CITY OF BREMERTON, Decision 6006 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BREMERTON PATROLMEN'S ASSOCIATION, Complainant,	)	CASE 12707-U-96-3045
vs.	)	DECISION 6006 - PECB
CITY OF BREMERTON, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Roger C. Cartwright, Attorney at Law, appeared on behalf of the complainant.

Jean Schiedler-Brown & Associates, P.S., by Jean Schiedler-Brown, Attorney at Law, appeared on behalf of the respondent.

On September 17, 1996, the Bremerton Patrolmen's Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the City of Bremerton committed unfair labor practices in violation of RCW 41.56.140(4) and (1), by refusing to provide specifically requested information necessary for the processing of a grievance. A hearing before Examiner Katrina I. Boedecker was scheduled for March 18, 1997. At the time and place set for the hearing, the Examiner granted the parties' request to submit the case on stipulated facts followed by written briefs. The record before the Examiner thus consists of six exhibits marked on March 18, 1997, and the stipulation of facts filed on April 1, 1997. The record was closed with the filing of briefs on May 1, 1997.

BACKGROUND

The stipulated facts and exhibits establish the following:

A. Jeff Moon was formerly employed as a police officer with the Bremerton Police Department, within a bargaining unit re represented by the Bremerton Patrolmen's Association (association).[1]

B. The City of Bremerton (city) imposed discipline on Officer Moon on three separate occasions:

- A 5-day suspension for traffic accidents;
- A 30-day suspension for misuse of cellular phones; and
- Termination of employment for going to CENCOM (Central Communications Center) without authority, and making comments about the Chief.

C. The city and association had a collective bargaining agreement in effect at the time discipline was imposed. Within the agreement there is a provision setting out procedures that require grievances to be put in writing within a certain period of time. The association did not submit a timely written grievance in reference to the 5-day suspension for traffic accidents.

D. The association attempted to grieve all three disciplinary matters. An arbitration hearing was scheduled for September 24, 1996.

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[1] The association is the exclusive bargaining representative of Bremerton police officers in the ranks of sergeant and below.

E. On May 28, 1996, Roger Cartwright wrote to the city in his capacity as attorney for the association, requesting:

- Any and all disciplinary memorandums (e.g., letters of reprimand, counseling statements, etc.) regarding employees involved in the abuse of cellular phone privileges.
- All transcripts taken from taped conversations between Officer Moon and dispatch.
- All transcripts of tape recordings between police officers and dispatch from March through August of 1995.
- Officer Moon's entire personnel file - to include discipline and Letters of Commendation.

F. August, the parties had agreed to bifurcate the grievance hearing.[2] By this time, the city had supplied the union with all of the information pertaining to the CENTCOM incident which led to Moon's termination, all of the information pertaining to the 30-day suspension for misuse of cellular phones, and all of the information regarding the traffic accident which led to the 5-day suspension.

G. On September 5, 1996, Cartwright sent the employer a written "clarification and explanation" of his requests for information:

- He sought other disciplinary files open or pending involving the grievant, explaining "[I]f you intend to

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[2] The parties were to first present issues concerning the arbitrability of the 5-day suspension and the termination under the grievance procedure of the collective bargaining agreement.

enter these files into evidence or otherwise refer to these during the arbitration, I would like the opportunity to review them before the arbitration.";

- He asked for all investigatory/disciplinary files on Bremerton Patrolmen's Association members who had been in on-duty traffic accidents over the past five years;[3]
- He requested the internal affairs investigations and findings resulting in discipline involving specifically named officers;[4] and
- He reiterated his request (made the previous May) for information regarding other employees involved in abuse of cellular phones.[5]

H. One week before the arbitration hearing, Cartwright again sent the city a written request for information. He explained, "Again, I believe the City of Bremerton has treated Jeff Moon in a more severe fashion than other employees, similarly situated, for similar types of misconduct. ... This is the theory under which I am attempting to gain discovery."

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[3] Cartwright wrote that his preliminary investigation showed no other officer had received a 5-day suspension for such an incident, and he offered that he needed the requested information to develop theories of disparate/unequal treatment and progressive discipline/notice.

