

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-5-06

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF OREGON,)	AND ORDER
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

This matter was submitted directly to this Board on October 30, 2007, following a hearing before Administrative Law Judge (ALJ) B. Carlton Grew on December 7, 2006, in Salem, Oregon. The record closed with the submission of post-hearing briefs on February 28, 2007.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Sally A. Carter, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On January 31, 2006, Oregon AFSCME Council 75 (AFSCME) filed this unfair labor practice complaint against the State of Oregon, Department of Corrections (DOC). The complaint alleges that DOC reached an agreement concerning Susan Lindsey's resignation, and that DOC breached that agreement in violation of ORS 243.672(1)(e) and (g) when it directed a DOC representative to testify at a hearing concerning Lindsey's unemployment insurance benefits.

The following issues are presented: Did DOC violate ORS 243 672(1)(e) or (g) by breaching an agreement concerning Lindsey's resignation when it directed a DOC representative to testify at a hearing concerning Lindsey's unemployment insurance benefits?

RULINGS

1. On January 10, 2007, DOC moved to reopen the record to submit as evidence a November 14, 2006 letter that Lindsey wrote to Oregon Governor Theodore Kulongoski. DOC received a copy of the letter from the Governor's office on December 12, 2006. In her letter, Lindsey provided an explanation of the circumstances that led to her resignation and also stated that she lied under oath at the December 15, 2005 hearing concerning her unemployment benefits. DOC asserted that the letter was relevant to a disputed, material fact: whether Lindsey provided truthful information to the Employment Department about her resignation. AFSCME objected to DOC's motion and to the evidence offered. The ALJ granted DOC's motion to reopen the record and admitted Lindsey's letter as evidence.

This Board will not grant a motion to reopen a record to submit additional evidence unless the evidence is material to the issues and was unavailable at the time of hearing, or because there is some other "good and substantial reason" why the evidence was not presented at the hearing. *Cascade Bargaining Council v. Bend-LaPine School District*, Case No. UP-33-97, *ruling on reconsideration* 17 PECBR 609, 610 (1998). Here, DOC has demonstrated a valid reason why Lindsey's letter was not offered as evidence at the hearing—DOC did not become aware of the letter's existence until after the hearing. The letter provides evidence relevant to possible misrepresentations Lindsey may have made. Because AFSCME had an opportunity to address the significance of the letter in its post-hearing brief, AFSCME was not prejudiced by the fact that the letter was offered after the conclusion of the hearing. The ALJ correctly admitted Lindsey's November 14, 2006 letter into evidence.

2. All other rulings of the ALJ were correct.

FINDINGS OF FACT

1. AFSCME represents a bargaining unit of corrections personnel employed by DOC, a public employer.

2. On July 1, 1996, Lindsey began working for DOC as a canteen worker, a position in the AFSCME bargaining unit. Lindsey's duties included arranging for distribution of food, hygiene, and some recreational items to inmates in DOC

institutions, and billing inmates' accounts for items purchased. Under the DOC system, inmates earned credits that were put into their canteen accounts. In her job, Lindsey supervised a staff of inmates.

3. On a few occasions, Lindsey put unearned credits in the canteen accounts of some of the inmates with whom she worked. Lindsey did this in order to show appreciation for the inmates' work.

4. Some time in 2005, Lindsey learned that one of the inmates with whom she worked had discovered a password for the DOC computer system. Lindsey did not believe that this password allowed the inmate to access inmates' accounts, but told the inmate to stay away from the computer. Lindsey also attempted to change the password, but was unsuccessful in doing so. The inmate had, in fact, discovered the passwords necessary to allow him access to the inmates' canteen accounts. The inmate disobeyed Lindsey's instructions and used the computer to improperly debit and credit several inmates' accounts. Lindsey never notified another DOC staff member about the inmate's actions nor sought help in setting a new password.

5. Several times, Lindsey allowed inmates to take or consume damaged and undamaged canteen items without paying for them. She kept a list of the items that the inmates took, but never charged the inmates' accounts for them.

6. DOC policy required that Lindsey make a daily count of the inmates whom she supervised. In order to make her count, Lindsey collected the identity cards of the inmates with whom she worked and gave them to an inmate who then prepared a form for Lindsey's signature that listed the names and identity numbers of all inmates in Lindsey's area. Although Lindsey understood that she was expected to fill out the inmate count form, Lindsey knew that other canteen staff members allowed inmates to prepare the form.

