

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-05

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)	
CORRECTIONS EMPLOYEES,)	
)	
Complainant,)	
)	
v.)	
)	
STATE OF OREGON,)	RULINGS,
DEPARTMENT OF CORRECTIONS,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Respondent,)	AND ORDER
)	
and)	
)	
AFSCME,)	
)	
Intervenor.)	
_____)	

This Board heard oral argument on August 16, 2006, on the objections of Respondent and Intervener to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on March 9, 2006, following a hearing on October 25, 2005, in Salem, Oregon. The record closed with the parties' submission of post-hearing briefs on December 5, 2005.

Becky Gallagher, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97201, represented Complainant.

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

Monica A. Smith, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Intervenor.

On April 6, 2005, the Association of Oregon Corrections Employees (AOCE) filed this action against the State of Oregon, Department of Corrections (Department or DOC) regarding its return of six Oregon State Penitentiary (OSP) employees to the AFSCME bargaining unit. The Department filed a timely answer on July 1, 2005. AFSCME moved to intervene, and that motion was granted October 14, 2005. AFSCME filed its answer on October 18, 2005.

The issues are:

1. Did the Department enter into an agreement to place six OSP Inmate Management Floor (IMF) Counseling and Treatment Services (CTS) positions into the AOCE unit, but then return the positions to the AFSCME unit? If so, did the Department violate ORS 243.672(1)(e) and (g)?

2. Did the Department unilaterally transfer bargaining unit work by returning the six OSP CTS positions to the AFSCME unit? If so, did the Department violate ORS 243.672(1)(e)?¹

In his proposed order, the ALJ ruled that the Department did not violate ORS 243.672(1)(e) and (g) when it unilaterally placed six IMF CTS positions into the

¹The Department requested an award of civil penalties against AOCE pursuant to OAR 115-35-075. AFSCME did not request a civil penalty. We do not consider the Department's request because the Department did not include a statement of why a civil penalty would be appropriate, together with a clear and concise statement of the facts alleged in support of the statement, as required by OAR 115-35-075(2). We would deny the Department's request in any event. AOCE's complaint was not frivolous, nor was it filed with the intent to harass the Department.

AOCE unit and then returned the positions to the AFSCME unit. The ALJ also ruled that the Department unilaterally, but lawfully, returned the IMF CTS positions to the AFSCME unit. Finally, he determined that the Department violated ORS 243.672(1)(e) when it failed to bargain with AOCE regarding the return of the IMF CTS employees to the AFSCME unit.

As noted, AOCE did not file any objections to the proposed order. AFSCME and the Department both objected to the ALJ's conclusion that the Department violated ORS 243.672(1)(e) by "failing to bargain over the impact of the transfer." According to the Department, the ALJ's analysis was overly broad. The Department further argued that the transfer resulted in no "impact" over which it could be obligated to bargain.² AFSCME also argued that the Department was not required to bargain concerning its decision to retransfer the affected employees to the AFSCME unit, or any impact of that decision. AFSCME also contended that the result reached by the ALJ has no support in our case law.

We agree with the ALJ that the Department did not violate the Public Employee Collective Bargaining Act (PECBA) when it placed the six IMF CTS positions into the AOCE unit and then returned these positions to the AFSCME unit. We also agree that the Department acted lawfully when it unilaterally returned the positions to the AFSCME unit. However, for reasons set forth below, we hold that the Department did not violate ORS 243.672(1)(e) when it failed to bargaining with AOCE concerning the return of the IMF CTS employees to the AFSCME unit. We will dismiss AOCE's complaint in its entirety.

RULINGS

I. AFSCME moved to dismiss the matter without a hearing. The ALJ properly denied AFSCME's motion.

²In these proceedings, the Department has also asserted that it was not required to engage in impact bargaining with AOCE, because the union had never demanded that the Department bargain on such matters. Because of our resolution of the other issues in this case, we do not decide whether AOCE properly demanded that the Department engage in decision or impact bargaining.

2. The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT³

1. The State of Oregon is a public employer. Acting through the Department, the state operates 14 adult correctional facilities, including OSP.

