

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-06

(UNFAIR LABOR PRACTICE)

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

On September 3, 2008, this Board heard oral argument on both parties' objections to a Recommended Order issued on July 18, 2008, by Administrative Law Judge (ALJ) B. Carlton Grew following a hearing on December 17 and 18, 2007, in Salem, Oregon. The record closed with the receipt of the parties' post-hearing briefs on March 3, 2008.

Barbara J. Diamond, Attorney at Law, Diamond Law, 1500 NE Irving Suite 370 Portland OR 97232-4214, represented Complainant at oral argument, while Monica A. Smith, Attorney at Law, 603 SE 69<sup>th</sup> Avenue, Portland, Oregon 97245, represented Complainant at hearing.

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

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On April 25, 2006, Complainant Oregon AFSCME Council 75 (AFSCME) filed this unfair labor practice complaint alleging that the Department of Corrections (DOC) implemented a new sick leave policy without prior notice or bargaining with AFSCME. DOC filed a timely answer on November 24, 2006. The hearing was

postponed at the parties' request pending settlement discussions which were not successful.

The issue in this case is: Did DOC unilaterally change the *status quo* in violation of ORS 243.672(1)(e) by implementing a new sick leave policy without notifying or bargaining with AFSCME about the policy?

### RULINGS

1. At the start of hearing, DOC moved to amend its answer by adding the following paragraph:

“Assuming arguendo that aspects of the Staff Attendance Improvement Process may pertain to mandatory subjects of bargaining, the parties have bargained to agreement over any such subjects and included that agreement in their Collective Bargaining Agreements. The Process does not unilaterally alter the status quo concerning any such subject.” (Proposed Amendment to Answer, December 17, 2007.)

AFSCME objected to the amendment as untimely. DOC stated that it would not oppose a postponement of the hearing if AFSCME sought one. AFSCME did not request a postponement and did not request to amend the complaint. The ALJ took the matter under advisement, and denied the request to amend the answer in his Recommended Order. We agree.

Whether a party is permitted to amend its answer under these circumstances is subject to the ALJ's proper exercise of discretion. DOC's amendment sought to raise the legal issue of whether the parties had “bargained to agreement” regarding the subjects at issue. That issue is a component of the “bargained to completion” defense to a unilateral change which this Board has rejected. *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 624 (2002); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, *supplemental orders* 19 PECBR 804 and 19 PECBR 848, *on reconsideration* 19 PECBR 895, *aff'd*, 187 Or App 92, 67 P3d 951 (2003). We now hold that an employer can raise two types of contract defenses to unilateral change allegations: (1) that the contract language permits the employer to take the action it did, or (2) that the contract language clearly and unmistakably waives the union's right to bargain over the subject at issue. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 366 (2008).

DOC's amendment asserts neither of these defenses. The ALJ properly denied DOC's motion to amend its answer.

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

### FINDINGS OF FACT

#### Parties

1. DOC is a public employer under ORS 243.650(20)

2. AFSCME is a labor organization under ORS 243.650(13) representing two statewide bargaining units of DOC employees. The Security unit consists of approximately 1,800 strike-prohibited employees working in prisons and related settings. The Security Plus unit consists of approximately 1,250 strike-permitted employees working in prisons and related settings.

#### Collective Bargaining Agreements

3. At the time of hearing, the most recent collective bargaining agreements between the two AFSCME units and DOC were effective from July 1, 2005 to June 30, 2007. The agreements contain identical language relevant to this unfair labor practice.

Section 7 of Article 25, "Working Conditions," from the agreements provides, in pertinent part:

"Employees may agree to time [shift] trades with other employees who are qualified to perform the duties required in the course of the trade. Such agreement shall be in writing and signed by the affected employees. Supervisors shall not withhold approval of time trades without valid cause."

