

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-04

(UNFAIR LABOR PRACTICE)

DESCHUTES COUNTY 911)	
EMPLOYEES ASSOCIATION,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
DESCHUTES COUNTY 911)	AND ORDER
SERVICE DISTRICT,)	
)	
Respondent.)	
_____)	

On August 25, 2005, this Board heard oral argument on Respondent's objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on March 14, 2005, following a hearing on November 30, 2004, in Bend, Oregon. The hearing record closed with the receipt of the parties' post-hearing briefs on December 22, 2004.

John Hoag, Attorney at Law, Snyder & Hoag LLC, 4656 Scottdale, P.O. Box 42021, Eugene, Oregon 97404, represented Complainant in proceedings before the ALJ. David Snyder, Attorney at Law, Snyder & Hoag LLC, 4370 NE Halsey St. #124, Portland, Oregon 97213, represented Complainant in proceedings before the Board.

Bruce Bischof, Attorney at Law, 747 S.W. Mill View Way, Bend, Oregon 97702, represented Respondent in proceedings before the ALJ. Nancy Hungerford, Attorney at Law, The Hungerford Law Firm, 653 S. Center St., Oregon City, Oregon 97045, represented respondent in proceedings before the Board.

On June 25, 2004, Deschutes County 911 Employees Association (Association) filed this unfair labor practice complaint, alleging that the Deschutes County 911 Service

District (District) violated ORS 243.672(1)(e) by failing to provide information in a timely manner and by violating the status quo regarding just cause for discipline when it reprimanded Cari Elliston. On October 26, 2004, Respondent timely filed its answer, admitting and denying certain allegations.

The issues are: (1) Did the District discipline Cari Elliston without just cause and in violation of the status quo during bargaining, and (2) Did the District fail to provide, in a timely manner, information requested by the Association, in violation of ORS 243.672(1)(e)?

RULINGS

Transcript of interview without recording: At hearing, the Association sought to introduce an informally typed transcript of a tape-recorded interview of Elliston by Supervisor Sara Crosswhite. The District objected unless the Association permitted it to review the tape used to produce the transcript. The Association could not locate the tape. We have stated:

“This Board will accept exhibits that are in readable format but generally will not mark audiotapes. We will accept as an exhibit a transcript of an excerpt of a tape, provided that: (a) the transcriptionist signs a notarized statement that the document is a verbatim transcript of the identified tape, and (b) the party provides the opposing party with a copy of the transcript and the full tape from which it was derived sufficiently before hearing to give the opposing party an opportunity to review the tape and transcript. A reasonable time for such disclosure generally is no less than 14 days before hearing.” *Van Dyke v. State of Oregon, Department of Fish and Wildlife*, Case No. MA-6-01 (November 2002), quoting *Fairbank v. State of Oregon, Eastern Oregon Training Center*, Case No. MA-3-98 (March 2000).

The ALJ properly denied admission of the transcript which the Association sought to introduce into evidence.

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

FINDINGS OF FACT¹

1. The District is a public employer. The Association is a labor organization and the exclusive representative of a bargaining unit of District emergency services employees, including 911 dispatcher Cari Elliston. Prior to the filing of the complaint, this Board certified the Association as representative of most of the District's employees. At all times material to this proceeding, the Association was negotiating for its initial contract with the District.

2. The District and the Association's predecessor, American Federation of State County and Municipal Employees, were signatories to a collective bargaining agreement in effect from July 1, 1999 until the certification of the Association as representative of most of the District's employees. The agreement provided that discipline could be imposed only for just cause:

“Discipline may be invoked by the Director only for just cause. Conduct reflecting a discredit upon the District or which is a hindrance to the effective performance of District functions, shall be considered reason for disciplinary action. Such reason may include, but not be limited to, misconduct, inefficiency, incompetence, insubordination, misfeasance, malfeasance, the willful giving of false information, or the withholding of information, and violation of Departmental rules. Disciplinary action need not be progressive, but shall be appropriate for the nature of the offense committed.”

3. The District's sick leave policy states:

“Deschutes County 9-1-1 Service District Policy 1.4.10, Sick Leave: ‘Abuse of sick leave is a serious matter and is grounds for disciplinary action including termination.’

