

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-01-10

(UNFAIR LABOR PRACTICE)

KEVIN ZEMMER and)	
RONALD KIRK,)	
)	
Complainants,)	
)	
v.)	DISMISSAL ORDER
)	
AMERICAN FEDERATION OF)	
STATE, COUNTY AND)	
MUNICIPAL EMPLOYEES)	
and STATE OF OREGON,)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondents.)	
_____)	

Jaime B. Goldberg, Attorney at Law, Portland, Oregon, represented Complainants Kevin Zemmer and Ronald Kirk.

Jason M. Weyand, Legal Counsel, Pendleton, Oregon, represented Respondent American Federation of State, County and Municipal Employees.

Kathryn A. Logan, Senior Assistant Attorney General, Salem, Oregon, represented Respondent State of Oregon, Department of Corrections.

On January 11, 2010, Complainants Kevin Zemmer and Ronald Kirk filed this complaint alleging that: (1) the American Federation of State, County and Municipal Employees (AFSCME) violated ORS 243.672(2)(a) when it determined that a 1996 Settlement Agreement regarding seniority applied to the collective bargaining agreement

in effect in 2008; (2) that AFSCME violated its duty of fair representation under ORS 243.672(2)(a) by arbitrarily and unreasonably withdrawing their seniority-based grievances; and (3) that the State of Oregon, Department of Corrections (Department) violated ORS 243.672(1)(g) when it recalculated their seniority to comply with the 1996 Settlement Agreement. On February 5, 2010, AFSCME and the Department submitted their informal responses to these unfair labor practice allegations. OAR 115-035-0005.

On March 18, 2010, the Administrative Law Judge (ALJ) sent the parties his preliminary analysis that concluded the complaint was untimely filed and failed to state a cause of action. The ALJ provided Complainants Zemmer and Kirk an opportunity to amend their complaint to state a cause of action or rebut the ALJ's legal analysis no later than April 6, 2010. They did not respond.

For purposes of this Order, we assume the well-pled facts in the complaint are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). We can also rely on undisputed facts we discover during our investigation of the complaint. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 868 (2007); ORS 243.676(1)(b).

We summarize the complaint, the attached exhibits, and the undisputed facts as follows:

1. Complainants Kevin Zemmer and Ronald Kirk were hired as correctional officers by the Department in 1989 and stationed at the Snake River Correctional Institution (SRCI) in Ontario, Oregon. Their positions are part of a statewide bargaining unit of strike-prohibited, security series employees that includes Correctional Officers, Correctional Corporals, and Correctional Sergeants within the Department of Corrections.

2. At all relevant times, AFSCME was the sole and exclusive bargaining agent for the employees in the bargaining unit. AFSCME and the Department entered successive collective bargaining agreements dated 1994-1999, 1999-2001, 2001-2003, 2003-2005, 2005-2007, and 2007-2009. At the time the complaint was filed, the 2007-2009 collective bargaining agreement was in effect.

3. Article 25, Section 9 of the 2007-2009 collective bargaining agreement states in part that “[o]fficers who have completed trial service may bid shifts and days

off in order of seniority as defined in Section 9^[1] of this Article.” Article 25, Section 8 of the collective bargaining agreement defines seniority as “time in class in the security bargaining unit.”

4. Article 1, Section 4 of the 2007-2009 collective bargaining agreement states:

“This contract incorporates the sole and complete Agreement between the Agency and the Union resulting from negotiations held pursuant to the provisions of ORS 243.650 et seq and supersedes all prior labor contracts.”

5. On November 21, 1996, AFSCME and the Department of Administrative Services (DAS) signed a Settlement Agreement which resolved a scheduled arbitration involving employees at the Oregon Women’s Correctional Center (OWCC). Employees at OWCC (now Coffee Creek Correctional Institution) are in the same bargaining unit, and are covered by the same labor agreement, as employees at SRCI. The 1996 Settlement Agreement clarified how in-class seniority was to be calculated under Article 25 of the collective bargaining agreement for bargaining unit members who experienced breaks in service. The 1996 Settlement Agreement states in part:

“2. * * * Should an AFSCME bargaining unit member leave State service for a period of longer than one hundred eighty (180) days for any reason other than lay-off and then return, he/she shall lose all seniority for the purpose of bidding.

