

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-15-05

(UNFAIR LABOR PRACTICE)

LABORERS' LOCAL 483,)	
)	
Complainant,)	
)	
v.)	RULINGS, FINDINGS OF
)	FACT, CONCLUSIONS OF
)	LAW AND ORDER
CITY OF PORTLAND,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on July 12, 2006 on Respondent's objections to the Recommended Order issued by Administrative Law Judge (ALJ) Vickie Cowan on May 2, 2006, following a hearing before ALJ B. Carlton Grew on September 7, 2005 in Portland, Oregon. The record closed on September 22, 2005 with the submission of the parties' closing briefs.

Michael R. Dehner, Field Representative, Laborers' Local 483, 1125 S.E. Madison Street, Suite 206, Portland, Oregon 97214, represented Complainant.

Matthew V. Farley, Deputy City Attorney, City Attorney's Office, City of Portland, 1221 SW Fourth Ave., Suite 430, Portland, Oregon 97204, represented Respondent.

On April 6, 2005, Laborer's Local 483 (Union or Local 483) filed this unfair labor practice complaint alleging that the City of Portland (City) violated ORS 243.672(1)(e) by failing to provide, in a timely manner, information requested by the Union. On June 24, 2005, ALJ Cowan served the complaint and notice of hearing on the parties. The Employment Relations Board (ERB) received the City's answer on July 11, 2005, 17 days after service of the complaint and notice of hearing.

The issues presented for hearing are:

- (1) Did the City file a timely answer?
- (2) Did the City refuse to provide the Union with information in violation of ORS 243.672(1)(e)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. Local 483 is a labor organization affiliated with the District Council of Trade Unions (DCTU) and is the exclusive representative of a bargaining unit of employees employed by the City, a public employer.¹

2. DCTU and the City are parties to a collective bargaining agreement effective July 1, 2004 to June 30, 2006. Gilbert Torres is a member of the DCTU bargaining unit, and is covered by that contract.

3. On July 18, 2003, Torres and a coworker were involved in a verbal confrontation in the workplace. As a result of this confrontation, the City issued Torres an oral reprimand.

4. Torres had no prior discipline and no further discipline after issuance of the oral reprimand.

5. Article 34.3 of the collective bargaining agreement provides:

“Records of oral or written reprimand not involving other disciplinary action, shall be removed from an employee’s personnel file after one year, on the employee’s request, provided in the judgment of the City, the employee has taken corrective action and has received no other disciplinary

¹DCTU consists of: AFSCME, Local 189; Laborers’ International Union, Local 483; IBEW, Local 48; Machinists and Aerospace Workers, District Lodge 24; Auto Mechanics, District Lodge 24; Operating Engineers, Local 701; Plumbers, Local 290; and Painters and Allied Trades, District Council 5

actions. Approval to remove such material from the file shall not be unreasonably withheld.”

6. On September 22, 2004, the Union, on behalf of Torres, requested that the City remove the oral reprimand from Torres’ personnel file.

7. By letter dated September 27, 2004, the City refused the request.

8. On October 6, 2004, the Union grieved the City’s refusal to remove the oral reprimand under Article 34.3 of the collective bargaining agreement.

9. The City denied the grievance

10. The Union pursued the grievance to step two.

11. On December 8, 2004, the City again denied the grievance, stating, “The City will not remove letters of discipline from an employee’s file when the underlying violation concerns one of the City’s critical work rules.”

12. Michael Dehner is a Field Representative for Local 483. Patrick Ward is a Human Resources Coordinator for the City. On December 27, 2004, Dehner sent Ward a letter stating that the Union was advancing the grievance to arbitration by contacting the State Conciliator to request a list of arbitrators

13. On December 29, 2004, Dehner wrote to Ed Rutledge, the City’s Labor/Employee Relations Manager, requesting that the City provide to the Union:

“1. Please provide the name of every City employee working under the DCTU Labor Agreement (“the Agreement”) who, on or after January 1, 2003, has verbally requested that the City remove a record of an oral or written reprimand from their personnel file pursuant to Article 34.3 of the Agreement.

“2. For every City employee working under the Agreement who, on or after January 1, 2003, has made a written request that the City remove a record of an oral or written reprimand from their personnel file pursuant to Article 34.3 of the Agreement, please provide a copy of the employee’s written request.

