

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-48-07

(UNFAIR LABOR PRACTICE)

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|---------------------|---|-----------------|
| MULTNOMAH EDUCATION |) | |
| SERVICE DISTRICT, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | DISMISSAL ORDER |
| |) | |
| AFSCME COUNCIL 75, |) | |
| LOCAL 1995, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

Multnomah Education Service District (District) filed this unfair labor practice complaint which alleges AFSCME Council 75, Local 1995 (AFSCME) bargained in bad faith in violation of ORS 243.672(2)(b) and (c). Specifically, it asserts that AFSCME acted unlawfully when, during the statutory cooling-off period, it conducted a strike authorization vote of its members and then sent a notice of its intent to strike.

On November 16, 2007, this Board notified the District that under current Board precedent, the complaint did not appear on its face to present an issue of law or fact that warranted a hearing, and that as a consequence, we would dismiss the complaint unless the District showed cause why we should not dismiss it. On November 21, 2007, the District responded in two ways. First, it submitted an amended complaint. The amended complaint clarified that the District was asserting that AFSCME's conduct constituted either a *per se* violation or a "totality of the circumstances" violation of the duty to bargain in good faith. Second, the District submitted a brief which argued that the amended complaint presents an unanswered question of law which warrants a hearing.

We have reviewed the amended complaint, the District's arguments, and pertinent legal authorities and conclude that the amended complaint does not present an issue of law or fact that warrants a hearing. Accordingly, we will dismiss the amended complaint. ORS 243.676(1)(b); OAR 115-035-0020.

DISCUSSION

The crux of the District's amended complaint is that AFSCME acted unlawfully when, during the statutory cooling-off period, it conducted a strike authorization vote of its members and then sent a notice of its intent to strike. To put this dispute in context, we begin with a review of the pertinent statutory framework for negotiations. Under ORS 243.712, the parties must first bargain at the table for at least 150 days. If table bargaining fails to produce an agreement, the parties then bargain for at least 15 days with the assistance of a mediator; if mediation fails to produce an agreement, each party submits its final offer and cost summary to the mediator, who makes the submissions public. The parties then have a 30-day cooling-off period. If the parties fail to reach agreement during the cooling-off period, they may engage in self-help—the employer may implement its final offer and the employees may strike.¹

In order for public employees to lawfully strike, the employees must comply with the conditions of ORS 243.726(2), which states:

“(2) It shall be lawful for a public employee who is not prohibited from striking under subsection (1) of this section and who is in the appropriate bargaining unit involved in a labor dispute to participate in a strike over mandatory subjects of bargaining provided:

“(a) The requirements of ORS 243.712 and 243.722 relating to the resolution of labor disputes have been complied with in good faith;

“(b) Thirty days have elapsed since the board has made public the fact finder's findings of fact and recommendations or the mediator has made public the parties' final offers;

¹The recited procedures apply to employees, like those in the AFSCME bargaining unit, who are permitted to strike. Different procedures, most notably at the self-help stage, apply to employees who are prohibited by law from striking. *See* ORS 243.742 to 243.756.

“(c) The exclusive representative has given 10 days’ notice by certified mail of its intent to strike and stating the reasons for its intent to strike to the board and the public employer;

“(d) The collective bargaining agreement has expired, or the labor dispute arises pursuant to a reopener provision in a collective bargaining agreement or renegotiation under ORS 243.702(1) or renegotiation under ORS 243.698; and

“(e) The union’s strike does not include unconventional strike activity not protected under the National Labor Relations Act on June 6, 1995, and does not constitute an unfair labor practice under ORS 243.672(2)(f).”

The statute thus establishes a series of conditions public employees must meet before they can lawfully strike.

With this background, we turn to the amended complaint. In deciding whether to dismiss a complaint without a hearing, we assume the facts alleged in the complaint are true. *SEIU Local 503 v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). Here, the amended complaint alleges that the District is a public employer and that AFSCME is the exclusive bargaining representative of a group of classified employees who work for the District. The amended complaint further alleges that AFSCME and the District failed to reach agreement on a contract after table bargaining, mediation, impasse, and submission of final offers; that the 30-day cooling-off period required by ORS 243.712(2)(d) began on October 24² and was set to expire on November 23; that on November 17, during the cooling-off period, AFSCME conducted a strike authorization vote among its members; that on November 19, also during the cooling-off period, AFSCME sent notice of its intent to strike; and that the notice said the strike would commence on November 30, seven days after the cooling-off period ended.