“ * * * * *

“4. A bargaining unit member who promotes or demotes into a different classification and then returns to his/her original classification shall maintain his/her in-class bargaining unit seniority if he/she returns to his/her original classification within five (5) years.”

6. The November 1996 Settlement Agreement was not attached to, or incorporated into, any of the five subsequent collective bargaining agreements between the parties and was never applied to bargaining unit employees at SRCI. For SRCI bargaining unit members who left this unit and then returned, time spent in the collective bargaining unit prior to their break in service was included in their overall seniority computation for purposes of bidding on work shifts and days off.

¹This reference to “Section 9” appears to be a typographical error. Seniority is defined in Section 8 of Article 25.

7. Zemmer was promoted to Lieutenant in 1997 and to Captain in 2000. Both positions were classifications outside of the bargaining unit. Kirk left his SRCI bargaining unit position on March 20, 1995, to take another job, but transferred back into an SRCI bargaining unit position on March 16, 2001, as a Corrections Corporal.

8. In 2004, Zemmer and Kirk contemplated taking voluntary demotions to lower ranks in order to bid on shifts and days off that were more conducive to their families' schedules and activities. For Zemmer, the voluntary demotion would place him back in the SRCI unit. For Kirk, the demotion would place him in a corrections officer position in the same class as the position he held from 1989 until 1995. The president of the AFSCME local at SRCI at the time advised Zemmer and Kirk that their pre-break service would be included in their seniority calculations. This statement reflected the practice at SRCI but was at odds with the 1996 Settlement Agreement. There is no allegation and no evidence that the SRCI unit's local president intentionally misled Zemmer or Kirk or was even aware of the 1996 Settlement Agreement.

9. Relying on assurances from the SRCI unit's president, Zemmer and Kirk opted to take voluntary demotions at SRCI, Zemmer to Sergeant on August 29, 2004, and Kirk to Corrections Officer on July 1, 2004. From 2004 to 2008, both men were permitted to bid on work shifts and days off based on seniority accrued before and after their break in service from their SRCI bargaining unit.

10. In August 2008, AFSCME and the Department determined the 1996 Settlement Agreement was still valid and therefore binding on members working under the current collective bargaining agreement, notwithstanding the fact that it had not been attached to, or incorporated into, subsequent collective bargaining agreements, and its terms had not been implemented at SRCI.

11. As a result of this determination, Zemmer, who had been promoted out of the bargaining unit for more than five years, and Kirk, who had left State service and returned more than 180 days later, were no longer eligible to include their pre-break seniority when bidding for shifts or days off. In September 2008, Zemmer's seniority number changed from 10 to 30, and Kirk's changed from 168 to 386.

12. In October 2008, AFCSME filed grievances on behalf of Zemmer and Kirk because of the changes in their seniority, but it withdrew the grievances in September 2009 before arbitration.

13. In a September 10, 2009 letter to Zemmer and Kirk explaining the reasons for withdrawing the grievances, AFSCME's counsel stated the 1996 Settlement Agreement was "intended to be ongoing and is still in effect" and therefore binding on

the bargaining unit as well as the Department. The letter also stated the decision was reached after “careful inquiry into the facts leading up to the agreement, including the intent of the parties who signed and negotiated the agreement and the prevailing practice with seniority across the state.” Counsel described the chances of prevailing at arbitration as extremely low with “almost no reasonable chance of victory.” The letter also stated that taking the case to arbitration could be construed as refusing to follow a written agreement in violation of ORS 243.672(2)(d), and thus might subject AFSCME to an unfair labor practice complaint by the Department if it proceeded to arbitration. The letter notified Zemmer and Kirk that AFSCME had determined the risks and financial costs of going forward with the grievances were not justified.

DISCUSSION

This Board has reviewed the complaint, the accompanying exhibits, and the pertinent legal authorities. For the reasons explained below, we conclude as follows: (1) allegations that AFSCME violated ORS 243.672(2)(a) when it construed the 1996 Settlement Agreement to be binding on the collective bargaining agreement in effect in 2008 are untimely; (2) allegations that AFSCME violated ORS 243.672(2)(a) by arbitrarily and unreasonably withdrawing Zemmer’s and Kirk’s seniority-based grievances in 2009 fail to state a claim for relief and are therefore dismissed; and (3) allegations that the Department violated ORS 243.672(1)(g) when it recalculated Zemmer’s and Kirk’s seniority to comply with the 1996 Settlement Agreement are untimely and fail to state a claim for relief, and are therefore dismissed.

