

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

AFSCME LOCAL 189,)
)
 Complainant,) Case No UP-13-06
)
 v.)
) CONSENT ORDER
 CITY OF PORTLAND,)
)
 Respondent.)

STATEMENT OF THE CASE

On March 24, 2006, Complainant, AFSCME Local 189/DCTU (Union) filed an unfair labor practice complaint against the City of Portland (City) alleging violations of ORS 243.672(1)(e) and (b) based upon a failure to provide information. The allegations arose in the course of litigating three grievances combined for arbitration. In its complaint, the Union made three claims: (1) the City committed a *per se* violation of ORS 243.672(1)(e) by failing to provide information in a timely manner; (2) the City acted in bad faith in violation of ORS 243.672(1)(e) when it failed to locate and provide certain information and then represented that all information had been provided; and (3) the City's failure to provide the information interfered with the administration of the Union, in violation of ORS 243.672(1)(b). The Union also sought a civil penalty.

The City denied the allegations and the matter was set for hearing. Prior to a hearing being held, the parties agreed to settle the case by entering into a consent order.

Following discussions between Margaret S. Olney, counsel for the Union, and Catherine Riffe, counsel for the City, the parties agreed to the entry of this Consent Order, subject to Board approval. They also agreed to waive all further hearing on the merits before the Board as well as the right to judicial review of the order.

SETTLEMENT AGREEMENT

In lieu of a hearing on the issues raised by the petition, the parties agree and stipulate to the entry of the facts and conclusions set forth below.

PRELIMINARY MATTERS

The parties agree that DCTU will be dismissed as a party. Therefore, this consent order is between AFSCME Local 189 and the City of Portland only.

The Union agrees to dismiss its Second Claim for Relief (Bad Faith - Misrepresentation).

The Union agrees to dismiss its Third Claim for Relief (Interference with union administration)

The Union agrees to dismiss its claim for a Civil Penalty.

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STIPULATED FACTS

1. Complainant AFSCME Local 189 (AFSCME or Union) is a member of the DCTU and is signatory to the DCTU collective bargaining agreement with the City of Portland (City). AFSCME is the representative of approximately 1000 employees in the DCTU bargaining unit, including certain employees of the Portland Police Bureau.

2. In its role as exclusive bargaining representative, AFSCME represented a bargaining unit member (“Grievant”), who worked in a non-sworn position in the Portland Police Bureau (PPB) Records Division. Grievant was given three disciplinary actions: an 8-hour suspension without pay in or about October, 2003; a 40-hour suspension without pay on or about March 10, 2005; and a termination on or about April 12, 2005. Each of these disciplinary actions was grieved by AFSCME as a violation of just cause. The grievances were combined for arbitration. As a result of the arbitration, the suspensions were reduced and the termination was upheld.

3. On or about March 31, 2005,¹ AFSCME Staff Representative James Hester made a written request for information regarding Grievant’s two suspensions as well as the proposed termination. AFSCME specifically requested the following:

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¹ All dates hereinafter are 2005 unless otherwise noted.

- (a) Documentation of disciplinary action taken by the City of Portland in incidents similar to those alleged in each of the above disciplinary actions [the two suspensions and a pending proposed termination];
- (b) Any and all information compiled in the course of the City's investigation(s) into the alleged misconduct and performance of [Grievant], including, but not limited to, notes, correspondence and interviews relating to each disciplinary action;
- (c) The names and contact information of all individuals interviewed and witnesses in connection with the alleged misconduct of [Grievant] relating to each specific disciplinary action; and
- (d) Copies of all administrative rules and Portland Police Bureau Policies utilized in each individual disciplinary action by the City.

4. On June 3, counsel for AFSCME, Barbara Diamond, and Harper discussed case processing matters and Diamond indicated she would send an information request.

5. By letter dated June 3, Diamond sent Harper the March information request and added a new request for Grievant's personnel files "whether formal or informal."

6. On or about June 13, the parties selected David Stiteler to serve as arbitrator of the combined grievances. A hearing was scheduled for November 16-18.

7. By letter dated June 30, Harper responded to Diamond indicating that she needed more time to gather the information that Diamond had requested. Harper also indicated that AFSCME should have the investigation documentation

supporting all three disciplines because the Police Bureau “always provides that information to the employee’s union representative prior to the due process meeting.”

8 In a letter dated July 5, Diamond renewed her request, explaining that the Union’s request was “comprehensive” and included “notes and emails regarding each disciplinary action.”

9. On or about August 5, the City produced approximately 350 pages of documents. Harper represented that the City was providing the official personnel file, the criminal investigation file relating to the termination, the performance investigation relating to the 40-hour suspension, documents from the bureau discipline file regarding the 8-hour suspension and documentation regarding all three disciplinary actions maintained by the Records Division.

