

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-2-05

(UNFAIR LABOR PRACTICE)

UNION-BAKER ESD ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
UNION-BAKER EDUCATION)	AND ORDER
SERVICE DISTRICT,)	
)	
Respondent.)	
_____)	

The Board considered Memoranda in Lieu of Oral Argument submitted by both parties on objections filed by both parties to a Recommended Order issued by Administrative Law Judge (ALJ) Susan Rossiter on July 6, 2005. The parties entered a fact stipulation in lieu of a hearing.

Ralph E. Wisner III, Attorney at Law, Kruse Woods One, 5285 S.W. Meadows Road, Suite 333, Lake Oswego, Oregon 97035, represented Complainant.

Brandon Eyre, Mautz, Baum & O'Hanlon, 1902 4th Street, P.O. Box 967, La Grande, Oregon 97850, represented Respondent.

On January 19, 2005, the Union-Baker Education Service District Association (Association) filed this unfair labor practice complaint, alleging that the Union-Baker Education Service District (District) violated ORS 243.672(1)(e) by refusing to provide

requested information that related to a probable or potential grievance under the collective bargaining agreement. The District denied the allegations in the complaint.

The issues presented for hearing are:

1. Did the District refuse to provide the Association with minutes, notes, or tape recordings of District Board of Directors' executive sessions that have probable or potential relevance to possible grievances alleging violations of Article 5 (Evaluation), Article 6 (Just Cause and Criticism of Bargaining Unit Members), Article 25 (Complaint Procedure), and Article 26 (Non-discrimination), in violation of ORS 243.672(1)(e)?

2. Did the District fail to provide the Association with minutes of Board open meetings in a timely manner in violation of ORS 243.672(1)(e)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of District employees. The District is a public employer.

2. The Association and District are parties to a collective bargaining agreement effective July 1, 2004 through June 30, 2008. Article 5 of the collective bargaining agreement sets forth a procedure for evaluating the performance of bargaining unit members. Other articles of the collective bargaining agreement provide, in relevant part:

"Article 6- Rights of Bargaining Unit Members

“* * * * *

“B. Just Cause

“1. The Association has recognized, in another section of this Agreement that the Board has the right to establish and enforce laws, rules and regulations, not in conflict with this Agreement, and to discipline bargaining unit members for violations of these laws, rules and regulations.

“2. Discipline shall be defined as an act of the employer against an employee which may have an adverse affect on the continuation of employment of an employee.

“3. No bargaining unit member covered by this Agreement will be disciplined without just cause. Only violations of this agreement will apply. * * *

“* * * * *

“E. Criticism of Bargaining Unit Members

“Any questions or criticism by a supervisor, administrator or board member of a bargaining unit member, about his/her instructional methodology, shall be made in confidence.

“* * * * *

“Article 25 - Complaint Procedure

“A. If a complaint by an adult regarding a bargaining unit member is submitted to the Board, a board member, or an administrator, said complainant shall be asked to present his/her complaint in writing over his/her own signature.

“B. If the complainant is unwilling to present his/her signed complaint in writing, the complaint shall not be processed through this complaint procedure. The official receiving the complaint, however, may refer the concerns raised in the complaint to the bargaining unit member’s immediate supervisor who, if he/she deems it appropriate, may discuss the concerns informally with the bargaining unit member and work with said bargaining unit member on addressing the complainant’s concerns. A complaint not signed by an adult complainant shall not be the basis for any disciplinary action.

“* * * * *

“Article 26 - Non-Discrimination

“The District and Association agree not to engage in discrimination practices, nor shall the provisions of this Agreement be applied so that there is such discriminatory practices or impact based on age, marital status, race, color, sex, religion, national origin, characteristic, disability, union activity, or political beliefs, unless based on a bonafide occupational qualification. If a claimant under this provision pursues a remedy through judicial, quasi-judicial, administrative or legislative procedures, such action shall preclude pursuing said claim through the grievance procedure or proceeding under the Employment Relations Board.”

3. Sandy Bushek is employed as a UniServ Consultant for the Oregon Education Association and acts as the agent and representative of the Association. Jude Lehner is a member of the Association bargaining unit.

