EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-39-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
STATE OF OREGON, DEPARTMENT OF CORRECTIONS,	)	
Respondent.	)	

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) B. Carlton Grew on March 3, 2004, following a hearing on November 24, 2003, in Salem, Oregon. The hearing closed with the submission of post-hearing briefs on January 9, 2004.

Daryl S. Garrettson, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 638 E. 5th Street, McMinnville, Oregon 97128, represented Complainant.

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

The Association of Oregon Corrections Employees (Association) filed this complaint on July 16, 2003, alleging that the State of Oregon, Department of Corrections, (State or DOC) had violated ORS 243.672(1)(e) by failing to produce information to the Association after its request. On October 28, 2003, the State timely filed its answer, in which it admitted and denied certain allegations and raised affirmative defenses. A hearing was held on November 24, 2003, at which the parties presented testimony and other evidence.

The issues are whether the State refused to provide information to the Association, in violation of ORS 243.672(1)(e), regarding (a) the Koval grievance; (b) the ISDS coordinator position; and (c) a study involving correctional specialists' four-ten work shifts.

We conclude that the State violated ORS 243.672(1)(e) by failing to respond in a reasonable time to the Association's requests for information about the Koval grievance and about the study involving correctional specialists' four-ten work shifts, and by failing to reveal that it had withheld documents responsive to the Association's requests for information regarding the ISDS coordinator position. We conclude, however, that the State did not violate its duty to provide information under ORS 243.672(1)(e) as to the documents it unsuccessfully attempted to deliver regarding the ISDS coordinator position.

RULINGS

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

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of employees employed by the State, a public employer.

KOVAL POSITION CLASSIFICATION.

2. On November 21, 2002, Unoda Moyo, a State human resources consultant, performed a desk audit of a heating, ventilating, air conditioning, and refrigeration (HVAC) technician position held by Nick Koval at the Oregon State Penitentiary ("OSP"). Moyo concluded that some of Koval's duties were outside his classification. On December 6, 2002, the Association filed a grievance alleging that Koval was entitled to receive work out-of-class pay.[1]

3. On January 15, 2003, after reviewing the grievance, Acting Superintendent Brian Belleque[2] agreed to pay Koval five percent out-of-class pay retroactively to October 1, 2002, and continuing "until final approval/decision is made related to your position's proper classification, or until such time when these duties are no longer assigned to you."

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[1]On November 17, 2003, the Association won the grievance; the arbitrator awarded Koval five percent out-of-class pay.

[2]Belleque became the permanent OSP superintendent effective June 1, 2003.

4. On January 30, 2003, Moyo e-mailed Koval, Belleque, DOC Trades Maintenance Supervisor Steve Mitchell, and Association Executive Vice President of Correction Specialists Steve Jorgenson. Moyo informed them that he had erred in his assessment of Koval's position. He wrote that the parties needed to meet to discuss the issue

5. On February 5, at 8:18 a.m., Jorgenson e-mailed Belleque to ask about the DOC's plans regarding Koval's wages. Jorgenson sent copies of the e-mail to Association President Gary Harkins and Association Vice President of Correction Specialists at OSP Martin Bowser, as well as to DOC's Mitchell and Moyo. Belleque responded the same day, stating that his discussions with Mitchell and Moyo indicated that Koval would receive five percent work out-of-class pay "as long as he is assigned duties outside his classification."

6. Moyo also responded to Jorgenson's e-mail on the same day, at 1:35 p.m. Moyo stated, in part, "[t]hat is what I remember also. What we are doing now is looking for is [*sic*] a mechanism to pay him. We are not rescinding on [*sic*] the agreement we had."

7. On February 5, at 11:31 a.m., Koval e-mailed Moyo to request "all documentation that supports your out of class memo, dated 01/30/03." Koval sent copies of the e-mail to Belleque and Association officers Harkins and Jorgenson. Moyo responded, via e-mail, at 2:04 p.m. the same day:

> "Attached is a copy of the compensation plans for different bargaining units for the Refrigeration Mechanic classification. * * * So when we sent the agreement to Records they tried to enter that in the system and the system said NO, and they verbally informed me that it could not be done that way. *I have no other documentation I can share with you.* Like I said in the other e-mail message *we are still honoring the agreement and you will be paid.*" (Emphasis added.)

Moyo sent a copy of his response to Belleque, Harkins, and Jorgenson.

