EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-15-03

(UNFAIR LABOR PRACTICE)

LANE COUNTY PUBLIC WORKS ASSOCIATION, LOCAL 626,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
LANE COUNTY,	)	
Respondent.	)	

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) William Greer on October 30, 2003, following a hearing on June 12, 2003, in Eugene, Oregon. The hearing closed on June 27, 2003, upon receipt of the parties' post-hearing briefs.

Gary K. Jensen, Attorney at Law, 626 "B" Street, Springfield, Oregon 97477, represented Complainant.

David B. Williams, Assistant County Counsel, Lane County Courthouse, 125 E. 8th Avenue, Eugene, Oregon 97401, represented Respondent.

Lane County Public Works Association, Local 626 (Association or 626) filed this complaint on March 27, 2003, alleging that Lane County (County) had violated ORS 243.672(1)(a), (b), and (c) by threatening two shop stewards with discipline. The ALJ granted the County's motion to make the complaint more definite and certain, and the Association filed an amended complaint on May 7. The County filed an answer on June 5, admitting and denying allegations in the amended complaint.

The issues are:

1. Did the County threaten Association Shop Stewards Lalich and Wood with discipline because of, or in the exercise of, their protected activity, in violation of ORS 243.672(1)(a) and (c)?

2. Did that County action violate ORS 243.672(1)(b)?

3. Is County payment of a civil penalty warranted?

We conclude that Starr's e-mail was not a threat to discipline the stewards in or because of their exercise of protected activity, and the e-mail did not actually affect the Association as a labor organization. We dismiss the complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by the County, a public employer.

BACKGROUND

2. The County is organized into departments. One of the departments is Public Works. There are five divisions within Public Works, one of which is Parks.

Craig Starr was, at all material times, the assistant director of the County's Department of Public Works. He was responsible for two of the divisions within the Department, including the Parks Division. Starr supervised Rich Fay, the director of the Parks Division.

3. The Association represents about 150 full-time employees and seasonal employees who work more than 520 hours per year. Its bargaining unit includes the park maintenance and senior park maintenance employee classifications. Parks employees are divided into three zones and work at various locations throughout the County.

4. The Association has officers, a chief steward, and 15 shop stewards. Rick Lalich and Dan Wood are Association shop stewards.

5. The parties' collective bargaining agreement includes the following provision: "Work historically performed by bargaining unit members shall not normally be performed by non-bargaining unit employees."

6. In the past few years, two full-time Parks maintenance employees retired. Due to budget limitations, the County did not replace those two individuals.

7. In 2002, the County used volunteers to maintain and improve some of the property administered by the Parks Division. Without volunteers, the County would not perform that work.

8. On February 12, 2003, Division Director Fay conducted a meeting of all division employees. During the meeting, Association Shop Steward Wood asked whether the County, in the coming year, planned to use seasonal employees and whether it planned to fill the two full-time Parks maintenance vacancies. Fay responded that the County would hire seasonal employees, as it had done in 2001 and 2002, and had no intention of filling the full-time positions.

Wood replied that the Association had a problem with the County hiring seasonal employees instead of filling the full-time vacancies, and said he would talk with Association President Brad Rusow and Chief Steward Ted Bushek about the possibility of filing a grievance over the issue. Fay informed his supervisor, Craig Starr, about the concerns Wood expressed at the meeting and about the possibility that the Association might file a grievance on the issue.

MARCH 2003 COMMUNICATIONS

9. On March 3, the Parks Division volunteer coordinator, Loralyn Osborne, asked Association Steward Lalich to provide tools for volunteers to clear a trail in one of the County's parks. Lalich told Osborne that he was willing to work with the volunteers, but said that he wanted to talk with Fay about filling the two full-time Parks maintenance vacancies.

Parks Division Superintendent Todd Winter (not a member of the Association bargaining unit) was also present during Lalich and Osborne's discussion of volunteers. Winter suggested to Osborne that the County and the Association could address the bargaining unit work issue by entering a memorandum of understanding. Later, Osborne told Fay about that conversation and asked him to talk directly with Lalich. Osborne told Fay that he and Lalich needed to come to some agreement about Lalich's concerns.

10. Fay was concerned that Lalich may have been hinting to Osborne that Association-represented employees would refuse to work with volunteers. On March 3, 2003, at 3:31 p.m., Fay sent an e-mail to his supervisor, Assistant Department Director Starr, about the Lalich-Osborne conversation, stating:

> "* * * When [Osborne] discussed the arrangements with the maintenance staff today Rick Lawlich [*sic*] informed [Osborne] that they, 626 [the Association], considered this work bargaining unit work and would require a MOA prior to planning or working with her on arrangements for the work day. This is the first time we have had a MOA on this work - but in the larger picture Rick implied they would oppose a wide range of volunteer work days and projects. * * * Before taking any action I would like your view of this situation."

