

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-053-11

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,)	
DIVISION 757,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
TRI-COUNTY METROPOLITAN)	AND ORDER
TRANSPORTATION DISTRICT)	
OF OREGON,)	
)	
Respondent.)	
_____)	

On August 26, 2013, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Peter A. Rader, after a hearing held on July 25, 2012, in Salem, Oregon. The record closed on August 29, 2012, upon receipt of the parties' post-hearing briefs.

Julie Falender, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Shelley R. Devine, Senior Deputy General Counsel, Tri-County Metropolitan Transportation District, Portland, Oregon, represented Respondent.

On August 5, 2011, the Amalgamated Transit Union, Division 757 (ATU) filed this unfair labor practice complaint alleging that the Tri-County Metropolitan Transportation District of Oregon (TriMet) violated ORS 243.672 (1)(a), (e) and (g). ATU filed an amended complaint on October 5, 2011, and a second amended complaint on December 16, 2011. TriMet filed a timely answer with affirmative defenses and counterclaims alleging that ATU violated ORS 243.672(2)(a), (c), and (d). Before the hearing, the parties reached an agreement that limited

the scope of issues for hearing, and ATU withdrew all of the claims under (1)(a) and one claim under (1)(e). The ALJ also dismissed TriMet's remaining counterclaims before the hearing.

The remaining issues are:

1. Did TriMet unilaterally change a mandatory subject of bargaining, in violation of ORS 243.672(1)(e), by requiring employee T.P.¹ to see and then obtain a release from TriMet's contract physician before returning to work?

2. Did TriMet violate the terms of a written agreement with ATU, in violation of ORS 243.672(1)(g), by requiring T.P. to see and then obtain a release from TriMet's contract physician before returning to work?

3. If TriMet violated ORS 243.672(1)(e) or (g), what is the appropriate remedy?

For the reasons stated below, we conclude that TriMet did not violate either ORS 243.672(1)(e) or (g), and dismiss the complaint.

RULINGS

1. On March 22, 2012, ATU filed a motion to dismiss TriMet's counterclaims. TriMet voluntarily withdrew the ORS 243.672(2)(c) counterclaim. The ALJ then dismissed TriMet's remaining counterclaims alleging violations of ORS 243.672(2)(a) and (d). As TriMet did not file objections to this ruling, we will not consider the claims in our Order.

2. TriMet attached a copy of an arbitration decision to its post-hearing brief that it asserted was relevant to the case. This arbitration decision was discussed during witness testimony at the hearing, but was not offered by either party as an exhibit. This document is not relevant to our decision, and was not considered by the Board.

3. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT²

1. ATU is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of certain employees employed by TriMet.

2. TriMet is a public employer as defined by ORS 243.650(20).

¹The parties agreed to use initials to protect the privacy of the employee.

²Findings of Fact 1 through 8 are based upon the stipulated facts submitted by the parties. The remaining Findings of Fact are made based on the exhibits received and the testimony of witnesses.

3. ATU and TriMet are parties to a collective bargaining agreement that expired on November 30, 2009.

4. On April 13, 2011, TriMet employee T.P. was operating a light rail train when he contacted TriMet's Rail Control. He advised Control that he was "currently mentally exacerbated and physically in pain" and that he would be filling out a report of injury.

5. That same day, TriMet placed T.P. on paid administrative leave and informed him that an evaluation with TriMet's contract doctor would be required before T.P. could return to duty.

6. TriMet did not notify ATU of T.P.'s situation on or about April 13, 2011.

7. T.P. went to an evaluation by Dr. Harris, TriMet's contract physician.

8. When Dr. Harris released T.P. to return to work, T.P. returned to the same route that he was on before he was placed on leave.

The Parties' Working Wage Agreement

9. From 1976, the parties have entered into a series of collective bargaining agreements, called working wage agreements (WWAs).