2. AOCE is a labor organization. Scott Cantu is the president of AOCE. AOCE represents one multi-institution bargaining unit of DOC employees, which includes both strike-prohibited and strike-permitted employees at OSP, Mill Creek Correctional Facility, and South Fork Forest Camp, and strike-prohibited employees at Oregon State Correctional Institution (OSCI).

3. The most recent collective bargaining agreement between AOCE and the state expired on June 20, 2005.

4. Intervenor AFSCME is a labor organization. Randy Ridderbusch is the council representative for AFSCME who coordinates AFSCME's corrections units.

5. AFSCME represents four bargaining units of employees employed by the Department: (1) a statewide "security" unit that includes strike-prohibited employees at all correctional institutions other than those represented by AOCE; (2) a statewide "security-plus" (also known as "non-security") unit of all strike-permitted employees other than those represented by AOCE, including employees of 11 institutions and employees of centralized statewide Department programs located either on or off the grounds of an institution; (3) a craft unit of all Department dentists; and (4) a unit of employees of the Board of Parole and Post-Prison Supervision.

6. The relevant AFSCME unit to this case is the "security-plus" unit. The most recent collective bargaining agreement between AFSCME and the state for the "security-plus" unit is effective until June 30, 2007.

7. In 1996, the Department created the CTS unit to provide services to inmates in Department custody who are mentally ill, developmentally disabled, or who have behavioral problems. CTS workers also provide treatment for alcohol and drug addiction and HIV/Hepatitis-C. At the time of hearing, 7 of the 14 Department adult correctional facilities provided on-site CTS services.

³For the most part, the findings of fact are based upon a stipulation of the parties and the exhibits received at hearing.

8. The central administration of CTS is located at OSCI. It is comprised of an administrator, mental health services supervisor, chief psychiatrist, and an operations manager. The CTS administrator reports to the Department administrator for Health Services, who reports to the Department director of Operations. At the time of hearing, there were 84 CTS employees. Sixty-two of these are represented by AFSCME, 10 are represented by AOCE, and 12 are management employees.

9. Since 1996, CTS has provided on-site CTS services at OSP. OSP CTS positions now include case managers/mental health specialists, nurses, a nurse practitioner, and office specialists. At present, OSP CTS employees work in three locations: (1) the IMF, (2) the Special Management Unit (SMU), and (3) the Inmate Management Unit (IMU).

10. The IMF is accessible to inmates in the general prison population. CTS employees working on the IMF have offices which serve those inmates with less severe mental health or behavioral problems on an out-patient basis. CTS employees working on the IMF are represented by AFSCME.

11. The IMU, a special housing unit, houses inmates with severe behavioral problems which require their separation from the general prison population. The IMU CTS employee provides counseling services for mentally ill IMU inmates and oversees the behavior management program. The IMU CTS employee is represented by AOCE.

12. The SMU, a special housing unit, houses inmates with severe mental health problems which require their separation from the general prison population. The nine CTS employees working in the SMU provide in-patient mental health services and are represented by AOCE.

13. On August 26, 1998, this Board issued its decision in *AOCE v. State of Oregon, Department of Corrections, and AFSCME*, Case No. UC-36-97, 17 PECBR 730 (1998), *AWOP* 161 Or App 667, 984 P2d 959 (1999). In that case, AOCE had filed a unit clarification petition under OAR 115-25-005(3) seeking to clarify a number of OSP employees from the AFSCME unit into the AOCE unit, including CTS case managers and an office specialist. This Board denied the petition, ruling that the subject employees were not included in the AOCE unit under OAR 115-25-005(3) because (1) they had

been historically excluded from the AOCE unit, and (2) were not included in the AOCE unit by the terms of its contract or certification.⁴

14. Since 1996, the percentage of Department inmates with mental health problems has increased from 7.4 percent to 19 percent. Accordingly, the Department has increased the number of CTS employees serving on the IMF from three to seven. It added a nurse practitioner in 1998, and two case managers and an office specialist in May 2004. Also in May 2004, the Department moved some AOCE employees⁵ off the IMF to make two additional offices available for the new CTS employees. The Department placed the new IMF CTS employees in the AFSCME unit, as the prior IMF CTS employees had been.