7. In October 2005, inmates told DOC employees that canteen workers were engaging in a number of improper practices. DOC initiated an investigation into these charges and on October 11, 2005, a DOC investigator interviewed Lindsey. An AFSCME representative was present during the interview. In response to the investigator's questions, Lindsey denied putting unearned credits into inmates canteen accounts, and denied that an inmate had discovered a computer password for the DOC system. Lindsey also told the investigator that she never gave inmates free canteen items.

8. On October 12, 2005, Lindsey and her AFSCME representative asked to speak to the DOC investigator to clarify some of the matters discussed the previous day. Lindsey explained to the investigator that she had put extra, unearned

credits into some inmates' accounts in order to show appreciation for their help. Lindsey also told the investigator that she knew that an inmate had discovered the password for the DOC system, and that she had allowed inmates to take canteen items without paying for them. Lindsey also said that she permitted an inmate to prepare the daily count form for her signature. When the investigator asked if she verified the accuracy of the numbers on the form, Lindsey said that she did not.

9. The DOC investigator prepared a report in which he summarized his two interviews with Lindsey. After reviewing the report, DOC managers decided to initiate pre-dismissal proceedings for Lindsey.

10. By letter dated October 13, 2006, Assistant DOC Director John Koreski assigned Lindsey to work at her home "pending the outcome of an investigation currently underway."

11. Lindsey talked with AFSCME Representative Randy Ridderbusch about her situation, and Ridderbusch talked with the investigator who had interviewed Lindsey. Ridderbusch told Lindsey that it was likely that DOC would discharge her, and that he did not believe that AFSCME could successfully defend her, given the admissions Lindsey had made. Ridderbusch also told Lindsey that if she continued in her position, she would lose her ability to work effectively with inmates and coworkers who would no longer respect her due to the mistakes she had made. Ridderbusch encouraged Lindsey to resign, and told her that he would talk with DOC Human Resources Manager Unoda Moyo about her resignation.

12. Moyo and Ridderbusch talked about the resignation of Lindsey and another canteen worker. Ridderbusch proposed, and Moyo agreed, that DOC would not respond to inquiries about Lindsey's claim for unemployment benefits. Although both Ridderbusch and Moyo are familiar with the process of applying for unemployment benefits, they never talked specifically about the nature and extent of DOC's agreement not to respond to inquiries about Lindsey's unemployment claim.

13. On October 20, 2005, Moyo sent the following e-mail concerning Lindsey and another canteen worker to Ridderbusch:

"Randy:
"Per our discussion, we will accept * * *[¹] Susan Lindsey's
resignations. We will not respond to unemployment

¹The name of a second DOC employee who was mentioned in this e-mail has been omitted.

inquires [*sic*].²] They will both not be eligible for rehire here at DOC. When other public safety agencies inquire about their employment with DOC, we will tell them that they resigned in the midst of an investigation.”

14. On October 21, 2005, Lindsey sent a letter of resignation to DOC. The letter stated, in pertinent part:

“It is with both great reluctance and personal circumstances that I submit this letter of resignation to resign my position as a Property Specialist 3, effective 10-21-05.

“It has been my pleasure to work for DOC for the last nine years. I have enjoyed working with DOC staff and will miss my associations here. I wish only the best for you and for the organization.

“I have decided to take this time to evaluate my current goals and investigate new opportunities.”

15. Lindsey asked Ridderbusch what she should tell the Employment Department (Department) when she applied for unemployment benefits. Ridderbusch told Lindsey that she needed to tell the Department the truth: that she had been compromised by the inmates and that she could not continue working at DOC because of the stress she would experience. Ridderbusch knew that Lindsey suffered from sleep apnea, and told Lindsey to tell the Department about her condition.

16. Lindsey applied for unemployment benefits, and an authorized representative of the Department talked with Lindsey about the reasons why she quit her job. The representative also sent a form to DOC regarding Lindsey’s work separation that asked DOC to provide written answers to a number of questions, including: “[w]hat reason did the worker give you for leaving work?” DOC never returned the form and never responded to a telephone call from the Department representative.

17. On November 3, 2005, the Department issued an administrative decision that denied Lindsey unemployment benefits. The decision stated, in relevant part:

²Ridderbusch and Moyo agreed that “inquires” was a typographical error and that the word Moyo intended to use was “inquiries.”

“Findings of Fact

“1. Claimant was employed by DEPARTMENT OF CORRECTIONS from July 1, 1996 until October 21, 2005.

“2. Claimant voluntarily left work because work-related stress caused sleep problems.

“3. Claimant’s job was to supervise inmates in the canteen.

“4. Inmates would routinely steal items from the canteen.

“5. Claimant felt she was inadequately supervising the inmates because items were routinely stolen from the canteen.

