

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-19-05

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL)
UNION LOCAL 503,)
OREGON PUBLIC EMPLOYEES UNION,)

Complainant,)

v.)

STATE OF OREGON,)
DEPARTMENT OF FORESTRY,)

Respondent.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

This Board heard oral argument on February 14, 2007 on Respondent's objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on October 25, 2006 following a hearing on November 28, 2005 in Salem, Oregon. The record closed with the receipt of the parties' post-hearing briefs and Respondent's motion to reopen the record on January 25, 2006.

Elizabeth Baker, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant at hearing, while Joel Rosenblit, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant at oral argument.

Heather Pauley, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On April 15, 2005, Service Employees International Union Local 503, Oregon Public Employees Union (SEIU, Local 503, or Union) filed this complaint against the State of Oregon, Department of Forestry (Department or ODF). The Union alleged that the Department violated its duty to bargain under ORS 243.672(1)(e) when it refused to promptly provide relevant information in response to an information request, and charged an excessive amount for the information that it did provide.

Local 503 sought a Board order directing ODF to cease and desist from violating ORS 243.672(1)(e), to fully respond to the Union's request for information, and to provide an accounting of the time ODF spent in responding to the Union's request for information. The Union also sought reimbursement of its filing fees and an award of its full representation costs. The Department filed a timely answer on July 1, 2005, in which it denied liability. ODF sought dismissal of the complaint, together with an order awarding its reasonable representation costs, "including its filing fees."¹

The issues in this case are: Did ODF violate its duty to bargain under ORS 243.672(1)(e) when it responded to the Union's December 13, 2004 request for information and follow-up responses by (1) refusing to provide information in a timely manner, (2) providing incomplete information, or (3) charging an excessive amount for the information which it did provide?

In his Recommended Order, the ALJ ruled that the Department violated ORS 243.672(1)(e) by failing to provide a complete response to the Union's request for information. However, the ALJ determined that the Department provided the information in a reasonable time, given the work necessary to obtain it. He also held that the Union did not establish that the costs sought by the Department were unreasonable. ODF objected to certain proposed findings of fact in the Recommended Order, and to the ALJ's conclusion that ODF violated the Public Employee Collective Bargaining Act (PECBA) by providing an incomplete response to the Union's request for information. Local 503 filed no objections.

¹We award neither party reimbursement of its filing fees. Under OAR 115-035-0075(3), this Board may order reimbursement of filing fees to the prevailing party if the complaint or answer is found to have been frivolous or filed in bad faith. We do not order reimbursement of filing fees as part of representation costs incurred by a party. *IBEW, Local 48 and District Council of Trade Unions v. School District No. 1J, Multnomah County*, Case No. UP-69-03, 21 PECBR 13 (2005) (Rep. Cost order). Neither the complaint nor the answer was frivolous or filed in bad faith.

For reasons set forth below, we conclude that ODF violated its duty to bargain under ORS 243.672(1)(e) when it failed to provide a complete response to Local 503's request for information. We dismiss the remaining allegations of the complaint.

RULINGS

1. On January 24, 2006, after the evidentiary record was closed, the Department filed a "Motion to Reopen and Correct Record." The Department submitted an affidavit from Department Labor Relations Manager David Sandall stating that he erred in his testimony regarding the appropriate hourly rate for his time (\$42.57) and that of Human Resources employee Diane Wheeler (\$35.35). In his affidavit, Sandall stated that the correct hourly rates were \$35.99 for Sandall and \$26.24 for Wheeler.² The Union did not object to the change. The ALJ acted properly within his discretion in granting the request.

2. The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The Department is a public employer with approximately 700 permanent employees, 700 seasonal employees, and some temporary employees. SEIU is a labor organization representing a bargaining unit of Department employees.

2. During the events at issue here, SEIU and the Department had a collective bargaining agreement in place. That agreement provided in part that reimbursement of unit employees for moving expenses "shall be as provided in the Department of Administrative Services [DAS], Human Resources Services Division [HRSD] Policy, Employee Relocation Allowance (#40 055.10)."³ DAS/HRSD Policy

²The substituted figures are based on the following formula: divide the total cost of the individual's wages for the biennium by 24 (the number of months in a biennium); divide that result by 160 (the average number of working hours in a month).