“Deschutes County 9-1-1 Service District Policy 1.4.16, Fictitious reports of illness: ‘Employees will not feign illness

¹At oral argument, the Board questioned the parties regarding the existence of a prior labor contract between the parties. Following oral argument, the parties entered into stipulations regarding Findings of Fact 1 and 2, which we adopt and substitute for the findings made by the ALJ regarding these matters. The parties also referred this Board to certain documents from other ERB proceedings which were not made part of the record before the ALJ. These documents do no more than support the parties' stipulation and are, therefore, cumulative. We do not rely on these documents, nor are they made part of the record.

or injury, falsely report themselves ill or injured, or otherwise deceive or attempt to deceive any official of the District as to the condition of their health.”

4. Cari Elliston works as a District 911 dispatcher. She is married to Paul Elliston. They have two sons, ages 4 and 11, and one daughter, age 8.

5. District managers made comments to 911 dispatchers discouraging them from coming to work sick, because they could infect other workers during their long shifts in a confined work space. District 911 employees working at telephone consoles wiped them with disinfectant before and after each shift. It was Elliston’s practice to work when she was personally sick unless she was vomiting or incapacitated.

6. Prior to April 21, 2004, Elliston requested time off on April 22, 2004, to attend her son’s t-ball game. A District manager denied the request, but suggested Elliston ask again when it was clear how many dispatchers would be available for work that day.

7. On Wednesday, April 21, 2004, Elliston returned home from her day shift to find her four-year-old son vomiting. By 9 p.m. Wednesday evening, Elliston concluded that she would be up all night with the child and that it would not be prudent to work her next scheduled 12-hour shift. Around 9 p.m. Wednesday evening, Elliston called in sick for her shift beginning at 7 p.m. Thursday. She spoke with Supervisor Sara Crosswhite.

8. The District fills vacant shifts with employees who are on call. Crosswhite called in a replacement for Elliston, an employee named Kristin who was on call for such a situation.

9. By Thursday morning, April 22, Elliston herself had become sick and was vomiting. She spent most of the day in bed. In the early evening, she walked with her son to a neighborhood athletic field. She lay on the grass while he played his t-ball game. Elliston’s husband was working that evening.

10. By Friday morning, April 23, 2004, Elliston was somewhat better but feeling “drained” and occasionally sick to her stomach. At 11 a.m., Elliston called in sick for her next shift, which was to start at 7 p.m. that evening. District daytime supervisor Camille Smicz took the call and commented that Cari did not “sound good.”

11. Elliston’s husband was home on his normal day off, but was also ill. Elliston and her husband spent most of the day at home.

12. Smicz had difficulty locating someone to take Elliston's shift because the on-call worker, Kristin, had already worked the day before, and a number of District employees were ill or did not return telephone calls. Smicz called several employees at home, and was concerned that she would have to stay and work an 18-hour shift to cover for Elliston.

13. Elliston's daughter was scheduled for pictures with her softball team at 5 p.m., and a softball game from 6 to 8 p.m.; her son was scheduled for soccer practice at another location from 6 to 7 p.m. Elliston and her husband decided to share the tasks of transporting their children to these events.²

14. Elliston took her daughter to her picture and softball games in her car, which had distinctive vanity plates. Both activities were at an outdoor athletic complex. It was a cold, blustery day. Elliston, wearing several layers of warm clothing, sat in the bleachers watching the game from at least 5:10 p.m. until 6:30 p.m.

15. Crosswhite saw Elliston sitting in the bleachers and contacted Smicz.

16. After learning that Elliston was at the softball game, Smicz called Elliston's home to see if Elliston was feeling better and would be able to work her shift after all. Elliston's husband was still home and heard the telephone ring, but did not get up to answer it. Smicz did not leave a message, but when Paul Elliston got up, he noticed that the caller ID screen stated that the call had come from the District.

17. Elliston's husband took their son to his soccer practice, and then met Elliston at the softball game shortly before 6:30 p.m. He told Elliston that someone from the District called, but that he did not answer the phone.³ Elliston left the softball game at approximately 6:30 p.m. and went to pick up their son at the soccer game. She arrived early, parked in the parking lot, and waited in her car.

18. While Elliston was sitting in her car, 911 Dispatcher Megan Craig and her husband, Police Officer Stephen Craig, parked in the space to Elliston's left. Although

²It was their babysitter's regularly scheduled day off. The Ellistons did not look for someone else to handle these duties. Elliston's husband believed that they did not know the other parents well enough to have them take their children to these events.

³Another District 911 employee, Tina Stanfill, testified that Elliston told her on Saturday, April 24, that Elliston was home when Smicz called and did not answer the phone. The District suggests that this is evidence that Elliston sought to conceal her whereabouts. However, by the time of this conversation with Stanfill, Elliston knew that at least one co-employee had seen her at the athletic fields. We conclude that Elliston did not misrepresent her whereabouts to Stanfill.