4. On September 15, 2004, the District Board held a meeting. During this meeting, the Board went into executive session in accordance with the following subsections of ORS 192.660(2):

“(a) To consider the employment of a public officer, employee, staff member or individual agent.

“(b) To * * * hear complaints * * * against a public officer, employee, staff member or individual agent who does not request an open public hearing.

“* * * * *

“(f) To consider information or records that are exempt by law from public inspection.

“* * * * *

“(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation * * * likely to be filed.”

After the executive session, the Board returned to open session and voted to authorize the Board Chairman “to enter negotiations for the resignation of Jude Lehner.”

5. Bushek believed that during the open and executive sessions at the September 15 meeting, the Board considered information or took action which potentially or probably violated provisions of the applicable collective bargaining agreement. Bushek thought that the Board’s actions may have violated Articles 5, 6, 25, and 26 of the collective bargaining agreement.

6. On November 4, 2004, Bushek sent an e-mail to the District Personnel Office in which she requested minutes of executive and open sessions for all Board meetings held during the past six months. Bushek asked that these minutes be provided to her within 10 working days.

7. Bushek did not receive the minutes she had requested. In a letter dated November 19, 2004, Bushek told Boyd Swent, District Superintendent:

“On November 4, 2004, I requested that the District provide me a copy of all Board Minutes of Executive and Open sessions of all Board meetings for the last six months. By this letter, I am requesting this information from January 1, 2004 to the present date.

“The District’s response was that the Board minutes of the Open Sessions are on the District’s official website, but the Board Clerk’s notes of the Executive Sessions had not been typed up; and therefore a copy of the Executive Session minutes were not available for transmission to me.

“My review of the Open Session Board minutes leads me to believe that the Executive Session minutes potentially or probably contain information that is relevant to administration and enforcement of the contract. In addition, the website’s posting of open session minutes only went through the August 5, 2004 Board meeting.

“As you know, I made this request pursuant to ORS 243.672(1)(e). Because, among other things, this request concerns a potential or probable grievance, the District is required to give me all this information in a timely fashion. *See, Olney Education Association v. Olney School District No. 11,*

16PECBR [sic] 415,418 (1996), affirmed, 145 OR App [sic] 578 (1997). The Association does not have to file a formal grievance to trigger the District's obligation to provide me with this information.

“By this letter, I am renewing and expanding my request for this information. Please provide me all Board minutes, for both Open and Executive sessions, from January 1, 2004 to the present date. In addition, please provide me all of the Clerk's handwritten notes or typed notes, as the case may be, of all Executive Sessions without any deletions, revisions, additions, or modifications for the same time period and any and all tapes of Executive Session meetings.

“Unless I receive this information by November 29, I will contact an attorney to enforce the Association's rights to this information.” (Underlining in original.)

At the time that Bushek made her request for information from the District, the District had come under scrutiny from a community “watchdog” group. The group was concerned about District expenditures for purchase of an airplane, construction of new facilities, and hiring consultants. The District had also been investigated by the Oregon Department of Education, the Oregon State Police, and the Federal Bureau of Investigation. Bushek was worried that the District's refusal and delay in providing the requested information might be due to attempts to modify or revise the Board minutes. Bushek was concerned that any such actions by the District might harm Jude Lehner's interests, or interfere with the Association's ability to enforce the provisions of the collective bargaining agreement.

8. By letter dated November 29, 2004, the District's attorney, Brandon Eyre, responded to Bushek. In his letter, Eyre noted that Bushek's request for information was made under ORS 243.672(1)(e) and *Olney Education Association v. Olney School District 11*, Case No. UP-37-95, 16 PECBR 415, 420, *Motion to Stay* 16 PECBR 490 (1996), *aff'd* 145 Or App 578, 931 P2d 803 (1997). In regard to Bushek's request, Eyre stated:

“The Union Baker Education Service District would be happy to provide the OEA with relevant information it is entitled to under Statute and Case Law. However, the request that you have made is overly broad and not supported by the current standards set forth in the Olney case. On page 582 of the decision the court clearly states the ERB position that the ‘District (has) the

duty to provide the information requested, but not necessarily all portions of the tapes of the executive sessions. *The Association is entitled to receive only those portions of the executive session tapes which are probable or potential relevance to the pending grievance.*' Based on this standard we disagree with your assertion that the Association does not have to file a formal grievance to trigger the District's obligation to provide executive session information. Without knowledge of what the grievance is the District cannot evaluate whether or not the executive session information has probable or potential relevance to the pending grievance. At this point, the ESD does not even know what the potential grievance is. As such, the ESD is not inclined to provide you with ESD minutes or notes.