³Unit employees' moving expenses were also governed by Letter of Agreement 38.00-01-62 in Appendix A of the collective bargaining agreement. The Letter of Agreement provided for a pilot project modifying policy 40.055.10 as to amounts paid, time lines, and other matters. The Department does not argue that the Letter of Agreement's changes to the Human Resources Services Division policy are relevant to the Union's information request, which concerned the issue of eligibility for payment. Kelly's denial of the Fields grievance does not refer to the Letter of Agreement.

40.055.10, using definitions codified at OAR 105-010-0000, also applied to unrepresented and management employees of the Department.

3. Pam Fields, a member of the bargaining unit, moved from Sweetwater to Salem after her position became permanent. She was told she was ineligible for reimbursement of moving expenses. However, during her work at the Department's Business Services section, she noticed that some employees were reimbursed based on circumstances that seemed like her own. On November 22, 2004, SEIU filed a grievance alleging that the Department had violated Article 38 and the Letter of Agreement by refusing to reimburse Fields for her moving expenses.

4. On December 3, 2004, Payroll Manager Betsy Kelly denied the Fields grievance at step one. Kelly's grievance response initially notes that the Fields grievance is based on Article 38 and the Letter of Agreement. However, in discussing the merits of the grievance, the grievance response refers only to the Department's Directive regarding relocation expense reimbursement, DAS/HRSD policy 40.055.10, and OAR 105-010-0000. The grievance response stated in part:

"HRSD Policy clearly states in the Applicability section that the policy applies to 'Classified unrepresented, classified represented, management service, executive service employees, and initial appointments to state service in the above employee groups.' * * * Your * * * hire into the permanent position you now hold is a re-appointment as opposed to an initial appointment." (Emphasis in original.)

5. On December 13, 2004, SEIU unit Steward Cathy Clem filed a request for information with Department Human Resources Director Linda Fenske and Payroll Manager Betsy Kelly regarding the Fields grievance. Clem requested that the Department provide a list of "all Department * * * employees who received moving relocation expenses in the past three years (January 1, 2002 to present) with an indication on [*sic*] what prompted the relocation/move. This will include ODF transfers or promotions, transfers or promotions from another state agency, initial appointments to state service or re-appointments to state service." (Emphasis in original.)

The letter also stated:

"* * * If any part of this letter is denied or if any material is unavailable, please provide the remaining items by the above date, which the union will accept without prejudice to its

position that it is entitled to all information called for in this request.”

Clem requested that the information be provided by December 22, 2004.

6. Fenske was out of the office when the request arrived. She did not see the request until her return on December 20. Fenske forwarded the request to David Sandall, Department labor relations manager. Fenske directed Sandall to provide SEIU with a list of *represented* employees who received relocation expenses, if the Union still wanted the list after it was provided with a cost estimate for obtaining the information.

7. On December 22, Sandall e-mailed Clem. He stated that Fenske had received the request on December 20 and that he would not be able to respond to the request by December 22. Sandall also stated that the Department would charge SEIU in advance for Department employee time required to respond to the request. Sandall did not state how long it would take to produce the requested information.

8. On December 27, Clem responded by e-mail to Sandall, stating, “[t]hat will be fine. Please send the estimate. By what date are you able to provide the information requested?” On January 4, 2005, Sandall e-mailed Clem, stating that he estimated that providing “the information you have requested” would cost \$531.75, and that he would “need approximately three days to gather the information for you after receipt of the check.” Clem responded that same day, asking Sandall to explain how he arrived at the cost estimate. On January 5, Sandall wrote Clem:

“The cost estimate for your request was arrived at as follows:

“First by utilizing a computer code sort we were able to retrieve a list of all ODF employees who fit the employee profile contained in your request [a “BRIO report”⁴]. This sort generated a list of 64 employee names. *Because the sort code does not distinguish between SEIU represented employees and management service employees*, another sort will need to be conducted through a manual inquiry of each employee’s name/file through the PPDB system in order to sort out the

⁴The record does not state whether BRIO is an acronym or software program. The BRIO report did not state whether the employees who received the reimbursement were in the bargaining unit; it simply identified the employees and stated whether the expenditure was taxable.

SEIU employees from the management service employees. Diane Wheeler estimates that will take approximately 3 hours of her time. Once a list of SEIU employees is generated I will take that list, which I estimate to be 50 employees, and conduct a manual inquiry of each employee's individual personnel file to determine under what circumstances the employee was paid moving expenses. I estimate that it will take me 10 hours to complete this review. I already have expended 1 hour of my time in responding to your request." (Emphasis added.)