[4] Cartwright advanced that he needed to compare Moon's situation with the misconduct and discipline in those cases, and to explore theories of disparate treatment, lax enforcement of rules, and progressive discipline.

[5] Cartwright wrote that he had information that others within the department were engaged in this type of activity and, rather than being disciplined, they were given the opportunity to pay back any loss incurred to the city.

I. The city complied with some of Cartwright's requests:

- It produced the requested information on Officer Moon;
- It allowed association representatives to listen to taped conversations between other officers and dispatch; and
- It produced information on situations where other department employees were involved in alleged abuse of cell phone privileges.

J. During the arbitration, the city produced an investigatory file pertaining to a former employee. That file was not one of the four specifically requested by the union, and the city claimed it was produced because it was the only similar incident known within the 5 years prior to Officer Moon's discipline on December 20, 1995.

K. As to the officers about whom the union had requested information, the city responded as follows:

- It claimed that the first incident occurred after the grievant's discipline was imposed and furthermore, was determined by the department to be unfounded;
- It claimed the second incident was outside the scope of discovery, because both the incident and the investigation results occurred after the grievant's discipline was administered; and
- It claimed that there was no internal investigation, no findings, and no discipline in the case of the third officer identified by the association.

After hearing evidence on the issue and receiving briefs, Arbitrator Kenneth McCaffree ruled that he was without jurisdiction to

hear the grievances pertaining to the 5-day suspension and the termination, and that information on the traffic accident was irrelevant. McCaffree was prepared to arbitrate the grievance pertaining to the 30-day suspension, but the association elected not to pursue the matter further, and did not contest or appeal the arbitrator's decision.

POSITIONS OF THE PARTIES

The association argues that it made a timely request for relevant information which it needed to properly perform its function as exclusive bargaining representative, and that it had a genuine need for the information to show whether similarly-situated employees were being treated in an equal fashion. It contends the city failed to articulate a reasonable objection to providing the information in a timely fashion, and failed to negotiate the issue in any manner.

The city contends it objected to the disputed requests for information based upon lack of jurisdiction, since its theory was that the discipline for the traffic accident was not timely grieved. It also argues that the three requested files all pertained to discipline that occurred subsequent to the 30-day suspension of Moon, so that they were irrelevant and not likely to lead to relevant information.

DISCUSSION

As part of the duty to bargain, the parties to a collective bargaining relationship are required to furnish, upon request,

information needed by the opposite party for contract negotiations or for the administration of an existing contract. Town of Steilacoom, Decision 5947 (PECB, 1997); City of Bellevue, Decision 3085-A (PECB, 1989), affirmed, 119 Wn.2d 373 (1992). The duty to provide information certainly applies to requests for information necessary for the representation of bargaining unit members in processing grievances to enforce the terms of negotiated contracts. Pullman School District, Decision 2632 (PECB, 1987); City of Seattle, Decision 3329-B (PECB, 1990).

For the duty to provide information to exist, the information requested must be relevant to the collective bargaining process and relationship. In Pasco School District, Decision 5384-A (PECB, 1996), the Commission explored limits on the duty to supply information in regard to processing a grievance:

> The duty to supply information turns upon the circumstances of the particular case, but a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. Where the request puts the employer on notice of a relevant purpose, an employer is obligated to furnish the requested information. The requesting party must demonstrate more than an abstract, potential relevance of the requested information, and must show that the information is actually relevant. ... [W]here the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, an employer may be obligated to furnish the requested information.
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> Information pertaining to employees in the pertinent bargaining unit has been held to be presumptively relevant. ... [Footnotes omitted]

In Pullman School District, supra, a union requested personnel files of all employees who had been disciplined within the prior five years, for use in a disciplinary grievance. That employer was ordered to provide the requested information. Citing Pfizer Inc. v. NLRB, 763 F.2d 887 (1985), the Examiner in that case explained the relevancy of disciplinary records in such a situation, as follows:

> Arbitrators routinely consider employee work records in deciding whether employers have applied their disciplinary rules in a consistent and non-discriminatory manner. This is a fundamental principle of industrial justice.

The general relevance of comparative disciplinary records is thus clear in the context of a disciplinary grievance case.

