

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-09

(UNFAIR LABOR PRACTICE)

NORTH CLACKAMAS EDUCATION)
ASSOCIATION,)
)
Complainant,)
v.)
)
NORTH CLACKAMAS SCHOOL)
DISTRICT 12,)
)
Respondent.)
_____)

DISMISSAL ORDER

John S. Bishop, Attorney at Law, McKanna, Bishop, Joffe, & Arms, Portland, Oregon, represented Complainant.

Paul A. Dakopolos, Attorney at Law, Garrett, Hemann, Robertson, Salem, Oregon, represented Respondent.

On April 3, 2009, the North Clackamas Education Association (Association) filed an unfair labor practice complaint. The Association alleges that North Clackamas School District 12 (District) violated ORS 243.672(1)(e) and (f) by unilaterally changing the manner in which substitute teachers acquired status as temporary teachers under the collective bargaining agreement.

On April 21, 2009, the District filed a motion to dismiss the complaint. The District asserts that the alleged violation occurred on June 17, June 26, or July 30, 2008, more than 180 days before the complaint was filed, making the complaint untimely under ORS 243.672(3). The District also contends that substitute teachers are not included in the bargaining unit and, therefore, the complaint fails to state a claim under

the Public Employee Collective Bargaining Agreement (PECBA).

By letter dated April 22, 2009, Administrative Law Judge (ALJ) Larry L. Witherell denied the District's motion, to the extent that it relies upon June 17, June 26, or July 30 as the date on which the alleged violation occurred. However, the ALJ informed the parties that it appeared that the Association failed to allege any conduct occurring within the 180-day period, that is, on or after October 5, 2008. As a result, the ALJ gave the Association an opportunity to show cause why the complaint should not be dismissed as untimely.¹

On May 6, 2009, the Association filed an amended complaint, accompanied by a supporting letter. The District responded to the amended complaint on May 8, and renewed its motion to dismiss the complaint.

On May 14, 2009, the Association filed a second amended complaint, accompanied by a supporting letter.

For purposes of this Order, we assume the allegations in the complaint are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). We also rely on undisputed facts discovered during the investigation of the complaint ORS 243.676(1); *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 868 (2007). The following are the pertinent allegations in the second amended complaint:

“6. The District and NCEA have entered [into a] collective bargaining agreement whose term is from July 1, 2007 through June 30, 2010.

“7. Pursuant to section 1.2(A) of the Agreement, the District recognizes the NCEA as:

¹Because of our disposition of the case, we need not consider the District's alternative grounds for seeking dismissal: that the complaint fails to state a claim for relief under the PECBA because substitute teachers are not members of the Association bargaining unit

“the sole and exclusive bargaining representative for all full-time teachers, part-time teachers, temporary teachers at such time as the district places them under contract, counselors, vocationally licensed teachers, media specialists, licensed specialists, social workers, and nurses under contract to the Board.

“8. Under the parties’ current Agreement and under their prior agreements, temporary teachers have been afforded the rights and benefits similar to full-time and part-time teachers * * * Moreover, it has been the long standing practice between the parties for the District to begin deducting Association dues from a teacher’s pay as soon as they are placed under contract by the District as a ‘temporary teacher.’

“9. Substitute teachers employed by the District are not within the bargaining unit represented by the Association. * * *

“10. These parties have long provided in their current and past labor agreements the specific criteria which must be met to establish that a teacher is a ‘temporary teacher’ and thereby is part of the Association’s bargaining unit. In addition, the parties have had a long-established practice for determining when an individual achieves the status of a ‘temporary teacher’ if the individual is replacing a bargaining unit member who had to take a leave of absence. For many years, the parties’ practice in this regard has been as follows: once a substitute teacher had replaced a teacher for 20 continuous days or more, the District placed the teacher under contract * * * and treated the teacher as a ‘temporary teacher’ within the meaning of all other relevant provisions of the parties’ agreement.