“3. For each request identified in response to Request Nos. 1 or 2 above, please provide a copy [sic] the disciplinary document(s) requested to be removed, regardless of whether the records were actually removed from the City’s personnel file.

“4. For each of the disciplinary documents identified in Request No. 3 above, please indicate which records were not removed, and provide any documents memorializing or reflecting the reason(s) for the City’s refusal to remove the records.

“5. For any instance on or after January 1, 2003 in which disciplinary documents relating to a violation of HR Administrative Rule 4 12, HR Administrative Rule 5 01(9), or HR Administrative Rule 5.01(15) were removed from the City’s personnel file, please provide a copy of the disciplinary document(s) removed.”

14. The State Conciliator sent a list of arbitrators to the City and the Union on December 30, 2004.

15. On January 3, 2005, Ward responded to Dehner’s information request. Ward refused to furnish the information sought by the Union. Instead, he stated that “information requests require a statement of a reason for the request. Perhaps the request arises from the grievance filed by one of your members, but a written statement of the same will be needed before the City is able to assess the relevancy and scope of the request.”

16. On January 5, 2005, Dehner wrote Ward that the information request was in furtherance of the Union’s investigation of the Torres grievance, and asked that the information be furnished by January 19, 2005.

17. On January 5, 2005, Dehner notified Lory Kraut, a Deputy City Attorney, that Local 483 was ready to strike names from the list of arbitrators supplied by ERB.

18. On February 15, 2005, Ward made the City’s first substantive response to Dehner’s request for information. Ward did not furnish Dehner with the names of employees and documents which Local 483 had requested. Ward contended

that Article 34.1.2 of the DCTU agreement, and City Human Resource administrative rules prohibited divulging that information.² Instead, Ward sent Dehner a chart. According to the chart, 18 unidentified employees in the DCTU bargaining unit had requested to have an oral or written reprimand removed from their personnel files. The chart also contained: (1) the Bureau and work classification of each employee, (2) the level of discipline administered, (3) the date of the discipline, (4) the date of the reprimand's removal if removed and, (5) if not removed, the reason it was not removed.

19. On February 23, 2005, Dehner responded that the City's reply was insufficient because Ward had not furnished, as requested, the names of the employees in question, nor the disciplinary documents they received. Local 483 reiterated its need for the requested information. Ward did not respond.

20. On March 15, 2005, Dehner again wrote to Ward, asking for the information the City had failed to furnish. Again, Ward did not respond.

21. On March 17, 2005, Dehner notified Arbitrator David Pesonen in writing that the parties had selected him to arbitrate the Torres grievance. Dehner told the arbitrator that Stephanie Harper, another Deputy City Attorney, was handling the case for the City.

22. On March 21, 2005, Arbitrator Pesonen wrote to the parties that he had received the letter advising him of his selection as arbitrator and offered June dates for arbitration.

23. On March 29, 2005, Dehner again asked Ward to furnish the information that Local 483 had requested on December 29, 2004, January 5,

²Article 34.1.2 provides:

"If the City has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public. If the City has reason to discuss any disciplinary action or the possibility of any disciplinary action, the employee shall be given the option of having a Union representative present at any such discussion. Written disciplinary actions shall not be posted; however, this does not preclude management from notifying other management and employees when restrictions are applied to an employee as a result of discipline."

February 23, and March 15, 2005. He said that the Union would file an unfair labor practice complaint if the City did not respond. The City did not respond.

24. On April 6, 2005, the Union filed this unfair labor practice complaint. ERB informally served the City with the complaint on the same day. The City received the complaint on April 8, 2005.

25. On April 13, 2005, Dehner wrote to Harper, again renewing the Union's request for information. The letter states, in pertinent part:

“* * * Without intending to narrow my prior requests, the information I have requested includes three general categories: (a) any memorialization of written or verbal requests to remove a record of an oral or written reprimand; (b) the record(s) sought to be removed (regardless of whether the City actually did so), reflecting the underlying disciplinary issue(s); and (c) any records memorializing the City's refusal of a request to remove disciplinary records.

“* * * For starters, though, I need the names of those employees referenced in the table that Patrick Ward previously provided me, so that I can check Local 483's records to see what we already have in-house. You and I can then address any remaining issues.”

26. On April 15, 2005, Harper responded, stating that:

“I plan on responding more fully to your request for information. However, in the interest of time, I wanted to provide you with the information that I had promised to send. The names of City employees who are Local 483 members are enclosed. Please call if you have questions.”