“6. Claimant suffers from sleep apnea which causes sleep problems.

“Reasoning

“Voluntarily leaving work because of sleep problems which were partially related to work-related stress is not a reason of such gravity that the claimant had no reasonable alternative but to leave work

“Legal Conclusion

“Claimant voluntarily left work without good cause. * * *”

18. On November 4, 2005, Lindsey wrote Mitch Morrow, DOC Deputy Director, and asked that he “review the reasons that I was asked to resign” and “rethink progressive disciplinary action towards me instead of my resignation.” In her letter, Lindsey explained although she knew that an inmate had the password to the DOC computer system, she did not believe that the inmate had the password needed to allow access to inmate accounts. Lindsey also admitted to putting credits into the accounts of four or five inmates and to giving inmates some (mostly damaged) canteen products. Lindsey told Morrow that her procedure for making the daily inmate count—asking an inmate to prepare the appropriate form for her signature—was one commonly used by other DOC staff members. In her letter to Morrow, Lindsey did not mention sleep apnea or any stress she experienced in her work at DOC.

19. By letter dated November 19, 2005, Lindsey requested a hearing on the Department’s denial of her claim for unemployment benefits.

20. When DOC Human Resources Manager Pamela Nass read the Department’s decision denying Lindsey unemployment benefits, she was confused. Nass believed that Lindsey resigned her position with DOC because DOC planned to initiate

the pre-dismissal process. Nass spoke with Shelli Honeywell, DOC assistant director of human resources, about the decision. Honeywell believed that Lindsey had not been truthful to the Department and concluded that DOC was obligated to tell the Department the reasons why it believed that Lindsey resigned. Honeywell directed Nass to testify at the hearing on Lindsey's claim for unemployment benefits.

21. In a notice dated December 1, 2005, the Office of Administrative Hearings for the Department notified DOC and Lindsey that a telephone hearing concerning Lindsey's appeal was scheduled with an ALJ on December 15, 2005.

22. Both Lindsey and Nass appeared at the December 15, 2005 hearing on Lindsey's appeal. Lindsey testified that she resigned her position with DOC because of stress related to her job, caused by her feelings of inadequacy due to the fact that inmates stole canteen products. The ALJ asked Lindsey about sleep apnea, and Lindsey stated that this did not affect her decision to quit her job.

In response to questioning by the ALJ, Nass testified that a DOC investigation revealed "pretty blatant misconduct" on Ms. Lindsey's part, that DOC was planning to initiate dismissal proceedings, and that Lindsey resigned in lieu of discipline. Nass then described the allegations of misconduct cited in the DOC investigator's report—that Lindsey put unearned credits into inmates' accounts, that Lindsey allowed inmates to take canteen products, that Lindsey allowed an inmate to prepare the daily count form, and that Lindsey permitted an inmate to discover the password to the DOC computer system.

On rebuttal, Lindsey testified that Ridderbusch told her to tell the Department that she resigned due to stress, and that she was "really embarrassed that I took my Union guy's advice and stuck to it was stress." Lindsey then provided the same explanation for her actions that she gave to DOC Deputy Director Morrow in her November 4 letter.

23. In a decision dated December 19, 2005, the ALJ found that Lindsey was disqualified from receipt of unemployment insurance benefits under ORS 657.176(2)(c) and OAR 471-030-0038(5)(b)(F) because she quit work to avoid a discharge for misconduct.³ The ALJ concluded that Lindsey's testimony that she had resigned her position with DOC due to stress was not credible.

³ Under ORS 657.176(2)(c), an individual is disqualified from receipt of unemployment insurance benefits if the individual voluntarily left work without good cause. OAR 471-030-0038(5)(b)(F) provides that good cause for quitting a job does not include resignation to avoid a discharge or a potential discharge for misconduct.

24. By letter dated November 14, 2006, Lindsey wrote Oregon Governor Theodore Kulongoski to ask for his assistance in getting her job with DOC back, “or to see that fairness is done.” Lindsey’s letter stated, in pertinent part:

“* * * I was told that if I resigned that DOC would not fight my unemployment. I did not feel that I should be forced into resigning and I expressed this but my union rep said that if I did not resign then I would be fired and I would not be able to collect unemployment. I gave in and resigned. I was told to put down on my unemployment claim that I resigned due to stress. I did as I was told by my union rep even though I knew it was not true. I was denied my unemployment and I called my union rep and he told me to file for a hearing. * * * My union rep also told me that DOC was not going to respond to the hearing and that I needed to stick to my story of resigning due to stress. I had my hearing and I did stick to the stress story and guess what? DOC did respond and I lied under oath knowing it was wrong what I was saying. During this hearing DOC accused me of things that I did not nor could I have possibly done. I told the judge that I did lie and say that I resigned under stress per my union rep’s direction. * * *”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. DOC did not violate ORS 243.672(1)(g) when it directed a DOC representative to testify at a hearing concerning Lindsey’s unemployment benefits.

