

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-08

(UNFAIR LABOR PRACTICE)

ROGUE RIVER EDUCATION)
ASSOCIATION/SOUTHERN OREGON)
BARGAINING COUNCIL/OEA/NEA,)
)
Complainant,)
)
v.)
)
ROGUE RIVER SCHOOL DISTRICT 35,)
)
Respondent.)
_____)

ORDER ON REMAND

On October 11, 2011, the Oregon Court of Appeals reversed this Board's decision¹ and remanded the case to us for further proceedings. 244 Or App 18, 260 P2d 619 (2011). After the remand, we reopened the record to allow the parties to present evidence and argument to address the standard established by the court.

On February 16, 2012, Administrative Law Judge (ALJ) Peter A. Rader conducted a hearing in Salem, Oregon to receive evidence. The record closed on April 2, 2012, following receipt of the parties' post-hearing briefs.

On August 31, 2012, the matter was submitted directly to the Board.

Barbara J. Diamond, Attorney at Law, Diamond Law, Portland, Oregon represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett Hemann Robertson, PC, Salem, Oregon, represented Respondent.

¹The Board's original decision is reported at *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District No.35*, Case No. UP-17-08, 22 PECBR 577 (2008).

The issues are:

1. Was the Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA's (Association) complaint timely filed?
2. If the complaint was timely filed, did the Rogue River School District 35 (District) violate Article 25 of the 1998-2001 Collective Bargaining Agreement, the 2000 Memorandum of Understanding, and ORS 243.672(1)(g) when it refused to pay Jewel Allen seven years of early retirement incentive benefits?

RULINGS

1. At hearing, the ALJ properly denied the District's request to introduce evidence that was not listed in its exhibit list and not provided to opposing counsel as required in the notice of hearing. The evidence, the grievance provision from the parties' 1998 - 2001 collective bargaining agreement, was the basis for one of the District's affirmative defenses and the document was in the District's possession prior to hearing. By the time it was offered, most of the witnesses, many of whom had traveled considerable distance to attend the hearing, had already testified and been released. Recalling them at that late stage would extend and delay completion of the hearing. The District was able to introduce evidence of the grievance process through witnesses and was permitted to make an offer of proof at the conclusion of its case.
2. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is the exclusive representative of teachers employed by the District, a public employer.
2. The District and the Association were parties to a collective bargaining agreement (Agreement) in effect from 1998 through 2001.
3. Under Article 25 of the Agreement, teachers who had taught in the District for 15 years were eligible for early retirement incentive (ERI) benefits, which included a monthly stipend plus medical benefits for up to seven years. Article 25 states:

“EARLY RETIREMENT INCENTIVE

- “A. When an employee [*sic*] has at least fifteen (15) years of service in District 35 reaches age fifty-five (55) or is PERS retirement eligible, the employee may apply for early retirement through the personnel office. Notification of retirement under this provision shall be one hundred twenty (120) days prior to the intended effective date of such retirement.

- “B. The duration of the program is for a period of up to seven (7) years * * *.
- “C. As an incentive the District agrees to pay:
1. A monthly stipend of .75% of the last year’s teaching salary. Annual salary does not include extra duty or extended salary compensation.
 2. Full family medical insurance subject to the rules of the District insurance carrier. This coverage shall not include dental, vision, life or long term disability.
- “D. All monthly payments under the early retirement incentive program cease upon the occurrence of any of the following:
1. Death of the retired employee;
 2. The employee completes seven (7) years under the program or attains age 65, whichever occurs first;
 3. The employee qualifies for Medicare.
- “* * * * *
- “F. It is understood that once the employee has been granted early retirement incentive, their rights hereunder cannot be terminated by the District.
- “G. The provisions of this article shall not be available to employees hired after April 1, 1999.”