Megan Craig was on maternity leave, Smicz had called her earlier that day to see if she was available to work that night because of Elliston's illness. Under the circumstances, Megan Craig was surprised to see Elliston.

19. Had she been on sick leave, Megan Craig believed that she would have picked her children up from school herself, but would have used alternative means to take her children to athletic events.

20. Megan Craig got out of her car and spoke to Elliston for a few minutes. Stephen Craig remained in the car. Elliston looked ill to both Craigs.

21. When her son arrived, Elliston drove him home, arriving after 7 p.m. She played a voicemail message from Smicz. Smicz's message said that she had called earlier to see if Elliston could come in after all, because Smicz was having trouble filling Elliston's shift. However, in the meantime, Smicz found someone to come in.

22. Elliston worked her next scheduled shift, Saturday April 24.

23. While at work on April 24, Elliston expressed concern to coworker Tina Stanfill that she might be reviewed for discipline because she called in sick on April 22, a day for which she previously requested and was denied leave. Elliston also expressed anger that Smicz called her at home after she called in sick.

24. The District decided to investigate the circumstances surrounding Elliston's April 23 absence. Between April 24 and May 16, Crosswhite interviewed Elliston and some other employees. The interview was tape recorded and later informally transcribed.

25. On May 16, 2004, Crosswhite issued a reprimand to Elliston. The reprimand stated, in part:

"Please be advised that this memorandum will serve as documentation of a written reprimand for the below outlined incident:

- Calling out sick for night shift 4/23/04 but being seen by me at 5:10 pm that same day at Redmond Spud Bowl watching your child's t-ball game in blustery weather conditions.

"I am highly disappointed in your actions, and note that your [*sic*] have violated the following policies:

- “● **Deschutes County 9-1-1 Service District Policy 1.4.10, Sick Leave:** ‘Abuse of sick leave is a serious matter and is grounds for disciplinary action including termination.’

- “● **Deschutes County 9-1-1 Service District Policy 1.4.16, Fictitious reports of illness:** ‘Employees will not feign illness or injury, falsely report themselves ill or injured, or otherwise deceive or attempt to deceive any official of the District as to the condition of their health.’

“The 9-1-1 log shows that you called out sick for your nightshift at 10:56 a.m. On the tape your voice was hoarse and you stated that you felt really bad for Kristin who was on-call but that you had been sick since the day before so you could not make it for you [*sic*] nightshift at 7 p.m. that evening. At 5:10 p.m. your car with your personalized plates was seen at Bowlby Park. At that same time your residence was called with no answer. You were seen sitting in the park watching a t-ball game. At approximately 5:25 p.m. your vehicle was still witnessed in the parking lot. At 6:12 p.m. you were seen sitting on the bleachers alone at the ballpark watching a game. Then after that game you continued to the area of Redmond BMX park near the dump where Megan spoke to you while you sat in your vehicle.

“To further investigate this situation I interviewed fellow employees who were working with you the next night when you arrived at work on April 24, 2004. You expressed concern to Tina out on the deck that you thought you were going to be written up for calling out sick for two days in a row. You advised that you had the stomach flu and that you were very upset that Supervisor Smicz called your house and left a message troubling you with staffing problems. You also advised Tina that you were at home listening to the answering machine when Supervisor Smicz called back the second time and left the message to see if you were feeling any better to come back to work the time was 6:19 p.m. [*sic*]. When asked about this same situation by me, you told me that you were not home listening to the answering machine and that it was your husband that was at home sick listening to the machine.

“By abusing sick leave you have created a lack of trust between yourself and management. I am deeply concerned about your inability to follow policy in this area. Due to the violation of this policy you are receiving a letter of reprimand. Such conduct affects everyone around you when they are called in to cover your shift. It is very important from this point forward that you follow the Policies in place in regards to sick leave. Any further instances of violation of policy (Deschutes County 9-1-1 Sick Leave Policy) will be taken very seriously. Violations will be subject to further discipline, up to and including termination.

“If you have any questions or concerns regarding this reprimand, please notify me in writing no later than May 21, 2004.”

26. On May 20, 2004, Association attorney John Hoag wrote District attorney Bischof that the Association was “contemplating challenging [Elliston’s] discipline” and requested the following information pursuant to ORS 243 672(1)(e):

“1. All documentation that exists in the District’s files to prove a violation of a policy to justify the reprimand. This is to include all the investigation conducted by the District concerning this manner [*sic*].

“2. All discipline that has occurred for the last three years, for any allegations of abuse to [*sic*] sick leave.”

