

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-39-06

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL)	
EMPLOYEES ASSOCIATION,)	
)	
Complainant,)	
)	ORDER ON COMPLAINANT'S
v.)	MOTION FOR RECONSIDERATION
)	
COVE SCHOOL DISTRICT #15,)	
)	
Respondent.)	
_____)	

On December 17, 2007, this Board issued an Order which concluded that Cove School District #15 (District) did not violate ORS 243.672(1)(a) or (c) when it laid off Ramona Roper. 22 PECBR 212. On January 14, 2008, Complainant Oregon School Employees Association (OSEA) filed a motion for reconsideration in which it also asked, in the alternative, for rehearing. OSEA did not request oral argument. The District filed no response to OSEA's motion.

When, as here, no recommended order has been issued, we generally grant reconsideration if a party requests it. *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality*, Case No. UP-47-06, 22 PECBR 54, 54-55 (2007) (citing *Jefferson County v. OPEU*, Case No. UP-16-99, 18 PECBR 421 (2000)). Accordingly, we grant reconsideration to address some of the issues raised by OSEA in its motion.¹

In its motion, OSEA alleges that a number of our conclusions of law are erroneous because they are based on inaccurate findings of fact. In particular, OSEA challenges our conclusion that the District had a legitimate reason for laying off Roper because the number of high school special education students with whom Roper worked

¹We will not address every argument OSEA raises in its motion. We will discuss only those issues that we believe require additional consideration or clarification.

had decreased by the beginning of the 2006-07 school year. OSEA argues that this determination is based on an incorrect description of Roper's assignment, because Roper did not work exclusively with high school special education students.

Based on our review of the record, we determine substantial evidence supports our finding that in January 2006, District Superintendent Jeffrey Clark changed Roper's assignment so that she would work primarily with high school special education students in the resource room.² Although Roper may have had some other duties, the record is clear that she spent the majority of her work day assisting high school students with special needs. OSEA has never challenged our finding that at the end of the 2005-06 school year, the District anticipated a substantial decrease in the number of high school special education students for the 2006-07 school year. Accordingly, we did not err when we concluded that the District had a legitimate reason for laying off Roper: a lack of need for her services.

In regard to numerous other inaccuracies alleged by OSEA, we find that substantial evidence in the record supports our findings of fact.³

OSEA also contends that we erred when we concluded that the District School Board acted unreasonably when it chose to lay off Roper and use the resulting savings in personnel costs to fund an FFA extra-duty position. OSEA argues that because the District's financial position was sound, it was unnecessary to eliminate Roper's job to fund the extra-duty position. According to OSEA, the lack of a rational basis for the District's decision indicates that the budgetary reason given for laying off Roper was merely a pretext.

In a case alleging that an employer violated ORS 243.672(1)(a) by interfering with, restraining, or coercing an employee "because of" the employee's exercise of protected rights, we examine the reasons for the employer's action to determine if those reasons are lawful under the Public Employee Collective Bargaining

²OSEA contends that we erroneously stated that Roper worked in the high school "resource room" when, in fact, Roper actually worked in the high school "learning center." We note that both parties used the terms "resource room" and "learning center" interchangeably to describe the facility where Roper primarily worked during the latter half of the 2005-06 school year.

³OSEA alleges that Finding of Fact 11 is inaccurate because it fails to mention that Debbie Murchison, a District employee who told Roper that Superintendent Clark opposed a classified employee union, is the mother of District School Board Member Dennis Murchison. OSEA's contention is incorrect; we did, in fact, state that Debbie Murchison is Dennis Murchison's mother. 22 PECBR at 215.

Act (PECBA). *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). In a mixed-motive case such as this one, where the employer has both lawful and unlawful reasons for its action, we consider all the evidence to decide if the employer would not have taken the action absent the unlawful motive. *Portland Association of Teachers and Poole v. Multnomah School District No. 1*, Case No. UP-72-96, 19 PECBR 284, 295 (2001). We weigh and evaluate the evidence to determine causation. *Id.* at 300.

Here, we determined that one of the reasons the District laid off Roper was lawful: a desire to save money. The District chose to fund an extra-duty position by eliminating Roper's job, a position that it no longer needed due to a decrease in the number of high school special education students with whom Roper had been working. We also determined that the District had an unlawful reason for laying off Roper: dislike of her union organizing activities.

We disagree with OSEA that the District's purported legitimate reason for laying off Roper was so irrational as to suggest that the real motivation for the lay off was anti-union hostility. The District acted reasonably in choosing to eliminate a job that was no longer necessary, even though it may have had ample financial resources and could have continued funding Roper's position. Thus, one of the District's reasons for laying off Roper was legitimate and based on facts in the record that OSEA never disputed. Substantial evidence supports our conclusion that Roper would have lost her job even if she had not engaged in PECBA-protected activity.

OSEA asks that we order a new hearing if it does not prevail on its motion for reconsideration. In support of its request, OSEA cites the poor quality of the transcript of the Administrative Law Judge (ALJ) hearing contending that portions of the testimony are missing from the record.

Due to an equipment problem, the recording of the hearing was not perfect. After the record closed, this Board reviewed the transcript of the ALJ hearing. During the testimony of District Superintendent Jeffrey Clark and District School Board Member Timothy DelCurto, we found numerous instances where the transcriptionist noted that testimony was "unintelligible." In regard to all other witnesses, there were few, if any, instances where the transcriptionist indicated "unintelligible" testimony. We ordered a Board staff member to review the recording of Clark and DelCurto's testimony and prepare a certified, corrected transcript of their testimony. Although several instances remained where a word or phrase was still "unintelligible," we concluded that these did not materially affect the quality of the transcript. We determined that the instances where the testimony of witnesses other than Clark and DelCurto was noted as "unintelligible" were minimal and did not order a corrected transcript of their testimony. Both parties asked for and received a copy of the corrected transcript.

OSEA has failed to demonstrate that any problems with the corrected transcript prejudiced the outcome of its case. OSEA has cited no examples of inaccuracies in the corrected transcript. OSEA has identified no portions in the corrected transcript noted as "unintelligible" where critical testimony was not transcribed. OSEA has not shown how a better transcript would make a difference in the outcome of this case.

In support of its request for a rehearing, OSEA cites *IAFF, Local 1817 v. Jackson County Fire District #3*, Case No. UP-130-91, 14 PECBR 111 (1992). In that case, the testimony of several witnesses at an ALJ hearing was never recorded due to malfunctioning recording equipment. We reopened the record and conducted an additional day of hearing to take the testimony of witnesses for whom no record was made. *Id.* at 112. Here, unlike *Jackson County Fire District #3*, the testimony of all witnesses has been recorded and transcribed. OSEA has failed to demonstrate that any problems with the transcript of testimony, as corrected, materially affected the outcome of the case or prejudiced OSEA's rights. *See State v. Gonzales-Gutierrez*, 216 Or App 97, 105, 171 P3d 384 (2007) (minor differences between transcripts and recordings did not affect a criminal defendant's substantive rights).

ORDER

Reconsideration is granted. We adhere to our Order of December 17, 2007, as clarified herein. The request for rehearing is denied.

DATED this 15th day of February 2008.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

*Board Member Cowan is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.