Harper enclosed a copy of the chart Ward had previously provided on February 15, 2005. This time, the chart included the names of employees represented by Local 483. However, the chart did not include the names of any other City employee covered by the DCTU contract.

27. On April 28, 2005, Harper notified Dehner that the City would not provide the remaining requested information. She stated that the City did not keep

records of verbal requests to remove written reprimands; and, in any event, this request was burdensome and a fishing expedition.

She then stated that the City had responded to Local 483's requests for information regarding written requests to remove reprimands and related matters. According to Harper, Local 483 was "not entitled to information about members it does not represent," and that "[t]hese requests are not relevant to the grievance." Harper went on to state that "[d]espite this, the City did something it had no obligation to do, which is research DCTU employees who have had an oral or written reprimand removed and pull it together into a chart. This required a hand search and a significant amount of time." Harper said the City would not produce any other information which Local 483 had requested.

Harper then chastised Dehner for "engaging in numerous contacts with Patrick Ward * * * with respect to your information request rather than this office over the course of the last three months." According to Harper, when the grievance was moved to arbitration it came under the jurisdiction of the City Attorney's office for all purposes, and all communications should have been addressed to it. Finally, Harper contended that any disputes regarding the Union's requests for information should be settled by the arbitrator, not ERB

28. On May 16, 2005, Arbitrator Pesonen scheduled the arbitration hearing for June 20, 2005. Following a prehearing conference, both parties submitted written arguments to the arbitrator regarding, among other things, Local 483's request for information.

29. On June 7, 2005, Arbitrator Pesonen reached an "initial conclusion" that the City was not required to produce the additional documents requested by the Union beyond the chart it had already provided, and so advised the parties.

30. In the meantime, after an initial investigation, ALJ Cowan set the hearing for July 19, 2005. On June 24, 2005, ERB formally served the Service of Complaint and Notice of Hearing on the parties by certified mail.³ The notice of hearing stated in boldface type: "**Respondent has 14 calendar days from the date of mailing or personal service of this complaint within which to file an answer with this Board.**" The notice further provided, in bold faced type:

³The City received this document on June 27, 2005.

“* * * ORS 243.672(3) requires payment of a \$100 fee when filing an answer to an unfair labor practice complaint. A respondent that does not submit the filing fee with its answer will not be permitted to participate in the hearing before the administrative law judge or in oral argument before the Board, unless the respondent shows good cause for the failure to pay the filing fee when filing its answer.”

31. The City’s answer was due on Friday, July 8, 2005. The City faxed a copy of its answer to ERB and the Union on Friday afternoon, July 8, 2005.

32. On Monday, July 11, 2005, an employee of Douglas, Conroyd, and McMinimee, Attorneys at Law, located on the second floor of the same building as ERB, hand-delivered the City’s answer and filing fee to ERB’s office along with a signed copy of the receipt for service. The service receipt indicated that the employee signed for the documents at 5:15 p.m. on Friday, July 8, 2005.

33. On July 11, 2005, ALJ Cowan notified the parties by e-mail and fax that the City’s answer was untimely and informed them that unless the City could show good cause why the answer should be received, it would not be permitted to present evidence at the hearing and would be restricted to legal argument only.

34. The City responded the next day, July 12, asserting that it made a good faith effort to deliver the answer and filing fee by 5:00 p.m. on Friday. The City hired Transerv, a messenger service, to deliver the answer and the filing fee to ERB. The Transerv driver got held up in traffic and did not arrive until approximately 5:05 p.m.

35. Subsequently, the City submitted the sworn affidavit of Michael Wirth, the Transerv driver assigned to deliver the City’s answer and filing fee on July 8. Wirth’s affidavit states that he was filling in for the regular Transerv driver that day. Another driver collected the City’s answer and filing fee at approximately 1:00 p.m. and met Wirth in Wilsonville. Due to heavy traffic that day, the Portland driver was late meeting Wirth. Wirth left Wilsonville at approximately 3:35 to 3:40 p.m. Because traffic was heavy and slow from Wilsonville to Salem, Wirth arrived at ERB at approximately 5:05 p.m. to find the elevator locked.

He then ran up the stairs to the fourth floor to find the door locked and lights off. He searched the building for an open office. The law offices of Douglas, Conroyd, and McMinimee on the second floor of the building were still open for

business. The receptionist there informed him they could not accept service for ERB, but another employee agreed to sign for the documents and deliver them to ERB's office first thing Monday morning. That employee signed the receipt of service at 5:15 p.m. on Friday. The law office employee delivered the City's documents to ERB on Monday morning, July 11, 2005.