"I have been in contact with Boyd Swent regarding this matter and he has informed me that he will take steps to provide you with all open session minutes. We apologize that the minutes subsequent to August 5, 2004 have not been posted on the website, but those minutes have not yet been approved by action of the Board. I will leave it to you and Boyd Swent to work out the particulars of obtaining those open session minutes."
(Emphasis in original.)

9. By letter dated December 7, 2004, the Association's Attorney Ralph Wisner responded to Eyre. Wisner said that he disagreed with Eyre's assertion that the Association's request for information was overbroad. Wisner stated:

"* * * But in an effort to move the matter along, the Association hereby reiterates its request for executive session tapes and advises you that the Association is investigating grievance activity for its members pursuant to Article 5 (Evaluation), Article 6 (Just Cause, Criticism), Article 25 (Complaint Procedure), and Article 26 (Non-Discrimination) of the Collective Bargaining Agreement between the District and the Union-Baker ESD Association effective from July 1, 2004 through June 30, 2008. The information sought is of probable or potential relevance to a grievance or grievances under any one of these articles and perhaps others depending on the information contained in the executive tapes."

Wiser reiterated the Association's request for the Board clerk's handwritten notes, and asked that all requested information be provided to Bushek within 10 days.

10. By letter dated December 13, 2004, Eyre responded to Wiser. Eyre said that based on the standard established in *Olney School District*, "we disagree with your assertion that the Association does not have to file a formal grievance to trigger the District's obligation to provide executive session information. If you are aware of other case law, which I have missed on this subject, please provide me with the citations. At this point the ESD does not even know what the potential grievance is. As such, the ESD is not inclined to provide you with ESD executive session minutes or notes at this time."

11. The District has not provided the Association with any of the requested minutes, notes, or tape recordings of executive sessions.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it refused to provide the Association with minutes, notes, or tape recordings of Board executive sessions that have probable or potential relevance to possible grievances alleging violations of Article 5 (Evaluation), Article 6 (Just Cause and Criticism of Bargaining Unit Members), Article 25 (Complaint Procedure), and Article 26 (Non-discrimination).

The duty to bargain in good faith under the Public Employee Collective Bargaining Act (PECBA) includes the duty to provide information, if the information requested is "of probable or potential relevance to a grievance or other contractual matter" or is "reasonably necessary to allow meaningful bargaining on a contract proposal." *Washington County School District No. 48 v. Beaverton Education Association et al.*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). This Board has adopted the liberal standard approved by the Supreme Court in *NLRB v. ACME Industrial Co.*, 385 US 432, 64 LRRM 2069 (1967), in holding that an employer may be directed to provide information if it is probable that the requested information may be relevant and useful to the union in carrying out its statutory duties and responsibilities. *Oregon State Employees Association v. Children's Services Division, Department of Human Resources, State of Oregon*, Case No. C-32-76, 2 PECBR 900 (1976). "When analyzing duty to provide information issues, we begin with the premise of full disclosure." While the respondent "may object to the release of the information requested, the threshold test * * * requires that the requested information have some probable or potential relevance to the 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).

In a case involving contract administration, we must first determine whether the requesting party has a right to the information under the PECBA. *Oregon Education Association and Alan Moberg v. Salem-Keizer School District #24J*, Case No. UP-55-96, 17 PECBR 188, 192 (1997), citing *OSEA v. Salem-Keizer School District*, Case No. UP-135-86, 10 PECBR 635 (1988), *recons* 10 PECBR 676 (1988), *aff'd* 103 Or App 221, 797 P2d 375 (1990). In regard to requests for information concerning grievances or contract administration, this Board has said: “[b]ecause the basic purpose of the information duty in this context is to allow a union to evaluate the merits of an actual or potential grievance, a necessary component of a union’s threshold showing of relevance is an assertion that some action by the employer has, or at least may have, violated a term of the collective bargaining agreement.” *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff’s Office*, Case No. UP-66-92, 14 PECBR 270, 270B (1992).