“11. On June 17, 2008, the Human Resources Director [Marla] Shuman sent an e-mail to the NCEA President and Vice President to notify them that the District planned to change the way that it paid long-term substitute teachers during the 2008-09 academic year. In her notice, Shuman claimed: ‘There is no contract language, state law, or district policy that mandates that a replacement teacher who works 30+ consecutive days has to be placed on a temporary contract.’

“12. Shuman stated in her June 17, 2008 e-mail that ‘[b]eginning with the 2008-09 school year,’ if a substitute teacher is needed for less than 95 days:

“the sub will not be placed on a temporary contract. The substitute will be paid at the sub rate. The position opening does not need to be posted. * * *

“13. Later in her June 17, 2008, e-mail to NCEA officers, Shuman stated the following with respect to when the District would place a teacher under temporary contract:

“If a replacement teacher is needed for 95 or more days in the same continuous assignment, the position will have to be posted because the replacement [substitute] teacher will be placed on a temporary contract. * * *

“14. Shuman prefaced her June 17, 2008, e-mail to NCEA officers with the following remark: ‘Even though NCEA does not represent substitute teachers, the district in good faith is sharing this information as a gesture of continuing the good labor relations between us.’

“15. By letter dated June 26, 2008, OEA UniServ Consultant Debbie Hagan sent Shuman a letter on behalf of NCEA responding to Shuman’s June 17, 2008, e-mail message. Hagan’s letter to Shuman included the following statements:

“The purpose of [your June 17, 2008, e-mail] appears to be to notify the Association that the District is unilaterally changing the definition of when a new hire becomes a temporary employee, and therefore part of the bargaining unit, from 30 to 95 days. We believe that the District’s planned unilateral change, if made, would constitute a violation of the Collective Bargaining Agreement.

“* * * * *

“16. Hagan concluded her June 26, 2008, letter with the following request: ‘Since your e-mail terms this a planned change, please notify me when and if the District implements the change so that we may begin the grievance process.’ Shuman received Hagan’s June 26, 2008 letter on June 30, 2008.

“17. The District did not respond to Hagan’s June 26, 2008 letter nor pursue or even initiate bargaining over its plan to change when it

would place substitute teachers under contract as temporary teachers.

“18. On or around July 30, 2008, District representatives and NCEA representatives held one of their regular monthly labor-management meetings. * * * One of the issues discussed was the District’s plan to change when it would place substitute teachers under contract as temporary teachers.

“19. By letter dated August 18, 2008, Hagan wrote to Shuman to state that the ‘NCEA/OEA position on the temporary employee issue remains as per my June 26, 2008 letter.’ * * *

“20. Once again, the District took no steps to respond to any of Hagan’s correspondence or to pursue or even initiate bargaining over its plan to change when it would place substitute teachers under contract as temporary teachers. * * *

“21. The 2008-09 school year at the District began on September 2, 2008.

“22. Prior to October 1, 2008, the Association did not receive any information or evidence from the District that would give the Association reason to believe that the District was engaging employees temporarily and not affording them status as ‘temporary teachers’ pursuant to the parties’ labor agreement and the parties’ long-standing past practices.

“23. On or around October 1, 2008, office staff working for the Association received word of a District employee who had submitted an application for Association membership.^[2] The employee’s name was Sharilyn Brooks. * * * [The Association staff member] recognized Ms. Brooks as a new District employee and not as someone who the District had previously indicated as being a member of the Association’s bargaining unit.

“24. On October 1, 2008, [the Association staff member] contacted District Payroll Compensation Specialist Lori Best via e-mail and asked whether she should set Ms. Brooks up as a temporary teacher within

² In the original complaint and the first amended complaint, in paragraph 23, the Association states “On October 1 ” rather than “On or around October 1.”

the Association's bargaining unit. Ms. Best sent an e-mail reply * * * stating: 'I haven't seen any paperwork on her. * * *' [The Association staff member] responded to Ms. Best's e-mail by stating '[i]f you don't have any paperwork on her, I will hold on to it and wait.' To this, Ms. Best replied 'I'm guessing she's a sub. Karen has already brought me down the new hires for October. We wouldn't have any licensed employees working only from Sept.-Dec anyway. Sorry.'³

