations). In American National Can Co., 293 NLRB 901 (1989), aff'd 924 F.2d 518 (4th Cir., 1991), the Board ruled a request for access to the plant to take heat measurements should be treated as an information request and reversed its administrative law judge's deferral of the matter to arbitration, reasoning that would create a two-tiered dispute resolution process where the union would have to arbitrate its right to access, then after winning and obtaining the needed heat measurements, separately arbitrate whether the employer had improperly denied heat amelioration procedures. See also the

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[12] The Supreme Court noted the lower courts had misunderstood the lessons of the Steelworkers Trilogy when they denied NLRB jurisdiction just because a grievance arbitration was pending.

discussion in The Developing Labor Law (Third Ed., 1992) at p. 657-659, which notes the Board refuses deferral even where contract language purports to discuss production of information during grievance processing.

Finally, the Commission has rejected an employer's contentions that the availability of arbitration shielded its conduct during grievance processing activities from Commission jurisdiction. The Commission reasoned that the collective bargaining process continues even after contracts are executed, and that its statutory responsibility to assure parties' collective bargaining complies with the law is not impaired by the existence or exercise of contractual dispute resolution methods. City of Pasco, Decision 3804-A (PECB, 1992). Several Examiners have specifically rejected employers' arbitration-based jurisdictional challenges in information request unfair labor practice cases. City of Tacoma, Decision 5439 (PECB, 1996) (rejected without discussion); City of Bremerton, Decision 5079 (PECB, 1995) (refused to be bound by arbitrator's decision that requested information not necessary), and State of Washington (Washington State Patrol), Decision 4710 (PECB, 1994) (refused to leave relevancy decision to arbitrators).[13]

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[13] I note the Pennsylvania Labor Relations Board has rejected similar arguments:

> In Commonwealth of Pennsylvania (Department of Public Welfare), the Board stated that the duty to provide information emanates not from the parties' collective bargaining agreement, but rather from the statutory requirement to bargain in good faith. As such, the Board stated that deferral of such information requests to the parties' grievance arbitration process is disfavored.

City of Philadelphia, Docket No. PERA-C-94-51-E (Examiner Decision, 1994) (citations omitted).

For the reasons explained above, I reject the employer's contention that this unfair labor practice complaint must be dismissed simply because Cassin's grievances and Laing's grievance have been taken to arbitration. This case presents important statutory issues which are the Commission's responsibility to answer.

LEGAL STANDARD ON DUTY TO PROVIDE INFORMATION

The Commission's most recent statement of collective bargaining partners' mutual obligation to provide information is as follows:

> Under both federal and state law, it has been determined that the duty to bargain collectively includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process.
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> Pasco School District, Decision 5384-A (PECB, 1996).

Commission and Examiner decisions have provided some gloss on the factors of relevance, need, and relationship to collective bargaining duties.

Relevance of Requested Information

Pasco School District, supra, involved a union request for information about a supervisor excluded from the bargaining unit. In that unusual context, the Commission said:

> ... The requesting party must demonstrate more than an abstract, potential relevance of the requested information, and must show that the information is actually relevant. ... **Information pertaining to employees in the pertinent bargaining unit has been held to be presumptively relevant** (emphasis by **bold** added).

I conclude that the Commission's first, more stringent, standard results from and is limited to the facts of Pasco School District, where the union requested information about an employee outside the bargaining unit. The second standard accords with the NLRB's approach detailed below.

The NLRB and courts use a "discovery-type test" for relevance in the more usual situations involving requests for information about bargaining unit members.

> The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."

American National Can Co., supra, quoting NLRB v. Acme Industrial Co., supra.

I conclude the Commission would apply its second, more relaxed, standard of presumptive relevance in cases involving bargaining unit members such as the present one.

Need for Requested Information

The second factor (i.e., the requesting party's need for the information), is usually a simple factual matter. Division II of the Court of Appeals confirmed in Vancouver School District 37 v. SEIU, Local 92, 79 Wn.App. 905, 918 (1995), rev.den. 129 Wn.2d 1019 (1996), that a union's right to investigate facts pertaining to grievances is concomitant and necessary to the right to pursue grievances. In Pasco School District, supra, the Commission did not directly address the union's need for information about the grievant's supervisor, apparently being satisfied with the combination of existing grievances and allegations the supervisor had created a hostile working environment for the grievants. See also City of Bremerton, supra, and State of Washington (Washington

State Patrol), supra, both holding that all documents an employer considers in deciding to discipline employees are presumed to be needed by the union representing the employees.