4. Jewel Allen is a former elementary school teacher for the District who had completed fourteen years of teaching by the end of the 1999-2000 school year. She wished to retire and, although she had not worked in the District for the requisite fifteen years, the District and Association entered into a Memorandum of Understanding (MOU) in March of 2000 that allowed her to become eligible for ERI benefits on July 1, 2000. That MOU states in part:

“2. The parties recognize that Jewel Allen will not be eligible for the early retirement incentive set forth at Article 25 of the collective bargaining agreement since she will have only completed 14 years of service with the District at the conclusion of the 1999-2000 school year. Notwithstanding, the parties agree to waive the 15 years of service requirement in order to allow Jewel Allen to access the early retirement incentive. The parties agree that Jewel Allen will be eligible for up to 7 years of benefits as otherwise described in Article 25, commencing July 1, 2000.”

5. Allen retired at the end of the 1999-2000 school year and received ERI benefits for the 2000-01, 2001-02, and 2002-03 school years.

6. In the fall of 2003, Allen was substitute teaching when the District approached her about a temporary teaching contract for the remainder of that school year.

7. Through a MOU negotiated on Allen's behalf by Oregon Education Association UniServ Consultant Susan Crumpton, and School Superintendent Charles Hellman, Allen entered into a contract to teach from November 2003 to June 2004, during which time she received a regular salary and medical benefits as a member of the Association's bargaining unit. The District stopped paying Allen ERI benefits during the 2003-2004 school year, but resumed paying them once she completed her teaching contract.

8. The 2003 MOU does not refer to any effect Allen's return to teaching may have on her ERI benefits, and the subject never arose during negotiations between Crumpton and Hellman.

9. When Allen's teaching contract ended in June 2004, she resumed her status as a retiree and began receiving ERI benefits again. She continued to receive them for the 2004-05, 2005-06, and 2006-07 school years. By the end of the 2007 school year, she had received a total of six years of ERI benefits.

10. On May 17, 2007, during a meeting of the District's Board, then-Superintendent David Orr stated that the language in Article 25 of the Agreement and the 2000 MOU was unclear and required clarification. Although he admitted that he did not look at the 1998 - 2001 Agreement in reaching his determination, Orr's interpretation was that any retiree who was receiving ERI benefits would not have those benefits tolled as a result of returning to work. In other words, a retiree receiving ERI benefits would have those benefits suspended during any period in which they returned to work, but the seven-year benefit period would not be extended to make up for any period during which benefits were not paid. Orr believed this interpretation should be retroactively applied to all retirees.

11. Two District teachers were about to retire under the Agreement's ERI provision, Ken Rensi and Louise Bodily, and Orr wanted to ensure that their ERI benefits would not be tolled if they returned to work for the District after they retired. The Board authorized him to enter into a new MOU to address this issue.

12. On June 5, 2007, the District notified Allen that it would stop paying her ERI benefits as of June 30, 2007.² Allen was no longer an Association member and did not contact anyone in the Association for guidance. Instead, she contacted Orr who told her she was not entitled to benefits beyond the seven-year period referred to in Article 25 of the Agreement. Allen did not file a grievance and took no further action at that time. She was the only retiree actively receiving ERI benefits affected by the new conditions in the proposed MOU.

13. On July 19, 2007, approximately six weeks after the District terminated Allen's ERI benefits, the School Board voted to approve a new MOU negotiated between Orr and Crumpton. The MOU clarified the language in the Agreement to reflect Orr's understanding of how ERI benefits would not be tolled for teachers who returned to work. The MOU states that it "shall amend and modify the collective bargaining agreement between the parties," and provides:

²Allen turned 65 in 2008.

“II. Bargaining unit members who retire from their contract in a previous contract year (school year) may be rehired for a new contract year (school year) under the following conditions:

“* * * * *

“C. A previously retired bargaining unit member who has been rehired under this section and who is entitled to the benefits of Article 25, Early Retirement Incentive, shall not have the medical benefits of Article 25 otherwise extended or ‘tolled’ for the period of time that the retiree is re-employed by the District as a temporary employee. That is, the medical insurance benefits will be afforded the retiree per the collective bargaining agreement and not Article 25, Early Retirement Incentive. Any retiree entitled to the monthly stipend in Article 25, Early Retirement Incentive shall continue to receive the stipend while re-employed by the District as a temporary employee. In summary, any early retirement medical insurance benefits to which the retiree is entitled pursuant to Article 25, Early Retirement Incentive, shall be negated during any period of reemployment by the District after the initial year of retirement.”