10. Article 1, Section 19, paragraph 6 of the 2004-2009 WWA, which remained in effect at the times relevant to the dispute pertaining to T.P.'s situation, provides that:

"When the District requires an employee to be examined by the District's consultant physician before returning to work, the appointment will be made as promptly as possible under the circumstances to avoid any potential loss of pay to the employee. Should a situation develop when the opinions of two (2) competent medical doctors conflict and the District will not permit the employee to work, the matter will be immediately investigated including, if necessary, written statements from doctors. If, after investigation and discussion between the two (2) physicians, it is clear that there is a direct medical conflict, the Association and the District shall select a third doctor competent in the medical area involved, and his opinion will be sought. The majority opinion will determine the employee's status."³

The 1991 Agreement

11. The parties have signed over two dozen side agreements, letters of understanding, or memoranda that address specific workplace issues or policies not addressed in the WWA. Although subject to change, these have included subjects such as a drug and alcohol policy, hours of service, and employee uniforms.

³At the time the complaint was filed, the parties were still in the process of negotiating a successor agreement to the 2004-2009 WWA. As a result, the parties were operating under the *status quo* established by the 2004-2009 WWA during the period of time relevant to this dispute.

12. On May 8, 1990, TriMet's labor relations director sent a letter to ATU's business representative Ron Heintzman that stated:

"When an employee returns to work with a valid release from his/her personal doctor, he/she immediately returns to the payroll.

"If TriMet is the cause of the delay in having the employee examined by the District's doctor, and the employee is cooperating to the extent that he/she is showing up for scheduled appointments, he/she continues on the payroll.

"If the District's doctor does not concur with the employee's doctor's release, we have reached a medical conflict and we (the Union and the District) agree on a third doctor. As per long standing policy, the employee is not on the payroll during the period between the conflict and the resolution.

"As far as I can determine, what I have outlined above is totally consistent with the contract and long standing past practice." (Emphasis in original.)

13. In November 1991, the parties received an arbitration award applying the terms of Article 1, Section 20, paragraph 7 of the WWA then in effect. Neither party agreed with the arbitrator's interpretation of the WWA, so the parties memorialized their understanding of the appropriate practice in a written policy agreement (the 1991 Agreement), which has been adhered to ever since.⁴

14. The 1991 Agreement states in relevant part that:

"1. An employee who has been absent due to accident or illness shall be returned to the payroll upon the receipt of a full written release to return to work from the employee's attending physician. Pay shall start as of the date the employee is released to return to his or her regular work; provided, however, that no employee shall receive workers' compensation benefits and pay for the same period.

"2. In the event the District exercises its discretion under Article 1, Section 20, Par. 7 and requires an employee to be examined by the District's consulting physician before returning to work, the employee's pay shall continue through the date the District's consulting physician renders an opinion.

⁴TriMet suggested in its post-hearing brief that the 1991 Agreement may not even be valid because it was never incorporated into the WWA, but at oral argument, TriMet conceded that the policy was binding. In addition, the credible evidence shows that the terms of that agreement have been followed since its adoption.

“3. The District shall, by the end of the next working day, notify the Union that it is exercising its discretion under Article 1, Section 20, Par.7. The Union and District shall select a third doctor competent in the medical area involved from a pre-established list as soon as possible thereafter. The method of selection will be agreement or, if either party elects, alternate striking.

“4. If the District’s consulting physician concurs that the employee is fit for duty, the employee shall be returned to work.

“5. If the District’s consulting physician advises that the employee is not fit for duty, the employee’s pay will cease and the employee shall be immediately notified, with a copy to the Union, of the necessity of a third doctor’s opinion.

“ * * * * *

“7. In the event the employee fails to keep the scheduled appointment without good cause, the District’s back pay obligation, if any, will cease from that day forward.

“8. If the third doctor concurs with the attending physician’s opinion that the employee is fit for duty, the employee shall be returned to work as soon as possible and shall receive back pay from the date of the opinion of the District’s consulting physician. Provided, however, that the District’s back pay obligation hereunder shall not exceed fourteen (14) calendar days unless the District has caused the delay, whereupon it will be obligated to pay for the period covered by its delay.

“9. If the third doctor concurs with the District’s consulting physician’s opinion that the employee is not fit for duty, the employee shall not be returned to work or be entitled to any back pay and the employee’s future status shall be determined by the applicable provision of the collective bargaining agreement.