ORS 243.672(1)(g) makes it an unfair labor practice for an employer to “[v]iolate the provisions of any written contract with respect to employment relations * * *” AFSCME alleges that it reached a written agreement with DOC in which DOC agreed to accept Lindsey’s resignation and to make no response to “unemployment inquir[i]es.” According to AFSCME, DOC breached this agreement and violated subsection (1)(g) when it directed Nass, a DOC employee, to testify at the December 15, 2005 hearing concerning Lindsey’s claim for unemployment benefits.

We begin our analysis by determining whether AFSCME and DOC reached a written agreement that is enforceable under subsection (1)(g). A written settlement

agreement affecting a represented employee is a “written contract with respect to employment relations,” and any breach of such an agreement violates subsection (1)(g). *Reinwald v. Employment Department*, Case No. UP-81-93, 15 PECBR 674, 685 (1995). Accordingly, we conclude that Moyo’s October 20, 2005 e-mail to Ridderbusch constitutes an electronically written settlement agreement concerning Lindsey, an AFSCME-represented employee, and is subject to the provisions of subsection (1)(g).

Next, we determine whether DOC violated the terms of the agreement when it directed Nass to testify at a December 15, 2005 unemployment hearing. The agreement specified that DOC would not respond to “unemployment inquir[i]es.” AFSCME asserts that this language prohibited DOC from appearing at the hearing on Lindsey’s unemployment claim and responding to questions from the ALJ. DOC contends that the agreement applies only to the initial investigation made by the Department after Lindsey filed her claim. According to DOC, the hearing before an ALJ is a process entirely separate from the Department’s investigation and is not the type of inquiry covered by the agreement with AFSCME.

When the meaning of the terms of an agreement is in dispute, we will examine the disputed provisions in the context of the entire document. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). We generally give words their ordinary meaning. If the text is unambiguous, we enforce the agreement according to its terms. If the language is ambiguous, we look to extrinsic evidence of the parties’ intent. If we are unable to resolve the ambiguity in this manner, we then apply maxims of contract construction. Language is ambiguous if “it can reasonably be given more than one plausible interpretation.” Whether a contract is ambiguous is a question of law. *Arlington Education Association v. Arlington School District No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004). Applying these principles, we consider the language at issue in the agreement between DOC and AFSCME. The dispute concerns the sentence that specifies that DOC “will not respond to unemployment inquir[i]es” regarding Lindsey’s claim for unemployment benefits.

We give “inquiry”—the word the parties intended to use—its ordinary meaning. *Webster’s Third New Int’l Dictionary* 1930 (unabridged ed 2002) defines inquiry as “1: the act or an instance of seeking truth, information, or knowledge about something: * * * 2: the act or instance of asking for information: a request for information.” Based on this definition, we find that the term “inquir[i]es” as used in the agreement between AFSCME and DOC unambiguously applies to the ALJ hearing. The hearing constitutes an inquiry because it was a procedure in which the ALJ sought information about Lindsey’s eligibility for unemployment benefits.

DOC argues that Moyo intended that the agreement only restrict DOC from responding to the Department's initial investigation concerning Lindsey's qualifications for unemployment benefits. We look at external evidence of the contracting parties' intent only when the language is ambiguous. Because there is no ambiguity here, we will not consider this evidence.

Even if we were to consider Moyo's subjective intent, it is not persuasive. Moyo never discussed this interpretation with Ridderbusch. The objective manifestations of DOC's intent control, rather than Moyo's unspoken assumptions. *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 207-8 (2007) (citing *OSEA v. Athena-Weston School District*, Case No. UP-2-97, 17 PECBR 586, 390 (1998)).

Because the hearing conducted by the ALJ concerning Lindsey's claim for unemployment benefits was an inquiry, DOC's agreement with AFSCME prohibited DOC from appearing at the hearing and answering the ALJ's questions. DOC's appearance at the hearing was contrary to the agreement.