14. Crumpton was unaware that the District had terminated Allen’s ERI benefits in June 2007, nor did she have reason to believe the MOU applied retroactively to retirees who had already retired and had been receiving ERI benefits. Allen’s name never came up in Crumpton’s and Orr’s negotiations for the 2007 MOU. The School Board’s Chair signed the MOU on July 19, 2007, but because Crumpton had relocated out of the District, it was not signed by her successor until six months later.

15. Anne Dumas has been the executive assistant to the Superintendent and the District’s School Board since 2001. Her duties include preparing or maintaining files for correspondence, collective bargaining records, interview packets, medical records, as well as School Board minutes, agendas, and personal correspondence.

16. In the summer of 2007, Dumas forwarded the recently-approved MOU to Association’s representative, Joseph Burns, for signature. Burns informed Dumas he had not received it, so she hand-delivered three copies to him in October 2007. She did not discuss the contents or purpose of the MOU with Burns.

17. A few days before Thanksgiving in 2007,³ Allen called the Association’s business manager Jim Bond regarding the termination of her ERI benefits, which was the first time she had discussed the issue with an Association representative.

18. On December 20, 2007, Burns signed the MOU approved by the Board in July 2007.

³We take official notice that the date of Thanksgiving in 2007 was November 22.

19. On May 6, 2008, the Association filed this unfair labor practice complaint with the Board.

CONCLUSIONS OF LAW

1. The complaint was timely filed.

ORS 243.672(3) provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” At issue here is the District’s decision to discontinue payment of ERI benefits to Allen; the benefits ceased on June 20, 2007. The Association filed this complaint on May 6, 2008, more than 180 days from the date on which the District stopped paying Allen benefits.

In our original Order, we dismissed the unfair labor practice complaint as untimely. We acknowledged that our cases inconsistently interpreted and applied the 180 day time limit in ORS 243.672(3). In some cases we applied an occurrence rule, holding that the 180 days began to run from the date on which the facts constituting the unfair labor practice occurred. In other cases, we applied a discovery rule, concluding that the 180 days began to run on the date that the allegedly unlawful act was discovered.

We then applied the occurrence rule and concluded that the Association’s complaint was untimely because it was filed more than 180 days from the date on which the facts constituting the unfair labor practice occurred—the date on which the District stopped paying ERI benefits to Allen. We held, however, that the complaint would also be untimely if we applied the discovery rule. Under established case law, the Association reasonably should have known of the change in Allen’s ERI benefits when Allen became aware of the change—on June 5, 2007.

On appeal, the court concluded that

“ORS 243.672(3) incorporates a discovery rule, which means that the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred.” 244 Or App at 189.

The Court considered other Oregon statutes and the National Labor Relations Act (NLRA) statute of limitations, 29 USC Section 160(b), and concluded:

“we are persuaded that the determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis.” 244 Or App at 190.

The court held that we failed to make such an analysis, and remanded the case to us to “apply the discovery rule in ORS 243.672(3) to resolve the factual question of whether *the association* knew or reasonably should have known more than 180 days before it filed its complaint that the district had stopped paying early retirement benefits to Allen.” 244 Or App at 192-193. (Footnote omitted, emphasis in original.) Consistent with the court’s instructions, we consider the factual record

established on remand to decide when the Association knew or should have known about the termination of Allen's ERI benefits.

The Association argues that it did not know the District had stopped paying Allen's ERI benefits until the last week of November 2007, when Allen contacted Association business manager Bond. Until she spoke with Bond, no Association representative was aware that the District had ended Allen's ERI benefits.⁴

The District offers no evidence that any Association representative knew, before the end of November 2007, that the District had terminated Allen's benefits. Accordingly, we must next determine whether the Association should have known of the District's actions more than 180 days before the complaint was filed.

