STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFFS' GUILD, Complainant, vs. KITSAP COUNTY, Respondent.	CASE 19286-U-05-4897 DECISION 9326-B - PECB DECISION OF COMMISSION

Merker Law Offices, by *George E. Merker*, Attorney at Law, for the union.

Russell D. Hauge, Kitsap County Prosecuting Attorney, by *Ione Sue George*, Senior Deputy Prosecuting Attorney, for the employer.

On March 15, 2005, the Kitsap County Deputy Sheriffs' Guild (union) filed a complaint alleging that Kitsap County (employer) committed multiple unfair labor practices in violation of Chapter 41.56 RCW, including failing to provide necessary and pertinent collective bargaining information and failing to bargain in good faith by misrepresenting information in order to strengthen its position at the bargaining table. Examiner Lisa A. Hartrich held a hearing and dismissed the union's complaint.[1] The union now appeals the dismissal of those allegations.

ISSUES PRESENTED

1. Did the employer fail to provide the union with copies of its draft preliminary budgets and any reports and memorandums showing the employer revenue projections?

[1] *Kitsap County*, Decision 9326-A (PECB, 2008). The Examiner also dismissed the union's allegations that the employer unilaterally changed its practice for charging copying costs for documents, charged an excessive rate for copies, regressively bargained in bad faith, and discriminated against an employee in reprisal for exercising union activities. The union did not appeal the decision to dismiss those allegations.

2. Did the employer fail to bargain in good faith by providing false and misleading information about its financial condition and intentionally withholding certain information from the union?

For the reasons set forth below, we affirm the Examiner's decision that the employer did not commit an unfair labor practice by failing to comply with the union's request for information.[2] This record demonstrates that the union requested from the employer "any and all drafts of the year 2005 preliminary budget" and at the time of the request, such documents did not exist. Accordingly, there was no document in existence that would have satisfied the union's request. Furthermore, the union's allegation that the employer withheld certain reports, memoranda or other internal or external revenue documents is also not supported by the evidence. When the union and employer discussed the union's request for revenue projections, the employer provided the union with additional documents, and the union responded that the information provided was "responsive" to the union's request.

With respect to the union's allegation that the employer failed to bargain in good faith by providing the union with false and misleading revenue information that made the employer's financial status appear to be worse than it was, the union failed to sustain its burden that the employer knowingly or carelessly did so. Accordingly, we affirm the Examiner's decision.

DISCUSSION

ISSUE 1 – Duty to Provide Information

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, governs the relationship between these parties. Under RCW 41.56.030(4), the parties have an obligation to negotiate in

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[2] This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

good faith. Under both state and federal law, this duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd*, *City of Bellevue v. International Association of Fire Fighters, Local 1604*, 119 Wn.2d 373 (1992); *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967). The obligation extends not only to information that is useful and relevant to the collective bargaining process, but also encompasses information that is necessary for the administration of the parties' collective bargaining agreement. *King County*, Decision 6772-A (PECB, 1999).

This case is not about the relevancy of the information requested by the union, nor does the employer argue that the union is not entitled to the information requested.[3] Instead, the question before this Commission is whether the employer failed to adequately search for the requested information in order to sufficiently respond to the union's request.

The duty to provide information does not compel a party to create records that do not exist; however, a party does have an obligation to make a reasonable good faith effort to locate the information requested. *Seattle School District*, Decision 9628-A (PECB, 2008). The duty to locate the requested information also includes a duty to communicate with the requesting party to ensure that the information being gathered is the type of information that is being sought through its request. *See City of Seattle*, Decision 10249 (PECB, 2008), *aff'd City of Seattle*, Decision 10249-A (PECB, 2009). A party may not refuse to respond to an ambiguous or overbroad request, but rather that party is required to request clarification and/or comply to the extent that the request for information clearly asks for necessary and relevant information. *See Keauhou Beach Hotel*, 298 NLRB 702 (1990).[4] Similarly, if a requesting party does not believe the information provided sufficiently responds to the intent and/or purpose of the original request, the requesting party also has a duty to contact the responding party and engage in meaningful discussion about what kinds of information it is seeking so that the other party can comply with the request.

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[3] For a discussion regarding the discovery-type standard, *see King County*, Decision 6772-A (1999).