Section 6 of Article 33, "Sick Leave with Pay," from the agreements provides, in pertinent part:

"Employees who have earned [paid] sick leave credits shall be eligible for sick leave for any period of absence from employment which is due to the employee's illness, bodily injury, disability resulting from pregnancy, necessity for

medical or dental care, exposure to contagious disease, attendance upon members of the employee's immediate family (employee's parents, wife, husband, children, brother, sister, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, or another member of the immediate household including the PEBB definition of domestic partners) where employee's presence is required because of illness or death, in the immediate family of the employee, the employee's spouse, or domestic partner. \* \* \* Certification of an attending physician or practitioner may be required by the Agency to support the employee's claim for sick leave, if the employee is absent in excess of seven (7) days, or if the Agency has evidence that the employee is abusing sick leave privileges."

Article 34, "Sick Leave Without Pay," from the agreements provides that DOC will grant sick leave without pay after paid sick leave has been exhausted

DOC may require medical certification "in verification of disability resulting from job-incurred or non-job incurred injury or illness."

Section 1 of Article 50, "Discipline and Discharge," from the agreements provides:

"The principles of progressive discipline shall be used when appropriate. No employee who has completed the initial trial service period shall be disciplined or dismissed without just cause."

Section 3 of Article 53, "Stress/Career Counseling," from the agreements provides, in pertinent part:

"Where an employee who has established a good work record develops improper work habits or excessive absenteeism, which may be evidence of job stress, the Agency shall attempt to establish the reasons behind the employee's poor work habits and shall counsel with the employee in an attempt to aid the employee in developing a program to begin improving those habits. Any admissions of the employee of wrong doing, which are brought out during such counseling sessions, shall not later be used against the employee in any subsequent disciplinary procedure unless otherwise proven. \* \* \*"

## Staff Attendance Improvement Process

4. In March 2006, Stan Czerniak, DOC's Assistant Director for the Operations Division, issued a department-wide Staff Attendance Improvement Process (SAIP) policy. The policy states:

"Process for monitoring attendance and use of sick leave without pay and/or unscheduled leave:

- "1. Staff who enter sick leave without pay or leave without pay status or who show questionable patterns of leave use, such as for repeated time off (as indicated in time keeping records) associated with weekends or certain days of the week, will have a meeting scheduled by supervisors to review issues and concerns. Progress will be reviewed on a monthly basis following that initial meeting.
- "2. Staff who continue to demonstrate attendance problems may be subject to a Staff Attendance Improvement Plan including remedial action. Failure to meet the objectives of the Staff Attendance Improvement Plan may result in appropriate disciplinary action up to and including dismissal.
- "3. Leave that has been scheduled in advance or has been used due to an on-the-job injury or an absence that qualifies under the provisions of FMLA or OFLA leave laws will not be considered in monitoring unscheduled leave usage.

### "STAFF ATTENDANCE IMPROVEMENT PLAN STEPS

#### "STEP I Sick leave and/or leave without pay usage Attendance Review Form

- "A. Meeting by immediate supervisor with employee using review form as a guideline, to discuss attendance concerns and offer opportunity for employee to state mitigating factors. (See Attachment A, Attendance Review Sheet)

“B. Supervisor will monitor monthly the employee’s attendance. If no significant progress is made, the supervisor may move to Step 2.

“STEP 2     Staff Attendance Improvement Plan

“A. Meeting and discussion with staff, whom after monthly review meetings, enter sick leave without pay and/or leave without pay status or who show questionable patterns of leave use, such as times associated with weekends or certain days of the week. (Unscheduled leave due to an on-the-job injury or an absence that qualifies under the provisions of FMLA or OFLA leave laws will not be considered in monitoring unscheduled leave usage.)

“B. Provide notifications of usage and expectations placing employee on Staff Attendance Improvement Plan. (See Attachment B, Staff Attendance Improvement Plan)

“STEP 3     Staff Attendance Improvement Plan Monthly Review with Employee

“Any of the actions listed in A through C1, and C2 below can be initiated at any time during this six to twelve month Plan dependent on employee’s progress

“A. Decision to extend monthly review period.

“B. Initiate remedial action, if circumstances dictate.

“C. Initiate disciplinary process.

“1. Issue ‘pre-disciplinary notice’  
(for individual cases not  
demonstrating improvement).

“2. Conduct pre-disciplinary meeting  
and take disciplinary action.”  
(Emphasis in original.)