“* * * * *

“11. It is the intent of the parties that this agreement completely set forth the procedure to implement Article 1, Section 20, Par. 7 of the collective bargaining agreement. However, in the event there is an omission or ambiguity, every attempt will be made to resolve it through negotiation.”

The Parties’ Practice

15. The parties agree that since 1991, TriMet has been able to direct an employee to see its contract physician after the employee returns to work with a medical release from his or her attending physician. If the two physicians confer and disagree about the employee’s ability to return to work, the procedures of the 1991 Agreement are invoked to resolve the dispute.

16. ATU provided numerous examples of injured or ill employees who were released for work by their attending physician, but were then directed to see TriMet's contract physician before being allowed to return to duty. Either the parties reached agreement on the employee's return to work, or the third-doctor-opinion process in the 1991 Agreement was invoked to resolve the dispute.

17. Bargaining unit members who are ill or injured typically, but not always, seek medical releases from their attending physicians before returning to work. During the past 17 years, senior TriMet managers have sent between 75 and 100 employees to see its contract physician for medical examinations.⁵ The employees were referred for examinations regardless of whether they had already seen an attending physician. Those referrals were usually based on safety concerns or questions TriMet had about an employee's ability to work. Under these circumstances, TriMet does not notify ATU when it directs employees to see its contract physician. The referral does not interfere with an employee's ability to seek a medical opinion from his or her own attending physician.

TriMet's Human Resources Policies

18. Beginning in 2008, TriMet's HR department posted newly issued policies or rules on the company's intranet website called TriNet. TriMet reminds employees annually that they are required to self-notify and understand these policies, which are accessible through their desktop computers or workstation computers set up at kiosks at major TriMet facilities. The TriNet website lists over 70 HR policies or rules.

19. TriMet's HR policy 332 was adopted in 2002 and posted on its intranet website in 2008. The policy states in part:

"FITNESS FOR RETURN TO WORK

"An employee in a safety-sensitive position may be required to undergo a physical examination to determine fitness for return to work under the following circumstances:

- "• The person has been absent from work on a leave of absence 6 months or longer.
- "• The person has experienced a health problem that could jeopardize safety, such as heart attack, stroke, seizure, loss of consciousness, or breathing difficulty.

⁵We credit the testimony of TriMet's Transportation Director Hayden Talbot and Executive Director of Operations Shelly Lomax as to the number of employees they, or their managers, have referred to fitness for duty evaluations during this period. ATU's consultant Heintzman and ATU's general counsel Susan Stoner disputed these numbers, but neither is employed by TriMet and the company does not always notify ATU when it orders these evaluations. Presumably that information was available through discovery, but was not produced at hearing.

“• Even if the condition is undiagnosed but the symptoms suggest a health condition that could compromise safety, Tri-Met may require an employee to have a physical examination and doctor’s clearance before returning to work.

“Tri-Met’s contracted physician performs the examination or may refer the employee to a specialist * * *.”⁶

Facts Giving Rise to the Complaint

20. Following T.P.’s return to work a week after obtaining a release from TriMet’s contract physician, representatives of ATU and TriMet exchanged letters in which they disagreed about the process to follow when an employee reports a work-related injury. ATU objected to TriMet’s requirement that T.P. be examined by its contract physician *before* he had seen his attending physician. TriMet maintained that its actions were consistent with terms of the WWA, the practice of the parties and the 1991 Agreement.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. TriMet did not violate ORS 243.672(1)(e) or (g) when it required employee T.P. to see and obtain a release from TriMet’s contract physician before returning to work.

DISCUSSION

ATU alleges that TriMet violated both ORS 243.672(1)(g) and (e) when it required light rail operator T.P. to obtain a release from its contract physician before returning to work. Although ATU pleaded these claims separately, they are based on the same legal theory: that TriMet violated the provisions of the WWA/1991 Agreement in its treatment of T.P. ATU’s first assertion is that TriMet violated subsection (1)(e) by unilaterally changing the *status quo* established by the WWA/1991 Agreement.⁷ ATU further alleges that TriMet violated subsection (1)(g) by breaching the terms of this written agreement. Because both claims turn on the application and interpretation of the WWA/1991 Agreement, we will consider them jointly.