11. Upon reading Fay's e-mail, Starr was concerned that Lalich's comment was part of an Association effort to force the County to fill the two full-time Parks maintenance vacancies, even though the Association knew that the County had a budget shortfall. An hour after Fay's e-mail, Starr responded to Fay in a manager-to-manager e-mail:

> "I think that you and/or [Parks Division Superintendent] Todd [Winter] should have a talk with your crew about this business. For my part, I'd tell them that you fully intend to use volunteers in the same manner as Parks always has and that it is unacceptable for them to *obstruct* such activities. I don't know how far you would want to take it, but *I could clearly see discipline resulting if they continue to act out improperly in this regard*.
>
> "I generally consider myself to be a fairly easy-going person on most labor-management issue [*sic*], but *the kind of deliberate obstructionist behavior that Dan Woods* [*sic*] and, *now, Rick Lalich seem to be implying is totally unacceptable to me*.[1] Faced with the kind of comment that you've indicated from Rick, I'd probably ask him point blank if he is refusing to work with Loralyn on arrangements for the work day. If he said 'yes', I'd give him a direct order that he is required to do so. If he still refuses, I'd probably tell him to go home because he's not willing to do the

[1]Fay, Osborne, and Winter established at hearing that the stewards' conduct was not "deliberately obstructive."

work that he's been assigned to do and that'll [*sic*] he'll hear from me on some pretty serious disciplinary charges.

"I'll contact [Association President] Brad [Rusow] about this and see if it's possible to work on it from the other end. If 626 intends to push it, I'll suggest that they file a grievance and take it to arbitration before, rather than after, one of their members risks [his] employment." (Underline in original; emphasis added.)

12. About 30 minutes after Starr sent his e-mail to Fay, Starr sent a separate e-mail to Association President Rusow about the controversy. He entitled it "Heads Up - Parks Problem." Starr wrote:

"I've heard that Dan Woods [*sic*] recently made a comment about grieving <u>any</u> hiring of seasonal or extra-help staffing this year if we haven't first filled the two (2) permanent PM-2 positions. Now, I've heard that Rick Lalich has objected to working on a project involving volunteers. I don't know the basis of Rick's comments for sure, but I suspect that they go to the same issue as Dan's comments.

"Just so you know, Rick's comments as they were reported to me start to go toward an area - insubordination - where I don't think he should go. The grievance process is <u>always</u> available under the contract if Dan, Rick, other park staff or union representatives feel that we've done something that violates the contract. However, acting out by refusing to accomplish legitimate (or even disputed) work assignments is not acceptable and leaves the individual at risk of discipline. Personally, I think that your members in Parks would do better to wait for a grievable action on our part and go through you (the union) to pursue the matter than to take matters into their own hands and risk their County employment. Or, if you think a basis for a grievance already exists, let's get on with it rather than have your people in Parks be at risk.

"If you want to talk about this, let me know." (Underline in original.)

13. The Association opened Starr's e-mail the next morning, March 4, 2003. Association President Rusow and Association Chief Steward Bushek discussed it, and

Rusow drafted a response which he sent at about 10 a.m. Rusow asked Starr whether Lalich or Wood had ever refused to perform their duties or had been insubordinate. Rusow asserted that the stewards' actions were protected by law and that Starr's e-mail to Rusow involved "a threat to their job security and [is] illegal under state law."

At about 3 p.m. that day, Starr responded. Starr assured Rusow that he had no concern about Wood's comments in regards to filing a grievance; he also stated his view that Lalich had not been insubordinate. Starr explained that Lalich's "reported comments could imply an intent by individual members of the Parks staff to stage individual work actions with respect to projects to be carried out by volunteers. Should that occur following direction otherwise, I think that kind of action could be insubordination."

SHOP STEWARDS' REACTION

14. On the morning of March 4, Fay called Lalich into his office. Lalich was not yet aware of Starr's e-mail to Rusow. Fay asked whether Lalich was willing to assist Osborne. Lalich responded that the Association might need a formal agreement with the County regarding the use of volunteers to do bargaining unit work. Fay asked whether Lalich was refusing to work with Osborne if there was no such formal agreement. Lalich replied that he was not refusing to work.

