

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-1-08

(UNFAIR LABOR PRACTICE)

DAVID HADLEY, LINDA HADLEY,)
JEFF CORDES, BRET BURTON, AND)
OFELIA McMENAMY,)

Complainants,)

v.)

MULTNOMAH COUNTY DEPUTY)
SHERIFF'S ASSOCIATION AND)
MULTNOMAH COUNTY,)

Respondents.)

DISMISSAL ORDER

Roger Hennagin, Attorney at Law, 8 North State Street, Suite 300, Lake Oswego, Oregon 97034, represented Complainants.

David A. Snyder, Attorney at Law, Snyder & Hoag, LLC, P.O. Box 12737, Portland, Oregon 97212, represented Respondent Association.

Kathryn A. Short, Assistant County Counsel, Multnomah County, 501 S.E. Hawthorne Blvd., Suite 500, Portland, Oregon 97214, represented Respondent County.

On January 30, 2008, David Hadley and four other individuals (Complainants) filed this unfair labor practice complaint. The complaint fails to specify which sections of the Public Employee Collective Bargaining Act (PECBA) the Multnomah County Deputy Sheriff's Association (Association) and Multnomah County

(County) allegedly violated. By letter dated March 4, 2008, Complainants clarified their position, alleging that the Association violated ORS 243.672(2)(a)¹ and the County violated ORS 243.672(1)(a) and (c) by entering into a retroactive pay agreement that excluded the Complainants. The gist of the complaint is that the Association violated its duty of fair representation, and the County discriminated against Complainants by treating them differently from others who were similarly situated.

For purposes of this Order, we assume all the allegations in the complaint are true. *Service Employees International Union Local 503 v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). The pertinent allegations in the complaint are as follows:

“1. All six²] Complainants are former employees of Multnomah County and members of the Multnomah County Deputy Sheriff’s Association.

“* * * * *

“4. Beginning in July, 2005, and continuing until August 9, 2007, Respondents were engaged in collective bargaining about retroactive pay raises for deputy sheriffs represented by the Association.

“5. On or about August 9, 2007, Respondents reached an agreement awarding to those deputy sheriffs who remained employed by the County as of that date retroactive pay for the two-year period July 1, 2005, through June 30, 2007. The written agreement did not apply to any deputy sheriffs who had either retired or resigned from their employment subsequent to July 1, 2005.

¹The Complainants’ March 4 letter also alleges that the Association’s conduct violates ORS 243.672(2)(b). That statute obligates a labor organization “to bargain collectively in good faith *with the public employer* * * *.” (Emphasis added.) Because Complainants do not allege they are a public employer with whom the Association is obligated to bargain, the complaint fails to state a claim under subsection (2)(b).

² The complaint erroneously states there are “six” complainants; it should state “five.”

“6. The agreement that was reached by Respondents on August 9, 2007, included an oral provision that the Respondents would subsequently execute a writing which would award retroactive pay to two deputies who had retired as a result of disabilities that were not work-related.

“7. On or about August 29, 2007, Respondents executed a Memorandum of Exception awarding retroactive pay to the two deputies who retired subsequent to July 1, 2005, as a result of disabilities

“8. None of the Complainants were awarded retroactive pay.

“9. Association failed to fairly represent Complainants when it negotiated for and obtained retroactive pay for two retirees but not for all retirees and resignees, including Complainants.

“10. Association unfairly, unlawfully, and arbitrarily discriminated against Complainants when it bargained on behalf of two retirees but failed to bargain on behalf of Complainants who were also retirees or designees [*sic*]. There is no lawful distinction between the two classes of individuals.

“11. County engaged in an unfair labor practice when it agreed to give retroactive pay to two retirees but not to all retirees and resignees who were employed as deputy sheriffs between July 1, 2005, and June 30, 2007.”

By letter dated February 21, 2008, Administrative Law Judge Larry L. Witherell directed Complainants to show cause why the complaint should not be dismissed. By letter dated March 4, 2008, counsel for Complainants responded with factual and legal arguments.