Hoag also wrote that if the information could not be provided “within two weeks from the date of this letter, or at mediation at the very latest,” the District should “indicate to me well before mediation why it cannot be provided in a timely manner and when the District intends to provide it.”

27. On June 15, after it was reviewed by Association officials and counsel, Elliston gave the District her written response to the reprimand.

28. On June 17, the parties engaged in contract mediation. The District had not yet provided the information Hoag requested. Hoag asked Bischof to produce the requested information. Bischof stated that the District would do so.

29. On the morning of June 18, Hoag sent Bischof an e-mail, stating in part that, “if Cari’s requested discovery is not on my desk a week from yesterday, or her discipline not rescinded, a ULP will be filed that day [Thursday, June 24].”

30. On June 24, Bischof sent Hoag a packet by Federal Express in response to the information request. Bischof enclosed copies of other reprimands of other employees regarding sick leave, a tape of an interview of Elliston, and a letter from Interim District Director Schrader to Bischof dated June 23, 2004, summarizing Schrader's investigation of the relevant facts regarding the Elliston reprimand. Hoag received the material on June 25.

31. Although the complaint is dated June 21, the Association did not file it until June 25, 2004.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it reprimanded Elliston without just cause, contrary to the status quo.

The Association alleges that the District unilaterally changed the discipline standard in violation of the status quo requirements of ORS 243.672(1)(e) by reprimanding Elliston without just cause. The District agrees that the "just cause" requirement of the old contract became part of the status quo, but argues that Elliston's actions on April 23, 2004 were "not defensible by any standard, including 'just cause.'" (Resp. Br. p. 7.)⁴

In this type of case, we first identify the status quo, which is the just cause and progressive discipline standards contained in the expired collective bargaining agreement. *Todd Cooper v. Oregon Department of Corrections and Executive Department, Personnel and Labor Relations Division*, Case No. UP-22-92, 14 PECBR 93, 105 (1992). Next, we determine the meaning of the applicable standards in that agreement and apply those standards to the facts at hand.

In *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 137-138 (2002), *AWOP*, 192 Or App 672, 89 P3d 688 (2004), we described the analysis we use to interpret the language of a collective bargaining agreement:

⁴This Board has stated: "[A]n employer must maintain the status quo as to mandatory subjects of bargaining during the hiatus period (typically after the expiration of the parties' contract and until the exhaustion of Public Employees Collective Bargaining Act (PECBA) dispute resolution process)." We have also held that just cause for discipline is a mandatory subject of bargaining *Todd Cooper v. Oregon Department of Corrections and Executive Department Personnel and Labor Relations Division*, Case No. UP-22-92, 14 PECBR 93, 105 (1992) (Citations omitted)

“We first examine the text of the article in the context of the contract: if the provision is ‘clear,’ our analysis ends. If the text is ‘ambiguous,’ we examine ‘extrinsic evidence of the contracting parties’ intent.’ If the meaning of the text remains unclear, we use ‘appropriate maxims of contract construction.’ *IAM Woodworker Lodge W-261 v. Roseburg Urban Sanitary Authority*, Case No. UP-75-97, 17 PECBR 757, 763 (1998), citing *Yogman v Parrott*, 325 Or 358, 361-364, 937 P2d 1019 (1997); *OSEA v. Rainier School District*, Case No. UP-85-85, 9 PECBR 9254 (1986), 311 Or 188, 194, 808 P2d 83 (1991); and *MCLEA v. Marion County*, Case No. UP-101-91, 13 PECBR 829 (1991), 130 Or App 569, 575, 883 P2d 222 (1994).”⁵

We follow this template here and begin with an examination of the pertinent contract language in context. It states:

“Discipline may be invoked by the Director only for just cause. Conduct reflecting a discredit upon the District or which is a hindrance to the effective performance of District functions, shall be considered reason for disciplinary action. Such reason may include, but not be limited to, misconduct, inefficiency, incompetence, insubordination, misfeasance, malfeasance, the willful giving of false information, or the withholding of information, and violation of Departmental rules. Disciplinary action need not be progressive, but shall be appropriate for the nature of the offense committed.”