8. On February 20, the parties met to discuss the Koval issue. Belleque summarized the information provided at the meeting in a February 24 letter to Koval and the Association. The letter identified some job classifications comparable to Koval's position and concluded that those classifications were paid at, or below, the same salary Koval was receiving. The letter stated, in part:

> "* * * Therefore, there is no need for the employer to request a change in classification of the HVAC technician position, there

> is no justification for additional compensation when you are assigned duties that fall within the class specifications for refrigeration mechanic, and there is no reason to remove those job duties from you."

Belleque's letter also stated that Koval's additional five percent salary payment would end on February 28, 2003, since Belleque had made his final decision regarding the proper classification of Koval's position. This was the first notice to the Association that the State would not continue to pay Koval the additional five percent in salary.

9. On March 3, the Association, through its attorney Daryl Garrettson, filed a demand to bargain regarding the assignment of duties to Koval which were outside of his job classification and job description.

10. On March 20, Belleque wrote Garrettson to state that the State had classified Koval's position properly, and that he was forwarding the demand to bargain to the State Department of Administrative Services (DAS).

11. On March 28, Garrettson wrote Belleque to ask whether Belleque or DAS would be responding to the demand to bargain.

12. On April 4, Jorgenson wrote Belleque to request "all documentation and or information that was used in your response letter to * * * Garrettson dated March 20, 2003," and "all documentation and or information used in the decision to disregard the first written agreement."

13. On April 4, Belleque responded to Garrettson's March 28 letter by stating that Garrettson should deal directly with DAS.

14. On April 10, Belleque wrote Jorgenson, stating:

> "This is in response to your request for information regarding Nick Koval and a letter sent to Mr. Daryl Garrettson dated March 20, 2003. As indicated in a letter to Mr. Garrettson dated April 4, 2003, this issue has been raised as a demand to bargain and, as such, all requests for information will need to be sent to Jan Weeks at Labor Relations."

15. On April 10, 2003, Jorgenson filed a demand to bargain with Jan Weeks regarding the assignment of additional work duties to Koval.

16. On April 17, Jorgenson wrote Weeks at DAS to request "all documentation and or information used in not following the written agreement for Mr. Koval working out of class duties."

17. In late April, Moyo attempted to set a meeting on the Koval issue. On April 25, Jorgenson responded by e-mail, with copies to Wells, Weeks, Harkins, and Koval:

> "Mr. Moyo, there was a meeting on this issue and we talked about having another meeting. This is in the third step a DEMAND TO BARGAIN We will not set down with all these managers about this issue. * * * Until I get the information I have requested on this issue I would coceder [*sic*] this a unfair labor practice and you can conceder [*sic*] this your notice. This is fare [*sic*] from the spirit of the agreement ! I am in no way going to let this one drag on."

18. Weeks responded the same day, stating that the purpose of the meeting was to review the parties' different understandings of the substance of Koval's work, and that Garrettson was going to send Weeks a copy of an Employment Relations Board case regarding the State's obligation to bargain.

19. On May 28, Garrettson wrote Weeks. Garrettson referred to Jorgenson's April 17 request for the following:

> "* * * [A]ny and all documentation and/or information utilized or relied upon by the Department in repudiating or refusing to implement the grievance settlement signed by Brian Belleque on January 15, 2003. This request is for that information considered and relied upon by the Department in repudiating the above referenced settlement."

20. Garrettson also stated that the Association had made numerous requests for this information and threatened to file an unfair labor practice action if the documents were not forthcoming.

21. Association and State representatives discussed the Koval issue several times during labor-management meetings in the spring of 2003. At one such meeting, Association representative Jorgenson asked Belleque, Moyo, and Weeks for the classifications the State had reviewed in reaching its conclusion that Koval was not entitled to any additional wages. Moyo told Jorgenson that the information he sought was in the DAS classification document, which was on the internet.

22. On June 16, 2003, Moyo met with Association representatives about the Koval matter. Attorney Garrettson told Moyo that the Association wanted "whatever it was you looked at in changing your mind." Moyo stated that he would provide the Association with additional information. Moyo believed that the Association representatives did not understand what he was telling them about positions comparable to Koval's. Moyo decided to create a chart to aid their understanding.