15. On June 1, 2004, Daryl Garrettson, attorney for AOCE, sent a letter to Jan Weeks of the Department of Administrative Services (DAS) demanding to bargain over the unit status of the new IMF CTS employees. Garrettson's letter stated that he understood that DOC was moving CTS employees into IMU and other special housing units for the purpose of providing psychological services to inmates. Garrettson stated that these CTS employees were being kept as AFSCME represented and that the work they were doing belonged to AOCE.⁶ Garrettson identified this as an unfair labor practice and demanded to bargain over the transfer of the work and the restoration of the status quo.

16. Department officials discussed the placement of the new IMF CTS employees with AOCE representatives on June 10, 2004, and with representatives of AOCE and AFSCME on July 1. AOCE argued that the new CTS employees belonged in its unit. AFSCME did not agree.

⁴In the same action, AOCE petitioned for the inclusion of some central warehouse, pharmacy, inmate work program, fugitive apprehension, classification and transfer, and OSP residence 1 employees into its unit under OAR 115-25-005(6); that petition did not include the CTS employees.

⁵The record does not reveal the positions held by these AOCE employees.

⁶In its post-hearing brief to the ALJ, AOCE based part of its argument on the allegation that the addition of AFSCME-represented CTS employees to the other AFSCME-represented CTS workers on the IMF was a transfer of bargaining unit work from AOCE to AFSCME. There is no evidence in the record to support this claim aside from vague and unsupported statements made by AOCE officials.

17. On July 8, 2004, Department officials interviewed the IMF CTS employees at OSP. The interviews revealed that all but one employee worked exclusively with OSP inmates (the nurse practitioner served additional Department institutions). Some employees expressed a desire to remain in AFSCME. Other employees did not report a unit preference. No employee expressed a desire to join the AOCE unit.

18. The Department consulted DAS, which in turn consulted its attorneys. On November 22, 2004, DAS informed the Department and AOCE of its recommendation for the IMF CTS positions in an e-mail which stated in part:

“* * * [T]he Department of Administrative Services Labor Relations Unit is asking that the Department of Corrections resolve existing questions concerning bargaining unit representation by placing the six CTS positions currently represented by [sic] AFSCME although duty stationed at OSP in the AOCE bargaining unit * * *.”

DAS based its decision on a case decided by this Board in 2002, *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections and AOCE*, Case No. UP-4-01, 19 PECBR 785 (2002).

19. On December 28, 2004, Shelli Honeywell from the Department Human Resources Division sent a memorandum to Arthur Tolan and the six IMF CTS employees, with copies to AFSCME and AOCE. It stated in part:

“In response to discussions that had occurred earlier this year between Management and Labor organizations representing DOC employees, interviews were conducted in early July, 2004 with most of you to determine where you worked and to which institutions you dedicated what portion of your efforts. The gathering of this information culminated in a review by the Dept. of Justice and Dept. of Administrative Services for the purposes of recommending the appropriate labor representation for your positions.

“Based on a recent Employee [sic] Relations Board finding, these ruling agencies have instructed the Dept. of Corrections to change your representation from AFSCME to AOCE. This change will be effective January 1, 2005. We have notified both Labor organizations and will schedule a time to meet

with you to answer any questions you might have regarding this change.”

20. The change caused four of the six IMF CTS employees to receive slightly lower wages. Two of the employees received a slight wage increase. The union dues of two employees increased, while those of the remaining four were slightly reduced. Because of the wage changes, the Department and AOCE entered a Letter of Agreement on January 13, 2005, providing that these employees would have their wages frozen until the wage schedule caught up with them or they left their positions. The Letter of Agreement stated, in part:

“This Agreement is between the State of Oregon acting through the Department of Administrative Services (Employer), on behalf of the Department of Corrections (Agency), and the Association of Oregon Corrections Employees (AOCE), and is binding upon the Employer, Agency, and AOCE.

“The parties agree, where certain CTS employees now working at the Oregon State Penitentiary are currently designated as AFSCME represented but will be redesignated as AOCE represented effective January 1, 2005, the following will happen relative to their pay:

“I. Employees who would be reduced in pay if placed on step in the AOCE salary range for the classification will continue to receive their current pay (and be paid off step) until either a salary adjustment or step adjustment allow their placement on step without a cut in pay, or the employee moves out of the position, whichever occurs first.