5. Attachment A to the policy was a form to be used by managers in conversations with employees subject to the policy. Portions of the attachment follow.

“Attachment A

“ATTENDANCE REVIEW SHEET

“\* \* \*

Discussion Issues:

“Review patterns of use:

“Review requirements of position description:

“Review leave for any work-related issue:

“Review any personal issues causing absences:

“*(Remind employee of Employee Assistance Program)*

“Any FMLA/OFLA qualifying issues not previously noted?

“Anything the employer can do to assist?

“Review costs and morale issues:

“Implications of sick leave and/or leave without pay, if applicable:

“Additional comments:

“Next progress review date (approximately one month):” (Emphasis in original.)

6. Attachment B to the policy contained directions for employees on the plan. Portions of the attachment follow.

“This form is to be completed whenever deficient attendance has been documented. The purpose of this plan is to bring deficient performance up to acceptable standards.

**“Concern: Designated area of difficulty or deficient performance**

“Lack of dependability in reporting for work which has set a pattern of absences from duty; \_\_\_ days absent from \_\_\_\_\_ to \_\_\_\_\_ resulting in \_\_\_ hours of sick and/or unscheduled leave. If applicable, a pattern of excessive use of sick and/or unscheduled leave has been recorded.

**“Work Improvement Objective: Measurable change in deficient performance**

“Establish a record of dependability in reporting for work by maintaining an acceptable level of attendance. Failure to meet the objective of the staff attendance improvement plan may result in appropriate disciplinary action.

**“Activities (list the activities and dates for the employee and supervisor):**

“Effectively on the above date, you are required to carry out the following directives.

“1. Report for work on time on the days you are scheduled for duty.

“2. Avoid the use of unscheduled leave. If you intend to use unscheduled leave, you are required to:

“a. Provide at least one-hour notice, and personally contact your supervisor to advise of your intent. If your supervisor is not available, leave your phone number for a return call.

- “b. If your reason for this unscheduled leave is illness, you must provide a physician’s certification of the illness and a completed leave request form immediately upon your return. Documentation will also include a memorandum of any unscheduled leave taken.
  
- “3. After the first of each month, your supervisor will meet with you to discuss your previous month’s attendance performance, review all leave accrued and used during that month, and review available alternatives to avoid future absences.
  
- “4. Shift trades will be at the discretion of the supervisor.”  
(Emphasis in original.)

7. On March 20, 2006, AFSCME Council Representative Randy Ridderbusch sent a letter demanding to bargain the impact of the SAIP to Czerniak and Craig Cowan, a Department of Administrative Services labor relations manager assigned to DOC. Ridderbusch asked that DOC not implement the policy until bargaining was completed. On March 24, Cowan responded by letter. Cowan asked to meet with AFSCME to discuss why AFSCME believed that the procedure must be bargained.

8. In April or May 2006, Czerniak modified the SAIP in response to feedback from DOC managers and their reports of AFSCME’s concerns. The most significant change was the removal of the language regarding shift trades.<sup>1</sup>

9. On May 18, 2006, Ridderbusch met with Cowan. At the meeting, Ridderbusch argued that the SAIP interfered with contractual leave. Ridderbusch raised four specific concerns: (1) the term “questionable patterns” was undefined; (2) there were no standards for how an employee under the improvement plan could get off the plan; (3) the Attachment A questions for managers to ask employees could create morale issues; and (4) the policy did not state who would pay for a medical certification required under the new policy.

10. DOC did not agree to bargain or rescind the policy.

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<sup>1</sup>The Complaint was filed on April 25, 2006, with a copy of the March 2006 SAIP attached as an exhibit. In our Conclusions of Law, we consider only the March 2006 SAIP policy and address the subsequent SAIP policy as a matter of historical fact.

11. Prior to the adoption of the March 2006 SAIP policy, employees were required to give at least one hour notice prior to taking sick leave. The Coffee Creek Correctional Institution and Columbia River Correctional Institution had attendance improvement policies in effect beginning in 2002 and 2004, respectively. These policies were not identical to the department-wide SAIP policy.