9. On January 2, Clem sent Sandall a check payable to the Department for \$531.75. When she did so, Clem knew that Sandall would be analyzing the applicable personnel files, the methodology ODF would use, and how long Sandall thought it would take him to do so. In particular, ODF informed Local 503 that its first step in compiling its response to the Union's request would be to separate management from SEIU represented employees. This was ODF's first indication that it did not intend to furnish SEIU Local 503 with the information it requested. Clem did not object.

10. Once the check was received, Sandall began work on the request. He asked Betsy Kelly, Department payroll manager, for the BRIO report showing Department moving expense reimbursements between January 1, 2002 and December 13, 2004. The BRIO report was based on payroll codes "MVN" moving non-taxable," and "MVT" moving-taxable." The BRIO report listed 64 reimbursements of Department employees. Wheeler checked the BRIO report against a list of represented employees and identified which employees were represented, cutting the list of names to 34. It took her approximately 1½ hours to complete this task.

11. Sandall took Wheeler's list of represented employees and reviewed their personnel files to determine why the expenses had been approved. He determined this from reading the file copies of the relevant personnel action forms.⁵ It took him approximately 11 to 11½ hours to complete this task. His work time during this period was primarily consumed with his ordinary day-to-day tasks as well as assistance with two cases before this Board and bargaining with two separate bargaining units.

12. On February 14, 2005, Sandall sent Clem the results of his search. He listed 34 names. For each name he included the date of the event, whether the event

⁵The record does not show that it was possible to do a computer search of the personnel action forms.

was a transfer or new hire, and the cities involved in the employee's move. The list began with a transfer on April 30, 2002, and ended with a transfer on November 30, 2004.

13. On February 17, Clem wrote Fenske to state that the list was incomplete in that it reflected a smaller date range than requested, omitted unrepresented employees, and did not explain whether the employees were initial appointments to state service. She asked "that we receive what we originally requested," attached a copy of her December 13 letter, and asked that the information be provided by February 23.

14. On February 24, SEIU Organizer Melita Vanderbeck called Sandall to determine the status of the information request and when the response would be provided. Fenske and Vanderbeck discussed why unrepresented employees were not included in the list provided to the Union. Sandall repeated the Department's position that management employees were not relevant to the Fields grievance, and suggested that if Vanderbeck disagreed, she should take the matter up with his supervisor, Fenske. Vanderbeck did so, and Fenske agreed that the Department would also provide information regarding unit employees who had been promoted to management service in connection with their relocation.⁶

15. Fenske asked Sandall to produce another list with the additional information. Sandall spent 3½ to 4 hours doing so. On March 4, Fenske sent Clem a letter responding to Clem's February 17 letter and enclosed a revised list with 41 names. The Department did not bill the Union for this additional work. In her letter, Fenske stated that there were no payments of moving expenses between January and March of 2002; that the Department construed the "present" in the Union's December 13 letter to mean December 13; and that names listed as "new hire" in the report were initial appointments to state service, and the rest were reappointments. Fenske did not refer to the dispute over the production of the names of unrepresented employees.

16. The Union and Department did not communicate further regarding these issues before the Union filed this unfair labor practice complaint on April 15, 2005.

⁶The Department argues that the Union agreed, in turn, to limit its request to this additional information instead of its original request. We conclude, based on the limited evidence on this issue in the record, that the Union did not waive its right to pursue the information which the Department had refused to provide.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Department violated ORS 243.672(1)(e) by failing to provide a complete response to the Union's request for information.

On December 13, 2004, as part of its work on the Fields grievance, the Union requested that the Department provide a list of "all Oregon Department of Forestry employees" who had received moving relocation expenses from "January 1, 2002 to present" along with "an indication on [sic] what prompted the relocation/move." It sought the information by December 22. At first, the Department refused to produce any information regarding payment of moving costs for management employees, and then produced information only as to unit employees who received moving expenses in connection with a promotion to a management position.

The Union argues that the Department violated ORS 243.672(1)(e) by failing to provide complete information, failing to provide information in a timely manner, and charging an excessive amount for the information. The Department argues that the Union failed to prove that information regarding management employees was relevant, that the information could have been provided more quickly, and that the lists were incomplete. It also argues that the charges were not excessive.⁷

We turn first to the Department's refusal to produce information regarding moving costs for management employees. It is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). This includes the obligation to provide information.