“* * * * *

“III. This agreement becomes effective January 1, 2005 and ends when conditions allow the last employee to be placed on step in the AOCE

compensation plan or move out of their position.”

21. AFSCME notified the Department that it objected to the Department’s decision to move the six IMF CTS employees out of its unit. AFSCME stated that it intended to file an unfair labor practice complaint. In January 2005, AFSCME filed a unit clarification case on the issue, Case No. UC-02-05.

22. On January 20, 2005, AFSCME withdrew Case No. UC-02-05 and notified the Department that it would file an unfair labor practice complaint if the Department did not return the six employees to AFSCME’s bargaining unit.

23. After discussions with DAS and other governmental officials, DAS decided that the IMF CTS employees should be returned to the AFSCME unit and advised the Department accordingly.⁷ On February 8, 2005, Department Labor Relations Manager Tom Wells sent letters to AOCE President Cantu and AFSCME Representative Ridderbusch advising that the six employees would be returned to their original AFSCME bargaining unit. The return was made retroactive to January 1, 2005. Wells also sent copies of the memo to the affected employees.

24. Department officials were aware that AOCE might respond with a unit clarification petition or unfair labor practice complaint to seek the return of the employees to the AOCE unit. AOCE responded with this unfair labor practice complaint on April 6, 2005.

CONCLUSIONS OF LAW

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

2. The Department did not violate an agreement with AOCE, and ORS 243.672(1)(e) and (g), when it unilaterally placed six IMF CTS positions into the AOCE unit and then returned the positions to the AFSCME unit.

⁷Jan Weeks, a DAS state labor relations manager involved in these decisions, believed that the return of the employees was not unilateral because the parties had discussed the appropriate bargaining unit for the IMF CTS employees at length over the six-month period ending with the original transfer.

Analysis

ORS 243.672(1) provides in part:

“* * * It is an unfair labor practice for a public employer or its designated representative to do any of the following:

“* * * * *

“(e) Refuse to bargain collectively in good faith with the exclusive representative.

“* * * * *

“(g) Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.”

As a threshold matter, we consider whether the original transfer of the IMF CTS employees to the AOCE unit was lawful. This Board has already determined that the IMF CTS employees would not be clarified into the AOCE unit because they had been historically excluded from the AOCE unit, and were not included in the AOCE unit by the terms of its contract or certification. *AOCE v. State of Oregon, Department of Corrections, and AFSCME, supra*, 17 PECBR 730. AOCE explicitly acknowledged in its post-hearing brief to the ALJ that it “is not asking the Board to determine the appropriate bargaining unit for the CTS positions. It did not file a UC.” The unit clarification issue is not before us. Therefore, we have no occasion to revisit this Board’s 1998 decision regarding the placement of IMF CTS employees—they are “not included under the terms of the [Department/AOCE] collective bargaining agreement” and are properly in the AFSCME bargaining unit. 17 PECBR at 742. The Department erred in moving these employees unilaterally to the AOCE unit.

AOCE contends that the Department transferred the subject employees pursuant to an agreement between the parties. The record does not, however, contain evidence of such an agreement. On November 22, 2004, DAS informed the Department and AOCE of its recommendation for the IMF CTS positions in an e-mail which stated in part:

“* * * [T]he Department of Administrative Services Labor Relations Unit is asking that the Department of Corrections resolve existing questions concerning bargaining unit representation by placing the six CTS positions currently represented by [sic] AFSCME although duty stationed at OSP in the AOCE bargaining unit * * *.”

On December 28, 2004, the IMF CTS employees, AFSCME, and AOCE were officially notified that the transfer was taking place through a memorandum from Shelli Honeywell of the Department Human Resources Division. The memorandum stated that the Department had gathered information from employees and provided it to the Department of Justice and DAS “for the purposes of recommending the appropriate labor representation for your positions.” It stated that, “[b]ased on a recent Employee [sic] Relations Board finding, these ruling agencies have instructed the Dept. of Corrections to change your representation from AFSCME to AOCE.”

The January 13, 2005 Letter of Agreement states that it is between “the State of Oregon acting through the Department of Administrative Services (Employer), on behalf of the Department of Corrections (Agency), and the Association of Oregon Corrections Employees (AOCE), and is binding upon the Employer, Agency, and AOCE.” The agreement describes its effect as follows: “[W]here certain CTS employees now working at the Oregon State Penitentiary are currently designated as AFSCME represented but will be redesignated as AOCE represented effective January 1, 2005, the following will happen relative to their pay * * *.”

