

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-53-09

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY)	
EMPLOYEES' ASSOCIATION,)	
)	
Complainant,)	DISMISSAL ORDER
)	
v.)	
)	
CLACKAMAS COUNTY)	
)	
Respondents.)	
_____)	

Kevin Keaney, P.C., Attorney at Law, Portland, Oregon, represented Complainant.

David W. Anderson, Assistant County Counsel, Clackamas County, Oregon City, Oregon, represented Respondent.

On October 26, 2009, the Clackamas County Employees' Association (CCEA) filed this unfair labor practice complaint against Clackamas County (County). The complaint, as amended on November 23, 2009, alleges that the County failed to bargain in good faith in violation of ORS 243.672(1)(e). Specifically, it asserts that the County

unilaterally changed health insurance benefits and coverage during the period of negotiations for a successor agreement without bargaining over these changes with CCEA.¹

Under ORS 243.676(1)(b), this Board investigates unfair labor practice charges to determine if a hearing is warranted. This Board may dismiss a complaint without a hearing if, after the investigation, it determines that no issue of law or fact exists that warrants a hearing. *Id.* We conclude that no hearing is warranted here. Even if CCEA proved all of the relevant facts alleged in its amended complaint, it would not prevail. The amended complaint fails to state a claim for relief under ORS 243.672(1)(e), and we will dismiss it.²

When deciding whether to dismiss a complaint without hearing, we assume that the well-pled facts in the complaint are true. *David Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution, and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98, 17 PECBR 907, 908 (1999). We may also rely on undisputed facts we discover during our investigation. ORS 243.676(1)(b); *Karen Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 867-68 (2007); *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 498 n 2 (1993).

Facts

What follows are relevant allegations from the amended complaint and other undisputed facts.

1. The County is a public employer and CCEA is a labor organization. The parties are currently in the process of negotiating a successor to their 2006-09 collective

¹CCEA's sole theory for its subsection (1)(e) claim is that the County unilaterally changed health care benefits. It does not allege that the County bargained in bad faith by engaging in surface bargaining under the totality of the circumstances, by refusing to discuss the language regarding health insurance benefits or coverage to be included in the successor agreement, or by acting in bad faith under any other theory. Nor does CCEA assert that the County violated the parties' collective bargaining agreement in violation of ORS 243.672(1)(g).

²This complaint was initially assigned to an Administrative Law Judge (ALJ). On December 16, 2009, the ALJ notified CCEA that she intended to recommend that this Board dismiss the complaint unless it could show cause why she should not. On December 30, 2009, CCEA responded with arguments and authorities as to why the complaint should not be dismissed. We have considered those arguments and authorities in reaching this decision.

bargaining agreement. Neither party has declared impasse even though the 150-day bargaining period in ORS 243.712(1) has expired. One subject of the parties' current bargaining is the extent of employer-provided health insurance benefits or medical coverage to be included in the successor agreement.

2. During this period of negotiations, the County's Benefit Review Committee (BRC) decided to change the health care coverage and benefits provided to bargaining unit members under the parties' 2006-09 agreement. CCEA did not participate in the BRC process after the current negotiations began in April 2009, and it did not participate in the BRC's decision. The County decided on the insurance plan design changes without first bargaining over these changes with CCEA. As a result of the County Commissioners' vote on November 12, 2009, the County entered contracts with health insurance providers which incorporate these plan design changes into the health plans that are currently the subject of bargaining. The County has imposed these plan design changes on CCEA-represented employees during bargaining.

3. During the current negotiations, CCEA proposed that the County provide bargaining unit employees with health insurance coverage and benefits that are different from those provided under the 2006-09 agreement. The County rejected this proposal and imposed the health care coverage and benefits found in the parties' present contract, as modified by the plan design changes.

Relevant Contract Language

4. Article IX of the parties' 2006-09 collective bargaining agreement provides in relevant part as follows:

"ARTICLE IX - HEALTH AND WELFARE

"1. Medical Coverage.

"The County agrees to contribute toward the monthly composite premium for each medical plan for fulltime employees and their eligible family members, effective on the first day of the month following the benefit-waiting period described in Section 10. The design of the medical plans and eligibility of family members shall be determined by the Benefits Review Committee as described in Section 11.

"* * * * *

“Effective January 1, 2009, the County agrees to contribute an amount equivalent to 95% of the monthly composite premium for each medical plan up to a maximum of \$1034.82.

“* * * * *

“The County and the union will make plan design changes through the Benefits Review Committee as may be needed to keep the total annual increase nine percent (9.0%) each year or less. In addition, the Benefits Review Committee will make an assertive effort to make plan design changes as may be needed to keep the total annual increase at or below seven and one-half percent (7.5%) each year.

“2. *Flexible Benefits.*

“* * * * *

“11. *Benefits Review Committee.*

“(a) A Labor-Management Benefits Review Committee shall have the responsibility for deciding the level, scope, and design of benefit plans offered to employees for medical and vision coverage, dental coverage, and for disability and life insurance. The primary emphasis in plan design shall be to provide a comprehensive, competitive benefit program at a reasonable cost.

