EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-009-15

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION,	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
UNIVERSITY OF OREGON,	)	
Respondent.	)	

On May 25, 2016, the Board heard oral argument on Respondent's objections to a March 7, 2016, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held before ALJ Martin J. Kehoe on September 29, 2015, in Salem, Oregon.[1] The record closed on November 25, 2015, following receipt of the parties' post-hearing briefs.

Shirin Khosravi, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Brian Caufield, Director of Labor Relations, University Shared Services, Corvallis, Oregon, represented Respondent.

On March 30, 2015, Service Employees International Union Local 503, Oregon Public Employees Union (Union) filed this complaint alleging that the University of Oregon (University) had violated ORS 243.672(1)(e) by refusing to produce the names and content of student reports regarding Union bargaining unit members, which the University had used in the disciplinary process of those members. The University filed a timely answer, including an affirmative defense that the alleged student reports were protected from disclosure by the Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). Thereafter, the University ultimately provided the Union with the requested documents.

[1]In a periodic reassignment of cases, the matter was transferred to ALJ Grew for the issuance of a recommended order. We reject the University's objection to this reassignment. *See Washington County Dispatchers Association v. Washington County Consolidated Communications Agency*, Case Nos. UP 015/27-13, 26 PECBR 35, 35-36 n 1 (2014).

The issues are:

1. Are the Union's claims moot?

2. Did the University violate ORS 243.672(1)(e) by how it responded to the Union's information request concerning the discipline of bargaining unit member CB?

3. Did the University violate ORS 243.672(1)(e) by how it responded to the Union's information request concerning discipline of bargaining unit member RG?

We conclude that the claims are not moot, and that the University violated ORS 243.672(1)(e).

RULINGS

Witness Testimony

At hearing, the ALJ received the testimony of expert witness Francis C. Moran on the text and operation of FERPA and the regulations issued pursuant to that statute. We disregard those portions of the testimony that consisted of a legal opinion on the merits of this case, but consider the remainder of that testimony. The remaining rulings of the ALJ were reviewed and are correct.

Motion to Reopen the Record

After filing objections to the recommended order, the University, on April 20, 2016, filed a motion to reopen the record to admit three exhibits: (1) an arbitration subpoena; (2) a series of emails; and (3) a settlement agreement. The Union objected to reopening the record and admitting any of the documents.

On May 5, 2016, Board Chair Kathryn Logan conferred with the parties by phone. During that call, the parties agreed to stipulate that the Union had received the all of the existing documents and information sought in the Union's requests. Therefore, we reopened the record to accept this stipulation. Consequently, we did not admit the arbitration subpoena and the series of emails, which were proffered for purposes of establishing the facts of the stipulation.

Finally, we declined to admit the settlement agreement, which concerned the discipline of RG. A timetable is useful in understanding that ruling:

Record closed:	November 25, 2015
Settlement agreement signed:	December 28, 2015
Recommended order issued:	March 7, 2016
University objections filed:	April 4, 2016
Oral argument notice issued:	April 6, 2016
Motion to reopen record filed:	April 20, 2016

The University had ample time and opportunity between December 28, 2015, and April 20, 2016, to make its assertions. The University could have raised this matter with the ALJ shortly after the agreement was signed and before the issuance of the recommended order. Instead, the University waited until after the recommended order was issued, after it filed objections, and even after oral argument was set. This is simply too late for a matter that was known, or should have been known, approximately four months before it was raised with the Board. Therefore, we declined to reopen the record to admit the parties' settlement agreement.

Motion to Appear as *Amicus Curiae*

On the afternoon of May 20, 2016, which was the deadline for both parties to submit any memorandum in aid of oral argument, the Board received a motion to appear as *amicus curiae* (with an accompanying *amicus* brief) from attorney Ryan Hagemann, on behalf of Oregon Public Universities, the Oregon Community College Association, and the Oregon School Boards Association. We denied the motion, explaining that, although the identified *amici* might have a significant interest in issues raised by the case, the submission was filed too late to be considered. In doing so, we noted that when we do afford an entity *amicus* status, we do so in a time and manner that allows the named parties to respond. Because this *amicus* petition was submitted on the afternoon of the parties' deadline to submit any final memorandum to the Board (and just three business days before oral argument), we denied the motion.

