

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-06

(UNFAIR LABOR PRACTICE)

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

On June 13, 2007, this Board heard oral argument on Complainant's objections to a Recommended Order issued on April 6, 2007 by Administrative Law Judge (ALJ) Vickie Cowan, following a hearing on October 30, 2006 in Salem, Oregon. The record closed on December 18, 2006, upon receipt of the parties' post-hearing briefs.

Becky Gallagher, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 423 Lincoln Street, Eugene, Oregon 97401, represented Complainant.

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

On July 14, 2006, the Association of Oregon Corrections Employees (AOCE) filed this unfair labor practice complaint alleging that the Department of Corrections (DOC) violated ORS 243.672(1)(e) by unilaterally transferring bargaining

unit work. DOC filed a timely answer admitting and denying certain allegations and raising affirmative defenses.

The issue is: Did DOC unilaterally transfer AOCE bargaining unit work in violation of ORS 243.672(1)(e)?

RULINGS

1. At hearing, the Oregon State Penitentiary (OSP) moved to dismiss the allegation that it unlawfully transferred work that traditionally belonged to bargaining unit electricians. The ALJ deferred ruling on the motion.

AOCE has the burden of proof in this matter. AOCE presented little evidence and no argument to support this claim, and at oral argument, it conceded it did not prove its case in this regard. We will dismiss the allegation regarding the electricians.

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. AOCE is the exclusive representative of a bargaining unit of corrections personnel employed by DOC, a public employer.

2. AOCE and DOC are parties to a collective bargaining agreement that expired on June 30, 2007.

3. AOCE represents the non-security staff at OSP including physical plant staff, nurses, and culinary staff.

4. Physical plant classifications in the AOCE bargaining unit include facility maintenance specialist, electrician, plumber, carpenter, painter, and facility energy technician.

5. Nick Koval is the only facility energy technician (FET) III at OSP. Koval is also AOCE's executive vice-president for the non-security staff.

6. Koval's job duties include: boiler operation and monitoring; designing, installing, repairing, and troubleshooting heating, ventilation, and air conditioning systems (HVAC); and designing, building, installing, maintaining, and repairing commercial and domestic refrigerators, fans, freezers, and other types of HVAC.

equipment. Koval also supervises inmates and is responsible for their work on the HVAC systems.

7. Koval is the only represented employee at OSP regularly assigned to maintain and operate OSP's HVAC systems. The electricians assist him at times, but electricians are not certified to handle the gasses used in HVAC systems.

8. Don Neal is a maintenance and operations supervisor 2 and Koval's direct supervisor. Neal is not a member of the AOCE bargaining unit. Neal's job description requires that Neal maintain and repair the physical plant and equipment, perform a wide variety of building trades in the maintenance and improvement of the institution, provide preventative maintenance on all equipment and buildings, respond to emergency breakdowns, shut down systems when appropriate, maintain inventory, and order supplies. This position directs, instructs, and coordinates inmate work crews in the performance of repairs and enforces all applicable DOC rules and procedures, institution procedures, and administrative directives.

9. Koval and Neal both possess the appropriate licenses for repairing HVAC system. Before Koval assumed the HVAC duties, Neal performed them.¹

10. OSP policy provides that employees will not be called into work while they are on an approved vacation unless there is a declared emergency.

11. Koval took his regularly scheduled vacation from May 12-19, 2006. By e-mail dated May 11, 2006, Koval notified AOCE and OSP that he would be on vacation during the week of May 12-19 and would be available by pager on May 17, and 18, but unavailable on May 15, 16, or 19.

12. Neal was also on vacation May 15 and 16.

13. During the week of May 15, 2006, the outside temperature was unseasonably warm and sometimes exceeded 100 degrees.

14. On May 16, OSP Physical Plant Manager David Versteeg called Neal and informed him that OSP was having air conditioning and refrigeration problems, and asked Neal to come to work. Neal asked Versteeg if he had called Koval, and Versteeg said Koval was not available.

¹Neal has been a supervisor since his hire in 1984.

15. On May 16, Neal repaired the air conditioning unit in the Intensive Management Unit (IMU) by resetting the circuit breaker. IMU is a maximum-security detention facility which houses approximately 100 inmates in windowless cells with no outside ventilation.