The Association was not copied with the District's June 2007 correspondence informing Allen that her ERI benefits would end at the end of that month. By that time, Allen had not been a member of the Association's bargaining unit for several years and was not in touch with any of its representatives or officers. UniServ Consultant Crumpton and Superintendent Orr did not discuss Allen or the termination of her benefits during negotiations for the 2007 MOU. No other retired teacher was in Allen's position and the Association had no cause to reasonably believe that any former employees with vested ERI rights would be affected by the new MOU.

Based on the record before us, we find no evidence that the Association knew or should have known the District terminated Allen's benefits prior to the last week of November 2007. Accordingly, the complaint was filed less than 180 days from the time the Association learned of the District's actions and is timely. We turn now to the merits of the Association's claim.

2. The District violated the terms of a 2000 Memorandum of Understanding and ORS 243.672(1)(g) when it reduced Jewell Allen's Early Retirement Incentive Benefits by one year.

The Association alleges that the District violated the provisions of the 2000 MOU when it ended Allen's ERI benefits in June 2007. We begin our analysis by considering the terms of the MOU.

⁴In *Rogue River School District*, 244 Or App at 193, n 7, the court noted that depending on the nature of the alleged unfair labor practice, a public employee, labor organization, or public employer may be an "injured party" under ORS 243.672(3). As an example, the court explains that a labor organization (and not an employee) is generally the only party authorized to file a complaint alleging a violation of a collective bargaining agreement and ORS 243.672(1)(g), unless an employee can establish a breach of the duty of fair representation. (Subsection (1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *.")

The 2000 MOU that provided Allen with ERI benefits amended the applicable collective bargaining agreement. Only the Association and District are parties to it. Consequently, the Association is an "injured party" authorized to pursue an unfair labor practice against the District alleging a breach of the MOU in violation of subsection (1)(g).

To interpret a contract, we follow the three-part analysis we described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We first examine the text of the disputed contract language in the context of the documents as a whole and, if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id.* If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. "[W]e will examine the parties' prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous." *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009). (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Accordingly, we first look to the language of the 2000 MOU for evidence of the parties' intent regarding the treatment of ERI benefits upon a retiree's return to teach for the District. As a general rule, parties are strictly bound to agreements they have signed, and we will not rewrite or reconstitute the language of those agreements. *Gresham Grade School Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 5 PECBR 2889, 2895 (1980), *remanded for further proceedings on other matters*, 52 Or App 881, 630 P2d 1304 (1981), *order on remand*, 6 PECBR 4953 (1981).

The 2000 MOU states that Allen "will be eligible for up to 7 years of benefits as otherwise described in Article 25, commencing July 1, 2000." Nothing in the MOU addresses how these benefits may be terminated. The MOU, however, incorporates by reference the provisions and conditions of Article 25, so we next examine this contract article.

Article 25 from the 1998 - 2001 Agreement, the agreement in effect on the date the MOU was executed, allows District employees with at least fifteen years of service to retire under an early retirement incentive program with a monthly stipend equal to .75% of the last year of teaching salary and full family medical benefits. Paragraph B states that the "duration of the program is for a period up to seven (7) years." Paragraph D states that

"[a]ll monthly payments under the early retirement program cease upon the occurrence of any of the following:

1. Death of the retired employee;
2. The employee completes seven (7) years under the program or attains age 65, whichever occurs first;
3. The employee qualifies for Medicare."

Paragraph F states that "[i]t is understood that once the employee has been granted early retirement incentive, their rights hereunder cannot be terminated by the District."

The record contains no evidence of the occurrence of any triggering events that would terminate Allen's ERI benefits while she was in the program. Allen is obviously alive, and she did

not reach age 65, qualify for Medicare, or complete seven years “under” the ERI program, *i.e.*, seven years of receiving ERI benefits. Furthermore, Paragraph F states that once rights have been granted under the program, they cannot be terminated by the District. Based on the clear language in this Agreement, and absent any of the automatic conditions that would trigger an end to ERI benefits, we find no authority for the District’s decision to unilaterally terminate Allen’s benefits.⁵

We next examine the memoranda of understanding negotiated after 2000 to determine if they affected Allen’s eligibility for and participation in the ERI program. The MOU of 2003, which allowed Allen to return to teach under contract for the 2003-04 school year does not reference her ERI benefits being affected in any way by her return to work. Accordingly, we find nothing in this document that limits Allen’s receipt of these benefits. The MOU of 2007, which was negotiated between UniServ Consultant Crumpton and Superintendent Orr, states that it “shall amend and modify the collective bargaining agreement between the parties” and contains conditional language that is not present in the 2000 MOU.