Request for Use in Collective Bargaining Context

The third factor (i.e., that the request is made in the collective bargaining context and in support of collective bargaining duties or obligations), has been well explored in prior decisions. The Commission has held that rights to notice and an opportunity to explain one's version of events before receiving discipline stem from the United States Constitution rather than this state's collective bargaining laws and, therefore, that a union cannot use its statutory right to information in order to get data for a Loudermill meeting.[14] City of Bellevue, Decision 4324-A (PECB, 1994). Similarly, a union cannot use this right to obtain information solely for use in court. Highland School District, Decision 2684 (PECB, 1987). However, the fact that collective bargaining and litigation activities are proceeding in parallel does not reduce the employer's obligation to give the union information for use in the collective bargaining context. City of Seattle, Decision 3329-B (PECB, 1990).

Information Provider Must Voice Concerns

Finally, the party receiving an information request has a duty to explain any confusion about, or objection to, the request and then negotiate with the other party toward a resolution satisfactory to both. Pasco School District, supra, citing prior Examiner decisions with approval.

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[14] See discussion in note 6, supra. One may argue, however, that although the employee's right to a pre-disciplinary hearing derives from constitutional sources, the union's obligation to represent the employee at that stage derives from its statutory responsibilities as an exclusive bargaining representative.

APPLICATION OF LEGAL STANDARD

Relevancy of the Requested Information

Brian Cassin was put on paid leave "due to allegations of inappropriate conduct toward a student" at his school. The union's first request was for all documents supporting the allegations, including witness statements, complaints, and supervisor's notes; parts of Cassin's personnel file; rules believed violated, and records of others involved in similar offenses. A later request asked for all information leading to the decision to put Cassin on paid leave. After Cassin's discharge, the union sent two additional information requests focused on evidence supporting the reasons cited in Cassin's discharge letter.

Patrick Laing was put on paid leave for "a physical confrontation with your supervisor...a witness alleges you had Mr. Nguyen in a head lock." The union requested a list of specific records such as security reports and log sheets, statements by persons whose titles indicate they might have had knowledge of the incident, and any other investigative reports on the incident.

It is interesting to note that Michigan's Employment Relations Commission has decided a case surprisingly similar to the present one. There MERC required a school district to turn over information that led it to suspend a teacher with pay pending investigation.

> The record establishes that information regarding these conversations with third parties was not otherwise available to the Charging Party and that it was both relevant and necessary to Charging Party's duty to process the grievance. If the information was so confidential that the Respondent felt that it could not release it, then it would have been better

> advised not to impose discipline on this basis.[15]
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> Flint Community Schools, Docket No. C92 J-272 (1993).

The union in the present case requested information related to the work performance of two bargaining unit members. Such information is presumed relevant, Pasco School District, supra, and the employer has not contested the relevancy of the requested information. The union has satisfied the relevancy factor of the duty to provide information formula.

Need for the Requested Information

In considering this factor it is important to focus on the information the requesting party already had when it made the particular requests.

Cassin's Situation -
The union knew only that Cassin had been sent home for possible inappropriate conduct toward a student when it made its first two or three requests for information.[16] The employer described the allegations and gave the names of some adult witnesses in the Loudermill meeting on November 2, 1995. No more information was given to the union until three weeks after Cassin's discharge.

The employer suggests the Commission should defer the question of what information the union needed about Cassin to the arbitrator(s) deciding his grievances; this is separate from the employer's argument that the pendency of arbitration deprived the Commission of jurisdiction over this complaint. Alternatively, the employer: (1) asserts the union has not proven the information it received at

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[15] The only discipline revealed in the case is the suspension with pay.

[16] The union's third request is dated the same day as Cassin's Loudermill meeting and the record does not indicate which occurred first.

the Loudermill meeting was inadequate and therefore has no right to additional information under City of Bellevue, supra, and (2) argues the union's need for information before Cassin's discharge is strictly limited by the allegations of his pre-discharge grievance (i.e., whether paid leave was discipline and the basis for the employer's refusal to provide the requested information). The employer contends it fulfilled its duty to give the union information after Cassin's discharge; it fails to address the approximate three week delay between Cassin's discharge and its first disclosure of documents to the union.