"25. On or around Friday, October 3, 2009, [sic] [the Association staff member] informed local Association leaders about the information she had received from the District concerning Ms. Brooks [sic] employment status. [The Association staff member] speculated to the local leaders that: a) either administrators at Ms. Brooks' school were not properly communicating with the District's payroll staff about Ms. Brooks' employment; or b) there was a possibility that the District was planning not to treat Ms. Brooks as a member of the Association's bargaining unit

"26. On Monday, October 6, 2008, Mr. Parrington [Association Vice President] spoke with District Human Resources Director Marla Shuman and confirmed that the District was, in fact, going ahead with its plan to change how it treated substitute and temporary teachers.

"27. After speaking with Ms. Shuman, Mr. Parrington began preparing a grievance to file against the District over its decision to change unilaterally when teachers attained 'temporary teacher' status. Mr. Parrington signed the grievance on October 9, 2009 [sic]. In the grievance, Mr. Parrington alleged, among other things, that the District's unilateral change violated Agreement Articles 1.2 (A) & (F), 14, 24.1, and the parties' past practices under their Agreement and prior agreements. Mr. Parrington based his allegations in the grievance on the fact that Ms. Shuman confirmed for him on October 6, 2008, that the District would refuse to treat Sharilyn Brooks and other similarly situated teachers as part of the Association's bargaining unit. Mr. Parrington had no other information about any other teachers besides Ms. Brooks who the District planned to treat as substitutes, but he presumed there were more, since Ms. Shuman had confirmed to him that the District had implemented the planned change it announced in June."

³On September 30, 2008, Brooks had taught 20 consecutive days in the District.

The Association filed a grievance which the District received on October 9, 2008. The Association provided a copy of the grievance and related correspondence as part of the ALJ's investigation required by ORS 243 676(1).

The grievance, which was prepared by Association Vice President Parrington, states:

“On October 1, 2008 it came to the attention of the Association that Sharilyn Brooks, along with several other temporary teachers, is not being treated as a member, under the North Clackamas School District Collective Bargaining Agreement. Both past practice and current contract language have been ignored. In the past, if a substitute teacher worked for more than twenty days (to fill a long term vacancy for a teacher out on leave) he or she was considered a temporary teacher with rights and benefits defined in our contract. Sharilyn, along with many other temporary teachers, is now being classified as a long term substitute. By arbitrarily ignoring our contract, the District has not only denied our members union legal protection but also critically needed health care.”

The grievance requested that the District “[p]lease immediately reverse this policy and follow the contract. Restore the benefits and salary that these temporarily [*sic*] teachers are entitled to.”

In the letter dated October 8, 2008, which accompanied the grievance, the Association Vice President stated:

“It has come to our attention that, Sharilyn Brooks, a teacher at Wichita Elementary School was denied the right to become a temporary teacher by the North Clackamas School District. She filled out OEA membership form in September. * * * However, after 20 days, she is still being paid as a substitute teacher. * * * We hope the District will immediately rescind this unilateral policy change and restore the rights of full membership and fair pay to our temporary teachers. Attached you will find our grievance.”

The parties were unable to resolve the Association grievance at the lower levels of the contract's grievance process. The parties agreed to submit the grievance to arbitration for a final and binding resolution. The grievance was heard by an arbitrator on May 6, 2009.

DISCUSSION

ORS 243.672(3) provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” The Association filed its initial complaint on April 3, 2009. For the complaint to be timely, the unfair labor practice must have occurred on or after October 5, 2008.

Based on our review of the amended complaint and attached documents, and the documents the Association provided during the investigation of the complaint, we conclude that the complaint is untimely. Accordingly, we will dismiss the complaint. ORS 243.672(3) and OAR 115-035-0020.

