

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-054-12

(UNFAIR LABOR PRACTICE)

TUALATIN EMPLOYEES' ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS
)	FINDINGS OF FACT,
CITY OF TUALATIN,)	CONCLUSIONS OF LAW, AND
)	ORDER
Respondent.)	
_____)	

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on October 21, 2013, after a hearing held on May 30, 2013, in Salem, Oregon. The record closed on June 24, 2013, following receipt of the parties' post-hearing briefs.

Derek R. Budzik, Attorney at Law, Lafayette, Oregon, represented Complainant.

Ashley Boyle, Labor Relations Attorney/Consultant, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On October 17, 2012, the Tualatin Employees' Association (Association) filed this unfair labor practice complaint against the City of Tualatin (City) alleging that the City violated ORS 243.672(1)(a), (b), and (c) by giving employees who were subject to a pending unit clarification petition a 2.5 percent wage increase. The City filed a timely answer to the complaint.

The issues are:

1. Did the City interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under ORS 243.662, in violation of ORS 243.672(1)(a), by giving the employees who were subject to the Association's unit clarification petition a 2.5 percent salary increase?

2. Did the City dominate or interfere with the formation, existence, or administration of the Association, in violation of ORS 243.672(1)(b), by giving the employees who were subject to the unit clarification petition a 2.5 percent salary increase?

3. Did the City discriminate in regard to the terms and conditions of employment for the purpose of discouraging membership in the Association, in violation of ORS 243.672(1)(c), by giving the employees who were subject to the unit clarification petition a 2.5 percent salary increase?

4. If the City violated ORS 243.672(1)(a), (b), or (c), what is the appropriate remedy?

For the reasons discussed below, we conclude that the City did not violate ORS 243.672(1)(a), (b), or (c).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT¹

Parties

1. The Association is a labor organization as defined by ORS 243.650(13) and the exclusive representative of approximately 70 employees at the City. The City is a public employer as defined by ORS 243.650(20).

2. There are approximately 43 unrepresented City employees.

3. The Association and City were parties to a collective bargaining agreement that was effective July 1, 2010 through June 30, 2012. Under that contract, Association bargaining unit employees had the option of selecting medical insurance under either a Blue Cross Plan, V-PPO, or a Kaiser plan.

Bargaining for 2012 - 2015 collective bargaining agreement and unit clarification petition

4. The Association and the City held their first bargaining session for a successor collective bargaining agreement in February 2012. In its initial proposal, the Association

¹The following Findings of Fact are based upon a stipulation by the parties and the record at hearing.

proposed to add language providing for the City to make contributions to an HRA VEBA Medical Reimbursement plan (Reimbursement Plan)² in the amount of one percent of each unit employee's base pay and the cash value of each employee's accrued vacation time in excess of 35 days.

5. On April 24, 2012, the Association filed a unit clarification petition under OAR 115-025-0005(2) with this Board seeking to clarify whether thirteen unrepresented employees in various positions were public employees within the meaning of ORS 243.650(19). *Tualatin Employees' Association v. City of Tualatin*, Case No. UC-012-12, 25 PECBR 565 (2013). The Association subsequently withdrew its petition regarding two of the positions.

6. On May 10, 2012, the City filed timely objections asserting that the petition should have been filed under either OAR 115-025-0005(3), the purpose of which is to clarify whether the positions at issue are included under the express terms of the recognition clause, or OAR 115-025-0005(4), the purpose of which is to determine if it is appropriate to add unrepresented employees to a bargaining unit. The City also asserted that the petitioned-for employees should be allowed to vote on whether they should be placed in the Association bargaining unit. On July 15, 2012, the City again objected to the petition being considered under subsection (2) and asserted that a self-determination election should be held.

7. After the petition was filed, the City initially suspended the parties' negotiations because it was concerned that the bargaining conduct might constitute an undue influence on employees, should a self-determination be ordered under subsection (2), and its desire to know the scope of the positions in the bargaining unit that bargaining would address. After the Association notified the City of its intent to file an unfair labor practice complaint against the City asserting that the City was refusing to bargain under ORS 243.672(1)(e), the City resumed bargaining with the Association.