Timeliness

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.” 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.” The complaint was filed on January 11, 2010, which means that alleged violations of the Public Employee Collective Bargaining Act (PECBA) occurring on or after July 15, 2009, fall within the 180-day filing period.

The first claim alleges that AFSCME violated subsection (2)(a) when it agreed with the Department that the terms of the 1996 Settlement Agreement applied to bargaining unit employees at SRCI. AFSCME made this agreement in August 2008, and Zemmer and Kirk knew about it no later than September 2008 when their seniority was reduced for purposes of bidding on shifts and days off.

Implementation of a change constitutes the “occurrence” of an alleged unfair labor practice that triggers the 180-day period. *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, 581-83 (2008), *appeal pending* (a violation occurs for purposes of ORS 243.672(3) when the employer implements a change); *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District No. 24J*, Case No. UP-104-90, 13 PECBR 89, 93 (1991)(unilateral change in employment benefits triggers the 180-day period).

Under these facts, the alleged unfair labor practice against AFSCME for construing the 1996 Settlement Agreement as binding at SRCI occurred no later than September 2008 when the Department changed Zemmer and Kirk’s seniority dates. This occurred well outside the 180-day statutory period for filing complaints. As a result, these claims are untimely and we will dismiss them.

Duty of Fair Representation

Zemmer and Kirk allege that AFSCME violated its duty of fair representation under ORS 243.672(2)(a) when it relied on the language in the Settlement Agreement, rather than the collective bargaining agreement, to withdraw their seniority grievances. They argue that AFSCME’s explanation for the withdrawal was “unreasonable, without any logical or relevant basis, and unfair,” and thus “arbitrary.” AFSCME withdrew the grievances in September 2009, so these claims are timely.

In a September 10, 2009 letter informing Zemmer and Kirk of the decision to withdraw their grievances, AFSCME’s counsel stated that his investigation revealed the negotiating parties intended the 1996 Settlement Agreement to be binding, even though it had not been incorporated into subsequent collective bargaining agreements or implemented by their SRCI unit. AFSCME’s counsel also determined that the 1996 Settlement Agreement had been implemented for bargaining unit members at other facilities covered by the same collective bargaining agreement, that AFSCME faced a potential unfair labor practice complaint from the Department for failing to abide by the terms of the settlement agreement, and that the costs, fees, and expenses of proceeding with what appeared to be an unsuccessful effort were not justified. All of these factors were taken into account in the decision-making process and disclosed to Zemmer and Kirk at the time the grievances were withdrawn.

Under ORS 243.672(2)(a), a labor organization has a duty to fairly represent those bargaining unit employees for which it is the exclusive representative. To establish a violation of the duty of fair representation in a case involving a union’s decision not to file or arbitrate a grievance, a complainant must prove that the union acted in bad

faith, or that the decision was arbitrary or discriminatory. *Chan v. Leach and Stubblefield, Clackamas Community College*; and *McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563 (2006), *recons den*, 21 PECBR 597 (2007); *Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP 31-04, 20 PECBR 967 (2005). This Board accords substantial discretion to a union in deciding whether to arbitrate, or even to file, a grievance. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79 (1999). A union has discretion to withdraw a grievance based on its judgment that there is insufficient evidence to support the claim. *Balch v. Oregon Public Employees Union*, Case No. UP-6-96, 16 PECBR 478 (1996). The law focuses not on the merits of the grievance but on the conduct of the union. A good-faith decision not to pursue a meritorious grievance, even if mistaken, does not violate a union's duty of fair representation. *Chan*, 21 PECBR at 575 (citing cases). A union can also legitimately consider the cost of arbitration in determining whether to proceed. *Strickland v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90, 13 PECBR 113, 123-124 (1991).