In this case, the Association alleged that the material requested—minutes, notes, and tape recordings of executive sessions held during District Board meetings—has probable or potential relevance to grievances alleging violations of the evaluation, just cause, and complaint provisions of the applicable collective bargaining agreement. No grievances have been filed, however, and the District objects to providing the requested information. According to the District, it is obligated only to provide information that is potentially or probably relevant to a *pending* grievance.

In support of its argument, the District cites *Olney School District* wherein the Court of Appeals upheld a decision by this Board in which we found that an employer violated its duty to bargain in good faith when it refused to provide a labor organization with tape recordings of school board executive sessions that were of probable or potential relevance to a pending grievance filed by the Association. The court rejected the employer’s argument that it was obligated to provide only information that is “reasonably necessary to allow pursuit of a valid grievance.” *Olney School District*, 145 Or App at 582. The issue was the nature and extent of the information an employer was obligated to provide to an exclusive bargaining representative under ORS 243.672(1)(e). In *Olney School District*, the Court of Appeals and this Board were presented with a pending grievance; a party’s duty to provide information relevant to a possible grievance was neither considered nor decided.

We discussed the duty to provide information about a potential grievant in *Eugene Police Employees Association v. City of Eugene*, Case No. UP-43-97, 17 PECBR 634 (1998), *AWOP* 159 Or App 426, 978 P2d 459 (1999). There, we considered a labor organization’s request for a psychological report on an officer which stated that the officer was unfit for duty as a police officer. The association requested the report after the

psychologist issued his opinion, and after the City notified the association that it could no longer employ the officer. The City also made a settlement offer, which included the officer's resignation. We found that

“[t]hese facts establish the relevancy of the information *at the time it was initially requested*. Even though termination had not occurred, the information was relevant to the Association's obligation to represent Berger. *See, Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9556 (1987). That is, the information was relevant to the Association's evaluation of settlement options and of a potential grievance.” *City of Eugene*, 17 PECBR at 640-641. (Emphasis in original.)

Here, as in *City of Eugene*, the Association requested information at a time when the employer announced its intentions to negotiate the resignation of an employee. The information requested by the Association—minutes, notes, and tape recordings of Board executive sessions that may have led to the decision to negotiate Jude Lehner's resignation—has relevance to the Association's evaluation of possible grievances or settlement options. The requested information is important to the Association so that it can fulfill its duty to represent Lehner.

In *Olney School District* we concluded that the school district

“had a duty to provide the information requested, but not necessarily *all* portions of the tapes of the executive sessions. The Association is entitled to receive only those portions of the executive session tapes which are of probable or potential relevance to the pending grievance. We will direct the District to provide a copy of the tapes at issues to this Board for *in camera* review by an ALJ. Portions of any tapes which concern complaints or discipline against teachers would be of probable or potential relevance to the Association's grievance; copies of those portions of the tapes will be provided to the Association.”
16 PECBR at 419.

We reach the same conclusion on the facts before us. We find that the Association is entitled to receive those portions of the Board's minutes, notes, and tape recordings which are of probable or potential relevance to grievances that may be filed concerning violations of Article 5 (Evaluation), Article 6 (Just Cause and Criticism of

Bargaining Unit Members), Article 25 (Complaint Procedure), and Article 26 (Non-Discrimination) of the collective bargaining agreement. We will direct the District to provide a copy of the minutes, notes, and tape recordings at issue to this Board for *in camera* review by an ALJ. Copies of the minutes, notes, and tape recordings which are of probable or potential relevance to grievances concerning these contract provisions will be provided to the Association.

Notice Posting

The Association requested that this Board order the District to post a notice that the District's refusal to provide the requested information violated subsection (1)(e). In deciding whether to require that an employer post a notice, we consider if the action "(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge." *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590 (1983). Here the employer's unlawful conduct had an impact on the ability of the labor organization to fulfill its statutory responsibilities. Representation of bargaining unit members in the grievance process is "one of the fundamental responsibilities of a labor organization." *Olney School District*, 16 PECBR at 420. Where employer conduct significantly interferes with this responsibility, it is appropriate to order the posting of a notice. We will order the District to post the attached notice.