10. By letter dated August 12, Harper sent Diamond three tapes from Grievant’s due process meetings.

11. On or about September 14, Harper informed Diamond that Deputy City Attorney Lory Kraut would be handling the arbitration. The case was reassigned due to Harper’s workload.

12. By letter dated September 23, Harper forwarded copies of the rules and directives relied upon in the disciplines, and stated she believed these to be the only outstanding documents responsive to the Union’s requests for information.

13. On or about November 8, Diamond examined the documents Harper had forwarded. In a letter dated November 8, Diamond indicated that she was

“skeptical” that the City had fully complied with the Union’s information request and asked Kraut to “double check” that the City had searched its records and provided a complete response to the March 31 request for information.

14. By separate letter on November 8, Diamond informed Kraut that the City had not provided any comparator information.

15. On November 9, Kraut sent an email to Diamond apologizing for any “inadvertent error in not responding to the Union’s request for documents reflecting similar disciplinary actions by the Police Bureau.”

16. On November 10, the City provided AFSCME with a 56-page discipline log reflecting discipline imposed on DCTU represented members. The City also sought a protective order for this information. The Union objected to the scope of the protective order. The Union also continued to assert its right to information regarding discipline imposed on Police Bureau employees, as well as copies of the disciplinary letters that were the basis for entries in the log.

17. Both parties utilized *subpoena duces tecums* to obtain information immediately before and during the arbitration.

18. On November 14, the City provided the Union the following documents that had not previously been provided:

- (a) A copy of the Grievant’s Police Bureau personnel file (130 pages);
- (b) The Internal Affairs file regarding the incident that formed the basis of grievant’s termination (144 pages)

The City noted that everything in the bureau personnel file appeared to be a duplicate of what had already been provided.

19. On November 15, the arbitrator issued a protective order, which allowed the Union to obtain information documenting disciplinary action against all Police Bureau employees for violation of certain City rules. The arbitrator denied the Union's request for information for DCTU employees outside of the Police Bureau. Pursuant to the protective order, the City provided AFSCME with the following documents:

- (a) November 15: copies of 8 disciplinary letters for AFSCME members working at the Police Bureau;
- (b) November 16: a 20-page discipline log reflecting discipline imposed on sworn members of the Police Bureau;
- (c) December 1: copies of 26 disciplinary letters for sworn members of the Police Bureau on.

20 During the arbitration hearing, the City presented the testimony of two individuals who were the manager and the direct supervisor of Grievant at the time of the disciplinary actions. On cross-examination, Diamond learned that these individuals maintained files regarding Grievant which had not been produced by the City. Harper would testify that she requested the manager to provide documents supporting the three disciplinary actions and that she provided Diamond the documents she received in response to her request. The hearing was postponed in order to give Diamond an opportunity to review the supervisor's and manager's files.

On review, Diamond received approximately 315 pages of documents that had not previously been provided, some of which she used in cross-examination.

21. During the hearing, the Union asked the arbitrator to sanction the City for its late provision of documents. The arbitrator stated that he did not have power to afford a remedy for violation of the PECBA and would not exclude evidence or testimony on that basis.

22. If this matter proceeded to hearing, City witnesses would testify that any failure to provide information was either inadvertent, or due to its failure to object to the scope and relevance of some of the information requested and/or to clarify the requests.

STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and this subject matter.
2. The City violated ORS 243.672(1)(e) by failing to provide or object to the requested information (comparator information, the internal affairs file related to the termination, portions of the police bureau's personnel file, and certain supervisors' files) in a timely manner. The Board acknowledges that the City provided the requested information before or during the arbitration hearing.

STIPULATED ORDER

1. DCTU is dismissed as a party to this proceeding.
2. The City failed to provide or object to information requested by AFSCME in violation of ORS 243.672(1)(e).

3 The Union's Second Claim for Relief (Bad Faith – Misrepresentation, ORS 243.672(1)(e)) is dismissed

4 The Union's Third Claim for Relief (Interference with Administration of Union, ORS 243 672(1)(b)) is dismissed.

5 The Union's claim for a civil penalty is dismissed.

6 The City shall cease and desist from failing to bargain in good faith with AFSCME.

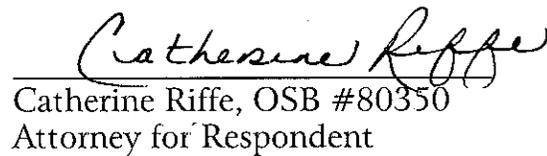
7 The City shall pay the Union \$250 for the filing fee and \$1,750 in representation costs

FOR AFSCME LOCAL 189:


Margaret S. Olney, OSB #88135
Attorney for Complainant

June 19, 2007
Date

FOR CITY OF PORTLAND:


Catherine Riffe, OSB #80350
Attorney for Respondent

June 21, 2007
Date

This Consent Order is hereby approved and adopted.

DATED this 26th day of June, 2007.


Paul B. Gamson, Chair


James Kasameyer, Board Member


Vickie Cowan, Board Member