Examiner decisions have declined to leave the question of a union's need for information to grievance arbitrators. City of Bremerton, supra, and State of Washington (Washington State Patrol), supra. There is no reason to depart from that approach in the present case. The employer's remaining arguments are misdirected; they address the factor of use in a collective bargaining context, rather than the factor of need for the information, and are therefore discussed below, beginning at page 17.

Though it had no specifics, the union knew Cassin faced serious allegations that would warrant heavy discipline if proven, since the October 13, 1995 letter confirming his paid leave status mentioned "allegations of inappropriate conduct toward a student". The record reveals no source of information for the union other than the employer. I must conclude the union genuinely needed the information listed in its requests.

Laing's Situation -

The record indicates the union knew Laing was alleged to have had a physical confrontation with his supervisor, witnessed by at least one other employee, when it made its first and only information request for a long list of specific reports, any statements by fellow workers, and any notes made by various named managers.

The employer urges deferral of this question to the arbitrator deciding the discharge grievance. The employer also argues the requested information was not necessary because neither the union nor Laing had filed a grievance before the request, which the employer reads City of Bellevue, supra, to require.

As discussed with regard to Cassin, it is inappropriate to defer this question to an arbitrator. The argument about the necessity of a grievance when the union makes an information request is more properly addressed to the factor of use in a collective bargaining context, discussed immediately below.

Laing faced a very serious allegation about which the union had almost no information. The record indicates no source of information for the union other than the employer. Accordingly, I must conclude the union genuinely needed the information it requested.

Use in Collective Bargaining Context

In considering this factor, it is important to focus on the requesting party's explanation of the purposes for which it wanted the particular information; that is all the other party can review before deciding whether to comply with the request.

Cassin's Situation -
The first request for information said:

> 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 (**bold** in original).[17]

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[17] The union was handicapped by the fact that it knew no specific allegations against Cassin until the Loudermill hearing some three weeks after he was sent home.

The second request said Cassin felt unjustly punished by the paid leave and contended the employer's refusal to provide the information was a denial of due process and prevented the union from effectively representing Cassin. Once Cassin filed his pre-discharge grievance, the union asserted it needed the requested information to represent him in that grievance. After Cassin's discharge, the union contended it needed the information it still had not received in order to fulfill its obligation to represent him.

The employer makes two non-deferral arguments against the union's pre-discharge requests for information about Cassin:[18] (1) that every pre-discharge request asserted constitutional due process claims over which the Commission has declined jurisdiction, and (2) that after Cassin's pre-discharge grievance the union was entitled only to information about whether the employer considered paid leave to be discipline, and about the basis of the employer's policy of withholding information until after imposing discipline, since those were the foci of the grievance. This latter contention proceeds from the employer's desire that a union be prevented from bootstrapping its way to information by grieving an employer's refusal to provide that information.

Timing Does Not Invalidate Request - The employer wrongly characterizes the union's pre-discharge information requests as for constitutional due process purposes only; arbitrators required employers to give disciplined employees procedural due process, including notice of charges and an opportunity to respond, long before Loudermill imposed similar requirements for civil service employees. None of the union's requests asserted the information was needed to prepare for a Loudermill hearing, as the request in

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[18] The employer recognizes its obligation to provide information after it discharged Cassin and asserts it complied, although as noted above, it says nothing about the three week delay.

the City of Bellevue had.[19] Although a Loudermill hearing was certainly foreseeable in Cassin's case, it is also true that employer action follows Loudermill hearings as the night does the day, and that employer action begets grievances. Thus, 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. I cannot conclude that information requests regarding potential employer action and potential grievances, which are otherwise legitimate and enforceable, are transformed into unenforceable requests just because they are made before the employer schedules a Loudermill hearing.[20] A contrary conclusion would grant employers inappropriate control over the timing of union rights to information.

Request Anticipating a Grievance is Proper - The employer argues that City of Bellevue holds "a union's request for information in anticipation of filing a grievance is not sufficient to create an employer's duty to provide information".[21] A careful reading of that decision reveals the Commission mentioned the lack of a pending grievance solely to address and correct the Examiner's mistaken belief that a grievance had been filed before the request for investigative files was made; no opinion is given on the

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[19] The employer has repeatedly characterized the union's information request as for the entire internal investigation files on Cassin and Laing, but it has not included in the stipulated facts and exhibits any evidence supporting its characterization, such as a list of the contents of the investigative files. Ironically, the Commission might uphold a request focused on Loudermill preparation in Cassin's case despite its City of Bellevue decision, since the employer withheld even **allegations** against Cassin until the Loudermill meeting began. Thus, this union had the need for the information which the Commission determined was lacking in City of Bellevue.