We have reviewed the complaint and accompanying documents, the Complainants' arguments, and pertinent legal authorities, and we conclude the complaint does not present an issue of law or fact that warrants a hearing. Accordingly, we will dismiss the complaint. ORS 243.676(1)(b); OAR 115-035-0020.

DISCUSSION

ORS 243.672(2)(a) makes it an unfair labor practice for a labor organization to “[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782.” Complainants allege that the Association violated its duty to fairly represent them. An essential element in such cases is the existence of a duty on the part of the labor organization to the complaining individuals. We conclude that in the circumstances of this case, there was no such duty.

Each of the five Complainants either retired or resigned from County employment between September 1, 2006 and June 30, 2007. The alleged unfair labor practices occurred no earlier than August 9, 2007, when the County and Association agreed to provide retroactive pay for two deputies who retired as a result of disabilities. Accordingly, the Complainants were not County employees at the time of the alleged unfair labor practices.

This Board has held that under the PECBA, a labor organization’s “duty to represent an individual exists only if it is the exclusive representative of a bargaining unit and it is in a position to assert PECBA rights on behalf of an individual who is in that bargaining unit.” *Timothy Reidy v. Oregon Public Employees Union*, Case No. UP-73-87, 10 PECBR 180, 182 (1987). Further, this Board has held that “[f]ormer employees, of course, are not bargaining unit members.” *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 722 (1996).³ Neither the County nor the Association had a legal obligation to bargain about the employment relations of retirees or former employees who voluntarily resigned their employment with the County and who, as a result, are no longer members of the bargaining unit. See *Chan v. Clackamas Community College*, Case No. UP-13-05, 21 PECBR 563, 576 (2006) (once an employee voluntarily resigned, there was no reason for the Association to proceed further on the employee’s behalf). Therefore, the Association did not violate the PECBA by not seeking or by failing to gain benefits for the former employees. The fact that the County may have agreed to provide some benefits to some former employees does not impose a legal duty on the Association to negotiate successfully with the County on behalf of other former employees.

³In *City of Springfield*, the issue was whether the employer violated ORS 243.672(1)(e) by refusing to bargain over a grievance procedure for retirees. In that case, the association proposed that “former employees have access to the contractual grievance procedure.” This Board held that “[b]ecause the preponderant purpose of the ‘retirement grievance’ proposal is to give contractual rights to nonmembers of the bargaining unit, it is not mandatory.” 16 PECBR at 722-23.

Even if we were to assume *arguendo* that the Association had some obligation to represent Complainants, we do not find that the agreement the Association reached with the County breached its duty to fairly represent them. In order to demonstrate that a union's deliberate actions violated its duty of fair representation, a complainant "must allege facts to support a claim that the union acted arbitrarily or in bad faith; a complaint which does not allege any such facts will be dismissed without a hearing." *Balch v. Oregon Public Employees Union*, Case No. UP-6-96, 16 PECBR 478, 480 (1996) (citing *Moustachetti v. AFSCME, Local 1246*, Case No. UP-42-90, 12 PECBR 174 (1990)). Here, Complainants allege no facts that would demonstrate the Association acted dishonestly or with a hostile motive, or failed, without any reasonable basis, to obtain an agreement that benefitted Complainants. The Association's decision to execute an agreement that awarded retroactive pay only to employees who retired because of disabilities was reasonable: the parties chose to provide benefits to those employees who were involuntarily forced to retire. See *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 959-60 (2005) (union acted reasonably and avoided upheaval in the bargaining unit when it entered a memorandum of agreement that denied recall and bumping rights to employees who had already been laid off).

The Association had no obligation to represent Complainants and therefore did not fail to fairly represent them. The Complainants have failed to allege a cause of action or an injury that this Board can remedy. We will dismiss the complaint against the Association.

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Where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722, 6734 (1984); *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04, 20 PECBR 967, 975 (2005). Therefore, we will also dismiss the complaint against the County.

ORDER

The complaint is dismissed.

Dated this 27TH day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.