Nor is a violation established by the fact that the union's acts benefit the complainant to a lesser degree than others, or even that those acts adversely affect the complainant. *Tancredi* at 974. A union has a duty to represent everyone in the bargaining unit. In seniority disputes, a resolution in favor of one group necessarily disadvantages others in the bargaining unit. *Baltus v. Multnomah School District No. 1J and Portland Association of Teachers*, Case No. UP-51/52-94, 15 PECBR 781 (1994) (Interim Ruling). Here, fighting to increase Zemmer and Kirk's seniority would necessarily seek to reduce the seniority rights of other bargaining unit members AFSCME has an obligation to serve. Generally, we do not substitute our judgment for that of a union in deciding what is best for the bargaining unit as a whole. Instead, we determine whether a union conducted a proper investigation and used a rational method of decision-making in reaching its conclusion. *Tancredi* at 975.

Here, AFSCME's attorney conducted an investigation and made a good-faith determination that the grievances lacked merit. AFSCME also considered the cost of the litigation and its judgment that dropping the grievances was best for the bargaining unit as a whole. Zemmer and Kirk do not allege that AFSCME acted for an illegitimate reason. The main gist of the complaint is that AFSCME's assessment of the grievances was wrong. As discussed, this alone is insufficient to prove a violation of the duty of fair representation.

AFSCME had a rational basis for its decision to drop the grievances. Even if we view the facts in the light most favorable to Zemmer and Kirk, we conclude that AFSCME did not act arbitrarily or in bad faith when it withdrew the grievances.

We turn next to the claim that AFSCME violated its duty of fair representation when its local president incorrectly informed Zemmer and Kirk that the time they spent in bargaining unit positions before their breaks in service would count towards their seniority. Zemmer and Kirk relied on that assurance and decided to take demotions into positions where they would have more seniority to bid on shifts and days off that met their personal needs. AFSCME later determined that, contrary to the local president's advice, service breaks of the type and length at issue prevent prior service from counting towards seniority.

Zemmer and Kirk must allege facts which, if proven, could establish that AFSCME's actions were arbitrary, discriminatory, or taken in bad faith. *Chan*, 21 PECBR at 574-575. A union need not represent a member in the same manner or as thoroughly as an attorney represents a client. *Putvinskis v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 898 (2000). A mere error in judgment about the meaning of a contract or the prospect of prevailing on a grievance is not unlawful. *Coan and Goar v. City of Portland, Bureau of Parks and Laborers' International Union of North America, Municipal Employees Local 483*, Case Nos. UP-23/24/25/26-86, 10 PECBR 342, 351 (1988), *reconsidered* 10 PECBR 438, AWOP 93 Or App 780, 764 P2d 625 (1988). Ordinary negligence is generally not enough to establish liability. *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 423 (1993).

Here, there is no allegation or evidence in the record suggesting that the local AFSCME president intentionally misled Zemmer and Kirk or that he was even aware of the existence of the November 1996 Settlement Agreement when he advised them about their seniority. We find no indication that AFSCME's actions were arbitrary, discriminatory, or taken in bad faith.

Moreover, Zemmer and Kirk failed to respond to the ALJ's offer to amend the complaint to state a cause of action or to otherwise contradict his analysis. We conclude, therefore, that AFSCME did not violate its duty of fair representation under ORS 243.672(2)(a). Zemmer and Kirk have failed to state a claim for relief and this portion of their complaint is dismissed.

Claim Against the Department

Zemmer and Kirk allege the Department violated ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations." Specifically, they allege the Department breached the collective bargaining agreement when it implemented the more restrictive terms of the 1996 Settlement Agreement in 2008 for purposes of calculating seniority in shift bidding. We dismiss this charge for two separate and independent reasons.

First, we dismiss this charge as untimely. Just as with the charge against AFSCME, any violation occurred no later than September 2008. This is more than 180 days before the Complaint was filed. ORS 243.672(3).

Second, our determination that AFSCME did not violate its duty of fair representation requires us to automatically dismiss the breach of contract claim against the Department. *Eldred v. Association of Engineering Employees and State of Oregon, Department of Transportation*, Case No. FR-03-09, 23 PECBR 245 (2009); *Chan*, 21 PECBR at 574; *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, UP-71-99, 18 PECBR 882, 899 (2000).

ORDER

The complaint is dismissed.

DATED this 18 day of August, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.