Prior to the 2008-2009 school year, the District changed the status of a long-term substitute to that of a temporary teacher (and Association bargaining unit member) after the individual taught 20 consecutive days. During the summer of 2008, the District told the Association that it would alter this practice. Beginning on September 2, 2008, the District would change the status of a long-term substitute to that of a temporary teacher only after the individual taught 95 consecutive days. On October 1, 2008, Association office staff discovered that the District did not consider Sharilyn Brooks a temporary teacher even though Brooks had taught 20 consecutive days as a substitute teacher.

On October 6, 2008, Association Vice-President Parrington talked to District Human Resources Director Shuman and confirmed that the District would not change Brooks’ status to that of a temporary teacher. The Association contends that the 180-day statute of limitations began to run on this date, when its leadership confirmed the District’s allegedly unlawful action. We disagree.

We recently clarified our interpretation of ORS 243.672(3) and rejected the discovery rule that the Association urges upon us. *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District No. 35*, Case No. UP-17-08, 22 PECBR 577 (2008), *appeal pending*, and *Oregon State Police Officers’ Association v. State of Oregon, Oregon State Police*; Case No. UP-30-07, 22 PECBR 970 (2009), *appeal pending*. In both *Rogue River* and *Oregon State Police*, the employer made an allegedly unlawful unilateral change in working conditions several months before the union leadership found out about the change. The unions contended that the 180-day time limit began on the date the union leadership learned about the changes at issue. We rejected this argument. After examining the statutory language and pertinent decisions of the Oregon Supreme Court, we instead applied an occurrence rule. We held that an unfair labor practice occurs when the employer implements an allegedly unlawful

change. Here, the allegedly unlawful change occurred on October 1, 2008, when the District failed to change Brooks' status from substitute teacher to temporary teacher. The complaint was filed more than 180 days after this occurrence and is, therefore, untimely.

Even if we were to apply the discovery rule, the complaint would be untimely. In cases where we applied the discovery rule, we concluded that the limitations period begins when a union knows, or reasonably should know, about an allegedly unlawful change. Here, it appears that the Association actually knew of the change no later than October 1, since the Association's grievance specifically states that it learned of the change on October 1.

If the Association had no actual knowledge of the change, it should have known about it. A union is presumed to have notice of changes that affect its bargaining unit members when the changes occur. *Rogue River*, 22 PECBR at 582-583; *Oregon State Police*, 22 PECBR at 973-974. We explained that

“[m]onitoring of unit members' employment conditions, whether they are established in a negotiated contract or by past practice, is a primary responsibility of the exclusive representative. It would derogate the basic purposes of the limitation period to toll its running, after a change in working conditions is implemented and its effects are fully apparent, simply because the labor organization leadership did not become aware of the change for some period of time. To effectuate the purposes of ORS 243.672(3), we find that when the effects of a change are manifest to the employees, the exclusive representative must be presumed to be on notice that the change occurred. To put it in terms of our discovery rule, the union 'reasonably should have known' of the change at that time.” *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 19 (1996), *adh'd to on recons*, 17 PECBR 75 (1997).

Here, the union leadership had ample and adequate notice of the change the District made on October 1. In the summer of 2008, the District announced it would change the way in which long-term substitutes acquired status as temporary teachers. There was nothing tentative or equivocal about the District's announcement. The Association leadership knew or should have known about the change the District implemented on October 1, 2008. Accordingly, the complaint is untimely and will be

dismissed.

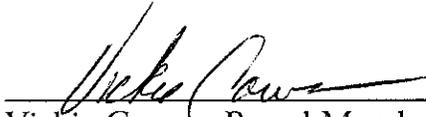
ORDER

The complaint is dismissed.

DATED this 18TH day of June 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

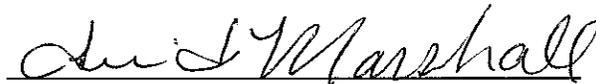
This Order may be appealed pursuant to ORS 182.482.

CERTIFICATE OF MAILING

I hereby certify that on June 18, 2009, I mailed a true copy of the Dismissal Order, dated June 18, 2009, in Case Number UP-17-09, by depositing same in the United States mail and/or state mail to the following parties of record:

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