⁵The term “just cause” is not self-defining. We part analytical ways with our concurring colleague over how to give meaning to the term. Our colleague would proceed directly to cases that identify and discuss “the common law of labor relations.” We believe we must first look to the contract and should consult the common law only if the contract is silent. Parties are free to negotiate their own standards of what constitutes just cause for discipline, and we will enforce such an agreement. That is what occurred here. The parties’ agreement contains a list of employee conduct that “shall be considered reason for disciplinary action.” The District charged Elliston with violating its rules regarding sick leave, so the pertinent reason listed in the contract is “violation of Department rules.” This rule violation, if proved, can be grounds for discipline because that is what the parties expressly agreed to. Our colleague would have us ignore this language in the parties’ agreement. We cannot. ORS 42.230 (when construing an instrument, the court may not omit what the parties have inserted). We hold, quite simply, that we will look first to the words of the contract to determine the contractual standards the District must meet in order to discipline a bargaining unit member. We resort to common law definitions only if the contract language fails to provide an answer.

Under this contract language, we must determine whether the District had just cause to discipline Elliston, and if so, whether the discipline was appropriate to the nature of the offense.

The District sent Elliston a letter which identified the reason for her discipline: "Due to the violation of this [sick leave] policy you are receiving a letter of reprimand." The contract is unambiguous on this point. It specifically recognizes a "violation of Departmental rules" as a reason for discipline. We therefore turn to the threshold factual question of whether Elliston violated the sick leave rule.

The burden of proof regarding this claim is on the complainant. *Association of Oregon Corrections Employees v. Oregon Department of Corrections*, Case No. UP-21-94, 15 PECBR 621 (1995). The District concluded that, on April 23, 2004, Elliston violated its policies against "Abuse of sick leave." Specifically, it concluded that she violated District Policy 1.4.16, "Fictitious reports of illness," by "[C]alling out sick for night shift 4/23/04 but being seen by [Crosswhite] at 5:10 p.m. that same day at Redmond Spud Bowl watching your child's t-ball game in blustery weather conditions."

The District's "Fictitious reports of illness" policy provides:

"* * * Employees will not feign illness or injury, falsely report themselves ill or injured, or otherwise deceive or attempt to deceive any official of the District as to the condition of their health."

There is no dispute that Elliston called in sick, took her daughter to her athletic events, sat on the bleachers for an hour in the cold, waited in her car in an outdoor parking lot, and then returned home with her son some two hours after leaving home with her daughter. The evidence also shows that Elliston was, in fact, sick on April 23. The District argues that, whether Elliston was ill or not, if she was well enough to sit on outdoor bleachers watching a softball game on a cold, blustery day, she was well enough to report to work.⁶ Therefore, the District argues, Elliston "feigned" that she was too sick to work. As the District argued in its post-hearing brief "[t]he written reprimand was designed to address a serious problem by an employee. That being the use of paid sick leave in order to attend

⁶In its brief to the ALJ, the District took the position that Ms. Elliston had gone to the softball game on paid time. This is incorrect. The record does not disclose when Elliston arrived at the t-ball game. All we know is that Elliston was seen by Crosswhite at the softball field at 5:10 p.m. Elliston's shift was not due to start until 7:00 p.m. She arrived home from the softball game sometime shortly after 7:00 p.m. However, this is of limited relevance, since the District only argues that if Elliston was well enough to watch the softball game, she was well enough to go to work.

family sporting events. * * * In the case of employee Cari Elliston, calling in sick for a regularly assigned shift on April 23, and thereafter spending two to three hours outdoors in cold weather watching the children's sporting events is fundamentally wrong." (Resp. Br. at 7-8.)

The Association and Elliston contend that Elliston was ill, and believed she was well enough to fulfill these obligations to her children but not well enough to work her scheduled shift, a 12-hour shift from 7 p.m. to 7 a.m. The Association also notes that "it had been discussed at work not to come to work when one was sick because of the problem of infecting other employees in a closed area." (Comp. Br. at 3)

The District argues that Elliston should have used alternatives, such as sending the children with other parents, finding another babysitter, or keeping the kids at home. The Association and Elliston counter that it was the Ellistons' babysitter's day off, the Ellistons didn't know other parents well enough to ask such a favor, and it seemed unfair to deprive their children of scheduled athletic events through no fault of their own.

We have determined that Elliston was, in fact, sick on April 23, 2004. The Association notes that the District has no policy requiring that an employee on sick leave stay in his or her home, and that if such a policy existed, it would likely need to contain numerous exceptions for visits to the doctor's office, drugstore, and perhaps even picking up children.

We do not agree with the District that, simply because Elliston was well enough to sit outdoors for more than an hour on a cold day, while dressed for the weather, she was well enough to work a 12-hour shift as a 911 dispatcher.