8. At some point during the bargaining process, the City Council authorized its bargaining team to make proposals increasing the total compensation package up to three percent, and to increase compensation for unrepresented employees by the same amount.

9. During bargaining, the parties discussed allowing the Association bargaining unit employees to vote on replacing Blue Cross Plan V with either Blue Cross Plan 1-B or Blue Cross Co-Pay Plan B, both of which had lower premium costs. Because the City's medical insurance premium contribution was based on a percentage of the Kaiser Plan premium, the amount of the City's contribution remained the same regardless of the plan selected by employees. Leaving Blue Cross Plan V for either Blue Cross Plan 1-B or Co-Pay Plan B would lower employees'

²HRA is an acronym for health reimbursement arrangement; VEBA is an acronym for voluntary employees' beneficiary association. However, HRA VEBA is also a shortened form of HRA VEBA Trust, which is "a multiple employer non-profit trust managed by a board of trustees elected by the plan participants. HRA VEBA Trust currently serves over 43,000 participants from more than 400 governmental employers in the Northwest." <http://www.hraveba.org/#!about/c20r9>, accessed October 17, 2013. The parties' negotiations appear to have concerned participation in the HRA VEBA Trust.

out-of-pocket premium costs. The City also presented a counter proposal for a Reimbursement Plan contribution linked to Association members agreeing to Blue Cross Plan 1-B or Co-Pay Plan B. Based on the parties' bargaining discussions, the City bargaining team believed that the Association bargaining unit members would vote for either Plan 1-B or Co-Pay Plan B.

10. On July 30, 2012, the parties reached a tentative agreement on a total compensation proposal, which included a two percent salary increase each July 1, in 2012, 2013, and 2014; a maximum insurance premium contribution of 90 percent of the Kaiser plan and ODS Dental II with Ortho; an increase in the City's insurance contribution of up to five percent in January 1, 2014 and January 1, 2015; and new Reimbursement Plan language contingent on the Association's selection of either the Blue Cross Co-Pay Plan B or Plan 1-B, including a one-time City contribution of \$200.00 for each employee with an established Reimbursement Plan account and contributions based on the cash value of accrued vacation in excess of 260 hours per quarter. The parties also agreed that the Association would select its insurance plan in the collective bargaining agreement ratification vote and that the City would provide a \$25.00 monthly payment for full-time employees who opted out of the City insurance plans.

Compensation increase for unrepresented employees

11. On August 6, 2012, Human Resources Manager Janet Newport and Financial Director Donald Hudson reviewed the tentative agreement with City Manager Sherilyn Lombos. Hudson provided Lombos and Newport with his analysis of the cost impact of the tentative agreement. The document reflected that the total increased compensation cost of the tentative agreement was three percent during the three years of the contract, which included a cost of approximately 0.5 percent each year based on the City's contributions to the Reimbursement Plan.

12. At this meeting, for the first time, the managers discussed the structure of a total compensation package for unrepresented employees. In past years, the City had given unrepresented employees the same salary increases as Association bargaining unit employees. Lombos, Newport, and Hudson decided to provide unrepresented employees with an economic package equivalent to the three percent total compensation increase bargained for Association bargaining unit employees. Because the managers decided not to include unrepresented employees in the City's 0.5 percent contribution to the Reimbursement Plan, the managers proposed a 2.5 percent salary increase for unrepresented employees. They also proposed the same City contribution to unrepresented employees' regular health insurance as provided to Association bargaining unit members. During this meeting, the managers did not mention or discuss the pending unit clarification or the status of the 11 employees subject to the petition.

13. After the August 6, 2012 meeting, Newport explained to Association President Bailey that the City provided the additional 0.5 percent wages to unrepresented employees because those employees would not receive City contributions to a Reimbursement Plan account. Soon after their discussion, a leaflet was posted at the City stating that management employees would receive a 2.5 percent increase, but would not have a Reimbursement Plan option. On August 12, 2012, Newport sent an e-mail to all unrepresented employees clarifying that the proposed compensation package for those employees included a 2.5 percent salary increase and an increase in the amount of health insurance contribution based on the 90 percent formula.

