

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-39-06

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES	)	
ASSOCIATION,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW
	)	AND ORDER
COVE SCHOOL DISTRICT #15,	)	
	)	
Respondent.	)	
_____	)	

This matter was submitted directly to this Board on October 30, 2007, following a hearing before Administrative Law Judge (ALJ) Vickie Cowan on April 10 and 11, 2007 in Cove, Oregon. The record closed with submission of post-hearing briefs on June 1, 2007.

Sarah K. Drescher, Attorney at Law, Law office of Michael Tedesco, 1729 N.E. 65<sup>th</sup> Avenue, Hillsboro, Oregon 97124, represented Complainant.

David Turner, Attorney at Law, Oregon School Boards Association, 1201 Court Street N.E., Suite 400, Salem, Oregon 97308-1068, represented Respondent.

On August 18, 2006, the Oregon School Employees Association (OSEA) filed this unfair labor practice complaint alleging that the Cove School District #15 (District) discharged Ramona Roper in violation of ORS 243.672(1)(a) and (c).

The following issue is presented: Did the District violate ORS 243.672(1)(a) and (c) when it laid off Ramona Roper?

## RULINGS

At the hearing, the ALJ deferred ruling on the admission of Exhibits C-28, C-29, C-30, and C-33. We will consider the admissibility of each of these exhibits in turn.

Exhibit C-28 is a September 13, 2006 article from the “Observer” newspaper that describes an increase in the number of students enrolled in District schools for the 2006-07 school year. The Association offered this exhibit to demonstrate that one of the reasons the District gave for laying off Roper—lack of need for her services—was false. Exhibit C-28 contains no information about enrollment of the special education students with whom Roper worked. Accordingly, it provides no relevant evidence concerning the District’s need for Roper’s services and will not be admitted into evidence.

Exhibits C-29, C-30, and C-33 were offered to demonstrate that another reason the District gave for discharging Roper—lack of funds—was false. Exhibit C-29 is an October 19, 2006 article from the “Observer” newspaper that describes an upcoming election on a District bond levy for capital construction and building maintenance. Exhibit C-30 is a “District Profile Data Comparison for Cove School District 15” prepared by the Oregon Department of Education that provides data regarding District student enrollment for the 2004-05 and 2005-06 school years. Exhibit C-33 is a newsletter prepared by the Oregon School Boards Association Insurance Trust that notes that the cost of health insurance plans offered by the Trust will increase 1.4 percent in 2006. None of these exhibits provide specific information about funding for District operating expenses for 2006, the year in which Roper was discharged. Exhibits C-29, C-30, and C-33 are not relevant and will not be admitted into evidence.

All other rulings of the ALJ were correct.

## FINDINGS OF FACT

1. The District is a public employer and OSEA is a labor organization.
2. The District and its classified employees were parties to a contract in effect from June 1, 2003 through July 30, 2006.<sup>1</sup> The contract provided, in relevant part:

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<sup>1</sup>From this record, it is not clear whether this contract was collectively bargained.

“When it becomes necessary to lay off an employee, the District shall make every effort to give thirty (30) days written notice to the employee.”

3. On February 9, 2004, Roper began working full time for the District as an instructional assistant. During the first year that she was employed by the District, Roper assisted special education students in the high school resource room. In the spring of 2005, Roper’s position was reduced to half time.

4. At the beginning of the 2005-06 school year, District Superintendent Jeffrey Clark assigned Roper to work half-time with an autistic student in addition to her half-time job in the high school resource room.

5. In her assignment helping the autistic student, Roper worked closely with Special Education Teacher Jan Michel. Problems soon developed between Michel and Roper. Roper believed that Michel provided her with inadequate and ineffective training, and Michel thought that Roper was unprofessional and uncooperative. Both Michel and Roper complained about one another to Clark.

6. In December 2005, Roper began keeping a log on a District computer in which she recorded daily notes about Michel’s performance. Any District employee could readily access Roper’s log. Michel was deeply upset when she discovered the log. On December 13, 2005, Michel and a representative from the teacher’s union met with Clark to complain about the log. The union representative told Clark that he believed it was inappropriate for a classified employee to make comments about the performance of a certified staff member. Clark talked with Roper, and told her that she must stop keeping the computer log.

7. Clark believed that neither Roper nor Michel was to blame for the problems that had developed in their working relationship. He thought that their difficulties resulted from a personality conflict and decided it would be best to separate them. In January 2006, Clark reassigned Roper to work full time in the high school resource room. In this position, Roper had less frequent contact with Michel.