⁷The Department also raises a mootness argument, based upon SEIU's failure to pursue the Fields grievance beyond the first step of the grievance procedure. We reject this argument. An employer's refusal to provide information in connection with a grievance can damage a union's ability to represent its members even if the information is eventually provided or the grievance is settled. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891 (2007), citing *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220, 227 (1992); and *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924, 935 (2005).

“* * * When analyzing duty to provide information issues, we begin with the premise of full disclosure. The respondent may object to the release of the information for certain reasons. The threshold test established in *Colton* [*OSEA v. Colton School District*, Case No. C-124-81, 6 PECBR 5027, 5031-32 (1982)], requires that the requested information have 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).

In *Colton*, we considered four factors in determining whether a party complied with its duty to furnish information: (1) the reason given for the request, (2) the ease or difficulty with which the data can be produced, (3) the kind of information requested, and (4) the history of the parties’ labor-management relations. We apply those factors here.

(1) *The reason given for the request:* We must first determine if Local 503 requested material which had some probable or potential relevance to a grievance or other contractual matter. This is the threshold test. A responding party has no duty to provide irrelevant information. *See Ashland Police Association v. City of Ashland*, Case No. UP-50-05, 21 PECBR 512, 517 (2006), and cases cited therein.

Here, Local 503 sought information which was specific and relevant to the Fields grievance. Its request was based on the Department’s moving reimbursement policy, which was specifically referred to in the labor contract. Management, unrepresented employees, and bargaining unit employees were subject to an identical policy regarding their eligibility for reimbursement. The treatment of management and unrepresented employees was relevant to the Fields grievance and hence an appropriate subject for a request for information.

(2) *The ease or difficulty with which the information can be produced:* The Union’s request was straightforward: Local 503 wanted to know who had received relocation reimbursement in the last few years. The request was not vague or over broad. The Department does not argue that it failed to search for and produce information regarding managers because it was more time consuming than reviewing unit employee files. To the contrary, it took ODF more time and effort to cull out data regarding management employees than it would have taken to comply fully with the Union’s request for information.

(3) *The kind of information requested:* ODF raises no confidentiality or other issues which would preclude it from responding fully to the Union's request.

(4) *The history of the parties' labor-management relations:* Nothing in the record suggests that the parties have a history of difficulties in connection with requests for information under the PECBA.

We conclude that the Department violated ORS 243.672(1)(e) by refusing to provide the Union with names of management employees who received moving reimbursement payments under the same policy governing bargaining unit members, and the reason for the payments. The treatment of management and unrepresented employees was an appropriate subject for a request for information. The relevancy of the request was obvious on its face. We will order the Department to provide this information.⁸

3. The Department did not violate ORS 243.672(1)(e) by providing information to Local 503 in an untimely manner.

Local 503 also argues that ODF took an unreasonably long time to respond to the Union's request for information. The Union argues that the Department repeatedly missed its own internal deadlines, let alone those set by Local 503.

The Union has the burden of establishing that the Department failed to provide information in a timely fashion. OAR 115-035-0042(6). Whether the period of time between the request and the response is reasonable depends on the "totality of the circumstances." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 672 (2004), citing *Colton*, 6 PECBR at 5031. "Where the information must be gathered or be translated into a form usable to the requesting party, the responding party has a reasonable time in which to provide the data. A reasonable time will be determined by considering circumstances such as the accessibility of the data, clerical time necessary to produce the information, the workload priorities of the responding party, and the amount of data requested." 6 PECBR at 5032.

⁸The Department's estimated cost of \$531.75 included an estimate of \$106.05 for Diane Wheeler to separate out reimbursement for managerial employees from reimbursement for all employees. We will direct the Department to reimburse SEIU Local 503 this sum. The Union should not have to pay the Department to violate the PECBA.

For reasons which follow, we conclude that the Department did not take an unreasonably long time to respond to the Union's request for information. We summarize the chronology of request and response.

Clem first requested information in connection with the Fields grievance on December 13, 2004. On December 22, 2004, Sandall sent Clem a plan for the records search and a cost estimate. Sandall said that the Department would not begin to process the Union's request until ODF received prepayment of its estimated cost. Clem thereafter requested an explanation of the cost estimate, which Sandall provided on January 5, 2005. On January 27, 2005, Clem sent the Department a check for \$531.75, the estimated cost. On February 14, 2005, Sandall gave Clem some of the information sought, but did not provide information on relocation reimbursement for managers. After correspondence and discussions regarding the Department's failure to respond completely to the Union's request, ODF provided additional information on March 3, 2005. The parties did not communicate further until Local 503 filed this unfair labor practice complaint in April 2005.