[20] I note the Loudermill meetings were held 21 and 22 days, respectively, after Cassin and Laing were put on paid leave.

[21] Respondent's initial brief, page 11.

necessity of a grievance as a precondition to the duty to provide information, nor do the facts of City of Bellevue require such a ruling.

Furthermore, NLRB precedent runs against the employer's position. Board decisions on the duty to provide information clearly disavow any requirement that a grievance be filed before one party has a right to receive, and the other party an obligation to provide, relevant information. For example, see American National Can Co., supra, where the Board added the language in **bold** to a quote from NLRB v. Acme Industrial Co., supra:

> Disclosure by an employer of requested information "necessary ... to enable [a union] to evaluate intelligently grievances filed" **or contemplated**...(emphasis by **bold** added).

The Board has also found a violation where no grievance had been filed and if one were filed, it might be found untimely; the relevancy test was clearly met and the timeliness problems of a possible grievance would be for an arbitrator, not the Board. United States Postal Service, 303 NLRB 502 (1991).

Other state agencies administering public sector collective bargaining laws have addressed this issue. An Illinois Education Labor Relations Board administrative law judge required disclosure to a union of reports and statements about an incident over objections that no grievance had yet been filed.

> The Federation sought information to determine whether there was a breach of the parties' Agreement... The Federation's request for information was both necessary and reasonable for its determination of whether to pursue a grievance over Thompson's disciplinary removal from his extracurricular duties. The District's attorney...noted that it appeared that the "records are sought merely to assist someone to decide on Mr. Thompson's behalf whether to take action." Contrary to the

> District's belief, this is a valid reason to seek relevant information.
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> Dupo Community Unit School District 196, Docket No. 96-CA-0021-S (1996).

And in summarizing the law on providing information, Oregon's Employment Relations Board has confirmed "[t]he duty...applies to discovery of information for purposes of initiating grievances" as well as to processing grievances to and through arbitration. State of Oregon, UP-24-88 (1989).

The only contrary agency decision I have found is Town of Davie, Florida PERC Docket CA-95-050 (1995). The town deducted a doctor's cancellation fee from the pay of a fire fighter who had failed to keep an appointment, disciplined him, and denied the union's request for the employer's basis for the deduction. The agency's general counsel dismissed the charge, noting that a prima facie case would be stated if the union grieved the employer's refusal to provide the requested information. Several policy reasons justify rejecting this approach, in my opinion. It seems to raise form over substance. It requires grievances to be filed in order to obtain information which could have prevented a grievance by persuading the employee and union that no contract violation had occurred. By increasing the number of grievances, it risks exacerbating collective bargaining relationships which are made difficult enough by the competing interests inherent in the statutory system. For each of these reasons, I prefer to adopt the approach of the NLRB, Illinois, and Oregon, under which an employer is obligated to provide relevant, needed information where circumstances indicate a contract violation may exist though no grievance has yet been filed.

Employer's Concern Over Bootstrapping - The employer has objected in advance to any order that would permit a union to obtain requested information simply by grieving an employer's denial of the information. This is a legitimate qualm which is

satisfied by NLRB precedent. The Board has found violations in situations where a major change that would affect employees is in the offing, or the facts suggest the employer might be violating contract provisions; in each of these cases, the obligation to provide information is triggered by specific employer actions rather than any union reaction.

For example, foreseeable major changes in the structure or ownership of the employer may trigger the union's right to information. Affirming a Board decision, the First Circuit Court of Appeals explained the rights and responsibilities in advance of a merger which the employer described as certain to occur:

> Put another way, requested information should be deemed relevant if it is likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer's decision-making process on persons within the bargaining unit. ...

Providence Hospital and Mercy Hospital v. NLRB, 93 F.3rd 1012, 1017 (1996).

Rejecting the employer's argument that the union had no right to information because the merger had not yet occurred, the court said "[a] union is entitled to plan in advance for likely contingencies." Ibid. On a similar theory, a union's request for information about an alleged sub-contracting of bargaining unit work must be fulfilled. Appel Corp., 308 NLRB 425 (1992).[22] The same result applies to alleged alter ego situations. Barnard Engineering Co., 282 NLRB 1101 (1987).