Civil Penalty

The Association requested imposition of a civil penalty in accordance with OAR 115-35-075(1)(a). We do not find that a civil penalty is warranted. The District did not "repetitively" engage in unfair labor practices, and its actions were not "egregious."

3. The District did not violate ORS 243.672(1)(e) by failing to provide the Association with minutes of Board open meetings in a timely manner.

We do not find that the District's delay in providing minutes of open Board meetings violated ORS 243.672(1)(e). The parties do not dispute the District's obligation to produce minutes of open Board meetings; the only issue is whether the District failed to provide this information in a timely manner in violation of its duty to bargain in good faith. In deciding if an employer's delay in providing information violates subsection (1)(e), we do not consider the length of the delay, but the timing of the release of information. We determine whether the employer has shown that it would be difficult to release the

information, or has established any other legitimate reason for its delay. An employer who releases information only after an unfair labor practice has been filed violates subsection (1)(e). *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220, 226-227 (1992); and *Lincoln City Police Employees' Association v. City of Lincoln City*, Case No. UP-32-98, 18 PECBR 203, 214 (1999).

In this case, the District has shown a legitimate reason for its delay in providing the requested minutes of open Board meetings: the Board had not approved the minutes. Although the record is unclear as to when the minutes were actually produced, the District apparently made arrangements to give Bushek the requested minutes as soon as they were available, and before this unfair labor practice was filed. We do not find that the District's delay in providing minutes of Board open meetings to the Association violated ORS 273.672(1)(e).

ORDER

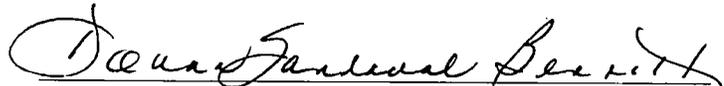
1. The District will cease and desist from refusing to provide the Association with requested minutes, notes, or tape recordings of Board executive sessions that have probable or potential relevance to possible grievances alleging violations of Article 5 (Evaluation), Article 6 (Just Cause and Criticism of Bargaining Unit Members), Article 25 (Complaint Procedure), and Article 26 (Non-discrimination).

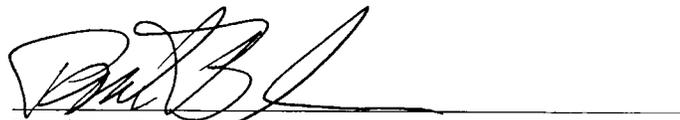
2. The District will submit a copy of the requested executive session minutes, notes, and tape recordings to this Board within 20 days of the date of this Order. After an *in camera* inspection of the material by an ALJ, copies of any of these materials determined by the ALJ to be of probable or potential relevance to grievances alleging violations of Article 5 (Evaluation), Article 6 (Just Cause and Criticism of Bargaining Unit Members), Article 25 (Complaint Procedure), and Article 26 (Non-discrimination) will be released to the Association.

3. The District will pay to this Board the cost of reproducing the noted portions of the tapes for the Association.

4. The District will sign and prominently post a copy of the attached notice in each District facility where Association bargaining unit members work. The notice will be posted within 5 days of the date of this Order and will remain posted for 30 consecutive days.

DATED this 16th day of March 2006.


Donna Sandoval Bennett, Chair


Paul B. Gamson, Board Member


James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-2-05, *Union-Baker ESD Association v. Union-Baker Education Service District*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board (ERB) has found that Union-Baker Education Service District (District) violated ORS 243.672(1)(e) by refusing to provide the Union-Baker ESD Association (Association) with information that was necessary for the Association to evaluate possible grievances.

ERB ordered the District to cease and desist from such unlawful activity, to provide the information to the Association (after review by ERB), and to post this notice in conspicuous places in the District.

The District will comply with ERB's Order.

UNION-BAKER EDUCATION SERVICE DISTRICT

Dated _____, 2006

By _____
Employer Representative

Title

* * * * *

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street NE, Suite 400, Salem, Oregon 97301-3807, phone (503) 378-3807.