We received no objection or reconsideration request from the *amici*, but received, on May 23, 2016, an objection and reconsideration request by the University. We adhere to our decision and incorporate that ruling into this order.[2]

FINDINGS OF FACT

The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13).

2. The University is a public employer within the meaning of ORS 243.650(20).

3. The Union and University are parties to a collective bargaining agreement, which provides that bargaining unit members shall not be disciplined without cause. The agreement includes a dispute resolution procedure ending in binding arbitration.

CB Discipline

4. On October 31, 2014, University Associate Dean of Finance Rocco Luiere wrote University Human Resources official Linda King recommending disciplinary action against Union bargaining unit member CB. That email was later shared with CB.

[2]The University subsequently filed an "offer of proof" to preserve its objection to our ruling on the *amicus* motion.

5. Two of the allegations in the email involved employment of graduate students. In the first instance, the email stated that a graduate student had previously discussed employment with a department head and later asked CB if the prospective student employee needed to provide any information to get the hiring process started. The email stated that CB replied that this was the first CB had heard of the matter and that he would check with the Department head.

6. The second allegation was that CB had been asked by a graduate student about being hired by a faculty member on sabbatical. CB allegedly replied that the faculty member was not allowed to use hiring funds while on sabbatical, but that the department head was trying to find a way around that obstacle.

7. On November 10, 2014, CB, his steward, and University officials met for an investigatory interview.

8. After that meeting, the Union steward interviewed faculty witnesses to the alleged events. After faculty witnesses did not corroborate the University's version of events, the steward requested the names and contact information for the student witnesses cited in the memo. University officials refused to disclose that information.

9. On November 25, 2014, the University issued CB a written reprimand. The reprimand included the following allegations in support of the discipline:

> "One example occurred when a student worker approached you regarding her payroll status. Your response to the student was 'This is the first I've heard of it.'
>
> "Later, however, when a graduate student had a conversation with [department head] Professor [C] to ask about the position's funding, she told Professor [C] that you had said that Professor [R] can't use funds while on sabbatical, but that Professor [C] was trying to find a way around it."

10. CB filed a Step 1 Grievance challenging the written reprimand under the collective bargaining agreement. The grievance alleged in part that "[e]-mails from a neutral witness outright contradict management testimony."

11. On January 6, the steward emailed University officials a request for information related to CB's grievance. The request sought the name and the contact information of the student witness who had reported to a department head that CB had stated the department head was trying to find a way around a funding limitation.

12. On January 9, 2015, Luiere refused to provide names or contact information regarding students, stating that this disclosure was barred by FERPA. Luiere also forwarded the steward's request to Wes Fowler, University Director of Employee and Labor Relations. On January 30, Fowler also emailed the steward to state that the requested information could not be disclosed under FERPA.

13. On May 4, 2015, University Director of Labor Relations Brian Caufield wrote a letter to the federal Family Policy Compliance Office (FPCO) of the federal Department of Education, requesting assistance with the CB information request.

14. Subsequently, the CB grievance was settled. On September 9, 2015, the University withdrew its request to FPCO for assistance.

RG Discipline

15. Before being terminated (described below), RG was a University Equipment Systems Specialist 2 and a member of the Union bargaining unit. In 2001, RG pleaded guilty to the crime then designated as Attempted Sexual Abuse, a Class C Felony. The guilty plea involved his conduct between 1997 and 1999 with a minor relative, Jane Doe.

16. In 2014, Doe enrolled in the University and notified the University of RG's crime against her. University officials stated to RG and his steward that Doe "was affected by the possibility of running into you as she pursued her education at UO."[3]

17. On December 8, 2014, the University informed RG that it sought to discipline him by terminating his employment:

> "because of a report that you engaged in conduct of a sexual nature with a minor at your place of work in university facilities while employed * * *. This activity occurred between 1997 and 1999; however, the seriousness of the conduct and its current implications raised significant concerns about your continued employment * * *."