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[22] On the other hand, where the employer was obviously only exploring in a general way the concept of subcontracting school administration to a private firm, it was not required to provide information to the union about the contract which never came into existence. Pinckney Community Schools, Michigan ERC Docket No. C94 F-136 (1996).

Lastly, numerous NLRB decisions enforce employers' obligations to provide information where unions have reason to believe employers may be violating a contract right. In Hertz Corp., 319 NLRB 597 (1995), the Board found the union had reasonable suspicion the employer had been violating their contract's non-discrimination clause by hiring many foreign nationals in its Washington, DC, offices but no African-Americans, and the union was therefore entitled to equal employment opportunity information on applicants for bargaining unit positions. The union in Associacion Hospital del Maestro, Inc., 317 NLRB 485 (1995), was concerned about possible erosion of its bargaining unit and was therefore entitled to information about the employer's use of per diem nurses. And in Pennsylvania Power and Light, 301 NLRB 1104 (1991), the union was entitled to a summary of the information that led the employer to request drug testing of several employees, so that the union could determine whether the employer had met its self-imposed standard of testing for "suspicion".

A review of the facts of each case mentioned above should be reassuring to the employer, for in each situation the union's right to information was occasioned by the respective employer's action or proposed action, rather than being constructed by the union out of whole cloth.

Conclusion - Based on the absence of contrary Commission precedent, and the existence of clear NLRB precedent in a subject area where the Commission has previously followed such precedent, I find that investigation of a potential grievance on behalf of Cassin (both during his paid suspension and after his discharge) is an appropriate collective bargaining related purpose for using the information requested by the union.

Laing Situation -
The union's first and only information request involving Laing stated the union needed the listed information to fulfill its

obligation to represent Laing and to decide whether to grieve the paid leave as discipline.[23] This brief explanation must be considered against the background of the existing dispute over access to information about Cassin. In fact, the parties behaved as if Laing's situation were subsumed by Cassin's. The employer never responded in writing to the union's request for information about Laing, though the parties must have talked because the union attended the employer's interview of the witness to the altercation. Unlike the Cassin situation, the union did not repeat its request even though a month intervened between the request and Laing's discharge, and another month between Laing's discharge and the union's first receipt of any of the requested information. These facts demonstrate the parties knew the other's position on this issue was the same as in Cassin's situation.

The employer contends it correctly refrained from giving the union the requested information because no grievance had yet been filed, and that it satisfied any obligation to provide information that could occur before it decided to discharge Laing by giving him and the union a summary of the facts pursuant to Loudermill.

As discussed above with regard to Cassin, the duty to provide information can be triggered before a grievance has been filed, and this duty exists independent of any employer obligations imposed by Loudermill. The union was seeking information about Laing for a collective bargaining related purpose.

Summary of Union Entitlement to Requested Information

To summarize, the union requested information about the work performance of bargaining unit members, a type of information which

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[23] The reference to the information being needed to consider grieving must have been made verbally; it does not appear in the written information request, but the parties stipulated it was made.

is presumed relevant. The union had no source for the information but the employer, and bargaining unit members were facing serious allegations which, if proven, would warrant further employer action; therefore, the union had a genuine need for the information. Finally, investigation of potential grievances is a collective bargaining related purpose which triggers the employer's obligation to provide the requested information or articulate any concerns about producing the information and negotiate with the union toward resolution.

Under the circumstances of this case, the union's right to information about Cassin crystallized at least by the date the employer completed its investigation into the incident precipitating his paid leave, which occurred when the investigator's first report and witness statements were given to the employer on October 26, 1995. It seems reasonable to require the employer to answer the union's questions at least by the time it is ready to take further action. Here the employer obviously felt it had enough evidence by the end of October because it scheduled a Loudermill meeting for November 2, 1995. This two week delay in obtaining answers to the union's questions is long enough to be uncomfortable for Cassin but does not seem so long that witnesses' memories would likely be impaired by the time the union could begin its own investigation. Under the circumstances of this case, the union's right to information about Laing crystallized at least by the time the employer told Laing to schedule his Loudermill meeting.[24]

Duty to State Concerns and Negotiate Resolution

The employer has raised several policy-based arguments in this proceeding: That complying with the union's request would permit