23. On July 16, the Association filed this unfair labor practice complaint.

24. On August 6, Moyo presented the chart to the Association.[3]

25. Moyo and Association representatives met on August 11. The Association representatives told Moyo that they did not believe the information he had supplied complied with their requests, because it was information that the Association already had. Moyo responded, "[t]hat's all I've got in my file."[4]

26. The State had asked the Association to put its information requests in writing, so that it could be clear what the requests were. According to Belleque, the State's responses to those requests should also be in writing. Belleque understood that the written requests from the Association sought a formal response.

27. During the spring of 2003, the State was handling several Association document requests on a variety of subjects.

ISDS COORDINATOR POSITION

28. On May 20, 2003, Jorgenson sent a written request to DOC Security Manager Tom Wright for information related to the assignment of Kyle Page to an institution staff development coordinator (ISDS coordinator)[5] position. Jorgenson had seen the State's file on the issue, which was approximately two inches thick, but not the

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[3]Moyo's delay was apparently due to inadvertence or the press of other work; the evidence does not indicate Moyo acted in bad faith.

[4]Moyo did not recall whether he had previously told Association representatives that he had given them everything. Weeks believes that Moyo had made statements to that effect before the August meeting, but did not identify when those statements were made. We conclude that, aside from Moyo's February 5, 2003 e-mail *prior* to Belleque's decision, the State never informed the Association in writing that it had provided all the material responsive to the Association's requests. We conclude that State representatives did not clearly state that they had provided all the information they had until Moyo's remarks on August 11, 2003.

[5]The acronym does not match the testimony regarding the name of the position.

individual documents. Wright responded[6] through a reusable interoffice mail envelope ("thousand-miler") to the OSP interoffice mailroom. Jorgenson never received the letter.

29. On June 12, 2003, Jorgenson sent a second request to Wright, attaching a copy of his May 20 request. Jorgenson stated, "[y]ou still have not given me the information I have requested." Wright realized that Jorgenson had not received the information. On June 13, Wright sent the information again, after reprinting his original letter with the new date. He sent the information through the U.S. mail addressed to the Association's office address, as well as in another "thousand-miler" through the interoffice mail. He addressed copies of the letter to Belleque, Moyo, "Harkins/Bowser," and Garrettson. Belleque received a copy; Jorgenson, Bowser, and Harkins did not.

30. In July, after learning of this unfair labor practice complaint, Wright approached Jorgenson and explained that he had sent the material. Jorgenson replied, "it's in ULP. It's too late now." Later, the State supplied Jorgenson with a copy of Wright's June 13 letter and two additional pages. When Jorgenson told Wright that the information provided did not comply with the request, Wright told him that he had supplied what he believed Jorgenson was asking for.

FOUR-TEN SHIFT STUDY

31. From April 2 to September 3, 2001, the State conducted a pilot program regarding work schedules of four ten-hour days per week (a four-ten shift). The program resulted in a file containing 43 pages of documents.

32. On June 6, 2001, Association Vice President Jorgenson asked for the State's file on the four-ten pilot program. On June 11, the State asked that the Association pay a $9 copying fee for the file. The Association never paid the fee, and the parties disagree about whether the file was provided.[7]

33. On March 18, 2002, Mitchell issued a two-page memo summarizing the State's experience with the four-ten pilot program.

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[6]Wright's response was limited to a cover letter and two additional documents. Wright did not object to the request for information as seeking confidential documents or as otherwise objectionable and did not disclose in his letter to Jorgenson that he had withheld any documents.

[7]The State was inconsistent in demanding payment for information requests, and the Association was inconsistent in responding to those demands. Jorgenson and Mitchell disagree about whether Jorgenson received the report and supporting documentation. We need not resolve this dispute.

34. On April 11, 2002, Association Vice President Jorgenson asked for a copy of the State's pilot program file.

35. On August 26, 2002, Bowser received, and signed for, a copy of Mitchell's March 18 memo.[8]

36. On August 26 and 27, Bowser and the DOC's Stan Czserniak exchanged e-mails about the four-ten pilot program and the March 18 memo.

37. On March 19, 2003, Acting Superintendent Belleque issued a memo denying physical plant worker John Melnick's request to work a four-ten shift. The memo referred to the 2001 study on four-ten shifts. Belleque stated that the study demonstrated that four-ten shifts did not allow "the most effective interface of the physical plant with the overall operations of the institution."