16. Neal also repaired two of the six walk-in refrigerators in the culinary department. The culinary department stores and prepares meals for OSP's inmates and staff. When the refrigerators malfunctioned in the past, the food was transferred to another refrigerator until Koval could fix it. However, two refrigerators were down at the same time on May 16.

17. On May 17, Neal, with the assistance of two electricians, performed additional repairs on the IMU air conditioning unit, and also repaired an air conditioning unit on the infirmary building roof. The infirmary is on the third floor of the infirmary building. It is comprised of medical and dental offices, and a ward where inmates are treated. There are windows that open in the infirmary, but when it is 100 degrees outside it is about 110 degrees in the infirmary.

18. On May 18, Neal, with the assistance of two electricians, repaired the air conditioning unit in the special management unit (SMU). SMU houses inmates who are being evaluated and/or treated for psychiatric conditions.

19. From May 16 through May 19, Neal used inmate Dearborn to assist him in the repairs.²

20. In the past, when OSP had problems with the HVAC systems and Koval was not present, the practice was to determine whether the repairs could wait until Koval could make them. If the repairs could not wait, OSP frequently called Koval back from his normal days off or from union leave to make the repairs. It once called Koval in from sick leave, and in April 2005, it called Koval back from his vacation when OSP had a declared emergency. Except during this declared emergency, OSP has not recalled Koval from vacation.³

²Measure 17 requires that inmates work while incarcerated. Three inmates are assigned to the HVAC shop. They report for work in the morning and then again after lunch. If their services are not needed, they are credited with either one hour or one and one-half hours work and released back to their cells.

³AOCE presented some testimony that OSP called Koval back from vacation on several occasions. It gave no specific dates, although one witness provided general time frames for the

21. Neal and Koval discuss the maintenance of the machinery on a daily basis.

22. On June 8, 2006, Physical Plant Manager Versteeg sent Koval a memorandum about the use of managers to perform trade and maintenance work. It stated: "If you [Koval] are not available and I determine that the work needs to be accomplished (non-emergency) he [Neal] could be assigned by me to make the repairs or adjustments."

23. Article 1, Section 6. Emergencies, of the parties' collective bargaining agreement provides, in pertinent part, that:

"During periods of bona fide emergency, provisions of this Contract regarding work assignments and scheduling, job posting, and overtime scheduling may be temporarily suspended by the Employer as required for the duration of the emergency. As soon as practicable, notification of the emergency status will be made to the Association or designee.

"A. A bona fide emergency is defined as the period of time during an unexpected occurrence or set of circumstances involving a substantial threat to Employer's ability to maintain the safe custody, control and security of inmates, including natural and man-made disasters or crises necessitating immediate lock down of inmates or extraordinary increase in security measures, including but not limited to earthquakes, storms, fires, inmate riots, bomb threats, explosions, power outages, inmate epidemics, escape attempts or other serious breaches of security, substantial unexpected depletions of available staff due to military call ups or disease epidemics, and periods of similar types of unexpected occurrences or sets of circumstances, which have the actual or probable effect of seriously compromising Employer's

call-backs. The time sheets in the record for that general time frame, however, do not indicate that Koval was called back from vacation, and DOC disputed that it ever happened. We find that, with the exception of a declared emergency, Koval has not been called back from vacation.

ability to maintain safe custody, control and security of the inmate population.”

24. The parties agree that the situation in May was not a declared emergency as defined in the collective bargaining agreement.

25. The May situation was the first time that OSP did not wait for Koval’s return from vacation before repairing the equipment. This was also the first time the institution had this many HVAC problems in such a short amount of time or during such extreme temperatures.

26. ARTICLE 9 - CONTRACTING OUT, provides in pertinent part:

“Section I.

“The Agency may determine to contract or subcontract work provided that as to work which is presently and regularly performed by employees in the bargaining unit, the Agency agrees to notify the Association and negotiate the decision and the impact of the pending action. It is specifically understood that such negotiations are not required in (1) emergency situations; (2) where the impact is minimal (and not mandatory).”

CONCLUSIONS OF LAW

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

2. DOC did not transfer bargaining unit work in violation of ORS 243.672(1)(e).

AOCE asserts that OSP unlawfully changed the *status quo* when it assigned a supervisor to perform repair work rather than calling the bargaining unit member who normally performs the work back from vacation.