Based on the evidence before us, we conclude that Ellison did not feign injury or illness, did not falsely report herself ill and did not deceive anyone about the state of her health in violation for District policies. Therefore, we find that her conduct did not warrant discipline. We do not need to proceed further with our analysis.

We shall order the District to withdraw the reprimand and otherwise make Elliston whole.

3. The District violated ORS 243.672(1)(e) by its delay in providing a response to the Association's request for information.

On May 20, 2004, the Association advised the District that it was contemplating a challenge to Elliston's discipline and requested the following:

“1. All documentation that exists in the District’s files to prove a violation of a policy to justify the reprimand. This is to include all the investigation conducted by the District concerning this manner [sic].

“2. All discipline that has occurred for the last three years, for any allegations of abuse to [sic] sick leave.”

The District does not dispute that the Association was entitled to the requested information. However, the District contends that it was reasonable for it to take approximately 35 days to respond to the Association’s request.

The Association sought the information “within two weeks from the date of this letter, or at mediation at the very latest,” and, if the District could not provide the information within that time, asked the District to advise the Association “well before mediation why it cannot be provided in a timely manner and when the District intends to provide it.” The District did not provide either the information or an explanation, prompting an Association e-mail to the District on the morning of June 18, stating in part that “if [Elliston’s] requested discovery is not on my desk a week from yesterday, or her discipline not rescinded, a ULP will be filed that day [June 24].”

There is no evidence in the record that any or all of the documents at issue were unusually difficult to locate or copy. Nor does the District argue that the request for information was vague, or that the records sought were voluminous. The District notes that its director is identified in the record as an “interim” director, and argues that this Board should conclude that it was harder for this individual to obtain the information because of his interim status. However, the record contains no evidence to this effect. Nor is there evidence that the District provided any explanation to the Association for its delay in providing all of the documents, or that it provided any documents readily available, such as the disciplinary file and tape recording of Elliston’s interview, without unnecessary delay.

It is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” ORS 243.672(1)(e). As part of their duty to bargain in good faith, employers and labor organizations have a duty to provide information to each other upon request if the information sought is of “probable or potential relevance” to a grievance or other contract administration issue, *Olney Education Association v. Olney School District 11*, Case No. UP-37-95, 16 PECBR 415, 418 (1996), *aff’d* 145 Or App 578, 931 P2d 804 (1997), or if “the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal,” *Washington County School District No. 48 v. Beaverton Education Association and Nelson*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981).

This Board considers four factors in reviewing an alleged refusal to provide information:

“* * * (1) [T]he reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested; and (4) the history of the parties’ labor-management relations. * * *” *Olney School District*, 16 PECBR at 417-418, citing *OSEA v. Colton School District*, Case No. C-124-81, 6 PECBR 5027 (1982).

The Association has the burden of establishing that the District refused to provide information in a timely fashion. OAR 115-35-042(6). Whether the period of time between the request and the response is reasonable depends on the totality of the circumstances. *Association of Oregon Corrections Employees v State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 672 (2004), citing *Colton School District*, 6 PECBR at 5031. These circumstances include such matters as “the accessibility of the data, clerical time necessary to produce the information, the workload priorities of the responding party, and the amount of data requested.” 6 PECBR at 5032. Further, “the reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether” where the parties’ history includes a pattern of numerous requests or apparent “fish-and-grieve” expeditions. *Id.*

In *Marion County Law Enforcement Association v Marion County and Marion County Sheriff’s Office*, Case No. UP-58-92, 14 PECBR 220 (1992), the union requested documents which the employer provided within 30 days, but after an unfair labor practice complaint had been filed. This Board stated:

“The County argues that the delay in providing the information was less than 30 days, and that a minimal delay of that nature does not support a finding of a violation. We do not agree. The issue is not the length of the delay, but the timing of the release. The County did not suggest that it would have been too difficult to release the information on request. The County did not establish any legitimate reason for the delay in providing the reports.” 14 PECBR at 226-227.

Although the material sought by the Association required a search of the District’s records, there is no evidence in this record that either Elliston’s disciplinary file, or the additional material sought by the Association, was difficult to locate. Under the totality of the circumstances set out on this record, this Board concludes that the District failed to

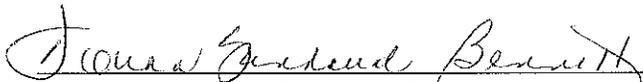
respond in a reasonable time to the Association's request for information, and that this failure violates its ORS 243.672(1)(e) duty to provide information. We shall order the District to cease and desist from failing to respond in a reasonable time to such information requests from the Association.

