

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-39-07

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)
LOCAL #1329,)
)
Complainant,)
)
v.)
)
CROOK COUNTY ROAD DEPARTMENT,)
)
Respondent.)
_____)

DISMISSAL ORDER

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, 308 S.W. Dorion Avenue, Pendleton, Oregon 97801, represented Complainant.

Bruce Bischof, Attorney at Law, 747 S.W. Mill View Way, Bend, Oregon 97702, represented Respondent.

Oregon AFSCME Council 75, Local #1329 (AFSCME) filed this unfair labor practice complaint on September 24, 2007. In its complaint, AFSCME alleged that the Crook County Road Department (County) violated ORS 243.672(1)(g) by failing to process a grievance. On October 10, the County filed an informal response, with a copy to AFSCME, arguing that the complaint was untimely. On November 30, the Administrative Law Judge (ALJ) wrote AFSCME stating that it appeared, based on the complaint and its exhibits, that the County was correct, and directed AFSCME to show cause why the complaint should not be dismissed. On December 11, 2007, AFSCME filed a response to the ALJ's show cause letter and filed an amended complaint. We dismiss this action as untimely.

Discussion

AFSCME's amended complaint alleged, in relevant part:

- "4. In October of 2006, the County disciplined Union members Gordon Chandler, Ron Ledford and Roger Chapman concerning alleged misconduct referred to as the 'Davis Loop' situation. When notified of the discipline, AFSCME Council Representative Steve Marris called County Counsel Dave Gordon to initiate the first step of the grievance procedure under the Contract. This initial call took place on October 24, 2006. Mr. Gordon agreed to set up a step 1 meeting.
- "5. Mr. Gordon did not arrange a Step 1 meeting. On November 6, 2006, Mr. Marris filed a written Step 2 Grievance (the 'Grievance') with the County over the disciplinary actions. A copy of the Grievance is attached as Exhibit 2.
- "6. Mr. Marris was informed that he should only deal with the County's retained attorney, Bruce Bischoff concerning this grievance. On November 7, 2006, Mr. Marris spoke with Mr. Bischoff concerning the Grievance. In that conversation, Mr. Bischoff informed Mr. Marris that there was no timeliness problem with the Grievance and that he believed the County and the Union could resolve the issue. Mr. Marris sent a subsequent letter to Mr. Bischoff elaborating on the reasons for the Grievance."

The complaint contained, as part of Exhibit 4, a November 24, 2006 letter from Bischoff to Union Representative Marris which stated:

"This letter will again confirm the County's position with respect to the Gordon Chandler grievance. On November 7, 2006, I informed you that the County would not be processing the Chandler grievance or any grievances arriving out of the incidence [*sic*] of October 3, 2006 referred to as the Davis Loop Project.

“The collective bargaining agreement, and specifically Article 8, Section 2 (Grievance Procedure) requires that formal grievances be initiated at Step 1 by the employee or group of employees verbally to the Road Master within ten working days of the date of the ‘presentation’ of the grievance. At no time did Gordon Chandler or any employees ‘present’ their grievance to the Road Master regarding this incidence. [*sic*] It is my understanding that you left a voicemail with either the Road Master or the County counsel regarding this matter. A voicemail does not constitute a ‘presentation’ of the grievance as contemplated by Article 8.

“A review of Section 3 of Article 8 clearly provides ‘If the grievance procedures established by this Article are not initiated within the time limits, the grievance shall be considered not to have existed’ [*sic*]. Moreover, any extension of time limits to the grievance procedure must be ‘mutually agreed to’ by the parties and reduced to ‘writing’ and signed by all parties involved.

“Under no circumstances have the employees and/or the Union complied with any aspect of the grievance procedure with respect to the issues arising out of the Davis Loop incident. Therefore, I have advised my client, with their concurrence, that the grievances are deemed null and void and will not be processed by the County.”

The body of the amended complaint also alleged:

- “7. Sometime shortly before April 4, 2007, the undersigned Counsel [Jason Weyand] contacted Mr. Bischoff by telephone to discuss this situation. During that conversation, Mr. Bischoff expressed his opinion that there must be some sort of misunderstanding about the facts. He stated that the County was open to processing the grievance if the Union would submit a letter setting out our position.
- “8. On April 4, 2007, Legal Counsel for the Union sent Mr. Bischoff a letter summarizing the Union’s positions and our understanding of the facts of this case. In addition, the Union made a final written

request for the County to process the Grievance per the Contract, reminding Mr. Bischoff that any issues of arbitrability were to be decided by an arbitrator, not the employer. See Exhibit 3. At the time this letter was sent, the Union believed that the County would be processing the grievance once the letter was received and the misunderstanding was cleared up.

- “9. On April 15, 2007, Mr. Bischoff responded in writing that the County would not arbitrate or further process the Grievance. This was a clear and final indication that the County was not going to arbitrate the disciplinary issues raised in the Grievance. At this point, the County’s decision to refuse to arbitrate this case became final as defined in ORS 243.672(3).”

The complaint stated that the County violated ORS 243.672(1)(g) by failing to process the Davis Loop grievance.

AFSCME alleges that its complaint is timely under ORS 243.672(3), which provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” According to AFSCME, its complaint was filed on September 24, 2007, within 180 days of April 15, 2007, the date on which the County confirmed its refusal to proceed with the Davis Loop grievances.

For purposes of a motion to dismiss, we assume that the facts alleged in a complaint are true. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 62 (2007), *appeal pending* (citing *SEIU Local 503 OPEU v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004)). According to the facts alleged in AFSCME’s amended complaint, the County’s attorney wrote Union Representative Marrs on November 24, 2006, and told AFSCME that the County would not process the Davis Loop grievances because they had not been properly filed under the provisions of the collective bargaining agreement. The complaint alleges no further discussion or correspondence between AFSCME and the County concerning the Davis Loop grievances until April 2007. At that time, the AFSCME attorney asked the County to process the grievances and the County’s attorney again refused to do so in a letter dated April 15, 2007.

An unfair labor practice alleging that an employer violated subsection (1)(g) by refusing to arbitrate a grievance is timely if filed within 180 days of the date on which the employer “clearly and unequivocally” communicates a refusal to arbitrate. *Mt. Hood*

Community College Faculty Association and Rick Kotulski v. Mt. Hood Community College, Case No. UP-7-99, 18 PECBR 636, 646 (2000); *See also Nash v. City of Oregon City*, Case No. UP-33-87, 10 PECBR 686, 693-94 (1988) (in a refusal to arbitrate complaint under subsection (1)(g), the 180-day statutory limitation period begins to run when an employer expresses its refusal in a manner sufficiently definite to objectively indicate its unwillingness to arbitrate). Here, we apply a similar standard to the County's refusal to process the Davis Loop grievances. In its November 24, 2006 letter, the County clearly and unmistakably told AFSCME that it would not process the Davis Loop grievances: it considered the grievances "null and void." Although the County's attorney offered to reconsider its decision in an April 2007 telephone conversation with the AFSCME attorney, the County never rescinded its decision that it would not process the Davis Loop grievances.

Therefore, the 180-day statute of limitations for the alleged refusal to arbitrate the grievance extended from November 24, 2006 until May 23, 2007. The complaint in this case was filed on September 24, 2007, and is untimely. We will order that the action be dismissed.

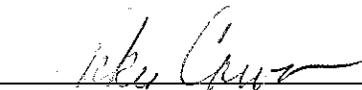
ORDER

The amended complaint is dismissed.

DATED this 7th day of February 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.