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[24] The record indicates one witness was reinterviewed after the January 9, 1996 Loudermill meeting by management in the union's presence, but the employer evidently had concluded when it wrote Laing on January 4, 1996, that it had enough facts to get Laing's response.

the union to interfere with the employer's right to discipline employees; that an early release of investigation results to the union could discourage witnesses from giving candid, truthful statements; that the union or the subject of the investigation could pressure witnesses to change their testimony, or adapt his own testimony to fit that of other witnesses; that attorney-client privilege or witness confidentiality might be involved, and that the employer could be discouraged from putting employees on paid leave pending investigation because of the duty to immediately respond to union information requests.

I take these to be objections to producing information before the employer's investigation is complete; the employer agrees it owed the union the requested information after it discharged Cassin and Laing, and the employer is in no different position vis-a-vis witnesses after the discharges than it is after finishing its investigation.

Concerns Not Timely Raised -
These are legitimate concerns the employer could have shared with the union after receiving its information requests. This was not done, as required by law. The only direct response in the record to the union's information requests stated the employer's position that the union had no right to information until the employer had disciplined Cassin and a grievance challenging the discipline had been filed; there was no written response to the Laing inquiry, but it is fair to infer the employer's position was the same.

While the employer justified its denial of Cassin's pre-discharge grievance by claiming the union wanted to participate in deciding whether discipline was appropriate, and that giving the requested information would impair the employer's ability to conduct its investigation, the employer later abandoned these contentions. They do not appear in the later responses to Cassin's pre-discharge grievance, nor are they mentioned in the employer's briefs.

Furthermore, the record lacks any indication the employer intended, or the union understood, these comments to be an articulation of concerns over producing the requested information and an invitation to the union for negotiation of a satisfactory resolution. Indeed, there is no logical connection between such an interpretation of those comments and the position taken in the employer's formal response to the information request; if the employer is convinced no union right to information exists until after discipline and a grievance, then no amount of discussion of management's right to discipline and of management's investigatory methods will satisfy the employer's expectation that discipline and a grievance are conditions precedent to any duty to respond.

I must conclude the employer did not present to the union the concerns it raises here about producing the requested information before completing its investigations.

Result of Failure to Timely Voice Concerns -

In the absence of Commission and Examiner decisions on the results of an employer's failure to timely raise its concerns with the union, it is appropriate to look to the NLRB for guidance, as the Commission has done on other aspects of the duty to provide information. The Board will consider, in an unfair labor practice proceeding, concerns the employer raised with the union upon receiving the information request. Geiger Ready-Mix Co., 315 NLRB 1021 (1994).[25] Legitimate and substantial confidentiality concerns an employer has expressed in response to a union's information request will be balanced against the union's need for that information. Pennsylvania Power and Light Co., supra.

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[25] The Board there held the employer had not proven a significant interest in keeping its customer and jobsite lists confidential, though it had properly offered to negotiate about its concerns with the union.

But an employer's attempt to make arguments against producing information that were not previously addressed to the union is generally unavailing.

> [T]o permit the requisite balancing [of interests involved when requested information is confidential], the employer normally must advance its claim of confidentiality in response to the union's information request. Only in that way will the parties have a fair opportunity to confront the problem head-on and bargain for a partial disclosure that will satisfy the legitimate concerns of both sides. ... Setting this principle into motion, the Board has held that it is untimely for an employer to raise a confidentiality objection to an information request for the first time after proceedings before the Board have been commenced. ... Thus, because the Hospitals failed to follow the proper procedural sequence and neglected to assert a confidentiality objection in their exchange with the union, we reject this [confidentiality] line of defense.

Providence Hospital and Mercy Hospital v. NLRB, supra, at 1020-1021 (citations omitted).

This precedent indicates I should dismiss the employer's untimely arguments. I thoroughly support the Board's reasons for adopting such a policy, deeming it crucial to achieving labor peace that parties divulge all their concerns to each other at a time when they can amend their behavior to accommodate the other's concerns. Nevertheless, the lack of Commission precedent on this question and the clear direction by Division II, Court of Appeals, in Vancouver School District 37 v. SEIU, Local 92, supra, that the Commission must balance competing interests, compel me to continue this analysis of the employer's arguments.

The employer argues the union would obtain an opportunity to participate in the employer's decision whether to discipline employees, and how much discipline to impose, if the union's requests for information must be fulfilled when made in this case.