ORDER

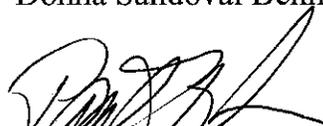
1. The District shall cease and desist from violating the status quo by disciplining Cari Elliston without just cause, shall rescind the written reprimand of Elliston, and shall make her whole for any consequences of that reprimand.

2. The District will cease and desist from refusing to respond to Association requests for information within a reasonable time after the request is made.

DATED this 15th day of May 2006.



Donna Sandoval Bennett, Chair



Paul B. Gamson, Board Member



*James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Kasameyer, concurring.

I join with my colleagues in their holding that the District violated ORS 243.672(1)(e) by failing to furnish information to the Association as requested. I agree with my colleagues that the District violated ORS 243.672(1)(e) when it reprimanded Elliston, but disagree with their analysis.

The Association alleged that the District unilaterally changed the discipline standard, in violation of the status quo requirements of ORS 243.672(1)(e), by reprimanding Elliston without just cause. The District agreed that the “just cause” requirement of the old contract became part of the status quo, but argues that Elliston’s actions were “not defensible by any standard, including ‘just cause.’” (Resp. Br. p. 7.) The status quo also included an arbitration clause, under which an arbitrator would determine whether Elliston’s discipline was proper.

My colleagues do not frame the issue as do the parties. They only answer the question of whether Elliston violated District policies. The majority’s analysis begins and ends as follows: the contract says that an employee may be disciplined for violation of District policy; Elliston did not violate District policy; therefore, the District did not discipline her in accordance with the contract. To reach this result, the majority applies the same analysis as would a reviewing court, *Hillsboro Education Association*.

That analysis is not appropriate here. In the *Hillsboro Education Association* case, this Board interpreted a contract term in order to determine what the status quo was. Here, we already know what the status quo consisted of: a contract which allowed discipline only for “just cause,” and which provided for binding arbitration of grievances contesting disciplinary action. The parties bargained for an arbitrator’s determination of whether discipline was imposed for “just cause.” My colleagues did not give the parties the benefit of their bargain.

To eliminate the arbitrator from the arbitration clause, as my colleagues did, is to interpret “abuse of sick leave” without any analytical framework. My colleagues correctly conclude that Elliston was sick. But what if she was not? What if she did abuse sick leave? Is this, too, merely a matter of contract interpretation, as in *Hillsboro Education Association*? Must the Board then determine if grievant’s conduct brought discredit to the Agency? If so, under what standard? If we determine that her conduct did bring discredit to the Agency, what then? Do we look at the contract language in a void? Or to put it simply, what standard does the Board apply to determine if Elliston was disciplined for just cause?

At some point, it seems, this Board must step into the shoes of the arbitrator. We should do so at once, thus avoiding these questions. Application of the standard just cause analysis—which always begins by determining whether the alleged offence was committed—does not amount to bringing something “extraneous” to the contract’s interpretation. Rather, it gives effect to the agreement. It is also the approach which this Board has used historically.

In cases such as this, this Board first identifies the status quo, which is the just cause standard contained in the expired collective bargaining agreement. *See, e.g., Todd*

Cooper v. Oregon Department of Corrections and Executive Department, Personnel and Labor Relations Division, Case No. UP-22-92, 14 PECBR 93, 105 (1992). Next, we apply those standards to the facts at hand. If the parties do not provide us with an arbitrator's ruling interpreting the "just cause" provisions of this agreement, we turn to the "reasonable employer" standard articulated by this Board in prior cases.²

This Board first adopted the "reasonable employer" test in "just cause" cases in *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986). As will be seen, we have not departed from it since. The question before this Board was whether the District disciplined an employee for just cause. We noted that

"* * * When this Board interprets [a contractual 'just cause' provision], it must give full consideration to the principles established over the years—mostly by arbitrators—that compose what often is called the 'common law of labor relations.'

"* * * * *

"The Oregon Supreme Court also has noted that '[c]ollective bargaining agreements are not 'ordinary contracts' and are not 'governed by the same old common law concepts which control private contracts,' but are unique in character and a field unto themselves.'" 9 PECBR at 8849. (Citation omitted.)