Several factors must be present to trigger the employer's duty to supply information:

> The request must be made clear. The information must be requested for use in the collective bargaining context. The information must relate to the union's performance of obligations arising form its status as exclusive bargaining representative; one of these obligations is processing a grievance. The union must have a genuine need for the information. Finally, the duty to provide information requires an employer to articulate, and negotiate with the union over any objections it has to producing the requested information.

City of Bremerton, Decision 5079 (PECB, 1995).

In the present case, the association satisfied all of the factors necessary to trigger the employer's duty to provide information. The association is the exclusive bargaining representative, and it

was attempting to represent one of its members in the grievance arbitration process. The information was requested in anticipation and preparation for the arbitration. The request was clearly made in a timely manner.

The association explained to the city several times what its rationale and theory was for the need for the information. The association's right to the information was necessary to properly perform its responsibilities in administering the collective bargaining agreement between the parties.

The information requested related to the association's performance of its obligations arising from its status as the exclusive bargaining representative. The union had a "genuine need" for the information. Equal treatment of employees is a generally recognized principle of evaluating discipline challenged in a grievance process.

Finally, there is no evidence that the employer "articulated and negotiated" with the association regarding any objections it had to producing the information.

Employer's Defenses

The employer asserts that it never refused to provide *relevant* information under the dictates of Pullman School District, supra, where a union was only seeking records regarding discipline imposed in the five years *previous* to the discipline then at issue. In defending that the files at issue here dealt with disciplinary actions subsequent to the discipline of Moon, the employer fails to realize that the Pullman decision did not limit or preclude unions from requesting information concerning discipline meted out *after*

the incident which is the subject of a grievance hearing. Indeed, the Commission was not presented with such a question in the Pullman case.

The city also contends that it acted in good faith pursuant to the language of the parties' collective bargaining agreement. Pursuant to Section 19.7 of the agreement, the arbitration was to be conducted in accordance with the American Arbitration Association Labor Arbitration Rules. It cites section 28 of those rules, which states in part:

> The parties ... shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall be the judge of the relevance and materiality of the evidence offered. ...

Working backwards from the arbitrator's ultimate results, the city advances that the arbitrator ruled that the 5-day suspension for the traffic accident was outside the jurisdiction of the arbitrator because it was not timely grieved and that the arbitrator denied the association's request for production of some disputed material as irrelevant because the personnel actions that were the subject of the request occurred subsequent in time to the personnel actions being grieved by the association. Therefore, the city claims that the law of the case is that the requested discovery is irrelevant. The standards for the duty to provide information are not result-driven, however. The association has met all the Pullman factors for relevancy vis a vis its role as exclusive bargaining representative. The fact that an arbitrator may later decide that certain issues are time barred or that certain evidence is irrelevant does

not preclude a finding that the exclusive bargaining representative was entitled to the information at a time critical to deciding whether, and how, to pursue a grievance.

The arbitrator's decision also does not estop the association from pursuing this unfair labor practice compliant. The Commission has jurisdiction here because the duty to provide information flows from the parties' duty to bargain in good faith. The parties have access to two separate forums — one statutory and one contractual.[6] The necessity and relevance of requested information is measured prospectively, not in retrospect. Bremerton, supra. The Commission has held that an information request is to be evaluated by whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative. Bellevue, supra. The relevancy of materials sought in preparation for arbitration can be more general than evidence accepted into an arbitration record. The information sought need only be reasonably calculated to lead to the discovery of admissible evidence. The city committed an unfair labor practice in this case before the grievance went to arbitration.

If the city had concerns about releasing the names of officers or other information about discipline that was still being challenged, it could have raised that concern with the union and the parties could have agreed to some accommodation (e.g., supplying the association with redacted files pending final resolution of the other cases). The employer failed to do so when the time was ripe, and thereby prevented consideration of such concerns.

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[6] In fact, the Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

The employer refused to bargain in violation of RCW 41.56.140(4), and, therefore, also interfered with employee rights in violation of RCW 41.56.140(1), when it refused to provide the union with requested information that was relevant to the union's role as exclusive bargaining representative of an employee who had filed a grievance. The union was entitled to have the discipline records of other bargaining unit members to determine if similar offenses were receiving similar discipline, regardless of whether the similar offenses occurred before or after discipline was imposed upon Officer Moon.

