EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-30-07

(UNFAIR LABOR PRACTICE)

OREGON STATE POLICE OFFICERS' ASSOCIATION,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
STATE OF OREGON, OREGON STATE POLICE,	)	
Respondent.	)	

On August 20, 2008, this Board heard oral argument on both parties' objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on July 15, 2008, following a hearing on April 18, 2008, in Salem, Oregon. The record closed after the parties' oral closing arguments.

Daryl S. Garrettson, Garrettson, Gallagher, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97239, represented Complainant.

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

On July 31, 2007, Oregon State Police Officers' Association (Association) filed this unfair labor practice complaint. The complaint alleges that the Oregon State Police (OSP) unilaterally changed the working conditions of certain OSP employees in violation of ORS 243.672(1)(e) when it contracted with the Oregon Department of

Transportation (ODOT) to share responsibility for maintaining both agencies' communications systems. OSP filed a timely answer and affirmatively alleged that the complaint was untimely filed.

The issues in this case are:

1. Is the complaint timely?

2. Did OSP and ODOT agree to use OSP employees to perform ODOT work and to use ODOT employees to perform OSP work? If so, did this conduct violate ORS 243.672(1)(e)?

RULINGS

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

FINDINGS OF FACT

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

2. The Association is the exclusive representative of a bargaining unit of OSP employees, including seven Communication Systems Analysts (CSAs).

3. The most recent collective bargaining agreement between the parties was effective from July 1, 2005 to June 30, 2007.

4. In August 2006, OSP and ODOT employees devised a plan to more efficiently service both agencies' communication towers and equipment. OSP CSA's were involved in planning and implementing the new program.[1] The plan was implemented in September 2006.

5. On January 8, 2007, OSP and ODOT formalized the plan and executed an interagency service agreement which provides that OSP and ODOT will share resources relevant to the maintenance and upgrading of OSP and ODOT communications towers and related equipment. The agreement provides that OSP CSAs will work on ODOT communications equipment, and ODOT specialists will work on OSP communications equipment.

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[1]OSP CSA John Kessinger was one of the employees involved in planning the new program.

6. The agreement took effect when it was signed,[2] but was applied retroactive to work performed beginning on September 1, 2006.

7. On May 30, 2007, OSP CSA Kessinger gave Association President Jeff Leighty and the Association bargaining unit members a written copy of the OSP/ODOT agreement.

8. On May 30, 2007, while the parties were engaged in contract negotiations, Association officials told Mike Halpern, a state labor relations manager representing OSP, that the Association knew about the OSP/ODOT agreement. The Association asked OSP to cease implementing the agreement, restore the *status quo*, and bargain over the OSP/ODOT agreement. Halpern told the Association that he would discuss the matter with OSP and respond to the Association.

9. On July 20, 2007, Association officials asked Halpern for a definitive answer regarding the OSP/ODOT agreement. On July 25, 2007, Halpern told the Association that the State would continue the program as agreed.

CONCLUSIONS OF LAW

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

2. The Complaint is untimely.

ORS 243.672(3) provides that an injured party may file a written complaint with this Board not later than 180 days following the occurrence of an unfair labor practice. In September 2006, OSP and ODOT implemented a program to more efficiently maintain and repair both agencies' communication towers and equipment. Under the terms of the agreement, OSP CSAs worked on ODOT equipment and ODOT employees worked on OSP equipment. They formalized the program by interagency agreement on January 8, 2007. The Association filed this unfair labor practice complaint on July 31, 2007, more than 180 days after OSP implemented the program and more than 180 days after OSP and ODOT formalized the agreement.

The Association argues that it did not discover the OSP/ODOT agreement until May 30, 2007. According to the Association, the complaint was timely because it

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[2]Representatives of OSP signed the agreement in December 2006; representatives of ODOT signed the agreement in January 2007.

was filed on July 31, 2007–less than 180 days from the date on which it discovered the allegedly unlawful unilateral change

ORS 243.672(1)(e) makes it an unfair labor practice to unilaterally change working conditions, which are mandatory for bargaining, without first bargaining to completion. The issue here is whether the 180-day limitation period began to run from the date on which the bargaining representative discovered the unilateral change (discovery rule) or the date on which the change occurred (occurrence rule).

Historically, we have applied both the occurrence rule and the discovery rule to determine the 180-day limitation period for filing an unfair labor practice complaint. The "occurrence rule" requires that a complaint be filed within 180 days of the date on which the change happened. In *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 19 (1996), *recons*, 17 PECBR 75 (1997) we applied an occurrence rule and found a complaint untimely when it was filed more than 180 days from the date on which the employer made allegedly unlawful changes in employees' pay. In *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case No. UP-13/118-93, 15 PECBR 347, 357 (1994), we applied a discovery rule and held a complaint timely when it was filed within 180 days of the date on which the union learned about an allegedly unlawful unilateral change.

We recently revisited this conflict in *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*. There, based on the plain reading of the statute and in accord with recent Oregon Supreme Court decisions, this Board determined that the 180-day filing period for a unilateral change complaint begins on the date the change occurs. *Id.*, at 580-81(citing *Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 26 P3d 817 (2001) and *Huff v. Great Western Seed Co.*, 322 Or 457, 909 P2d 858 (1996)). We also concluded that, even if we applied the "discovery rule," the complaint was untimely. We noted that the allegedly unlawful unilateral change occurred when the employer stopped paying retirement benefits to a former bargaining unit member. We held that the limitation period began to run on the date the benefits stopped and that "the Association was presumed to be on notice that the change occurred."*Id.*, 22 PECBR at 583.

Here we are faced with a similar situation. Bargaining unit employees' working conditions changed in September 2006 when OSP implemented the program about which the Association complains. Under the "occurrence rule," the complaint is untimely filed because it was filed more than 180 days after the allegedly unlawful unilateral change occurred. We conclude, as we did in *Rogue River*, that the union is

presumed to have notice of a change that affected bargaining unit members' working conditions

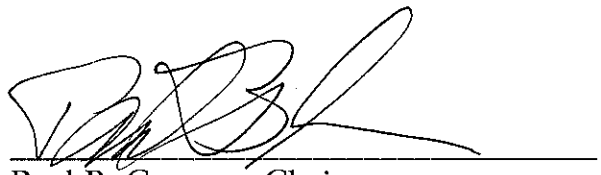
The complaint is also untimely under the "discovery rule." In its role as exclusive representative, exercising reasonable diligence, the Association should have known about the change. *Rogue River*, 22 PECBR at 583, quoting *Washington County Police Officers Association v. Washington County Sheriff's Office,* Case No. UP-12-02, 20 PECBR 274, 277 (2003). As we stated in *Rogue River*: "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." *Rogue River*, 22 PECBR at 582. *See Also, Oregon School Employees Association v. Astoria School District*, Case No. UP-40-02, 20 PECBR 46 (2002); *Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274, 277 (2003). In other words, regardless of which rule we apply in this case, the complaint was untimely filed.

Because the complaint was filed more than 180 days after the occurrence of the alleged unfair labor practice, it is untimely under ORS 243.672(3). Accordingly, we will dismiss the complaint.

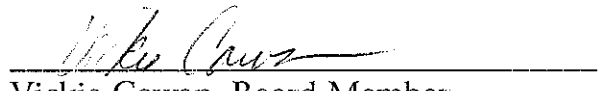
ORDER

The complaint is dismissed.

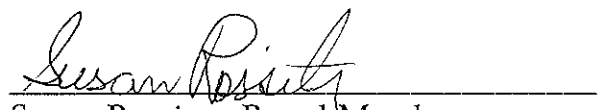
Dated this 27th day of January 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.