36. On August 19, 2005, Arbitrator Pesonen issued his decision and award. He ruled that the City had violated Article 34.3 when it failed to remove the reprimand from grievant's file, and directed the City to remove it.

CONCLUSIONS OF LAW

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

2. The City's answer was timely filed.

The Board requires complainants and respondents to file their pleadings and pay their filing fees in a timely manner. "Just as we will not process an untimely complaint, we will not give effect to an untimely answer, absent good cause shown." *OPEU v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 249-50 (1999) (emphasis omitted.)

An answer is not considered to be filed until the Board receives the filing fee. OAR 115-035-0035(4). The City's answer was due on Friday, July 8. The Board did not receive the fee until Monday, July 11.

Here, the City made every reasonable effort to comply with the filing deadline. It utilized a reliable, professional messenger service which guarantees its clients that it will timely deliver the documents. But for circumstances beyond the City's control, the answer would have been received by 5:00 p.m. Friday, instead of 5:05 p.m. Under the particular circumstances of this case, we find that good cause exists for excusing the late filing. Therefore, we give effect to the City's answer.

3. The City violated ORS 243.672(1)(e) by refusing to provide information to the Union.

The facts of this case are essentially undisputed. The collective bargaining agreement between the City and the DCTU provides for the removal of oral or written reprimands after one year, providing certain criteria are met. Local 483 requested that

Torres' oral reprimand be removed from his file and the City refused. The Union grieved the matter on October 6, 2004.

On December 29, 2004, Local 483 asked the City for (1) the names of City employees covered by the DCTU agreement who had requested removal of reprimands from their personnel files, (2) copies of employees' written requests for removal together with copies of the underlying disciplinary documents, and (3) identification of which requests were and which were not removed, together with the reasons therefor, and for related documents. Dehner's request did not specifically reference the Torres grievance.

On January 3, 2005, Ward denied Dehner's request. Ward stated that "information requests require a statement of a reason for the request. Perhaps the request arises from the grievance filed by one of your members, but a written statement of the same will be needed before the City is able to assess the relevancy and scope of the request." We conclude that Ward knew the Union sought information in connection with the Torres grievance.⁴ In any event, within two days Dehner responded directly that the information requested was in furtherance of the Union's investigation of the Torres grievance.

Until February 15, 2005, the City did not give Local 483 any of the information which the Union had requested. At that time, the City declined to furnish Local 483 with the employee names and documents it sought. Instead, the City prepared its own summary answer to the Union's request. Local 483 found the City's response to be unacceptable, since no names or documents were furnished.

The Union renewed its request for information on February 23 and again on March 15. The City ignored both requests. On March 29, after arbitrator Pesonen accepted jurisdiction of the arbitration proceedings, but before an arbitration date was scheduled, the Union again asked for the requested information. On April 15, the City gave Local 483 a revised chart containing the names of employees in the Local 483 unit. The City did not give the Union any of the documents which it had been asking for since December 29, 2004, nor did it give the Union the names of other employees in the DCTU unit. On April 28, the City said that it would provide no additional information. The parties then presented their arguments regarding document production to the arbitrator. On June 7, the arbitrator ruled that the City need not furnish Local 483 with additional information.

⁴The propriety of the City's position that "information requests require a statement of a reason for the request" is not before us for consideration.

Local 483 argues that the City violated its duty to provide information under ORS 243.672(1)(e). The City provided no information until February 15. Moreover, the information furnished on February 15 was essentially useless to Local 483, because the City provided neither the names of employees nor the documents requested. The Union concedes that the City furnished it with the names of Local 483 members—in April 2005—but argues that the City never gave it the names of other employees in the DCTU unit nor the documents it had requested in December.

The City agrees that it did not furnish all of the information sought by Local 483.⁵ Nevertheless, it urges this Board to dismiss this unfair labor practice complaint. In proceedings before the ALJ, the City argued that this Board has no jurisdiction over this matter because the issue was decided by the arbitrator, that the requested information was confidential, that the Union requested the information from the wrong person, and that the issue is moot. The ALJ rejected all the City's defenses, and ruled for the Union. The City filed a number of objections to the recommended order. Among other things, the City contended for the first time that Local 483's claim is barred under the doctrine of issue preclusion. None of the City's arguments is well taken.