14. A hearing on the objections to the unit clarification petition in Case No. UC-012-12 was held on August 14 and 15, 2012. At the time of the hearing, the Association had amended the petition to proceed under OAR 115-025-0005(2) and (3). The City continued to assert that a self-determination election should be held.

15. On August 14, 2012, Association President Bailey notified HR Manager Newport that the Association had ratified the tentative agreement and the bargaining unit employees had voted to retain Blue Cross Plan V. This choice meant that Association unit employees would not receive the 0.5 percent Reimbursement Plan contributions, and that, therefore, the increase in compensation to unit employees was 2.5 percent instead of 3 percent. City officials were surprised by the unit members' choice because much of the parties' bargaining had focused on lowering medical insurance premiums and other medical costs to Association unit members.

16. On August 27, 2012, the City Council adopted resolutions approving the 2.5 percent increase for unrepresented employees (retroactive to July 1, 2012); an adjustment to unrepresented employee medical insurance (retroactive to August 1, 2012); and ratifying the terms of the parties' tentative agreement (retroactive to July 1, 2012).

17. On June 21, 2013, the Employment Relations Board issued its final order in Case No. UC-012-12.³ The Board concluded that the express terms of the parties' collective bargaining agreement included the 11 positions at issue, and ordered that "they are contained" within the Association bargaining unit. The Board did not order an election.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City did not violate ORS 243.672(1)(a) by giving the employees subject to the Association's unit clarification petition a 2.5 percent salary increase.

The Association alleges that the City violated the "in the exercise" prong of subsection (1)(a) by giving a 0.5 percent pay increase to unrepresented employees who were at issue in the Association's unit clarification petition, thereby subjecting them to a 0.5 percent pay cut if they were clarified into the Association. The City contends that the employees at issue were not "public employees" under the Public Employee Collective Bargaining Act (PECBA) at the time of the pay increase, that the City provided all unrepresented employees with the same pay increase, and that the Association was responsible for the difference in pay.

³We take judicial notice of this decision. *See Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections and Association of Oregon Corrections Employees*, Case No. UP-4-01, 19 PECBR 785 (2002).

Legal Standards: ORS 243.672(1)(a) Claim

Under ORS 243.672(1)(a), it is an unfair labor practice for a public employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” Protected rights under ORS 243.662 include the right to “form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

Subsection (1)(a) prohibits two types of employer actions: (1) those that interfere with, restrain, or coerce employees “because of” their exercise of protected rights under ORS 243.662; and (2) those that interfere with, restrain, or coerce employees “in the exercise” of those protected rights. *Tigard Police Officers’ Association v. City of Tigard*, Case No. UP-59-10, 24 PECBR 927, 936 (2012).

The Association does not allege that the City violated the “because of” portion of subsection (1)(a), but that the City’s conduct affected employee rights under the “in the exercise” portion. The focus of our analysis under the “in the exercise” prong of (1)(a) is not on the employer’s motive or reasons for acting, but on the likely consequences of the employer’s actions. If the natural and probable effect of an employer’s action is to “deter employees from exercising a protected right, then the action interferes with, restrains, or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a).” *Milwaukee Police Employees Association v. City of Milwaukee*, Case No. UP-52-11, 25 PECBR 263, 275-76 (2012).

More specifically, an employer may violate the “in the exercise” prong when the natural and probable effect of the employer’s conduct, viewed under the totality of the circumstances, would tend to interfere with employees’ exercise of protected rights.⁴ These violations most frequently occur when an employer makes threatening or coercive statements regarding union activity. *Id.* at 276. The complainant has the burden of proof. OAR 115-010-0070(5)(b).

The Association established that the City granted a 2.5 percent salary increase to the employees subject to the OAR 115-025-0005(3) unit clarification petition, as it did with all then-unrepresented employees. To decide whether the City’s actions constitute an “in the exercise” violation, we consider the results that would likely flow from its actions. The City’s motive is not controlling, nor are the subjective impressions of affected employees. We base our decision on “an objective standard and the totality of the circumstances.” *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 590, 602 (2002), quoting *Spray Ed. Assoc. and Short v. Spray School District*, Case No. UP-91-87, 11 PECBR 201, 218 (1989).