18. On December 17, 2014, a Union steward emailed Fowler requesting information in preparation for RG's pre-dismissal meeting. The request included:

> "Copies of all documents, incident reports, letters, notes, photographs or other items considered in making the decision to discipline [RG], including email correspondence.
>
> "The names of any witnesses used in making the decision to discipline [RG] and copies of any written, audio, or video statements from such person."

19. On January 9, 2015, RG's pre-dismissal meeting was held, with RG, the Union steward, and University representatives. University officials refused to provide all of the requested documents.

20. On January 20, the University notified RG of his termination, effective that date. The six-page termination letter mentioned the "report" by Doe, discussed the conviction, various issues that the Union had raised in defense or in mitigation, and the relationship of the conviction to Doe's attendance at the University and the University's sexual harassment policies.

[3]Doe's statement itself is not a part of this record.

21. Regarding Doe's report, the termination letter stated, "[t]his concern was raised when the student enrolled at UO in Fall 2014 and was affected by the possibility of running into you as she pursued her education at UO."

22. On January 30, 2015, Fowler sent documents to the steward in response to the information request. The documents included redacted interviews with faculty and a redacted Title IX report. The University did not provide the Union with notes of any interviews conducted with Doe.

23. On February 9, 2015, the Union filed a grievance regarding RG's termination. Also on February 9, the Union steward emailed Fowler and University Human Resources Specialist Stephanie McGee, stating that the University had not provided the requested information regarding the student witness, and that the interviews and Title IX report had been heavily redacted.

24. On February 12, 2015, McGee replied to the steward, stating that the redacted information was withheld because the information was protected by FERPA.

25. On May 4, 2015, Caufield wrote a letter to FPCO requesting assistance with the RG information request. The letter referred to RG's misconduct solely as a "violation" of the University "policy prohibiting sexual harassment." Caufield's letter did not include the victim's non-student status at the time of RG's misconduct, the time frame of the criminal conduct, or the fact that RG had been convicted and sentenced for that conduct 14 years before the University's "finding" of the "violation." The letter also asserted that RG's due process rights had been protected by the University.

26. On November 6, 2015, Dale King of FPCO wrote back to Caufield, stating that the documents at issue were protected from disclosure to the Union by FERPA.

CONCLUSIONS OF LAW

This unfair labor practice complaint arose out of the Union's efforts to obtain information about possible violations of the collective bargaining agreement in the discipline of two employees. In both cases, statements by students were relevant to the University's decision to impose discipline. The Union asked the University for information about the student statements, and the University refused to provide some of that information. The University also failed to pursue a good-faith accommodation that recognized the Union's right for the information, even if the initial request presented the University with a conflict regarding its obligations under the Public Employee Collective Bargaining Act (PECBA) and FERPA. As set forth below, we conclude that the University's conduct violated ORS 243.672(1)(e).

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The dispute is not moot.

The University argues that the Union's claims are moot because: (1) the parties have settled the grievances; and (2) the University has now provided the Union with all responsive documents. A refusal to provide required information under the PECBA is not rendered moot by the disposition of a related grievance under the parties' collective bargaining agreement, or by ultimately providing the information. *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220, 227 (1992). Therefore, we reject the University's mootness defense.

3. The University violated ORS 243.672(1)(e) in how it responded to the Union's information request regarding the discipline of CB and RG.

It is well settled that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes promptly providing an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999). Here, the parties do not dispute that the information requested by the Union satisfies this minimal threshold. Rather, the University asserts that providing the information (as requested) would conflict with its obligations under FERPA. Specifically, the University argues that some of the requested information qualifies as "education records" within the meaning of 20 USC § 1232g(b)(1), such that disclosing it would put the University at risk of losing federal funds.[4] Relying primarily on *East County Bargaining Council v. David Douglas School District*, Case No. UP-43-07, 23 PECBR 333 (2009), the Union counters that the withheld documents do not constitute "education records" within the meaning of that statute, and that, in any event, the University did not make good-faith efforts to comply with both the PECBA and FERPA.