“(b) The Committee shall be comprised of members from management and from County bargaining units. Each bargaining unit adopting the provision of the Article shall be entitled to appoint one voting member to the Committee for every two hundred (200) members in their bargaining unit with a minimum of one (1) member. It is understood that bargaining units which do not adopt the provisions of this Article will be entitled to appoint one nonvoting member to the Committee. Management membership will consist of voting members in a number equal to the voting bargaining unit membership. However, a bargaining unit or the County may appoint fewer members than it is entitled but retain the same number of votes as described above. The Committee shall meet at least quarterly, or more frequently as required. Decisions of the Committee will be made by a majority of votes.

“(c) The Committee shall make plan design decisions for medical, vision, dental, disability, and life insurance plans at least 120 days prior to

the beginning of the following plan year, unless the County waives such requirement.

“(d) Payment for and funding of benefit plans selected by the Committee shall be in a proportion and manner determined through collective bargaining with each separate bargaining unit.

“(e) The County shall provide administrative coordination and support for the Committee. The Committee at its request shall be provided all financial information and related reports as may be available.

“(f) The County will make decisions on the following issues after consideration of committee recommendations: carrier selection, third party administrator selection, employee benefits consultant selection, selection of alternate funding arrangements, and other optional benefit programs.

“(g) Problems with benefit coverage will be brought up at the Labor-Management meeting for resolution.”

5. Article XII of the parties’ 2006-09 agreement establishes the parties’ grievance and arbitration process and provides that “[a]ny grievance or dispute which may arise between the parties involving the application, meaning or interpretation of this Agreement, shall be settled” following the steps of that process. Step VI of the parties’ grievance process provides for binding arbitration.

6. Article XXIV of the parties’ 2006-09 agreement, provides:

“ARTICLE XXIV - TERMINATION

“1. This Agreement shall become effective as of the 1st day of July, 2006, *and shall remain in full force and effect until the 30th day of June, 2009, or the date of signing a subsequent Agreement, whichever last occurs.* This agreement shall be automatically renewed on July 1, 2009, and each year thereafter unless either party shall notify the other in writing not later than March 1st that it desires to either terminate or modify this Agreement. In the event notice to modify is given, negotiations shall begin not later than April 1st. In the event that notification of termination is given, it shall become effective thirty (30) days after the date of notice is received.

“2. This Agreement may be amended at any time by mutual agreement of the Association and the County; such amendments shall be in writing and signed by both parties.” (Emphasis added.)

Legal Analysis

CCEA's complaint alleges that the County bargained in bad faith when it unilaterally changed health care benefits for bargaining unit members,³ a violation of ORS 243.672(1)(e). CCEA specifically alleges that

“One mandatory subject of bargaining in the current negotiations is the extent of health-insurance benefits (‘medical coverage’ in the current contract). Under Articles IX(1) and XXIV of the current contract (attached), the status quo must be maintained regarding health-insurance benefits pending ratification and approval of a successor agreement.”

CCEA further alleges that “this is a ‘per se’ violation of ORS 243.672(1)(e) because the County has failed to bargain in good faith for a successor agreement by unilaterally imposing a non-negotiated proposal for health-insurance benefits through executed contracts with health-insurance providers.”

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” An employer violates ORS 243.672(1)(e) when it unilaterally changes a working condition that is mandatory for bargaining and that is not addressed in the parties’ contract. A mandatory working condition is not addressed in the parties’ contract if either (1) the contract has expired, *Wy’East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 709 (2008), *appeal pending*, or (2) the contract, although in force, is silent on the matter, *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159 (2007). We conclude that CCEA has failed to state a claim under either of these theories.

The first theory applies only after the parties’ contract has expired. Here, the parties’ contract has not expired. The contract, by its own terms, is in effect “until the 30th day of June, 2009, or the date of signing a subsequent Agreement, *whichever last occurs*.” (Emphasis added.) The parties continue to negotiate and have not signed a subsequent agreement. The 2006-09 agreement remains in effect, so the County cannot be liable under a theory that applies only after the contract expires.

³Insurance benefits are mandatory for bargaining. *Service Employees Int’l Union Local 503 v. DAS*, Case No. UP-12-01, 19 PECBR 325, 331 (2001), *aff’d* 183 Or App 594, 54 P3d 1043 (2002); *Executive Department, Labor Relations Division, and Oregon State Police v. Oregon State Police Officers’ Association*, Case No. UP-11-85, 8 PECBR 7874, 7906 (1985).

CCEA relies on our decision in *Wasco County v. AFSCME*, Case No. C-176-75, 1 PECBR 637 (1976), *rev'd and rem'd*, 30 Or App 863, 569 P2d 15 (1977), *order on remand*, 4 PECBR 2397(1979), *aff'd*, 46 Or App 859, 613 P2d 1067 (1980). That reliance is misplaced because there, unlike here, the contract had expired before the employer implemented a change in working conditions. *See* 30 Or App at 865-866, (the parties' contract expired on June 11 and the employer gave notice of the change in working conditions on June 13).