15. Later on March 4, Bushek told Lalich about Starr's e-mail to Rusow. Lalich was surprised, shocked, and frightened about that e-mail. He returned to Fay's office and spoke with Fay about it.

16. Fay told Lalich that he was not upset with Lalich and said he was sorry about any misunderstanding. In response to a question from Lalich, Fay said that Lalich had been singled out because he was a shop steward.

17. Wood was on vacation until March 5, 2003. When Wood returned, Bushek told him about Starr's March 3 e-mail to Rusow. Wood was upset and later spoke with Fay. Wood stated that he had done nothing wrong. Fay responded that he would not apologize for the contents of Starr's e-mail to Rusow.

Fay also pointed out to Wood that Starr's e-mail to Rusow did not state that Wood had been insubordinate. Fay stated his position that it was appropriate for Wood to discuss Association issues and file grievances.

18. Wood then went to Starr's office and said that he remained upset and felt someone in County management owed him an apology.

19. Wood thought that Starr's e-mail to Rusow stated that Wood's County employment was at risk due to Wood's Association-related comments in the February 12, 2003 meeting. Starr later conceded to Wood that it appeared that Starr was singling out Wood due to Wood's comments in the February meeting.

20. Lalich and Wood believed that Starr, in his March 3 e-mail to Rusow, suggested that their actions in representing the Association's interests amounted to insubordination. Because of the above events, Lalich and Wood considered resigning as Association shop stewards. As of the hearing date, they had not resigned.

STARR-FAY COMMUNICATION REGARDING STEWARDS' RIGHTS

21. On March 5, Starr sent an e-mail to Fay stating that stewards are entitled to discuss the filing of grievances. In addition, he stated:

> "In re-reading my message [Finding of Fact 12, March 3, 5:04 p.m. e-mail to Rusow], I noticed a mistake regarding my reference to Dan Woods [*sic*]. As I understand it, his comments in the staff meeting a couple of weeks ago referred to having 626 file a grievance if you hire seasonal help without first filling the two vacant PM-2 positions. I don't have any problem with Dan's comments because his remedy (filing a grievance) is consistent with the labor agreement if he (and 626) think we've done wrong. I shouldn't have mentioned Dan in conjunction with my concerns about the comments that Rick made and I can only assume that my mistake was the result of my haste to get a message back to you before the end of the day.
>
> "My advice [the March 3, 5:04 p.m. e-mail] was intended for dealing with an employee who refuses a direct work assignment because it involves working with volunteers. That is, it would apply to an employee who takes an individual action that is outside of the labor agreement. That kind of <u>unsanctioned</u> action by individual employees is what should not be tolerated. However, on re-reading your initial message, I'm not even sure now that's what Rick was suggesting although I thought it was at the time I wrote my earlier message." (Emphasis in original.)

22. At hearing, Starr established that he understands that an Association steward's use of the grievance procedure does not amount to deliberate obstruction of County operations.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. Starr's March 3, 2003 e-mail communication to Rusow did not violate ORS 243.672(1)(a), (b), or (c).

Starr's e-mail specifically mentioned two Association shop stewards, Rick Lalich and Dan Wood. Wood had suggested at a staff meeting that the Association might file a grievance if the County hired seasonal employees without first filling two vacant full-time positions. On a separate occasion, Lalich had objected to the County's use of volunteers without first filling the vacancies. Assistant Department Director Starr wrote an e-mail to Association President Rusow about the activities of Wood and Lalich. (*See* Finding of Fact 12.)

The Association alleges that when Starr sent the March 3 e-mail to Rusow, the County violated ORS 243.672(1)(a), (b), and (c). We conclude that the County did not engage in unfair labor practices as alleged, and we will dismiss the complaint.

ORS 243.672(1)(A) CLAIMS

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 states: "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

Subsection (1)(a) creates two separate violations. It prohibits employer actions that interfere with, restrain, or coerce employees "because of" their exercise of protected rights; it also prohibits employer actions that interfere with, restrain, or coerce employees "in the exercise of" protected rights. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 (1986). The Association alleges that the County violated both prongs of (1)(a).

Allegation that County threatened discipline "because of" union activity. We have developed a test for determining whether a public employer has violated the "because of" prong of subsection (1)(a). *See Portland Association of Teachers and Poole v. Multnomah School District*, Case No. UP-72-96, 19 PECBR 284, 294-295 (2001) (Order on Remand); and *ATU v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780 (1998). We ask whether the employer took action "because of" the employee's exercise of rights protected

by the Public Employee Collective Bargaining Act (PECBA). *Portland Association of Teachers and Poole,* 19 PECBR at 294.