[4] This Commission and Washington Courts interpret issues arising under Chapter 41.56 RCW by examining federal decisions construing the NLRA when the language of the two statutes is similar. *IAFF Local 609 v. City of Yakima*, 91 Wn. 2d 101 (1978).

Application of Standard

The starting point for cases where the sufficiency of an information request is questioned is the request for information itself. The union represents a bargaining unit of uniformed employees. At the time of the union's July 21, 2004 information request, the parties were in the process of preparing for an interest arbitration hearing, and in preparation for that hearing the union made requests for 22 separate categories of information. Part of the union's request asked for the following documents:

> 17. Any and all drafts of the year 2005 preliminary budget;
> 18. Any reports, memorandum or other internal or external communications revenue projections from 2002 to the present[.]

Exhibit 2. On August 23, 2004, the employer informed the union that the requested documents were available for inspection. The union inspected the documents and, on October 4, 2004, the union informed the employer that the information provided did not include the requested preliminary draft budget for 2005 and revenue projections.

The employer responded to the union the next day by stating that a draft 2005 budget did not exist. However, the employer did provide the union with the "General Fund Financial Model" which showed the projected revenues and expenses through 2010. Upon receipt, the union sent a reply message to the employer stating that the document provided "appear[s] responsive to our requests for revenue projections." Exhibit 13. The union continued to insist that the employer provide it with a copy of the preliminary draft of the 2005 budget.

Although the employer did not provide a copy of the preliminary budget because it did not exist, the employer did offer the union the opportunity to review other documents, including the departmental budget requests. The union declined that offer.

During the interest arbitration hearing which began on October 11, 2004, County Administrator Malcom Fleming testified about the process that the employer used to create the county budget. At that hearing, Fleming produced several documents that outlined the employer's "General Fund Financial Status" and provided instructions to the employer's various department heads on

how to prepare their budget requests for the 2005-2006 biennial budget. Exhibits 23 through 28. When the union discovered that these documents existed, it objected to use of those documents on the basis that it had previously requested those documents and the employer had failed to timely provide them. The union was allowed a certain amount of time to review the documents, and the interest arbitration hearing continued. The union then filed this complaint.

The Examiner found that the employer did not commit an unfair labor practice by failing to produce the requested documents. In reaching this conclusion, she found that the preliminary 2005 budget did not exist at the time of the union's request, and the employer made a credible attempt to locate the requested revenue information. The Examiner specifically credited Benjamin Holland, Director of Administrative Services, who testified that the process the employer uses for creating a budget calls for the preliminary budget to be complete by late October or early November, and in this case the preliminary budget was not complete until November 10, 2004. The Examiner also found that during the employer's and union's exchange of correspondence about the revenue information, the union informed the employer that it had been "responsive" to the request, and therefore the employer reasonably believed that the information request had been satisfied.

The union argues that the Examiner ignored the fact that the employer "lied" to the union when it said that no preliminary budgets existed because certain of the documents produced by Fleming at the interest arbitration hearing were exactly the type of documents that the union claims it requested. The union asserts that the Examiner improperly concluded that the employer was justified in determining that it had satisfied the union's request for revenue information when the union sent its message to the employer that the provided information was "responsive." The union points out that Exhibit 28, the employer's budget instructions, demonstrates that the employer's preliminary budget was prepared in September 2004, well before the interest arbitration hearing. In the union's opinion, the employer also improperly interpreted the union's information request narrowly and failed to look for "all and not just any" documents that were the subject of its request. Union's brief at 11. We disagree.

Request for "2005 Preliminary Budget"

When the union asked for "any and all drafts of the year 2005 preliminary budget," the union made a request for a specific document: the draft preliminary budget. When the employer informed the union that such a document did not exist, the evidence demonstrates that the union did not ask for any documents other than the employer's preliminary budget, or attempt to explain to the employer the types of information that it was looking for, although the union questioned whether or not employer was being truthful in its assertion. *See City of Seattle*, Decision 7000-A (PECB, 2000)(the Commission expects that parties will negotiate solutions to any difficulties they may encounter in connection with information requests). Because the union was expressly looking to obtain "any and all drafts of the year 2005 preliminary budget," the employer was entitled to rely upon the union's statement that it was looking for that specific document, and not any documents that were associated with the creation of that document.