### CONCLUSIONS OF LAW

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

2. The Department did not unilaterally change the *status quo* in violation of ORS 243.672(1)(e) when it adopted a new sick leave policy in March 2006.

An employer's duty to bargain in good faith under ORS 243.672(1)(e) includes the obligation to negotiate to completion with a labor organization before changing the *status quo* in regard to working conditions that are mandatory subjects for bargaining unless the contract permits the changes or waives the union's right to bargain about them. *Lebanon Education Association v. Lebanon Community School District*, 22 PECBR 366 (2008).

AFSCME asserts that DOC unilaterally changed the *status quo* in violation of subsection (1)(e) when it adopted a new sick leave usage policy in March 2006. According to AFSCME, the policy imposed unprecedented restrictions on employees' use of sick leave. AFSCME objected to the provisions in the policy that require supervisors to counsel employees with "questionable patterns" of leave usage, place employees on improvement plans, and subject the employees to disciplinary action up to and including dismissal for chronic attendance problems. AFSCME contends that DOC also breached its statutory duty to bargain in good faith when it failed to notify AFSCME about the new policy and refused AFSCME's demands to bargain about the policy.

In a case alleging an unlawful unilateral change, we begin our analysis by examining relevant contract provisions. We interpret the contract language to decide if the language authorizes the actions taken by the employer. *Id.* As we have discussed above in the Rulings section of this Order, a public employer may defend against a unilateral change allegation by demonstrating that the action it took was permitted by the collective bargaining agreement. *Amalgamated Transit Union Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911 (2009).

Here, language in the relevant contracts permits DOC to make (and enforce) the rules to which AFSCME objects in the March 2006 sick leave usage policy. The applicable contracts specify that use of sick leave will be restricted to particular situations, that a doctor's note may be required to document appropriate use of paid and unpaid sick leave, that managers may counsel an employee with a record of excessive absenteeism and place the employee on a plan of assistance, and that managers may withhold approval of shift trades for cause. The provisions of DOC's March 2006 sick leave policy implement these contract provisions. The actions DOC may take under the policy—requiring that employees use sick leave for appropriate purposes, counseling and disciplining employees with persistent attendance problems, and denying approval of shift trades in certain situations—are all authorized by language in the relevant collective bargaining agreements. Accordingly, we conclude that DOC made no unlawful changes in the *status quo* when it adopted the SAIP policy.

Even if we assume *arguendo* that the collective bargaining agreements do not authorize DOC to adopt the March 2006 attendance improvement policy, DOC's actions in changing discipline policies are permitted by the Public Employee Collective Bargaining Act (PECBA). ORS 243.706(1)(b) provides:

“Public managers have a right to change disciplinary policies at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.”

The sick leave usage policy which DOC enacted in March 2006 provided reasonable advance notice to employees that disciplinary action could result from continued misuse of sick leave. Under the policy, employees received fair warning of the consequences of improper sick leave usage. The policy notifies employees of DOC's expectations in regard to use of sick leave, and specifies several steps DOC must take before disciplining employees for misuse of leave. AFSCME does not assert that the SAIP policy violates the parties' collective bargaining agreements. To the contrary, we conclude that the significant terms of the policy are consistent with the language in these contracts. Nor does the SAIP policy restrict or limit AFSCME's right to grieve any disciplinary action under the just cause provisions of Article 50. Thus, even if the provisions of the SAIP policy are not authorized by the collective bargaining agreement, they are nonetheless lawful under ORS 243.706(1)(b).

Because the changes DOC made in its disciplinary policies in March 2006 were authorized by the terms of the relevant collective bargaining agreements and the PECBA, DOC did not violate ORS 243.672(1)(e) when it adopted the SAIP policy. We will dismiss the complaint.

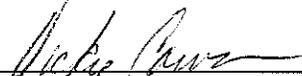
ORDER

The complaint is dismissed.

Dated this 27<sup>th</sup> day of January 2009.



\_\_\_\_\_  
Paul B. Gamson, Chair



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Vickie Cowan, Board Member



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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.