The County's conduct does not constitute an unlawful unilateral change under *Wasco County* and subsequent cases⁴ because the parties' agreement is still in effect.

We turn to the second unilateral change theory. It applies during the life of the contract and prohibits an employer from unilaterally changing the *status quo* regarding a working condition that is mandatory for bargaining *and is not covered by the parties' contract*. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007). This theory does not apply here because health care benefits, the working condition at issue, is covered by the parties' contract. CCEA's amended complaint specifically alleges that “[u]nder Articles IX(1) and XXIV of the current contract (attached), the status quo must be maintained regarding health-insurance benefits.” CCEA asserts that the County changed these benefits. An assertion that the employer changed the *status quo* on benefits established by the contract is nothing more than a convoluted way of saying that the employer breached the contract. Stated differently, although CCEA's pleadings and arguments are couched in the language of unilateral change, in their essence, they describe an alleged breach of contract.

A breach of contract does not violate subsection (1)(e). In *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04, 20 PECBR 850 (2005), the union alleged that the employer's breach of the parties' labor contract constituted bad faith bargaining, a violation of subsection (1)(e). We examined the language and structure of the Public Employee Collective Bargaining Act (PECBA).

⁴*E.g., Oregon Education Association v. Willamette Education Service District*, Case No. UP-8-07, 22 PECBR 585, 606 (2008) (“an employer violates its duty to bargain in good faith if it makes a unilateral change in employment relations *after a collective bargaining agreement has expired and before a new contract has been executed*.” (emphasis added)); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 139 (2007) (same).

We noted that in ORS 243.672(1)(g)⁵ “[t]he legislature specifically made it an unfair labor practice to violate a [collective bargaining agreement].” 20 PECBR at 851. We concluded that “[i]n light of the statutory scheme, a contract violation does not constitute bad-faith bargaining. If the Union wishes to assert a contract violation, it must do so either through the contract’s grievance procedure, or else in a complaint under ORS 243.672 (1)(g).” *Id.*; *Laborers’ International Union of North America, Local 483 v. City of Portland*, Case No. UP-12-06, 22 PECBR 12, 15-16 (2007).

We apply that reasoning here. CCEA asserts that the County changed the benefits it was required to provide to bargaining unit members under Articles IX and XXIV of the parties’ contract. Resolving CCEA’s complaint would require us to interpret and apply the relevant contract provisions to determine if the County provided the insurance coverage required by the contract. Such disputes are properly raised under ORS 243.672(1)(g). CCEA has not raised a claim under subsection (1)(g).⁶

By letter dated December 16, 2009, the ALJ notified CCEA of her intent to recommend that this Board dismiss the complaint because it raised issues under ORS 243.672(1)(g) but not (1)(e). CCEA responded in part:

“That the County’s actions might also be an ORS 243.672(1)(g) violation is interesting but not determinative of whether CCEA has stated a claim under ORS 243.672(1)(e). Cf. *Washington Cty. Police Officers v. Washington Cty.*, 321 Or 430, 438-40, 900 P2d 483 (1995) (colliding legal duties do not excuse employer from making good-faith effort to comply with duties *or excuse ERB from enforcement*).” (Emphasis in original.)

We are not persuaded. CCEA has not identified conflicting legal duties. As described earlier, a contract violation does not constitute bad-faith bargaining. Under the PECBA scheme, a party can assert a contract violation either through a grievance or through an unfair labor practice complaint under subsection (1)(g), but not under subsection (1)(e). *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department*

⁵ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations * * *.”

⁶The parties’ contract provides that any dispute involving the application, meaning or interpretation of the contract is to be resolved through a grievance procedure which culminates in binding arbitration. Any complaint filed under ORS 243.672(1)(g) would be subject to an exhaustion of remedies defense. *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978).

of Corrections, 20 PECBR at 851. Thus, even if we assume the truth of CCEA's claim that the County changed health care benefits during bargaining, contrary to the terms of the parties' collective bargaining agreement, the County's actions would not constitute bad-faith bargaining under ORS 243.672(1)(e).

On its face, the amended complaint fails to raise an issue of law or fact that warrants a hearing. The gravamen of the amended complaint is that the County breached the parties' collective bargaining agreement in violation of ORS 243.672(1)(e). A breach of contract does not violate ORS 243.672(1)(e) even when it occurs during the parties' negotiations for a successor agreement. Therefore, CCEA has failed to state a claim on which relief can be granted.

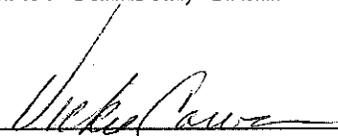
ORDER

The complaint is dismissed.

DATED this 25th day of February 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.