True, it took about two months for the Department to give Local 503 any information, and another month for it to supplement its first response. However, much of that time was spent on the issue of whether Local 503 would have to make a \$531.75 prepayment before the Department would begin to search its records. Local 503 did not object to the prepayment requirement at the time (or in these proceedings, for that matter). Thus, the "reasonableness" clock did not start until after January 27, 2005. The Department responded within two and a half weeks. This was not an unreasonable time period.

In these unfair labor practice proceedings, Local 503 lambastes ODF for using a very inefficient system to gather data in response to the Union's request. The Union's arguments are beside the point.

The information sought by the Union was not already compiled. The list of names of Department employees who received reimbursements was quickly created, but the reasons for the reimbursement could only be obtained through a manual search of the personnel files to review computer-created Personnel Action Forms. The Union did not present evidence that the time it actually took Sandall to search the files was unreasonable, or that the search could have been performed by additional employees. By contrast, the Department established that its personnel also had to respond to other workload priorities during the time in question, including collective bargaining responsibilities.

Finally, as of January 5, 2005, the Union knew precisely what data-gathering methods the Department would use. ODF said that its methodology would be laborious and time-consuming. This turned out to be true. Local 503 made no objections then. We will not consider its objections now.

4. The Department did not violate ORS 243.672(1)(e) by requiring Local 503 to pay an unreasonable amount to the Department for responding to the Union's request for information.

We turn now to the third issue in this case: the reasonableness of the fee which the Department charged Local 503, and its timing. In *Colton*, we stated that “* * * [w]here the responding party incurs expenses in providing the information that it would not otherwise incur, it may ask for reimbursement of such reasonable costs after informing the requesting party of its intention to do so. If such reimbursement is refused, the party may decline to provide the data.” 6 PECBR at 5032. Among other things, a party may seek reimbursement for “clerical time necessary to produce the information.” *Id*

“Reimburse” means “to pay back (an equivalent for something taken, lost, or expended) to someone.” *Webster's Third New International Dictionary*, 1914, (unabridged ed. 1971). Here, the Department did more than advise the Union of those estimated expenses for which it would seek reimbursement. Instead, ODF required prepayment of the sum of \$531.75 *before* it would begin its search for the information which Local 503 sought. Local 503 does not contest the Department's right to exact prepayment, and so that issue is not before us.

Instead, the Union argues that “[c]ommon sense does not support charging over five hundred dollars for a list of only 34 names.” (Complainant's Brief at 10.) According to Local 503, the Department improperly assigned highly paid employees to respond to the request for information. The Union reasons that while it may be reasonable to charge the hourly wage rate of the person gathering the information, the time spent on the task must also be reasonable. Finally, the Union concedes that it could have questioned the estimated costs more aggressively from the start.

In these proceedings, this Board will not consider SEIU's challenge to Department's selection of certain employees to respond to the Union's request for information. Nor will we consider its argument that \$531.25 was an unreasonable sum for the Department to require as prepayment for its costs in complying with the Union's request. The Union knew in January 2005 that Wheeler and Sandall, both highly paid

employees, would be compiling data in response to the request. It also knew just how the Department calculated the amount of the required prepayment.

However, SEIU did not object to the means or methods which the Department proposed to employ. Instead, the Union paid the money. Thereafter, Wheeler and Sandall compiled the data and furnished it to the Union. Since SEIU did not object then, it can hardly object now.

ORDER

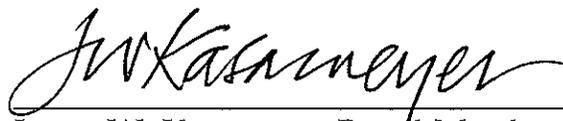
1. The Department violated ORS 243.672(1)(e) when it refused to furnish Local 503 with information concerning moving costs for management employees. The Department shall cease and desist from refusing to provide information about moving expenses paid to managers under the policies that govern payment of such expenses to bargaining unit members. The Department shall reimburse the Union for \$106.05, the amount the Department billed for time spent segregating management employees from Union employees in responding to the Union's request.

2. We dismiss the remainder of the complaint.

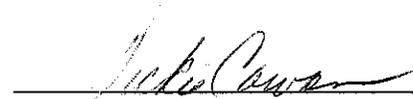
DATED this 10th day of September 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member



Vickie Cowan, Board Member

This Order may be appealed pursuant to ORS 183.482.