DOC asserts as an affirmative defense that in these unusual circumstances, the contract was illegal and therefore unenforceable. DOC contends that under ORS 657.300, it had a duty to appear at Lindsey's hearing and give the ALJ information about the circumstances surrounding Lindsey's resignation. ORS 657.300 provides:

“No employer or employer's agent shall intentionally and willfully make or cause to be made false statements or willfully fail to report a material fact regarding the claim of a claimant or regarding a claimant or claimant's eligibility for benefits under this chapter.”

As a general rule, an agreement may not be enforced if it is illegal. An agreement is illegal if it violates a statute or cannot be performed without violating a statute. *Staffordshire Investments, Inc. V. Cal-Western Reconveyance Corp.*, 209 Or App 528, 540, 149 P3d 150 (2006) (quoting *Uhlmann v. Kin Daw.*, 97 Or 681, 689, 193 P 435 (1920)). An illegal portion of a contract does not necessarily render an entire agreement unenforceable. The extent to which an agreement is unenforceable due to illegality depends on the applicable statute: “The substance and purpose of the rule that makes the agreement *illegal* determines in what respect the agreement cannot be effective.” *Mountain Fir Lumber Co. v. Employee Benefits Insurance Co.*, 296 Or 639, 643 n. 3, 679 P2d 296 (1984) (emphasis added). In *Mountain Fir Lumber Co.*, the parties entered into a contract for workers' compensation insurance. The court found an oral agreement in which the defendant agreed to pay insurance premium rebates was illegal and

unenforceable, but upheld the underlying contract providing workers' compensation coverage for employees.

Here, the applicable statute—ORS 657.300—prohibits employers from deliberately making false statements or deliberately withholding material information regarding a claim for unemployment benefits. DOC does not assert, and we do not find, that the agreement is unlawful on its face. Instead, an unusual series of events triggered DOC's statutory obligation to provide information regarding Lindsey's unemployment claim. The Department issued a decision on November 3. The decision indicates that Lindsey told a Department representative that she resigned because of stress exacerbated by her sleep apnea. In a letter dated November 4, one day after the Department's decision, Lindsey wrote DOC Deputy Director Morrow and provided an extensive explanation for her actions. Her explanation includes no mention of stress or sleep apnea. Based on the discrepancies between her letter to Morrow and statements to a Department representative, DOC reasonably determined Lindsey was neither straightforward nor truthful to the Department regarding the reasons she quit her job. DOC did not seek out this information. Lindsey herself sent it to DOC. In these circumstances, DOC had information material to Lindsey's unemployment claim that it was required to provide to the ALJ.⁴

DOC does not assert, and we do not conclude, however, that the entire agreement between AFSCME and DOC concerning Lindsey's resignation is illegal. Instead, we find that only a particular application of the agreement is illegal—that part of the agreement that prohibited DOC from giving the Department information that became material after Lindsey wrote a letter to DOC which made clear that her statements to the Department misrepresented the reasons for her resignation. We conclude that this specific application of the agreement cannot be enforced. Accordingly, DOC was entitled to appear at the ALJ hearing to provide information regarding the reasons for Lindsey's resignation. DOC did not violate ORS 243.672(1)(g) by refusing to apply the provisions of its agreement with AFSCME in an illegal manner.

We note that our conclusion regarding the illegal application of the agreement between AFSCME and DOC applies only to the unusual circumstances of this case and only to the wording of the particular agreement at issue. We offer no opinion regarding the legality under different circumstances or other types of agreements between employers and employees concerning unemployment claims.

⁴Both at the hearing and in her November 2006 letter to Governor Kulongoski, Lindsey concedes that she falsely told the Department that she quit her job because of stress.

3. DOC did not violate ORS 243.672(1)(e) when it directed a representative to testify at a hearing concerning Lindsey's unemployment benefits.

AFSCME alleges that DOC's failure to comply with the terms of its written agreement concerning Lindsey's unemployment benefits violated ORS 243.672(1)(e) which makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." At its heart, AFSCME's complaint alleges that DOC's actions violated the agreement between the parties. We have held that violating a contract does not constitute bad-faith bargaining, and that under the statutory scheme of the Public Employee Collective Bargaining Act, the appropriate method for asserting a contract violation is either through the contract grievance procedure or a complaint under ORS 243.672(1)(g). *LIUNA v. City of Portland*, Case No. UP-12-06, 22 PECBR 12, 16 (2007) (quoting *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04, 20 PECBR 850, 851 (2005)). We will dismiss AFSCME's allegation that DOC's actions violated subsection (1)(e).

ORDER

The Complaint is dismissed.

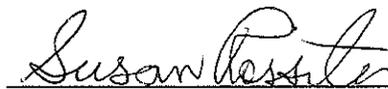
DATED this 11th day of January 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.