38. On April 2, 2003, Association Vice President Bowser wrote to request "the back up documentation" for the State's conclusion, stated in Belleque's March 19 memo, that the pilot program had failed to meet the needs of the institution. The request sought information including the State's Measure 17 compliance records; work orders received and completed; and complaints from staff about work not being done for the previous two years, the year of the pilot study and the following year.

39. On April 8, 2003, Belleque replied to Bowser. Belleque repeated the list of items Bowser sought. Belleque stated that he understood that the four-ten shift issue had been raised in bargaining, and, therefore, Bowser's request was being referred to Jan Weeks at DAS for a response.

40. On April 17, Bowser wrote Weeks to renew his request for information, enclosing a copy of Belleque's April 8 response.

41. On June 4, 2003, Bowser sent another memo to Weeks. Bowser stated that he had made a request in April for "a copy of an evaluation made after the pilot four ten-hour day program in 2001." Bowser wrote that he had not received a response from Weeks, and requested a response by June 14.

42. At a labor-management meeting on June 16, Garrettson made a verbal request for the four-ten shift study file. Weeks told Garrettson that she would comply with the request. As of the date of hearing, the Association had received only Mitchell's March

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[8]Bowser and Mitchell disagree about whether Bowser also received the supporting documentation for the report. We need not resolve this dispute.

18, 2002, two-page summary report. The State had not provided the Association with the remaining 43 pages of documentation.

CONCLUSIONS OF LAW

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

2. The State violated ORS 243.672(1)(e) in its responses to the requests for information regarding the Koval grievance, ISDS coordinator position, and four-ten shift study.

STANDARDS FOR DECISION

ORS 243.672(1)(e) provides that 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." As part of their statutory duty to bargain in good faith, employers and labor organizations have a duty under the Public Employee Collective Bargaining Act (PECBA) to provide relevant information to each other upon request if the information sought is of "probable or potential relevance" to a grievance or other contract administration issue, *Olney Education Association v. Olney School District 11,* 16 PECBR 415, 417-418 (1996), *aff'd* 145 Or App 578, 931 P2d 804 (1997), or if "the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal." *Washington County School District No. 48 v. Beaverton Education Association,* Case No. C-169-79, 5 PECBR 4398, 4405 (1981). This Board considers four factors in reviewing an alleged refusal to provide information:

> "* * * (1) [T]he reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested; and (4) the history of the parties' labor-management relations. * * *" *Olney School District,* citing *OSEA v. Colton School District,* Case No. C-124-81, 6 PECBR 5027 (1982).

The Association has the burden of establishing that the State refused to provide information in a timely fashion. OAR 115-035-042(6); *Ralphs v. OPEU and Oregon Executive Department,* Case Nos. UP-68/69-91, 15 PECBR 115, 116-117 (1994). The length of time a party may take to respond to an information request depends on the totality of the circumstances. *Colton School District,* 6 PECBR at 5031. A determination as to whether a party responded within a reasonable time depends on such matters 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." *Id.* at 5032. Further, "the

reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether" where the parties' history includes a pattern of numerous requests or apparent "fish-and-grieve" expeditions. *Id.* at 5032.

In each of these disputes, the State does not contest the Association's right to the requested information. Instead, the State argues that it complied with its statutory duties.

KOVAL POSITION CLASSIFICATION

The State argues that Moyo's February 5, 2003, 2:04 p.m. e-mail advised the Association that the State had no additional documents to provide. It also argues that Association representatives were repeatedly told that the State had no further information to provide. It asserts that Moyo's offer to provide more information was an offer to actually create a document, something which the State had no duty to do.

Moyo's February 5 e-mail to Koval stated that he had "no other documentation I can share with you." It is undisputed that Moyo and the State changed their position on Koval's salary *after* that e-mail. The State's position changed from "still honoring the agreement" and "looking for * * * a mechanism to pay [Koval]" to claiming that Koval had no duties which justified higher wages. The Association was entitled to determine the basis for the State's change in position, as well as the earlier information that led Moyo to call the January 30 meeting. Moyo's e-mail did not inform the Association that no other documentation existed that was responsive to the Association's request.

The parties disagree about the nature of oral representations made at meetings between Association and State representatives. However, it is undisputed that the Association made several formal, written requests for the information and received no written response stating the State's position on producing the documents. It is also undisputed that, on June 16, 2003, Moyo offered to provide additional information to the Association. Both Moyo and the Association representatives understood that Moyo intended to provide that information soon after the meeting. Confusion about the nature of the information Moyo intended to provide could have been clarified by a confirming letter from either party. It is apparent, however, that the Association representatives were not aware that Moyo planned to provide them with information that they already had, albeit in a slightly different form.