We need not apply that test here because the County did not actually discipline or take other action against either of the Association's stewards. We generally analyze allegations of unlawful threats, where there is no accompanying employer action, under the "in the exercise of" prong of ORS 243.672(1)(a). *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). We will dismiss the Association's claim under the "because of" prong of (1)(a).

Allegation that County threatened employees "in the exercise of" their protected rights. In evaluating an employer's allegedly threatening statements or conduct under the "in" prong of (1)(a), this Board applies "the objective standard of the probable effect of the statements in [question] upon employes under the totality of the circumstances." *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 7999 (1985) (employer unlawfully threatened not to promote officers if sergeants remained in the bargaining unit), citing *IAFF Local 1308 v. City of The Dalles*, Case No. C-25-76, 2 PECBR 759 (1976). We ask "whether the natural and probable effect of the employer's conduct would tend to interfere with employes' exercise of protected rights." (Footnote omitted.) *OPEU and Termine,* 10 PECBR at 521.

In the late afternoon of March 3, Starr sent the subject e-mail to Association President Rusow. This amounted to publication of the e-mail to Association members Lalich and Wood. Starr's e-mail stated:

> "I've heard that Dan Woods [*sic*] recently made a comment about grieving <u>any</u> hiring of seasonal or extra-help staffing this year if we haven't first filled the two (2) permanent PM-2 positions. Now, I've heard [from Fay] that *Rick Lalich has objected to working on a project involving volunteers*. I don't know the basis of Rick's comments for sure, but I suspect that they go to the same issue as Dan's comments.
>
> "Just so you know, *Rick's comments as they were reported to me start to go toward an area - insubordination - where I don't think he should go*. The grievance process is <u>always</u> available under the contract if Dan, Rick, other park staff or union representatives feel that we've done something that violates the contract. However, acting out by refusing to accomplish legitimate (or even disputed) work assignments is not acceptable and leaves the individual at risk of discipline. Personally, I think that your members in Parks would do better to wait for a grievable action

> on our part and go through you (the union) to pursue the matter than to take matters into their own hands and risk their County employment. Or, if you think a basis for a grievance already exists, let's get on with it rather than have your people in Parks be at risk.
>
> "If you want to talk about this, let me know." (Underline in original; emphasis added.)

The two italicized portions of Starr's e-mail are central to the Association's complaint. First, Starr stated his understanding that Lalich had "objected to working on a project involving volunteers. * * *" An employee could pursue an objection to a work assignment in a number of ways: the employee could refuse to work, file a grievance, or do nothing other than report to work. Of these possibilities, only a refusal to work might permit the County to lawfully impose or threaten to impose discipline against the employee.[2] Starr did not state that Lalich had refused to work or actually had been insubordinate. The day after Starr sent the e-mail to Rusow, he assured Rusow that he did not consider either Wood or Lalich to have been insubordinate. No sanction was imposed on Wood or Lalich.

Second, Starr indicated that the County might discipline an employee who chooses not to perform assigned work. Oregon recognizes the principle of "work now, grieve later." *Whitney v. Employment Division*, 280 Or 35, 41-42, 569 P2d 1078 (1977). A public employer generally has the right to discipline an employee who, instead of filing a grievance, refuses to perform lawfully-assigned work. Starr's statement expressed the County's intent to exercise its legal rights.

An employer does not violate ORS 243.672(1)(a) by stating its lawful intended response to certain activity. In particular, this Board has previously determined that a public employer does not violate subsection (1)(a) by stating its intention to exercise its rights under the law. In *OPEU v. Jefferson County*, Case No. UP-55-98, 18 PECBR 109, 125-127, *reconsid* 18 PECBR 199 (1999), this Board determined that the public employer's statements to bargaining unit employees amounted to an accurate statement of the law, and therefore did not violate ORS 243.672(1)(a).

---

[2]There are, of course, some circumstances in which an employer cannot lawfully take action against an employee who refuses to perform assigned work. For example, an employee who refuses to perform work as part of a lawful strike under ORS 243.726 is engaged in protected activity and cannot suffer or be threatened with consequences as a result of that activity. Similarly, there are some recognized exceptions to the "work now, grieve later" rule. *See Whitney v. Employment Department*, 280 Or 35, 42, 569 P2d 1078 (1977). The Association does not argue, and we do not find, that any such circumstance exists here.