We conclude that the decision to transfer the employees to the AOCE unit was a unilateral decision by the Department, based on advice from DAS and the Department of Justice. The Letter of Agreement determined how that transfer would affect the conditions of employment of the subject employees, but was contingent upon the retention of the subject employees in the AOCE unit. The Letter of Agreement was not, itself, an agreement to move those employees to, or retain them in, the AOCE unit. Nor were there any other oral or written agreements to that effect. The Department did not breach an agreement with AOCE by returning the employees to the AFSCME unit. We will dismiss AOCE’s claims for breach of an agreement brought under ORS 243.672(1)(e) and (g).

3. The Department unilaterally, but lawfully, returned the IMF CTS positions to the AFSCME unit. The Department did not violate ORS 243.672(1)(e) by failing to bargain over the impact of the transfer.

The remaining issue is whether the Department was required to bargain with AOCE regarding the return of the CTS employees to the AFSCME unit. The ALJ ruled that the Department had a duty to bargain regarding the demonstrable impacts on AOCE. We disagree. We hold that the Department did not violate ORS 243.672(1)(e) when it failed to bargain with AOCE concerning the return of the IMF CTS employees to the AFSCME unit.

A public employer may be compelled to bargain concerning “[e]mployment relations” as defined in ORS 243.650(7)(a), that is, “matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment” for public employees. This term does not include permissive subjects for bargaining, ORS 243.650(7)(b). Nor does it include “subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.” ORS 243.650(7)(d).

AOCE argues that the Department had a duty to bargain regarding its decision to transfer “bargaining unit work” to AFSCME and the impacts of that decision on bargaining unit members. AOCE’s position is not well taken. The Department was not required to bargain over the unit status of the IMF CTS employees in the first place. Bargaining unit composition is a permissive subject of bargaining. *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97, 17 PECBR 892 (1999). However, a change in a permissive subject may require the employer to bargain regarding mandatory impacts. *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01, 19 PECBR 925 (2002), *aff’d* 194 Or App 531, 94 P3d 1160 (2004).

The Department did have a duty to bargain with AOCE regarding the impacts of the transfers *into* the AOCE unit, and it did so. AOCE and the Department entered into the Letter of Agreement, which applied to these employees so long as they were in the AOCE unit—but which ceased to apply to them upon retransfer to the AFSCME unit. *Compare, Federation of Oregon Parole v. Dept. of Corrections*, 322 Or 215, 905 P2d 838 (1995), *affirming* 14 PECBR 739 (1993) (employer not obligated to bargain impact of transfer out of bargaining unit, because existing contract governed all wages, hours, and working conditions for bargaining unit members).

In his Recommended Order, the ALJ identified two impacts which resulted from the retransfer of the IMF CTS employees to the AFSCME unit. Both impacts affected only AOCE. The ALJ found that these employees owed AOCE dues, and that AOCE exerted time and effort to secure the Letter of Agreement to ensure that the employees were not adversely affected by the transfer. However, the record does not disclose that dues were actually owed to AOCE; and AOCE did not introduce evidence

regarding its efforts in negotiating the Letter of Agreement. We find these alleged impacts to be merely speculative in nature.⁸

Even if this were not so, no duty to bargain arises. AFSCME and the Department argue that “as a practical matter” the Department had no duty to engage in impact bargaining because there was nothing to bargain over. We hold that the Department had no duty to engage in impact bargaining at all.

It is axiomatic that a labor organization may not compel an employer to bargain concerning employees the labor organization does not represent. ORS 243.650(4). Thus, the Department had no duty to bargain with AOCE regarding any matters of employment relations affecting members of the AFSCME unit—which is precisely what the IMF CTS employees became after February 8.

In any case, neither loss of dues revenue nor expenses incurred negotiating the Letter of Agreement relates to “employment relations” as defined by the statute. AOCE introduced no evidence regarding the effect these impacts had, or could have had, on the wages, hours, and working conditions of the specific IMF CTS employees involved in this case. We can conceive of none.