8. In February 2006, Roper contacted OSEA about representing District classified employees. On a number of occasions, Roper had complained to Clark about problems with classified employee pay and work hours. Roper believed that Clark was unresponsive to her concerns and thought that a union could more effectively advocate for employee interests. OSEA referred Roper to Organizer Patrick Melendy; Melendy designated Roper as the lead organizer for the District classified employees.

Roper coordinated meetings, talked with other employees about the benefits of unionization, and circulated and collected showing-of-interest cards.

9. During the first week in May 2006, OSEA organizers came to the District to talk with employees. Roper introduced the representatives to Clark, who was cordial and courteous to them. At the end of the day, Clark talked with Roper and told her that he did not want a classified employee union in the District.

10. At a May 9, 2006 school board meeting, Roper and OSEA Representative Mary Kay Brant asked the school board to voluntarily recognize OSEA as exclusive representative of District classified employees. The school board refused to do so; the board chair told Roper and Brant that he thought employees should have an opportunity to vote on the union.

11. Some time in June 2006, Debbie Murchison, the District's head custodian and mother of school board member Dennis Murchison, talked with Roper and asked her to stop the "nonsense" in regard to the union. Debbie told Roper that Clark had sent her to explain that if classified employees stopped their organizing efforts, the school board would give them as good a contract as the one recently negotiated with the teachers.

12. Since 2004, the District has offered a summer reading program. A licensed teacher is head of the program and chooses the classified employees she wishes to hire for summer work. Roper worked in the summer reading program in 2005. When Roper asked Clark if she could work in the 2006 summer reading program, Clark told her that they had already hired all necessary staff.

13. On June 1, 2006, the District, OSEA, and this Board executed a consent agreement for a representation election. The agreement described the proposed bargaining unit as all regular full-time and part-time District classified employees who were employed on August 28, 2006 and still employed when the election closed on October 2, 2006. The agreement required the District to post election notices by September 1, 2006, provided that this Board would send out ballots on September 18, 2006, and required that ballots be submitted to this Board by October 2, 2006.

14. The District budget for the 2006-07 school year provided for a full-time media aide. Clark asked the current media aide, who worked half-time, if she wanted to work additional hours. The media aide refused the additional hours, and the District then advertised for a half-time media aide. After the position was advertised, the media aide told Clark that she had changed her mind and wanted to work full time.

15. At a July 25, 2006 meeting, the District school board discussed creating an extra duty position to advise the Future Farmers of America (FFA) club. Clark suggested reducing some budgeted expenses in order to fund this position. The school board directed Clark to prepare an itemized list of expenses for the FFA advisor job, and to also list budgeted expenses that could be cut.

16. At the August 8, 2006 school board meeting, Clark told the board members that he and the high school principal had determined that an instructional assistant position in the high school resource room could be eliminated due to a lack of students. Clark explained that some of the resource room students had graduated, others had “tested out” of the program, and others no longer needed classes offered at the resource room. Clark calculated that eliminating the instructional assistant position would reduce the budget by about \$23,000. The school board agreed with Clark’s proposal to eliminate the instructional assistant position in the high school resource room and voted to fund an FFA extra-duty position with salary and benefits in the amount of \$11,500.

17. On August 9, 2006, Clark called Roper and told her that the school board had eliminated her position as instructional assistant in the high school resource room and that Roper was laid off. Clark encouraged Roper to apply for other open positions, and Roper asked about the half-time media aide position she had seen advertised in the newspaper. Clark told her that he had “pulled” that advertisement.

On the date she was laid off, only one other classified employee had less seniority than Roper.

18. Roper contacted OSEA for assistance. OSEA Representative Brant called Clark and told him that he should send Roper written notice of her discharge. On August 17, 2006, Clark sent Roper a letter which stated, in pertinent part:

“As per our conversation on Wednesday, August 9, 2006, the high school resource room aide position in which you were employed during the 2005-2006 school year has been eliminated. The high school resource room will have a significantly reduced load during the 2006-2007 school year.”

19. By letter dated August 17, 2006, Brant wrote Clark and requested a school board hearing on Roper’s discharge. Clark contacted Brant and explained that Roper had been laid off. Brant did not pursue her request for a hearing.