Of most relevance here is the language in paragraph II.C. of the MOU, which states that “[a] previously retired bargaining unit member who has been rehired under this section and who is entitled to the benefits of Article 25, Early Retirement Incentive, shall not have the medical benefits of Article 25 otherwise extended or “tolled” for the period of time that the retiree is re-employed by the District as a temporary employee.” It is not clear, however, when this provision is triggered. On the one hand, the effect of this provision could be prospective, *i.e.*, it could apply to any previously retired bargaining unit member who returns to work for the District *after* the date on which the agreement is executed. On the other hand, the effect of the provision could be retroactive, *i.e.*, it could apply to any previously retired bargaining unit member who returned to work *before* the 2007 MOU was executed.

Because the provision at issue is ambiguous, we turn to extrinsic evidence to help us determine the parties’ intent. Evidence concerning the parties’ negotiations provides probative evidence of what they intended when they agreed to the terms of the MOU. Orr testified that he believed that the MOU applied to former retirees. He admitted, however, that he did not discuss or otherwise share this belief regarding the retroactivity of the 2007 MOU with UniServ Crumpton or any other Association representative. Crumpton and Orr never discussed Allen or termination of her benefits during negotiations for the 2007 MOU. The only specific situations the negotiators talked

⁵As an affirmative defense, the District contends that the Association failed to grieve the termination of Allen’s ERI benefits and, as a result, is barred from filing this subsection (1)(g) under the exhaustion of contract remedies doctrine this Board adopted in *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978). Under this doctrine, an aggrieved party is generally required to exhaust a contract grievance procedure before filing a subsection (1)(g) claim alleging a breach of the collective bargaining agreement.

Here, however, the agreement the Association seeks to enforce is the 2000 MOU—not a collective bargaining agreement. The MOU is not incorporated into the collective bargaining agreement and contains no grievance procedure that the Association could utilize. Consequently, the exhaustion of remedies doctrine is inapplicable.

about were two upcoming retirees whom Orr knew would probably be offered temporary contracts with the District.

Thus, Orr's understanding—that the 2007 MOU applied to individuals who retired before the date on which the MOU became effective—was never shared with Crumpton. In contract interpretation, “ it is the objective manifestations of the parties’ intent which controls, rather than subjective intentions or unspoken understandings and assumptions.” *City of Portland v. The District Council of Trade Unions*, Case Nos. UP-58/76-87, 10 PECBR 109, 118 (1987). Accordingly, we give no weight to Orr's unexpressed intention to cover all retirees—past, present, and future—in the 2007 MOU. Based on the parties’ failure to discuss retroactivity of the MOU in general, and Allen's situation in particular, we conclude that they did not intend for the MOU to apply to Allen—the only employee whose rights in the ERI program had vested on the date the MOU was approved.

Remedy

We have concluded that the District violated ORS 243.672(1)(g) when it denied Allen one year of ERI benefits. As required by ORS 243.676(2)(b), we will order the District to cease and desist from violating the law. In addition, we will order the District to make Allen whole for the stipend and benefits she would have received had the District not terminated her ERI benefits.

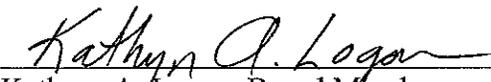
ORDER

1. The District will cease and desist from violating ORS 243.672(1)(g).
2. The District will make Allen whole for the stipend and benefits she would have received had the District not terminated her ERI benefits, with interest at nine per cent per annum.

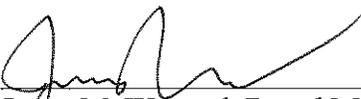
DATED this 13 day of November, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Board Member



Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.