⁸In *Oregon AFSCME Council 75 v State of Oregon, Department of Corrections and AOCE*, Case No. UP-4-01, 19 PECBR 785 (2002), AFSCME alleged that the Department violated ORS 243.672(1)(b) when it transferred employees from an AOCE-represented bargaining unit to unit represented by AFSCME, but agreed with AOCE that the employees were still covered under the AOCE contract. AOCE and the Department argued that AFSCME did not have standing to litigate its complaint because it had no legal interest that had been affected by this agreement. This Board held that AFSCME did have standing because its representative status was undermined, and it lost dues or fair share payments. We further ruled that the Department had violated ORS 243.672(1)(b) when it failed to treat all employees in the AFSCME unit as covered by the AFSCME contract.

That case has no bearing on our decision here. Facts necessary to establish standing in a proceeding under subsection (1)(b) are one thing. Facts necessary to establish that an alleged impact upon a labor organization is a mandatory subject for bargaining under ORS 243.672(1)(e) are another. The ALJ made no findings in support of his conclusion that the Department’s decision had a “demonstrable impact” on AOCE. Similarly, the fact that this Board ordered the Department to repay AOCE lost dues and fair share payments as part of our remedy for the Department’s unfair labor practice, does not establish these losses as mandatory subjects for impact bargaining.

Indeed, AOCE would require the Department to bargain regarding matters over which the Department can have no legitimate interest or control. This the union cannot do. *Federation of Oregon Parole v. Dept. Of Corrections*, 322 Or 215; and *Clackamas County Employees Association v. Clackamas County*, Case No. UP-38-03, 20 PECBR 905 (2005). The Department had no control—nor should it—over the effort AOCE put into negotiating the Letter of Agreement. That is an internal union matter. Similarly, the Department has no role in the enforcement of a member's obligation to pay dues to AOCE, unless the member has requested and not revoked dues deduction to it under ORS 292.055.⁹ That also is an internal union matter.

For the foregoing reasons, we dismiss AOCE's complaint in its entirety.¹⁰

ORDER

The Complaint is dismissed.

DATED this 13th day of April 2007.

*Paul B. Gamson, Chair



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

⁹Under ORS 292.055, an employee may request in writing that union dues be deducted from his wages. Dues deduction continues unless revoked in writing by the employee. The record does not indicate that IMF CTS employees either authorized or revoked dues deductions to AOCE.

¹⁰*Graduate Teaching Fellows Federation of Teachers Local 3544, AFT, AFL-CIO v. Oregon University System (University of Oregon)*, Case No. UP-18-00, 19 PECBR 496 (2001), and cases cited therein, are not to the contrary. This case does not involve conflicting legal duties which, it is contended, excuse a public employer from complying with its obligations under the PECBA.

*Chair Gamson concurring.

The facts are not complicated. AOCE demanded that DOC move a group of employees into the AOCE bargaining unit, and it threatened to file an unfair labor practice complaint if DOC refused. DOC complied. A little more than a month later, however, DOC changed its mind, apparently based on a 1998 decision of this Board which held that these employees belong in the AFSCME bargaining unit, not in the AOCE bargaining unit.¹¹ DOC therefore moved the employees back into the AFSCME bargaining unit.

AOCE first asserts that the employees belong in its bargaining unit because DOC agreed to the placement. For the reasons stated in the lead opinion, there was no such agreement. Further, even if such an agreement existed, it would be unenforceable in light of our earlier decision that the employees belong in the AFSCME bargaining unit.

AOCE next asserts that DOC acted in bad faith when it refused to bargain over the impacts of its decision to return the employees to the AFSCME bargaining unit. In essence, AOCE wants to bargain over damages it allegedly suffered when DOC complied with its demand to unlawfully transfer the employees into its bargaining unit. AOCE brought this entire circumstance on itself. In my view, a party cannot demand unlawful action and then seek to bargain over the damages it incurs when the inevitable happens and the unlawful action needs to be reversed. There is nothing for the parties to bargain.

I agree that the complaint should be dismissed. I therefore concur in the result.



Paul B. Gamson, Chair

¹¹*AOCE v State of Oregon, Department of Corrections, and AFSCME*, Case No. UC-36-97, 17 PECBR 730 (1998). AOCE does not ask us to revisit that decision