We agree with the Union that, even assuming that the withheld records qualify as "education records" under FERPA, the University violated ORS 243.672(1)(e).[5] Faced with possibly conflicting obligations under the PECBA and another law, public employers and labor organizations are not excused from their duty to bargain. Likewise, an assertion that the requested information is "confidential" (either by virtue of FERPA or another source), does not mean that

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[4] In relevant part regarding disclosure of student records, FERPA provides that:

> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization * * *." 20 USC § 1232g(b)(1).

With respect to students "attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." 20 USC 1232g (d). Additionally, FERPA permits disclosure "pursuant to any lawfully issued subpoena * * *." 20 USC 1232g(b)(2)(B).

[5] Consequently, we do not decide whether some (or all) of the withheld documents are "education records" under FERPA.

the obligation to bargain in good faith disappears. Rather, in those situations, the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict. *See David Douglas School District*, 23 PECBR at 352.

Applying that framework, we conclude that the University has not satisfied its obligation to pursue a good-faith accommodation regarding the requested information. Specifically, with respect to both the CB and RG matters, the University's first response to the at-issue requested documents was a flat refusal to provide the information on the ground that disclosure was precluded by FERPA. That response did not extend an accommodation to the Union or ask the Union to meet to try to work out an accommodation that would meet the Union's PECBA right to the information, as well as the University's concerns under FERPA. As set forth above, good-faith bargaining in these circumstances requires that the University pursue such an accommodation.

Moreover, after the University secured a letter from FPCO that FERPA precluded the disclosure of some of the information (which could arguably justify the claimed conflict between FERPA and the PECBA, as well as a legitimate and substantial confidentiality interest), the University still did not pursue a good-faith accommodation regarding the requested information.[6] In addition to the myriad proposals or compromises that the University could have suggested beyond FERPA, FERPA itself allows disclosure of otherwise protected information, with student consent. The University acknowledges that it did not seek the consent of any of the at-issue students. With respect to one student, the University asserts that it might have been difficult or upsetting to ask for that consent.[7] That it might have been discomfiting for the University to ask for that student's consent, however, does not excuse the University from seeking a basic accommodation.[8]

In short, we conclude that the University did not establish that it pursued a good-faith accommodation regarding the requested information. Consequently, we will hold that the University violated ORS 243.672(1)(e).

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[6]We further note that the request for FPCO assistance came several months after the information request and after the University had already decided that there was a FERPA/PECBA conflict. An earlier request for FPCO assistance would be more in line with seeking a good-faith accommodation, as would including the Union's position as part of that request. For example, in this case, the Union disputed how the University framed the facts to FPCO, and subsequently argued that FPCO's conclusion on the conflict was based on inaccurate information. By talking with the Union first, submitting a joint request for FPCO assistance, or allowing the Union to present its position on contested facts, the University could have more easily demonstrated that it sought a good-faith accommodation regarding the information request.

[7]The University advanced this position at oral argument. It did not submit evidence that it considered seeking student consent, or that this was an actual reason why it elected not to pursue student consent.

[8]It is speculative to guess at whether the student would or would not consent to the disclosure. Had the student consented, however, there would be no FERPA conflict and no confidentiality issue, and no issue with providing the Union with the requested information.

We turn to the remedy. Because the University violated ORS 243.672(1)(e), we are required to enter a cease and desist order. ORS 243.676(2)(b). Ordinarily, we would also take affirmative action by requiring the disclosure of the refused information. However, as noted above, the University has now provided that information, and the Union agrees that our remedy need not order the disclosure of that information.

ORDER

The University shall cease and desist from violating ORS 243.672(1)(e).

DATED June 3, 2016.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.