20. Some time in August 2006, Clark learned that a special needs, second grade student would be returning to the District for the 2006-07 school year. Clark thought that this student and his family had moved out of the District. The student needed individualized help from an instructional assistant. Clark believed that Roper was not suited for this position because the job involved extensive contact with Michel. Clark wanted to avoid the problems that occurred when Michel and Roper worked together in 2005. Clark offered the position to a person whom he believed had the appropriate qualifications for the job.

21. At a meeting on September 12, 2006, the school board voted to hire the media aide for a full-time position and voted to hire the person Clark recommended to work with the second grade, special needs student. The Board also voted to hire a person to work one and one-half hours a day in the District office while the school secretary supervised the lunch program. The person selected for this job had been both a volunteer and part-time employee with the District.

22. Prior to September 2006, District classified employees were allowed to arrange for their own substitutes when they were absent. On September 25, 2006, Roper posted a notice in the teachers' lounge in which she asked employees to contact her if work was available as a substitute instructional assistant, janitor, or cook. When Clark learned about Roper's notice, he was concerned that she might be asked to substitute in a position that required her to work with Michel. In order to avoid this possibility, Clark sent a memorandum to all classified staff in which he told them that substitutes would now be arranged by the school secretary or District clerk.

After Clark sent out his memorandum regarding the selection of substitutes for classified employees, Roper delivered a letter addressed to Clark, the District clerk, and the school secretary in which she offered to substitute. Since the date on which she delivered the letter, Roper has never been asked to substitute.

23. On October 3, 2006, this Board counted the ballots in the District representation election. Five employees voted for OSEA, and one employee voted for no representation. Two ballots were challenged; Roper's ballot was one of the ballots challenged. The District contended that Roper was ineligible to vote because she was not employed by the District on August 28, 2006. No objections were filed to the election, and the number of challenged ballots was insufficient to affect the outcome, so this Board certified OSEA as exclusive representative of District classified employees.

24. The District and other private schools in the Cove area offer a Homework Club program which is funded by a grant from the Ford Family Foundation.

At an October 10, 2006 meeting, the District hired a school board member's wife who is a certified teacher as an instructor for the Homework Club program. The District and other schools participating in the program required that the instructor have certification.

25. In November 2006, the District advertised for a full-time custodian/maintenance worker. Clark did not consider Roper for this position because he did not believe that she had the qualifications to perform the work. When Roper called the District to apply for this job, she was told that it had been filled.

26. For the fiscal year ending on June 30, 2006, the District had an ending fund balance of \$608,084.

27. There were 25 special education students enrolled in the District during the 2005-06 and 2006-07 school years.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District did not violate ORS 243.672(1)(a) or (c) when it laid off Roper.

OSEA alleges that the District violated ORS 243.672(1)(a) when it laid off Roper. Under subsection (1)(a), it is unfair labor practice for an employer to interfere with, restrain, or coerce an employee either "in the exercise of" or "because of" the employee's exercise of rights protected under the Public Employee Collective Bargaining Act (PECBA). OSEA contends that the District violated both the "in the exercise of" and "because of" prongs of subsection (1)(a).

To decide whether an employer violated the "because of" portion of subsection (1)(a), this Board examines the reasons why the employer took the disputed action. If the employer took the action "because of" an employee's exercise of PECBA rights, we will find that the employer's conduct is unlawful. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 92 (2007). To prove a "because of" violation of subsection (1)(a), a complainant need not demonstrate that the employer harbored hostility toward the union or acted with anti-union animus. It

is sufficient if a complainant shows that the employer was motivated by the protected right to take the disputed action.<sup>2</sup>

In analyzing a claim that an employer violated the “in the exercise of” portion of subsection (1)(a), we do not examine the employer’s motive. Instead, we look to the effect of the employer’s actions. Subjective impressions of employees do not control. If the natural and probable effect of the employer’s conduct, when viewed objectively, is to deter employees from exercising rights guaranteed by PECBA, we will conclude that the employer violated the “in the exercise of” prong of subsection (1)(a). *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). There are two types of “in the exercise of” violations. One is derivative: we have held that the natural and probable effect of an employer’s “because of” violation is to chill employees’ exercise of protected rights. The second occurs when an employer’s conduct independently violates the “in the exercise of” prong of subsection (1)(a), usually by making coercive or threatening statements. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168 (2007)

We first turn to OSEA’s contention the District discharged Roper “because of” her exercise of rights guaranteed under the PECBA. Our analysis begins with an examination of the reasons for the District’s action, which is a fact determination based on the record. Once we have determined the reason for the District’s action, we then decide if those reasons are lawful. If all of the reasons are lawful we dismiss the complaint. If all of the reasons are unlawful, or the employer’s supposedly lawful reasons are merely a pretext for unlawful conduct, the complainant will prevail. If we conclude that the employer acted for a mixture of lawful and unlawful motives, we apply a mixed motive analysis. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004).