That is simply not the case. Employers possess the power to discipline regardless of remedies provided in collective bargaining agreements, and of constitutional rights like Loudermill provides. An obligation to provide information about an investigation while it is ongoing does not require an employer to accept without caveat any criticism of the investigation or its results that a union may advance. The fact that discussions with the union led the employer to permit Cassin to return to work in a different setting suggests this employer and union are able to work together. Their Agreement also reflects a mutual intent that the employer communicate freely with the union.[26] These concerns are not well-founded.

The employer also contends early disclosure of investigation results to the subject and his union may discourage witnesses from making candid statements to the employer and may also permit the subject to adjust his version of the events accordingly. In light of these concerns, it is difficult to understand why the employer agreed to the following language in its current collective bargaining agreement:

> All individuals who might possibly contribute to the acceptable judgment of a grievance are urged to provide any relevant information they may have **to the grievant and/or the District administration** with full assurance that no reprisal will follow by reason of their involvement in the grievance.

Exhibit 1, Article XVII, Section D.1 (emphasis by **bold** supplied).

Surely this language encourages employees to seek out both the employer and union with information about the facts of grievances. If the parties believed when negotiating their Agreement that such shared information would assist them in properly deciding grievances, isn't it likely such shared knowledge would also contribute to

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[26] Exhibit 1, Article V.A.1, D.

preventing problems from becoming grievances, or at least allow the parties to reduce their areas of disagreement?[27]

Presented with the same claim that information could not be given a union early because of possible pressure on witnesses, the Illinois Local Labor Relations Board said:

> More to the point, in this [grievance and arbitration] process the employer is not an impartial administrative agency with no personal interest at stake but is, instead, a party in interest. As such, there is no apparent reasonable basis for denying the other party in interest, the union, equal access to the information since any concerns regarding witness intimidation are as applicable to the employer as they are to the union in this setting.

County of Cook (Oak Forest Hospital), Docket No. L-CA-91-045 (1992).

Applicable precedent suggests the employer's concerns about the possible deleterious effects on its own investigation of sharing information with the union have been weighed in the balance with the union's need for such information and found wanting.

In a summary fashion and without factual support in the record, the employer also suggests an obligation to provide information during an investigation may run at cross purposes with the attorney-client privilege, attorney work product considerations, and confidentiality. These arguments must await cases where the facts require that they be answered.

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[27] I note in this regard that the employer interviewed one witness in the union's presence during its investigation of Laing's situation; this must have been better for the parties than the dispute that occurred during the Cassin investigation over the union's separate questioning of an employee witness.

I conclude that the employer's stance in this case has prevented it and the union from reaching their own, particularized accommodation of their differing interests on the question how investigation results can be disclosed to the union in some manner before the employer completes the investigation. I find that the purposes of Chapter 41.56 RCW will more likely be achieved by these parties negotiating over such matters than by my determining when, during its investigations, the employer should have given the requested information about Cassin and Laing to the union.[28]

Remedy

The employer violated RCW 41.56.140(1) and (4) when it: (1) failed to articulate and negotiate over its concerns about telling the union its reasons for suspending Brian Cassin and Patrick Laing and sharing the results of its investigation while the investigation was on-going, and (2) continued refusing, after it had completed its investigation, to provide the requested information to the union.

The customary remedy in these cases is returning the complainant to the position it would have been in if no violation had occurred and posting an appropriate notice. If the employer had not violated the law, the union would have received the requested information about Cassin on October 26, 1995, rather than in late February and early March 1996, and about Laing on January 4, 1996, instead of in

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[28] For similar decisions preferring negotiated resolutions to imposed ones, see Exxon Co., 321 NLRB ___ (No. 126) (1996)(also found at 153 LRRM 1017)(though employer's interests in confidentiality less than union's interest in receiving information, disclosure order conditioned on good faith bargaining toward confidentiality agreement or other protective procedure), and Oil, Chemical & Atomic Workers v. NLRB, 711 F.2d 348 (D.C. Cir., 1983)(where both parties' legitimate interests implicated by information request, Board preference that parties with long-standing bargaining relationship attempt to negotiate accommodation was proper and enforced).

early March and late April 1996. The union asserts this delay prevented it from conducting its own investigations while witnesses' memories were fresh and unaffected by others, and precluded it from presenting extenuating facts to the employer before it made firm decisions to discharge Cassin and Laing. An additional result of the violation is that the grievance arbitrations have been delayed while this complaint was processed.