Nick Koval is the only bargaining unit member at OSP who is licensed to repair HVAC and refrigeration systems. Koval was on vacation from May 12-19. During that week, the outside temperature was unseasonably warm, sometimes exceeding 100 degrees. In the midst of that heat wave, the air conditioning units in the infirmary

and in two special facilities that house prisoners all broke down. Temperatures inside these facilities sometimes reached 110 degrees. In addition, two of OSP's six walk-in refrigeration units malfunctioned. These units store food for OSP inmates and staff.

OSP determined that repairs to the HVAC systems and refrigeration units could not wait for Koval to return from his vacation. Don Neal, Koval's supervisor, also has the appropriate licenses to repair HVAC systems. Neal is not a member of the AOCE bargaining unit. OSP's physical plant manager called Neal in to perform the necessary repairs. The repairs took three days, all during Koval's vacation. Both parties agree the work assignment issue is not addressed in their collective bargaining agreement. AOCE contends OSP violated ORS 243.672(1)(e) by assigning the work to Neal rather than calling Koval back from his vacation.

The obligation of good faith in ORS 243.672(1)(e) requires OSP to bargain to completion with AOCE before it changes the *status quo* regarding a mandatory subject of bargaining that is not addressed in the parties' contract. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89 (2001). When, as here, a union alleges the employer made a unilateral change, we must determine (1) whether the employer changed the *status quo*, and (2) whether the change concerns a mandatory subject for bargaining. *Roseburg Fire Fighters Association, IAFF Local 1110 v. City of Roseburg*, Case No. UP-47-97, 17 PECBR 611, 628 (1998); and *OSEA v. Bandon School District*, Case No. UP-26/44-00, 19 PECBR 609, 619 (2002).

The first step in our analysis is to identify the *status quo* and determine whether OSP changed it. A working condition can become the *status quo* in a number of ways, including through past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65, *reconsidered* 19 PECBR 895 (2002), *aff'd* 187 Or App 92, 67 P3d 951 (2003).

AOCE contends the parties' past practice establishes the relevant *status quo*. AOCE, as the party asserting the past practice, carries the burden of proving it. *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005). In *Lane County*, we discussed the factors we consider when deciding if there is a binding past practice:

“[W]e consider whether the alleged practice is clearly established. To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the

circumstances under which the past practice was created, and the existence of mutuality. Mutuality concerns the question of whether [the] practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or whether the practice arose from choices made by the employer in the exercise of its managerial discretion without any intention of future commitment.” 20 PECBR at 993 (citing *OSEA, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726 (1981)).

AOCE has failed to prove a clear and consistent practice that the parties have adhered to over a period of time. In fact, it does not appear, at least on this record, that this situation has ever come up before; that is, the HVAC system has not needed immediate repairs while Koval was on vacation.⁴ Because the situation is unprecedented, AOCE has not proved a clear and long-standing past practice that establishes the *status quo*.

The *status quo* can also be established through an employer policy. *Lincoln County Education Association*, 19 PECBR at 665.⁵ OSP has a policy which provides that employees will not be called back from vacation except in declared emergencies. There was no declared emergency. We find that the policy establishes the relevant *status quo*: employees will not be called back from vacation to perform repairs. OSP did not alter the *status quo* when it assigned Neal to perform the necessary repairs rather than calling Koval back from his vacation. Thus, OSP was under no obligation to bargain, and accordingly, we will dismiss the complaint.

AOCE also asserts that OSP’s June 8 memo to Koval demonstrates that OSP intends to change other call-back practices. The memo states that when Koval is “not available” and there is a need for non-emergency repairs, Neal may be assigned to perform the work. The memo does not state whether OSP considers Koval to be “not available” in circumstances other than during his vacation. We have made findings regarding OSP’s practice of calling Koval back to perform necessary repairs before or after his regular work hours, on his normal days off, and when he is out on sick leave

⁴The only exception was during a declared emergency. The parties agree that the collective bargaining agreement addresses call-backs during a declared emergency; they also agree that there was no declared emergency during the heat wave.

⁵We can also look to employer work rules to identify the *status quo*. There are no pertinent work rules in this record.

There is no evidence that OSP changed any of these practices. To the contrary, OSP stated on the record during oral argument that it does not intend to change its practices in this regard. If a case involving specific facts comes before us in the future, we will analyze it in light of our findings here and OSP's concession. In the absence of proof of a change at this time, however, we will not find a violation.

ORDER

The Complaint is dismissed.

DATED this 26th day of November 2007.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Cowan has recused herself.