Here, OSEA alleges (and the District does not dispute) that Roper was engaged in PECBA-protected activities at the time of her discharge: she was lead organizer in a campaign seeking OSEA representation for District classified employees. OSEA contends that the District discharged Roper because of her work in organizing District classified employees. OSEA’s claim is based on two arguments. First, OSEA asserts that because the District had no legitimate basis for discharging Roper, the purportedly lawful reasons given for its action are pretextual. Second, OSEA argues that

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<sup>2</sup>While proof that the employer harbors hostility toward the union is not necessary to a finding that an employer violated the “because of” portion of subsection (1)(a), proof of such hostility may nevertheless be evidence of unlawful motivation. *Campbell v. Portland Public Schools*, Case No. UP-46-92, 14 PECBR 574, 588 (1993).

evidence of District hostility to the union demonstrates that the District discharged Roper as a result of her exercise of protected activity. We will consider each of these arguments in turn.

The events that resulted in Roper's discharge began at the District's July 25, 2006 school board meeting. At that meeting, the school board and superintendent considered establishing an FFA advisor position. The superintendent suggested reducing some budgeted expenses to pay for the position, and the board directed him to give it a list of the costs for the proposed position as well as a list of budget items that could be cut to pay for the position. At the August 8, 2006 meeting, the superintendent told the Board that an instructional assistant position in the high school resource room was no longer needed. The superintendent proposed, and the Board agreed, to eliminate this instructional assistant position and to use the money saved to fund the FFA advisor position. OSEA notes that the District had a substantial amount of cash carryover on June 30, 2006, the end of its fiscal year, and contends that the District's action in cutting Roper's position was unreasonable, since ample funds were available to pay for the FFA advisor job.

At the outset, we note that our inquiry is limited to determining whether the District's acted as it did because Roper exercised PECBA-protected rights. Here, the District offered a legitimate rationale for its decision, one which OSEA never disputed: that the number of students in the high school resource room had decreased to such an extent that Roper's position was not needed. Even if the District had enough funds to pay for the FFA advisor position, the school board acted sensibly when it decided not to spend its money on a position that was no longer necessary. Accordingly, we cannot conclude that the District's action in eliminating Roper's job in order to fund the creation of a new one was so unreasonable that it gives rise to an inference of an unlawful motive.

Nor do the circumstances of Roper's layoff or the District's failure to hire her for positions that became available after her layoff suggest an illegal motive for the District's conduct. Although Roper was not the least senior District classified employee, the District had no legal obligation to consider seniority when laying off employees or recalling laid-off employees, since the parties had no collective bargaining agreement in effect or controlling District policy. The District offered legitimate reasons why it did not hire Roper for positions that became open between August and November 2006. The District concluded that Roper lacked appropriate qualifications for the jobs of custodian/maintenance worker and Homework Club instructor. The District chose to fill the office aide and media aide positions with current or former District classified employees. The District chose not to place Roper in a position as an instructional

assistant where she would have worked with a teacher with whom she had a personality conflict. Based on this record, we cannot conclude that the District's failure to consider seniority when it laid off Roper, or its refusal to hire her for the positions that became available after her layoff, was conduct so unreasonable that it indicates an unlawful motive.

We now consider OSEA's contention that District hostility to the union demonstrates that the District laid off Roper because of her exercise of rights guaranteed under the PECBA. The evidence shows that Superintendent Clark opposed Roper's efforts to win OSEA representation for District classified employees. Clark told Roper that he did not want the classified union, and he directed Head Custodian Murchison to ask Roper to stop her organizing effort. Clark's hostility toward Roper is also shown by the suspicious circumstances surrounding his recommendation that the school board lay her off. After the school board asked Clark to give them a list of possible budget cuts, Clark failed to do so and instead made only one suggestion—that the school board cut Roper's position. Based on these circumstances, we conclude that one of the reasons the District discharged Roper was because Clark disliked her union organizing efforts.<sup>3</sup> The PECBA guarantees employees' rights to form and join unions. ORS 243.662. Accordingly, this District reason for laying off Roper was unlawful.