⁴A derivative violation of the “in the exercise” prong of the statute occurs when an employer violates the “because of” prong of the statute, and is not at issue here.

Analysis: ORS 243.672(1)(a) Claim

The Association contends that the City interfered with or coerced employees in the exercise of their rights to choose union representation by offering employees a financial reward for giving up those rights.⁵ The Association argues that the natural and probable effect of implementing the additional 0.5 percent wage increase for the 11 employees would be to induce them to vote against membership in the Association bargaining unit (if an election was required). The Association further argues that this Board should sanction the City because its officials granted the wage increase while believing, and advocating, that a unit composition election should take place.

The difficulty with the Association's claim is that an election is not held in an OAR 115-025-0005(3) unit clarification matter. As this Board has previously stated:

"A subsection (3) unit clarification petition requires only that we interpret the recognition clause negotiated by the parties and does not involve an election by the employees. Hence, employees have no freedom of choice to exercise, and there is no employee voting subject to any improper influence by the employer through manipulation of the negotiating process." *American Federation of State, County and Municipal Employees v. Metropolitan Services District*, Case No. UP-97-90, 13 PECBR 26, 29 (1991).

In UC-012-12, this Board determined that the employees at issue were members of the unit as described by the collective bargaining agreement and did not order an election. *City of Tualatin*, 25 PECBR at 575-76. The Association's claim, consequently, is without merit because the employees could not be induced to vote against union membership when an election would never occur (regardless of any purported belief by City officials that an election "should" occur).

The Association offers no other rationale to support a conclusion that the City violated the "in the exercise" clause. We will dismiss this claim.⁶

Legal Standards: ORS 243.672(1)(b) Claim

We turn to whether the City violated ORS 243.672(1)(b) through its grant of a 2.5 percent compensation increase to the 11 employees at issue. ORS 243.672(1)(b) provides that it

⁵The Association's arguments focus on the City's advocacy for, and the possibility of, an election to determine whether the 11 employees at issue would join the Association unit. The Association's arguments also focus on the *difference between* the compensation increases of represented and unrepresented employees, rather than the fact that the City *changed* the compensation of the 11 then-unrepresented employees at issue.

⁶Although this Board determines that employees in positions subject to a successful OAR 115-025-0005(3) petition were already members of a bargaining unit pursuant to its unit description, the effective date of actual unit membership is determined by this Board's Order, not the date of the unit description agreement or the creation or modification of the positions at issue.

is an unfair labor practice for an employer or its representative to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.”

To prove a subsection (1)(b) violation, a union must “demonstrate that the employer’s actions actually, directly, and adversely affected the labor organization’s ability to serve as exclusive representative.” *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 397(2008).

Analysis: ORS 243.672(1)(b) Claim

The Association argues that the City’s actions made it less likely that the employees at issue would vote to join the Association bargaining unit and violated its duty of neutrality, citing *Teamsters Local 57 v. Lane County and AFSCME Local 2831*, Case No. C-199-82, 7 PECBR 5763, 5785 n 4 (1983), and *In the Matter of a Petition by Central School District, Polk County*, Case No. DR-5-85, 8 PECBR 8082, 8084 (1985). As explained above, no such election has been or will be held. As a result, the Board precedent cited by the Association is inapposite.

The Association also argues:

“The City violated ORS 243.672(1)(b) because it tried to have it both ways. If the City wanted an untainted self-determination election in UC-012-12, it should not have bargained and adjusted the salaries of the impacted employees. If the City wanted to adjust the salaries of the impacted employees, then it should not have argued for a self-determination election.” Association post-hearing brief at 16.

The Association has failed to demonstrate that the City’s actions actually and adversely affected the Association’s ability to represent its members. Accordingly, the City’s action did not violate subsection (1)(b). We will dismiss this claim.