Attorney Fees

The association contends that the city has established a pattern of failing to fulfill its responsibilities in disclosing information prior to an arbitration hearing. It thus urges that an award of attorney fees is appropriate in this case. The Commission awards attorney fees as an extraordinary remedy, where it is necessary to effectuate the order of the Commission or where defenses are frivolous and without merit. Lewis County, Decision 644-A (PECB, 1979); affirmed 31 Wn.App. 853 (Division II, 1982), review denied 97 Wn.2d 1034 (1982).

This employer was already subject of a ruling that an arbitrator's determination of relevancy is not controlling when interpreting a party's duty to bargain in good faith. In City of Bremerton, Decision 2733-A (PECB, 1987), the city defended that it did not have to release certain investigation reports because an arbitrator had ruled the reports were irrelevant. In response to a request for attorney fees in that case, the Examiner found that the employer had presented a case of first impression, so that attorney fees were not warranted even though the defense was rejected.

Unbelievably, the city is advancing that exact same defense again in this case. It does not seem to have gotten the message. The association has established evidence that an extraordinary remedy is necessary in the circumstances of this case.

FINDINGS OF FACT

1. The City of Bremerton is a public employer within the meaning of RCW 41.56.030(1).

2. The Bremerton Patrolmen's Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of non-supervisory law enforcement officers employed by the City of Bremerton.

3. The employer and union have negotiated a collective bargaining agreement which contains a grievance procedure incorporating final and binding arbitration of disputes concerning the interpretation or application of the agreement.

4. Prior to May 28, 1996, the association initiated a grievance under the parties' collective bargaining agreement, protesting discipline imposed by the employer upon bargaining unit member Jeff Moon.

5. On September 5, 1996, the association submitted a request to the employer for information from the employer's files concerning discipline of other specifically named bargaining unit members. The request was clearly made for information to be used in the collective bargaining context. The information related to the association's performance of its functions as

as exclusive bargaining representative. The association had a genuine need for the information.

6. The employer failed or refused to provide the information requested by the union, and it did not establish that it articulated concerns to the association, or that it negotiated with the association over any objections it had to producing the requested information.

7. The defenses asserted by the employer in this proceeding were frivolous, in light of a prior unfair labor practice proceeding in which the same arguments were advanced, considered and rejected as meritless.

CONCLUSIONS OF LAW

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

2. By refusing to provide relevant information requested by the Bremerton Patrolmen's Association and needed by that organization to perform its collective bargaining duties and responsibilities under RCW 41.56.030(4), the City of Bremerton committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

3. An extraordinary remedy is warranted under RCW 41.56.160(3) to effectuate the Commission's order in response to defenses which are frivolous and entirely without merit.

Based upon the foregoing findings of fact and conclusions of law, the Examiner makes the following:

ORDER

The City of Bremerton, 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 requested by the Bremerton Patrolmen's Association to fulfill its collective bargaining duties and responsibilities.

   b. 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. Provide all of the information requested by the Bremerton Patrolmen's Association in its letter of September 5, 1996.

   b. Reimburse the Bremerton Patrolmen's Association for its attorney's fees incurred in this matter.

   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. 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.

e. 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.

Issued at Olympia, Washington, on the 8th day of September, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, 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.

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 FOUND THAT WE 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, upon request, provide the Bremerton Patrolmen's Association with information relevant and needed by that organization to fulfill its responsibilities as exclusive bargaining representative in collective bargaining and contract administration.

WE WILL provide the Bremerton Patrolmen's Association with information it requested on October 5, 1995, concerning the disciplinary records certain bargaining unit members.

WE WILL reimburse the Bremerton Patrolmen's Association for attorney's fees incurred in this matter, because the defense we used in this matter had been found to be without merit in a previous unfair labor practice proceeding before the Commission.

WE WILL NOT, in any 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.

CITY OF BREMERTON

BY: _____
Authorized Representative

DATED: _____

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.