The union has not presented facts that would permit me to determine whether the employer's violation actually harmed the union's investigations in any quantifiable manner. However, a mere posting is unlikely to deter future violations by this employer or other employers, since there would be no disincentive directly tied to withholding the information. On the other hand, precluding the employer from using the improperly withheld information in the upcoming grievance arbitrations, as is done for Weingarten violations, seems overly harsh. Accordingly, to effectuate this decision and discourage future violations, the employer is ordered to make Brian Cassin and Patrick Laing whole for the time period their discharge grievance arbitrations were delayed by the employer's violation. This compensation for lost wages and benefits is separate and distinct from any compensation an arbitrator may order as a result of the grievances, because it results from a violation of Chapter 41.56 RCW rather than of the parties' Agreement.

FINDINGS OF FACT

1. Seattle School District is a public employer within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 609, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of an appropriate unit of custodial engineers and gardeners employed by

the Seattle School District. Brian Cassin and Patrick Laing were bargaining unit members at all relevant times.

3. The employer and union have negotiated a collective bargaining agreement which grants the employer the right to discipline for proper cause, requires the employer to explain changes to the union and employees, and encourages employees to bring relevant information about grievances to the employer and/or the union without fear of reprisal.

4. Brian Cassin was suspended with pay on October 12, 1995. The employer informed him on October 13, 1995, that the suspension was for alleged inappropriate conduct toward an elementary student. When the union requested the reasons and supporting documentation for the employer's action, the employer replied on October 16, 1995, that the union had no right to information before the employer took disciplinary action and in the absence of a grievance.

5. On October 19, 1995, Cassin grieved his paid suspension as discipline and challenged the employer's refusal to provide the requested information as a violation of the collective bargaining agreement. The union obtained no information as a result of processing this grievance, which was pending at arbitration when the file in this case was closed.

6. The employer's investigation into allegations of Cassin's inappropriate conduct toward a female student was complete on October 26, 1995, when it received an investigator's report and witness statements.

7. The employer did not give Cassin or the union any specifics of the allegations or any witness names until a pre-disciplinary meeting on November 2, 1995. Repeated union requests for more information made between November 1995 and late February 1996,

were denied by the employer on the grounds it had not yet imposed discipline.

8. The employer discharged Cassin on February 5, 1996. He grieved on February 6, 1996. The employer gave the union some of the requested information in late February 1996, and additional information in early March 1996.

9. Patrick Laing was suspended with pay, but without an explanation, on December 13, 1995. On January 4, 1996, the employer informed Laing and the union the suspension was for a physical confrontation between Laing and his supervisor. The employer's investigation into Laing's confrontation with his supervisor was complete on January 4, 1996. A pre-disciplinary meeting was held on January 9, 1996.

10. On January 10, 1996, the union requested information from the employer that related to the alleged confrontation. The employer did not respond in writing to that request.

11. The employer discharged Laing on February 6, 1996. He grieved the discharge on February 8, 1996. The employer gave the union some of the requested information on March 8 and additional information on April 24, 1996.

12. Each of the union's requests for information were clear, described information that it genuinely needed, and sought information which was relevant to its collective bargaining duties and responsibilities.

13. The employer failed to timely raise and discuss its concerns about providing information to the union during its investigations of Cassin and Laing.

14. The purposes of Chapter 41.56 RCW are more likely to be achieved by the employer and union negotiating appropriate accommodations of their respective interests in sharing information during the employer's investigations of employees suspended with pay, than by my determining those issues.

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

Based upon the foregoing findings of fact and conclusions of law, I make the following:

ORDER

SEATTLE SCHOOL DISTRICT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to provide relevant information 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. Compensate Brian Cassin in wages and benefits as if he continued to be employed by the Seattle School District during the period his discharge grievance arbitration was delayed by this proceeding.

b. Compensate Patrick Laing in wages and benefits as if he continued to be employed by the Seattle School District during the period his discharge grievance arbitration was delayed by this proceeding.

c. 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.

d. Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the Seattle School Board.

e. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Dated at Olympia, Washington on the 3rd day of January, 1997.

Public Employment Relations Commission

Pamela G. Bradburn

PAMELA G. BRADBURN, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.