In *Jefferson County*, we cited *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78, 5 PECBR 2991, 3000 (1980). In *Klamath County*, this Board stated:

> "* * * We conclude that [the employer statement to employees] was not a coercive communication because we find nothing in the [PECBA that] would, in fact, prevent an employer from [engaging in the conduct it stated to employees]. Thus, this communication must be viewed as a lawful factual statement of District legal rights, rather than as an unlawful threat of reprisal against [employees] or a promise of benefits." 5 PECBR at 3000.

We also stated in *Jefferson County* that, because the employer had the PECBA right to do what it said it might do, "there was nothing inherently unlawful about telling employees that it planned to exercise that right, provided that it did not communicate that information in a hostile or threatening manner." 18 PECBR at 126.

Finally, we explained:

> "* * * The facts in this record do not establish that the [employer's] statements were hostile or threatening. The statements were factual and conveyed the [employer's] plans.
>
> "* * * Communicating factual and accurate information about the County's legal rights would not have the natural and probable effect of interfering with, restraining, or coercing a reasonable person in the exercise of protected rights. This element of the complaint will be dismissed." 18 PECBR at 126-127.

Applying those principles, Starr's comments were not a threat to discipline Wood or Lalich if they engaged in *protected activity*.[3] Instead, Starr notified the Association

---

[3]Wood's statement that he might file a grievance is protected activity. An employer's threat to discipline an individual for filing or threatening to file a grievance would violate ORS 243.672(1)(a): "An employer interferes with protected activity when it intervenes in any way in an employe's consideration of whether or not to file a grievance or complaint." *Sandy Education Association and Davey v. Sandy Union High School District*, Case No. UP-42-87, 10 PECBR 389, 397 (1988). In this case, however, Starr *encouraged* and *invited* the Association to grieve any aspect of the seasonal or volunteer employee work disputes that the Association contended violated the parties'

(continued...)

of his position that Wood, Lalich, and other employees could be disciplined if they *refused to perform assigned work*. This was a factual statement of the County's legal rights. The statement was not hostile or threatening.

Starr's e-mail to Rusow would not have the natural and probable effect of interfering with, restraining, or coercing employees in the exercise of rights protected by ORS 243.662. We will dismiss the ORS 243.672(1)(a) element of the complaint.

ORS 243.672(1)(c) CLAIM

ORS 243.672(1)(c) provides that it is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization."

We give a broad construction to "membership" as that term is used in subsection (1)(c). It includes "union activity of any nature." *Schreiber v. Oregon State Penitentiary,* Case No. UP-124-92, 14 PECBR 313, 319 (1993). We consider whether the public employer engaged in discrimination that was "intended to affect the exercise of protected rights, and which does so or would have the natural or probable [effect] of doing so." *AFSCME Council 75, Haphey and Bondietti v. Linn County*, Case No. UP-115-87, 11 PECBR 631, 650 (1989).

Applying these standards, we find no (1)(c) violation. First, there was no discriminatory action. The County did not actually discipline the two job stewards. Second, the contents of Starr's e-mail would not have the natural and probable effect of influencing a reasonable employee's decision about exercising protected rights. We will dismiss the ORS 243.672(1)(c) element of the complaint.

---

[3](..continued)
contract.

Similarly, Lalich's objection to the use of volunteers is protected activity. *See Central School District 13J v. Central Education Association,* 155 Or App 92, 962 P2d 763 (1998) (asserting rights under a collective bargaining agreement is protected activity). A threat to discipline Lalich for the objection would violate (1)(a). Here, however, Starr did not threaten Lalich based on his objection to the use of volunteers. We read Starr's e-mail to say that *if* the matter goes beyond an objection and escalates into a refusal to work, then discipline may result.

ORS 243.672(1)(B) CLAIM

ORS 243.672(1)(b) provides that it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist the formation, existence or administration of any employee organization."

In deciding a subsection (1)(b) claim, we determine whether the employer's action amounted to "actual" domination, interference, or assistance that has a "direct effect" on a labor organization. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 351, *reconsid* 20 PECBR 388 (2003), citing *Klamath County Peace Officers Association v. Klamath County*, Case No. UP-18-97, 17 PECBR 515, 526, *reconsid* 17 PECBR 579 (1998).

The Association failed to prove it suffered any actual harm as a result of Starr's e-mail. Although Lalich and Wood considered resigning their positions as shop stewards, they did not do so. The absence of this critical element leads us to conclude there is no (1)(b) violation, so we need not proceed with the rest of the (1)(b) analysis. We will dismiss the ORS 243.672(1)(b) element of the complaint.[4]

ORDER

The complaint is dismissed.

DATED this 13th day of April 2004.

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

[4]Because we dismiss the complaint, we will not order the County to pay a civil penalty to the Association.