Before we reach the merits of the Union's claim that the City has violated ORS 243.672(1)(e), we discuss the City's argument that this matter is not properly before this Board for decision.

Deferral

The City argues that this Board should defer the Union's information request to the arbitrator because the unfair labor practice complaint was filed after the arbitrator took jurisdiction of the Torres grievance. The City also argues that the Public Employee Collective Bargaining Act (PECBA) favors settlement of disputes through arbitration, and that the arbitrator has already denied Local 483's request for the information it seeks in these proceedings. For reasons which follow, we deny the City's request for deferral, and hold that this Board has jurisdiction of these proceedings.

The City relies on *Multnomah County Sheriff's Office v. Multnomah County Corrections Officers Association*, Case No. UP-5-94, 15 PECBR 448 (1994). In that case, this Board dismissed an unfair labor practice complaint charging a refusal to produce

⁵The City does not concede that the information which it *did* produce was of no use to Local 483 in investigating the Torres grievance.

information, when the request for data was made after the arbitrator took jurisdiction of the underlying grievance.

In *Benton County Deputy Sheriff's Association v. Benton County*, Case No. UP-24-06, 21 PECBR 822 (2007), we refined the *Multnomah County* standard. We held that an arbitrator does not assume jurisdiction until the arbitrator has been selected and notifies the parties that he or she has accepted the appointment. Here, the Torres grievance was not in the hands of the arbitrator on December 29, 2004, when the Union made its first request for employee names and documents. Nor had the arbitrator assumed jurisdiction when the City first refused to comply with Local 483's request. From at least early January 2005, and thereafter, the City failed and refused to furnish Local 483 with information relevant to the Torres grievance. The parties did not notify Arbitrator Pesonen of his selection until March 17, 2005; and the arbitrator did not notify the parties of his acceptance of that selection until March 21. Since Local 483 made its requests for information months before the arbitrator could have assumed jurisdiction, this Board will not defer the parties' dispute to the arbitrator.⁶

Duty to furnish information

We turn now to the merits of the case, and determine whether the City failed to comply with its obligations under the PECBA. The law in this area is well settled. The PECBA imposes a statutory duty to bargain in good faith, which includes the obligation to provide information to the exclusive bargaining representative of its employees. ORS 243.672(1)(e). This Board begins with the premise of full disclosure. *AOCE v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999).

In determining whether a public employer has a duty to produce information, we generally look at four factors: (1) the reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kinds of information requested; and (4) the history of labor relations between the parties. *Oregon*

⁶Even though we may defer the parties' information disputes to the arbitrator, this Board does not lose jurisdiction over these disputes. Deferral furthers the PECBA's policies in favor of arbitration. However, these are not the only statutory policies which are relevant to a party's refusal to furnish information under the PECBA, and in appropriate circumstances, we may exercise our discretion to rule on an information dispute even though the information was requested after the arbitrator assumed jurisdiction.

School Employees Association, Chapter 68 v. Colton School District 53, Case No. C-124-81, 6 PECBR 5027, 5031-32 (1982).

Only one of the *Colton School District* factors is at issue here: the kind of information requested. The City knew that Local 483 sought information in connection with the Torres grievance. The City did not make an issue of the ease or difficulty with which it could produce that information.⁷ Neither party made an issue of the history of labor relations between the parties. We turn first to the subject of the request. The City questions its relevance.

Relevance

As this Board stated in *Oregon State Police Officers' Association v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718, 727 (1989), “[a]ll the union needs to establish is that the subject of the request has potential value in aiding it in the performance of its statutory duties of representation of bargaining unit members.” A public employer’s obligation to furnish information attaches when that information is of probable or potential relevance to a grievance or contract matter. A labor organization “is not required to play blind man’s bluff * * *. It is entitled to know the cards held by the employer * * *.” 11 PECBR at 728.

Local 483 sought the names of employees under the DCTU contract who had requested that reprimands be removed from their personnel files, and documentation related to those requests. The Union was entitled to this information. The City’s treatment of similarly situated employees under the DCTU contract is clearly of “probable or potential relevance” to the Torres grievance.