²Unless otherwise stated, all dates are in 2007.

The District's amended complaint asserts that AFSCME acted in bad faith in violation of ORS 243.672(2)(b)³ when, during the 30-day cooling off period, it conducted a strike authorization vote of its members, and again when it sent a notice of its intent to strike. The District further asserts that the same actions violated ORS 243.672(2)(c)⁴ by failing to comply with the provisions of ORS 243.726(2)(a). The District does not assert that AFSCME actually commenced a strike during the cooling-off period.

We begin with the District's assertion that it is unlawful to send a strike notice during the 30-day cooling-off period. Our cases have directly considered and rejected this contention. In *Yoncalla School District No. 32 v. Lane Unified Bargaining Council/YEA*, Case No. C-113-83, 7 PECBR 5867, 5871 (1983), we stated:

“The District essentially argues that the conditions precedent to a lawful strike set out in ORS 243.726(2) must be fully complied with in serial order. In other words, argues the District, the strike notice required by paragraph (d) [now numbered as paragraph (c)] cannot be sent until the requirements of paragraphs (a), (b) and (c) have been met in order. We do not interpret the statute as requiring such consecutive compliance. The statute sets up * * * conditions that must be present before public employes may lawfully *participate* in a strike. So long as all * * * requirements are met before the strike begins, ORS 243.726(2) has been complied with. * * *

“The requirements in ORS 243.726(2) may be completed concurrently. Accord: *OSEA v. State of Oregon*, Case No. C-85-75, 1 PECBR 324 (1975); *aff'd* 21 Or App 567 (1975).” (Emphasis in original.)

³ORS 243.672(2)(b) makes it an unfair labor practice for a public employee union to “[r]efuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative.”

⁴ORS 243.672(2)(c) makes it an unfair labor practice for a public employee union to “[r]efuse or fail to comply with any provision of” the Public Employee Collective Bargaining Act (PECBA)

These cases establish that a public employee union can lawfully send a strike notice during the cooling-off period. The District does not seem to disagree. Instead, it attempts to distinguish the cases. First, it observes that both *Yoncalla* and *OSEA* involved petitions to declare a strike unlawful, whereas the amended complaint here alleges unfair labor practices. We view this as a distinction without a difference. The District has not identified, and we cannot discern, any analytical, practical, or policy-based reason to apply a different rule here solely because the question arises in a different procedural context.

The District also observes that the PECBA has been amended since we decided the *Yoncalla* and *OSEA* cases. Although this observation is accurate, the District fails to identify any specific statutory change that might affect the outcome or analysis here. There is no change in the requirements that public employees satisfy a 30-day cooling-off period and give a 10-day strike notice before they can lawfully strike. The District has not identified any principled reason to overturn or distinguish our holding that a union can lawfully send its strike notice during the cooling-off period, so long as the strike does not commence before the completion of the cooling-off period.

We turn next to the District's claim that AFSCME acted unlawfully when it conducted a strike authorization vote during the cooling-off period. The vote was nothing more than a step in preparing to send the strike notice. We have already concluded that AFSCME was entitled to send the strike notice during the cooling-off period. It logically follows that AFSCME was also entitled to take steps during the cooling-off period to prepare to send the strike notice. AFSCME acted lawfully when it conducted the strike authorization vote during the 30-day cooling-off period.

The amended complaint does not allege facts which, even if true, would constitute a violation of ORS 243.672(2)(b) or (c). We will therefore dismiss it. ORS 243.676(1)(b); OAR 115-035-0020.

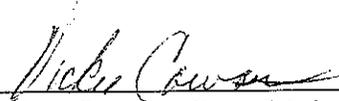
ORDER

The amended complaint is dismissed.

DATED this 3~~rd~~ day of December 2007.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.