Legal Standards: ORS 243.672(1)(c) Claim

ORS 243.672(1)(c) provides that it is an unfair labor practice for a public employer or its designated representative to “[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.” This Board has stated that generally, “[o]ur test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the ‘because of’ prong of subsection (1)(a).” *Oregon AFSCME Council 75, Local 2376 v. State of Oregon, Department of Corrections*, Case No. UP-24-12, 25 PECBR 721, 737 (2013), citing *State of Oregon, Department of Corrections, Santiam Correctional Institution*, 22 PECBR at 396 (2008). A (1)(c) violation is established by the same “but for” causation employed under (1)(a). *AFSCME Council 75, AFL-CIO and Haphey and Bondiotti v. Linn County, Linn County Sheriff’s Office and Sheriff Martinak*, Case No. UP-115-87, 11 PECBR 631, 650-51 (1989).

Analysis: ORS 243.672(1)(c) Claim

The Association argues that the City violated subsection (1)(c) by giving a “disparate salary increase”—*i.e.*, by raising the wages of the employees at issue 0.5 percent more than the compensation provided to Association employees. The Association is correct that the increase in compensation of unit employees differed from that extended to unrepresented employees, including the 11 employees at issue. However, the difference in treatment was not caused by the City alone. The City provided its unrepresented employees with a compensation increase equal to the higher compensation package it agreed to provide Association unit after bargaining with the Association. The 0.5 percent disparity was created when (1) Association leadership chose to present Association members with an option to retain their previous, lower value compensation package, and (2) a majority of Association members voted for that lower compensation package.

The City managers’ decision was made before the Association vote, albeit ratified by the City Council after that vote, and there is no evidence that City officials had any expectation that the Association members would reject the medical Reimbursement Plan that the Association obtained in bargaining.⁸ Had the Association members selected the more valuable compensation package, there would be no disparity in the value of the compensation.⁹ If the employees-at-issue ultimately received greater compensation than bargaining unit employees, this was due to the democratic choice of the Association unit, not the City. In addition, the compensation granted the employees-at-issue was given to all then-unrepresented employees, a status held by the 11 employees-at-issue until June 21, 2013. Therefore, the difference in compensation for unrepresented and represented employees, or the difference between the employees-at-issue and the represented employees, cannot be ascribed to unlawful discriminatory intent by City officials. We conclude that the Association has failed to prove the causation element necessary to establish a (1)(c) violation.

The Association also failed to prove that the City had an unlawful purpose. It is difficult to accept the Association’s argument that the City’s actions were intended to create a compensation disparity when, at the time that the City selected the non-bargaining unit employee compensation package, City officials reasonably believed that the Association members would choose the medical insurance option that the parties agreed to in bargaining. There is no evidence that union activities were a factor in the County’s decision except to the extent that the County used the Association’s benefits package as a benchmark to achieve compensation parity for non-bargaining unit employees. This is a lawful purpose.

⁸There is no evidence that the members of the City Council had any unlawful intent in approving the managers’ recommendations or revisited the managers’ analysis in light of the Association vote.

⁹Although the Association notes that there was a difference in the *type* of compensation (wages v. medical reimbursement funds) offered to the unrepresented and represented employees, it does not explain how this fact would change the analysis of its claims under the PECBA.

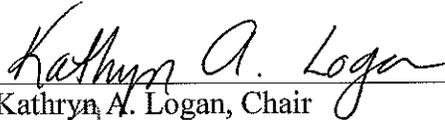
The Association has failed to prove that the City unlawfully discriminated against the Association and its unit members. We will dismiss this claim.

For the reasons set forth above, we conclude that the Association has failed to prove that the City violated ORS 243.672(1)(a),(b), or (c). As a result, we will dismiss the Association's complaint entirely.

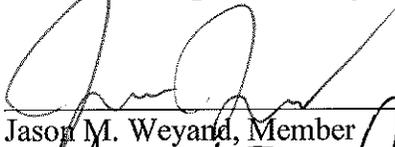
ORDER

1. The Amended Complaint is dismissed.

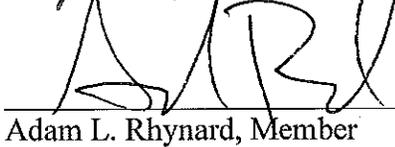
DATED this 12 day of December 2013.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.