Because the evidence establishes that the District had both lawful and unlawful reasons for laying off Roper, we must now apply a mixed motive analysis. We will determine whether the employer would not have taken the disputed action but for the unlawful motive. In other words, we must decide whether the employer would have treated the employee the same way if the employee had not engaged in protected activity. *State Teachers Education Association v. Willamette ESD and Oregon Education Department*, Case No. UP-14-99, 19 PECBR 228, 248 (2001), *AWOP* 188 Or App 112, 70 P3d 903 (2003), *rev den* 336 Or 509, 87 P3d 1136 (2004).

Here, the evidence does not indicate a great deal of District hostility toward the union. On one hand, Clark told Roper that he disliked the union, and also asked

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<sup>3</sup>The record contains no evidence that the school board which made the final decision to lay off Roper acted with any improper motive. The board did, however, accept Clark's recommendation which we conclude was motivated, at least in part, by his dislike of Roper's union organizing efforts. An employer violates subsection (1)(a) when the unlawful conduct of a lower level supervisor contributes or plays a significant part in the decision-maker's choice to discharge an employee. *Days Creek Association of Classified Employees v. Days Creek School District 15*, Case No. UP-93-94, 16 PECBR 187, 201 (1995), quoting *OSEA v. Medford Sch. Dist.*, Case No. UP-60-86, 10 PECBR 402, 428 (1988), *AWOP* 94 Or App 781, 767 P2d 934 (1989).

another employee to attempt to persuade Roper to drop her organizing efforts. On the other hand, the record contains plausible, legitimate reasons why the District wanted to eliminate Roper's position: it wanted to save money by cutting a position that was superfluous. We note that OSEA never contested the District's assertion that Roper's services were no longer needed in the high school resource room due to a lack of students. Based on this record, we conclude that the District would have eliminated Roper's position and laid her off even if she had not engaged in PECBA-protected activity.

For the foregoing reasons, we conclude that the District did not interfere with, restrain, or coerce Roper "because of" her exercise of protected rights.

Next, we determine whether the District's actions in discharging Roper violated the "in the exercise of" portion of subsection (1)(a). Since we have found no violation of the "because of" prong of subsection (1)(a), there is no derivative violation of this provision.

Nor do we find that the District's actions independently violated the "in the exercise of" portion of the statute. As discussed above, an employer's actions independently violate subsection (1)(a) if the natural and probable effect of these actions, when viewed objectively, is to deter employees in their exercise of protected rights. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App at 624. The natural and probable effect of an employer's *lawful* conduct would not be to interfere with, restrain, or coerce employees in their exercise of PECBA rights. *OSEA v. Lebanon School District No. 16C*, Case No. UP-53-91, 13 PECBR 292, 299 (1991), quoting *OSEA v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407 n. 7 (1990). Although District employees may have been fearful of involvement with OSEA after Roper's discharge, this is not relevant to our conclusion that the employer did not violate the "in the exercise of" portion of subsection (1)(a); we consider only the objective effect of an employer's conduct. See *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 n. 13 (1986) (an employer does not violate the "in the exercise of" prong of subsection (1)(a) if employees mistakenly perceive that a lawful employer action was taken "because of" an employee's exercise of protected rights). Since the District did not violate the "because of" prong when it discharged Roper, we conclude that the District's conduct did not independently violate the "in the exercise of" portion of subsection (1)(a).

Finally, we consider whether the District's discharge of Roper violated ORS 243.672(1)(c), which makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for

the purpose of encouraging or discouraging membership in an employee organization.” We have construed the word “membership” broadly to protect all types of union activity. *Schreiber v. Oregon State Penitentiary*, Case No. UP-124-92, 14 PECBR 313, 320 (1993). Our analysis of an alleged violation of subsection (1)(c) is similar to the one we use to determine a violation of the “because of” portion of subsection (1)(a). To prove a violation of subsection (1)(c), a complainant must show protected activity, employer action, and a causal connection between the two. *Schreiber v. Oregon State Penitentiary*, 14 PECBR at 320. Because we found that the causal link between Roper’s protected activity and her layoff is insufficient to prove a violation of subsection (1)(a), we also conclude that the connection between the two events is inadequate to demonstrate a violation of subsection (1)(c).

OSEA failed to demonstrate that the District discharged Roper in violation of ORS 243.672(1)(a) or (c). We will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 17<sup>th</sup> day of December 2007.



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Paul B. Gamson, Chair

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\*Vickie Cowan, Board Member



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Susan Rossiter, Board Member

\*Board Member Cowan is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.