⁶Although Heintzman and Stoner testified that they were unaware of HR policy 332, the policy has been in use since its adoption in 2002. The policy provides that conflicts between two medical opinions would be resolved by the procedure set forth in the WWA.

⁷In some instances, ATU suggested that the *status quo* in this case was established by the past practice of the parties. However, in its brief and at oral arguments, ATU clarified that the past practice it referenced consisted of the terms of the WWA/1991 Agreement. Accordingly, we limit our discussion to whether TriMet violated the terms of the WWA/1991 Agreement.

Legal Standards: ORS 243.672(1)(g) and (1)(e)

Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations.” When we interpret labor agreements and other contracts with respect to employment relations, we do so in the same way that we interpret other contracts. *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491 (2002). Our goal is to determine the parties’ intent. ORS 42.240. We first examine the text of the disputed provision, in the context of the document as a whole. *Portland Fire Fighters’ Assn.*, 181 Or App at 91. If the agreement is ambiguous, we examine any extrinsic evidence of the parties’ intent contained in the record. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). If the provision remains ambiguous after examining the extrinsic evidence, we resort to the use of any appropriate maxims of contract construction. *Yogman v. Parrot*, 325 Or 358, 364, 937 P2d 1019 (1997).

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” of its employees. An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under the Public Employee Collective Bargaining Act (PECBA). *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*), citing to *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980). Because both parties have identified the WWA/1991 Agreement as establishing the *status quo*, and there is no dispute between the parties that the subject concerns a mandatory subject of bargaining, our conclusion regarding the meaning of that agreement is dispositive of this claim. In *AOCE*, the Oregon Supreme Court summarized our methodology for analyzing unilateral change allegations as follows:

“When reviewing an allegation of unlawful unilateral change, ERB considers (1) whether an employer made a change to an “established practice,” often referred to as the “status quo”; [Footnote omitted.] (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Ass’n of Oregon Corr. Employees*, 20 PECBR 890, 897.” *AOCE*, 353 Or at 177.

If the complainant provides the requisite evidence to establish a violation, we then consider any affirmative defenses raised by the employer. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008).

Analysis

Article 1, Section 19, Paragraph 6 of the most recent WWA includes provisions that establish in general the process the parties have agreed to follow when there are conflicting medical opinions about an employee's ability to return to work. In turn, as noted in paragraph 11 of the 1991 Agreement, the parties negotiated that second policy agreement to "completely set forth the procedure to implement" the WWA's general provisions.⁸ The first three paragraphs, of the 1991 Agreement, which are most relevant to our analysis, state that:

"1. An employee who has been absent due to accident or illness shall be returned to the payroll upon the receipt of a full written release to return to work from the employee's attending physician. Pay shall start as of the date the employee is released to return to his or her regular work; provided, however, that no employee shall receive workers' compensation benefits and pay for the same period.

"2. In the event the District exercises its discretion under Article 1, Section 20, Par. 7 and requires an employee to be examined by the District's consulting physician before returning to work, the employee's pay shall continue through the date the District's consulting physician renders an opinion.

"3. The District shall, by the end of the next working day, notify the Union that it is exercising its discretion under Article 1, Section 20, Par. 7. The Union and District shall select a third doctor competent in the medical area involved from a pre-established list as soon as possible thereafter. The method of selection will be agreement or, if either party elects, alternate striking."

ATU contends that these paragraphs are steps that TriMet must follow sequentially. According to ATU, TriMet may not send T.P. or other members of the ATU bargaining unit to TriMet's contract physician unless it first requests a release from the employee's attending physician under paragraph 1 and also provides ATU notice of its decision. TriMet disagrees, asserting that the WWA/1991 Agreement does not prohibit it from sending employees to see its contract physician before the employee's attending physician is asked to provide a release.

As an initial matter, we conclude that both parties have offered plausible interpretations of the language, and as a result, the language is ambiguous. ATU's argument is supported by the language of paragraph 1 and the structure of the agreement as a whole, which could be read as creating sequential steps that must be followed in order. TriMet's argument is supported by the absence of specific language prohibiting it from requiring employees to see its contract physician before the employee's attending physician is asked to provide a release.