We then explained that

"In labor relations practice the term 'just cause' also carries with it a variety of conditions or restrictions on management's right to discipline employees. In judging discipline cases under the State Personnel Relations Law, this Board applies a 'no reasonable employer' standard, as explicated by the Court in *Brown v. Oregon College of Education*, 53 Or App 251 (1981). * * * We believe that the reasonable employer standard comprehends the generally-accepted elements used by arbitrators or others in making just

²Compare, *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, Case No. UP-22-00, 18 PECBR 847, 859 (2000), in which the parties introduced, and this Board accepted as authoritative, an arbitrator's decision interpreting the "just cause" provision of the applicable prior contract

cause determinations. Consequently, when confronted with (1)(g) complaints concerning 'for cause' discipline questions, this Board will use the reasonable employer standard to determine: first, whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable."³ 9 PECBR at 8850. (Citation omitted.)

In *Hillcrest/McLaren Education Association v. State of Oregon, Executive Department and Hillcrest/McLaren Schools*, Case No. UP-99-91, 13 PECBR 866, 881-882 (1992), the relevant language of the expired contract provided that no employee could be disciplined or discharged "without just cause and due process." ERB's analysis was quite different than that applied by my colleagues in this case. This Board did not first consider whether the employer had failed to provide "due process." Nor did it consider "due process" and "just cause" separately. Rather, it first defined "due process" with reference to state employment law; and then proceeded to analyze the due process issue as part of its "just cause" analysis.

Quoting from its decision in *Multnomah County Corrections Officers Association v. Multnomah County*, Case No. UP-21-86, 9 PECBR 9529 (1987), ERB summarized the principles underlying that standard as follows:

"In just cause cases such as this the Board's role is analogous to that of a grievance arbitrator. In making just cause determinations, the Board applies a 'reasonable employer' test, much like the 'reasonable person' test utilized in common law negligence cases. The 'reasonable employer' test is an objective one under which the employer's disciplinary action will be judged in terms of whether a fictive 'reasonable employer' would have taken the same disciplinary action under similar circumstances. (Citation omitted.) This analysis necessarily involves reference to the 'common law of labor relations,' as reflected in the large body of judicial and arbitral precedent. *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832 (1986).

³This Board made clear that the same standard would apply in subsection (1)(e) "status quo" cases involving just cause provisions. 9 PECBR at 8848-9, n. 20.

“Those principles require generally that the disciplinary action be taken in good faith for nondiscriminatory reasons; that the rules under which an employee is disciplined be reasonable ones; that the employee be given fair notice, express or implied, that the conduct involved will lead to disciplinary action; that an employee be given some opportunity to refute the charges of misconduct; and that the discipline given be appropriate and proportionate to the offense.” 13 PECBR at 881-882 (Citation omitted.)

In *Cooper v. Department of Corrections*, the contract provided that “[t]he principles of progressive discipline shall be used when appropriate. Discipline and dismissal . . . shall be imposed only for just cause.” 14 PECBR at 99. This Board did not first determine under the *Hillsboro Education Association* standard whether the employer failed to provide progressive discipline; but rather proceeded directly to a “just cause” analysis under the Board’s reasonable employer standard.

ERB concluded that a reasonable employer would not have disciplined Cooper as the Department did. Based upon our consideration of the severity of his offences against his past record, we found that the severity of the discipline was without just cause. We rescinded the discipline and issued a make-whole order.

Similarly, in *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, Case No. UP-22-00, 18 PECBR 847 (2000), the relevant contractual language included more than a bare reference to “just cause.” It also provided that “[t]he principles of progressive discipline shall be used when appropriate.” 18 PECBR at 857. Some years before the unfair labor practice complaint was filed, an arbitrator issued an arbitration award interpreting this language. We noted that

“The arbitrator determined that just cause would exist if the employer established the following:

‘* * * (1) Did the employer establish that the alleged misconduct occurred? (2) Did the employee know, or should s/he have known, that the conduct was incorrect and that the discipline that ensued was a likely result of the conduct? (3) Was the disciplinary process administered fairly and regularly? (4) Was the penalty that was imposed ‘within an ambit of reasonableness?’”
18 PECBR at 858.

This Board found that this definition of just cause consistently applied by the employer. We therefore determined that it was part of the status quo; and hence used the arbitrator's standards to decide the unfair labor practice case.⁴ We did not first attempt to analyze applicable contract language under *Hillsboro Education Association*, nor did we seek to decide the case based on whether progressive discipline was applied.

Instead, ERB analyzed the case as an arbitrator would—or as ERB does when it applies its reasonable employer analysis. We asked and answered the arbitrator's first question—that is, we found that the employer had not proven that the alleged misconduct had occurred—and proceeded no further. My colleagues erred by not applying the same process here.

⁴We noted that the arbitrator's definition "squares with this Board's approach to just cause cases" and went to yet again summarize just what this approach entails. *Id.* at 859, n. 6. (Citations omitted.)