Instead of giving Local 483 the information it sought, the City prepared a chart in which it purported to summarize its practice in responding to employee requests for removal of reprimands from their personnel files. The City argues that providing the Union with the employees’ names “would not be necessary to determine how the City had treated other employees’ requests.” And, “given the sensitivity of posting discipline records of employees, it seems the City responded reasonably in its initial response

⁷The City did argue, in passing, that the chart which it furnished to Local 483 required substantial review and redaction of City personnel files. The City also contended that it exceeded its statutory obligations when it compiled the chart in the first place. We agree in part. The city had no duty to compile its chart. On the other hand, in so doing the City did not comply with its obligations under the PECBA.

which provided all of the requested information regarding how other requests from employees had been treated in the past.” (Objections at p. 3.)

The City’s arguments are neither persuasive nor on point. It is not up to the City to determine what would be “necessary” to the prosecution of the Torres grievance. Under the PECBA it must furnish the Union with information which is of probable or potential relevance to a pending grievance. This it did not do. Local 483 requested—and was entitled to—certain names and documents. Instead, the City gave Local 483 only its version of what the City thought appropriate to share. This is not sufficient. *Oregon AFSCME Local 3851 v. Real Estate Agency*, Case No. UP-42-03, 21 PECBR 129 (2005).

In *Real Estate Agency*, the union sought a particular document from the agency, which refused to produce it—but instead furnished the union with a redacted version of the document. We held that, in so doing, the agency violated its duty to bargain under ORS 243.672(1)(e). We stated:

“This Board has recognized that in appropriate cases an employer may furnish relevant information to a labor organization in a form different from that sought by the Union. [*Lincoln City Police Employees’ Association v. City of Lincoln City* [Case No. UP-32-98, 18 PECBR 203 (1999)]] The Agency did not do this. It refused to furnish AFSCME with the Reynolds memorandum, and instead furnished it with another document* * * which * * * summarized issues raised at the meeting. The Union wanted the Reynolds memorandum because it documented what actually took place at the March 21, 2003, meeting. What the Agency gave instead was [its] version of what [it] thought appropriate to share with AFSCME regarding [that meeting]. Those are two very different things.” 21 PECBR at 135-36

As in *Real Estate Agency*, the City here failed to give Local 483 the information to which it was entitled. Instead, the City gave Local 483 a document which contained only certain information which the City thought appropriate to share. In so doing, the City failed to meet its obligations under ORS 243.672 (1)(e)

Confidentiality

The City also argues that the information sought by Local 483 was “confidential.” When an employer claims that information sought by a labor union is confidential, ERB must balance the union’s need for information against the employer’s legitimate and substantial confidentiality interests. In appropriate cases, there may be alternatives to complete disclosure. *Real Estate Agency; Lincoln City Police Employees’ Association v. City of Lincoln City*, Case No. UP-32-98, 18 PECBR 203 (1999). We urge the parties to take a common-sense approach. *Colton School District*, 6 PECBR at 5033. When a confidentiality defense is alleged:

“The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims may be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning that which an employer legitimately claims a partial confidentiality interest, the employer must bargain toward an accommodation which addresses the union’s information needs and the employer’s justified interests. *Pennsylvania Power & Light Co.*, 301 NLRB 138, 136 LRRM 225 (1991).” *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 71 (1999).⁸

In support of its confidentiality defense, the City relies on the language of Article 34.1.2 of the DTCU contract,⁹ which states:

⁸In *AOCE*, 18 PECBR at 71, and in several later cases, this Board adopted the NLRB’s formulation (as set forth in *Pennsylvania Power & Light* and elsewhere) that an employer must “bargain” toward an accommodation which addresses the union’s information needs and the employer’s justified interests. In so doing, we did not create a new and separate duty to bargain on the employer’s part. As part of its duty to bargain under ORS 243.672(1)(e), an employer must seek an accommodation which addresses the union’s information needs and the employer’s justified interests. However, *AOCE* and its progeny do not require an employer to engage in bargaining under the procedures set forth in ORS 243.698 and ORS 243.712 *et seq.*, regarding such an accommodation.

⁹Although the City claimed, in correspondence to Local 483, that certain of its
(continued ..)

“If the City has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public. If the City has reason to discuss any disciplinary action or the possibility of any disciplinary action, the employee shall be given the option of having a Union representative present at any such discussion. Written disciplinary actions shall not be posted; however, this does not preclude management from notifying other management and employees when restrictions are applied to an employee as a result of discipline.”