It remained the State's obligation to provide a definitive response to the Association's request. The State failed to provide that definitive response until Moyo stated "[t]hat's all I've got in my file" on August 11, 2003. That statement was made nearly a month after this unfair labor practice complaint (ULP) was filed, and after repeated written

and oral requests from the Association. The State argues that this delay does not matter, because the Association had received the appropriate documents long before. We disagree. A response to a request for information is required, and that response must include a definitive statement about the intended disposition of the request—even if the statement is simply to assert that all documents sought have been provided. *See Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-50-86, 10 PECBR 252 (1987); and *Colton School District*, 6 PECBR at 5033.

We conclude that the State failed to respond in a reasonable time to the Association's request for information about the State's changed view of Koval's job, and that this failure violated its ORS 243.672(1)(e) duty to provide information. We shall order the State to cease and desist from failing to respond in a reasonable time to such information requests from the Association.

ISDS COORDINATOR POSITION

The Association argues that it requested information that the State never provided until after this ULP was filed, and that Wright withheld some information as confidential without informing the Association that he was doing so. The State argues that Wright placed nonconfidential information in the mail to the Association twice, and that the State is not responsible for the failure of delivery. The evidence in the record suggests that the information was sent, but was never received by the Association. From the Association's perspective, two written requests were simply ignored; from the State's perspective, it had responded once, learned that the response had never been delivered, responded again, and received no information from the Association that the documents had not been received.

The State was required to make a reasonable, good faith effort to deliver the documents. From the information available to it, it appeared that the first effort failed completely, while the second succeeded in reaching at least one DOC official, Belleque, although not the Association. The Association followed up with a question after it failed to receive the documents the first time, but made no additional attempts to follow-up with Wright after that. The State did not follow up to see if the documents were, in fact, delivered. However, the State used an additional, and presumably more reliable, means to send them the second time—regular mail.

We conclude that, under these circumstances, the Association has failed to prove that the State violated its ORS 243.672(1)(e) duty to provide information, as to the documents it attempted to deliver. *See Salem-Keizer School District 24J*, 10 PECBR at 264, n 13. However, Wright did not provide the Association with documents he concluded were confidential and made no attempt to notify the Association that he had withheld

documents that fell within the scope of the Association's request for information. *See* Finding of Fact 28. Through these actions, the State violated subsection (1)(e). *See AOCE v. Oregon Department of Corrections,* Case No. UP-7-98, 18 PECBR 64, 74 (1999) (party refusing to supply information on confidentiality grounds has a duty to seek an accommodation). We shall order the State to cease and desist from failing to reveal that it has withheld documents responsive to Association requests for information.

FOUR-TEN SHIFT PILOT PROGRAM STUDY

The State argues that the materials sought by the Association, 45 pages regarding the four-ten shift study, were provided to the Association several times prior to the requests at issue here. The Association argues that the State never provided it with the entire file, and that even if the Association had received the file, and later lost it, the State still had an obligation to respond.

It is undisputed that the State failed to respond to the Association's multiple 2003 requests for the four-ten shift study documents.[9] Even if the State had provided the documents in the past, it still had an obligation to respond to the current request. Multiple, lengthy requests for the same documents could well be unreasonable, and justify a refusal to provide additional copies. However, there is no showing of any such burden in this case. *See Salem-Keizer School District,* 10 PECBR at 262-263, and *Colton School District,* 6 PECBR at 5032.

We conclude that the State failed to respond in a reasonable time to the Association's request for information about the four-ten shift study, and that this failure violated its ORS 243.672(1)(e) duty to provide information. We shall order the State to cease and desist from failing to respond in a reasonable time to such requests from the Association.

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[9]The State argues that the Association modified its request each time it was repeated. However, Garrettson's request clearly seeks all relevant documents. In any event, there was no evidence that the State contacted the Association to resolve any ambiguity in the requests or that any such ambiguity or changes had anything to do with its failure to respond.

ORDER

1. The State will cease and desist from refusing to respond to Association requests to produce information within a reasonable time after the request is made.

2. The State will cease and desist from failing to reveal that it has withheld documents responsive to Association requests for information.

DATED this 16th day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.