

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-26-03

(TERMINATION FROM CLASSIFIED SERVICE)

MARK A. MANION,)

Appellant,)

v.)

STATE OF OREGON,)

DEPARTMENT OF FISH AND WILDLIFE,)

Respondent.)

DISMISSAL ORDER

Paul J. Speck, Attorney at Law, Forcum & Speck, 1123 N.W. Bond Street, Bend, Oregon 97701, represented Appellant.

Donna Sandoval Bennett, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On July 25, 2003, the State of Oregon, Department of Fish and Wildlife, (State or ODFW) dismissed Mark A. Manion from classified State service for alleged personal use of a State-owned computer. Certain ODFW employees, including Manion, had been added to a strike-permitted unit of Service Employees International Union, Local 503, Oregon Public Employees Union (SEIU) on July 1, 2003. Effective July 30, the State and SEIU entered into a letter of agreement which (1) provided for negotiations between SEIU and the State, and (2) adopted Article 20 (Discipline and Discharge) and Article 21 (Grievance and Arbitration) from the Department of Administrative Services-SEIU collective bargaining agreement. The adoption of Articles 20 and 21 did not affect terminations prior to July 30, 2003.

Manion filed a timely appeal of his termination with this Board on July 31, 2003. On August 1, 2003, Manion filed a grievance regarding the termination. On August 8, 2003, Administrative Law Judge (ALJ) William Greer gave notice to the parties that he believed the Employment Relations Board (ERB) might not have jurisdiction in this case. ALJ Greer asked the parties to supply information on the jurisdiction issues. On August 12, the State supplied information relevant to the jurisdiction issue and objected to ERB's processing of the case, arguing that ERB did not have jurisdiction over the matter. On August 28, Manion requested that the ALJ defer processing the case pending resolution of the grievance. On September 12, 2003, ALJ Greer granted that request. On February 20, 2004, SEIU withdrew the grievance. On February 26, Manion asked that the complaint be reactivated, and the State renewed its objection. On February 26, the case was transferred to ALJ Grew who reactivated the appeal and gave the parties until March 12 to provide additional argument or other material relevant to the jurisdiction issue.

ORS 240.086(1) provides that this Board shall review "any personnel action affecting an employee, who is not in a certified or recognized appropriate collective bargaining unit." ORS 240.321(2) provides that:

"* * * [E]mployees of state agencies who are in certified or recognized appropriate bargaining units shall have all aspects of their wages, hours and other terms and conditions of employment determined by collective bargaining agreements between the state and its agencies and the exclusive employee representatives of such employees * * * except with regard to the recruitment and selection of applicants for initial appointment to state service."

The State argues that this Board has no jurisdiction over this appeal. It further argues that permitting Manion to litigate his termination under the State Personnel Relations Law (SPRL), after entering the grievance process, would unfairly give him an unwarranted "second bite of the apple." Manion argues that the statutes governing SPRL appeals were not intended to foreclose appeals based on personnel actions which occur between the date a union becomes the exclusive representative and the effective date of any agreed-upon grievance and arbitration procedure.

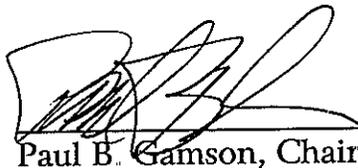
An employer and union may agree to a grievance and arbitration procedure, and may or may not agree to apply that procedure to discipline or terminations of employees occurring after the bargaining unit was certified but before ratification of the agreement. It may seem unfair to deprive classified employees of SPRL appeal rights

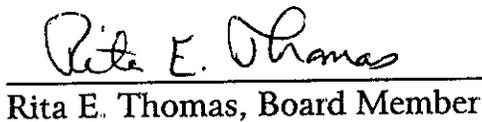
simply because the collective bargaining process has commenced, because this provides a window during which the State may terminate employees without meeting either the standards set out in the SPRL or a collective bargaining agreement. However, the statute is clear: in a SPRL appeal, this Board only has authority to review "any personnel action affecting an employee, *who is not in a certified or recognized appropriate collective bargaining unit*." ORS 240.086(1) (emphasis added); *Coyle and Busam v. State of Oregon, State Police Office of Emergency Management*, Case No. MA-11-97 (1998).¹ Manion was in a certified collective bargaining unit at the time of his dismissal, and as a consequence, this Board lacks jurisdiction over his SPRL appeal. We will dismiss the appeal.

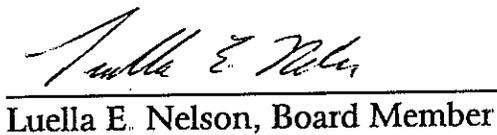
ORDER

The appeal is dismissed.

DATED this 22nd day of June 2004.


Paul B. Gamson, Chair


Rita E. Thomas, Board Member


Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

¹In *Coyle and Busam*, we cited *Oregon, AFSCME, Council 75, AFL-CIO, and James Tedder v. State of Oregon, Department of Environmental Quality*, Case No. UP-131-86, 10 PECBR 287 (1987). That case was filed under the Public Employee Collective Bargaining Act (PECBA) and involved a charge that the employer had violated ORS 243.672(1)(e) by unilaterally changing the discipline standard. The employee there was dismissed after the union was certified but before a contract had been signed. We treated the employee as a represented employee and decided the case under the PECBA rather than the SPRL. We held that the status quo the State was required to maintain during negotiations was established by the SPRL.