With respect to the union's argument that Exhibit 28 establishes that the preliminary budget should have been completed in September 2004, we note that Exhibit 28 is merely the instructions to department heads on how to prepare the budget, and the timelines that the union relies upon are merely an indication of when a certain document *should* be prepared, and not when the document was actually created or completed. The fact that the employer may have missed its targeted deadline for completion of the document does not mean that the employer failed to comply with the union's information request.[5]

Finally, although the financial reports produced by Fleming at the interest arbitration hearing detail the employer's financial health during specific quarters of the year, none of those documents could reasonably be described as the "2005 preliminary budget." Accordingly, the employer did not commit an unfair labor practice by failing to disclose those documents under the union's request for "drafts of the year 2005 preliminary budget."

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[5] Furthermore, the fact that the employer missed the RCW 36.40.050 statutory deadline for submission of its preliminary budget is of no consequence for this decision. This Commission does not have the authority to administer the provisions of Chapter 36.40 RCW or enforce those provisions through the unfair labor practice provisions of Chapter 41.56 RCW.

Request for "Revenue Projections from 2002 to the Present"

Following the union's request for "revenue projections from 2002 to the present," the employer provided the union with a document entitled General Fund Financial Model. Following the receipt of that document, the union sent the employer a message indicating that "the document you provided does appear *responsive* to our requests for revenue projections." Exhibit 13 (emphasis added). To be "responsive" means "giving or serving an answer : constituting a response made in response to something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1935 (3rd ed. 1986).

Although the union attempts to argue that saying that the information provided was "responsive" does not mean the information satisfied the request, the evidence here demonstrates otherwise. In fact, during the subsequent correspondence between the employer and union regarding the union's request for the draft 2005 budget, the union never claimed that the employer did not satisfy the union's request for the revenue information, nor did the union question the information already provided. Thus, unless the union expressed additional concerns to the employer about the sufficiency of the information provided, the employer was entitled to rely upon the union's statement that the documents provided were "responsive" to its request and deem the information request satisfied.

ISSUE 2 – Duty to Bargain in Good Faith

Chapter 41.56 RCW imposes a duty upon a public employer to bargain in good faith with the exclusive bargaining representative of its employees. RCW 41.56.030(4). The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(1) and (4); 41.56.150(1) and (4). Carelessly or knowingly providing false information in response to an information request violates the duty to bargain in good faith. *Seattle School District*, Decision 9628-A.

The Examiner found that the employer did not commit an unfair labor practice by intentionally withholding evidence from the union or by providing evidence that gave a misleadingly pessimistic outlook on the employer's financial state. The Examiner specifically noted that the employer was "responsive" and "prompt" in complying with the information request and that she was "not convinced" that the union made its case that the employer provided false information.

The union argues that the Examiner's conclusions are incorrect, and points to the employer's failure to provide the documents that it had previously requested as evidence of bad faith bargaining. The union also appears to argue that the information disclosed in the General Fund Financial Model is not supported by the evidence that was later provided by Fleming at the interest arbitration hearing, and argues that because of the differences between the information provided and other financial projections, this Commission should find that the employer committed an unfair labor practice. We disagree with the union's assertions.

As pointed out above, the employer did not commit an unfair labor practice by withholding information from the union. Accordingly, the employer cannot be found to have attempted to mislead the union by withholding collective bargaining information.

We also reject the union's allegation that the employer unlawfully provided documents that painted a pessimistic view of the state of the employer's finances in order to strengthen its own position. In order to prove that a party has provided misleading information, a complainant must prove by a preponderance of the evidence that the respondent provided that information "carelessly" or "knowingly". *Seattle School District*, Decision 9628-A. Accordingly, we reject the union's approach and decline to adopt a *per se* approach that would find an unfair labor practice if any discrepancies are found in information provided through an information request. *Cf. Whatcom County*, Decision 8512-A (PECB, 2005)(decline to adopt a *per se* approach that finds parity clauses presumptively unlawful). Here, because the union provided no evidence that the information provided by the employer was made in a careless or knowing manner, the Examiner's findings and conclusions are upheld.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Lisa A. Hartrich are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 10th day of November, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

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