⁸At some point, the parties renumbered the applicable section of the WWA that dealt with medical examinations, but the language was otherwise unchanged.

As the complainant, ATU has the burden of proof and must establish by a preponderance of the evidence that TriMet violated the WWA/1991 Agreement. And although we find the language set forth above to be ambiguous, the two plausible interpretations are not equally supported by the language. ATU asks us to construe the language in its favor by inferring the existence of a specific prohibition on TriMet's discretion in the absence of clear language establishing such a limitation. Under ORS 42.230, when interpreting an agreement, we are required "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." The difficulty with ATU's argument is that neither the WWA nor the 1991 Agreement states what ATU asks us to find (*i.e.*, that TriMet was prohibited from directing T.P. to see its contract physician, even though T.P. had not yet obtained a release from his personal physician). In order to agree with ATU's interpretation of the agreement, the extrinsic evidence in the record would need to establish such a prohibition. We now turn to that evidence.

Both parties offered extrinsic evidence in support of their interpretation and application of the WWA/1991 Agreement. ATU offered the testimony of Stoner and Heintzman, who were involved in negotiating the 1991 Agreement, about what they believed the intent behind the language was and the context in which that agreement was negotiated. ATU also offered documents and testimony concerning several examples of situations in which ATU and TriMet had invoked the 1991 Agreement to resolve disputes between an employee's physician and TriMet's contract physician.

In response, TriMet offered the testimony of Ms. Talbott and Ms. Lomax that, over the past 17 years, somewhere between 75 and 100 employees had been sent to TriMet's contract physician before they were allowed to return to work. Lomax and Talbott both testified that TriMet made the decision to send the employees to the contract physician regardless of whether the employee's attending physician had previously provided, or been asked to provide, a letter releasing the employee to work.

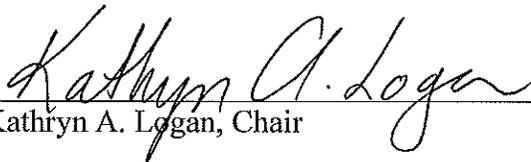
We find that the extrinsic evidence offered by ATU does not establish that TriMet was prohibited from sending employees to its contract physician before the employee's attending physician had an opportunity to provide a release. Rather, the evidence offered establishes that the intent of the 1991 Agreement was to ensure that employees would not be placed on unpaid status if TriMet insisted on sending them to its contract physician before allowing the employee to return to work. This intent is demonstrated by the language of the 1991 Agreement, which references employee pay status not only in paragraph 1, but in paragraphs 2, 7, 8 and 9 as well. Stoner and Heintzman acknowledged in their testimony that that the primary concern that led to the original arbitration proceeding and the subsequent negotiation of the 1991 Agreement was ATU's concern about the financial impacts on employees who potentially could have been placed on unpaid status for long periods of time while waiting for TriMet's contract physician to evaluate the employee's fitness for duty.

In summary, we find that the extrinsic evidence offered by ATU did not provide persuasive evidence that supported its assertion that the parties agreed, through the 1991 Agreement, to prevent TriMet from sending employees to its contract physician before the employee's attending physician was given the opportunity to provide a release for the employee. As a result, we conclude that ATU did not establish that TriMet violated the WWA/1991 Agreement or that TriMet changed the *status quo* with regards to those agreements by directing T.P to obtain a release from TriMet's contract physician before seeking a release from T.P.'s attending physician. Accordingly, we will dismiss ATU's complaint in its entirety.

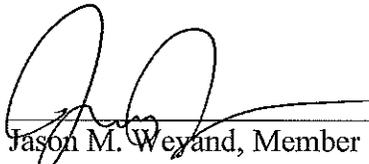
ORDER

The complaint is dismissed.

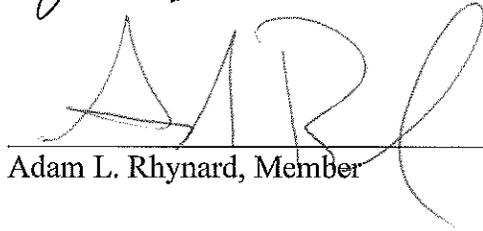
DATED this 25 day of October 2013.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.