According to the City, this language prevents it from releasing the names of employees and the documents sought by Local 483. Based upon our reading of the plain language of Article 34.1.2, we disagree. The Article describes only the method and manner whereby the City may reprimand an employee. It does not place any limits on information which the City must provide to the Union in connection with a grievance. It does not even use the word “confidential.” Further, the City partially undercut its confidentiality defense when the City’s counsel subsequently released the names of the Union’s bargaining unit members listed on the chart provided by Ward.

Finally, the City has not met its duty to seek an accommodation with Local 483. It gave Local 483 the names of employees in its own bargaining unit, some four months after the Union first requested this information. Otherwise, it made no effort to reach an accommodation which addressed the Union’s information needs and the employer’s justified interests. The City’s confidentiality defense is without merit.

Mootness

The City also claims that these unfair labor practice proceedings have become moot because the arbitrator ruled that the City did not have to furnish Local 483 with the information it sought. We reject the City’s mootness defense.

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. *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff’s Office*, Case No. UP-58-92,

⁹(...continued)
administrative rules also supported its confidentiality claim, the City does not rely on those rules in proceedings before this Board.

14 PECBR 220, 227 (1992). In refusal to furnish information cases, we seek to restore the Union to the position it would have occupied but for the City's violation. *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924, 935 (2005). Here, that requires the City to provide the information.

Claim Preclusion

Finally, the City argues that this Board should dismiss the complaint under the doctrine of claim preclusion. Claim preclusion is an affirmative defense. The City should have raised it as part of its answer. OAR 115-035-0035(1). Instead, the City first raised this issue in objections to the Recommended Order. The City's defense is not timely. We will not consider it now.

Conclusion

The City violated ORS 243.672(1)(e) when, in response to the Union's requests of December 29, 2004 and thereafter, it denied the Union access to information which had probable or potential relevance to the Torres grievance.¹⁰

Remedy

We will direct the City to furnish Local 483 with the information the Union first requested on December 29, 2004. To rule otherwise would allow the City to escape the consequences of its unfair labor practice. If the City had met its obligation to respond promptly and appropriately to the Union's information request, the information dispute would have been resolved long before the arbitrator assumed jurisdiction of the underlying dispute.

We will also direct the City to post an official compliance notice. In *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP 65 Or App 568, 671 P2d 1210 (1983)*, *rev den 296 Or 536 (1984)*, we listed the factors this Board considers in deciding whether to require posting of a compliance notice:

¹⁰The City also argued that the Association should have requested information related to Torres' grievance from the City Attorney's office, not the labor relations staff. The City did not tell Local 483 of this requirement until March 27. Before then, Local 483 and the City's labor relations staff had been in communication regarding the Union's the request for information for four months. City representatives did not raise this internal City policy. The City's argument is without merit.

“* * * This Board generally requires the posting of an official notice in situations in which the violation: (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.”

As this Board has held in *Oregon Nurses Association v Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002), and more recently in *Blue Mountain Faculty Association/Oregon Education Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007), the *Fern Ridge* list of factors is to be read in the disjunctive. In order to require the posting of a compliance notice, this Board need only find that the violation involved or resulted in one or more of the named factors. We do so here.

We find that the City’s actions were calculated, and continued over time. Furthermore, the City’s unlawful refusal to furnish information affected a significant portion of the bargaining unit, and had a significant impact on the Association’s ability, not only to represent one of its members, but to carry out its obligation to administer the collective bargaining agreement. These findings are sufficient to require the City to post a notice.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e).
2. The City will sign and prominently post a copy of the attached notice in each City facility where members of the Local 483 bargaining unit work. The notice will be posted within ten days of the date of this Order and will remain posted for 30 consecutive days.

DATED this 29th day of June 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member

*Vickie Cowan, Board Member

*Board Member Cowan has recused herself.

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-15-05, *Laborers' Local 483 v. City of Portland*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board has found that the City of Portland violated ORS 243.672(1)(e) by refusing to provide to Laborers' Local 483 information that was of probable or potential relevance to a grievance filed by the Union.

The Employment Relations Board has ordered the City to cease and desist from such unlawful activity, to provide Laborers' Local 483 with the information it sought, and to sign and prominently post a copy of this notice in each City facility where members of the Local 483 bargaining unit work. The notice will be posted within ten days of the date of this Order and will remain posted for 30 consecutive days.

The City will comply with the Order of the Employment Relations Board.

City of Portland

Dated _____, 2007

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.