

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-63-04

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)
LOCAL 3940,)

Complainant,)

v.)

STATE OF OREGON,)
DEPARTMENT OF CORRECTIONS,)

Respondent.)

DISMISSAL ORDER

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

Donna Sandoval-Bennett, Attorney-in-Charge, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On December 27, 2004, Oregon AFSCME Council 75, Local 3940 (Union) filed this complaint against the State of Oregon, Department of Corrections (Department). The Union alleged that the Department had violated the collective bargaining agreement (CBA) and ORS 243.672(1)(e) by requiring Department workers assigned to forest fire fighting to sign a form regarding their on-call status. On January 19, 2005, the Administrative Law Judge (ALJ) notified the Union that there was a strong argument for dismissal of the action because it failed to state a claim for relief. The ALJ invited the Union to provide him with any reasoning, or disputed facts, which demonstrated that the argument identified by the ALJ was incorrect, or that the complaint rested on other legal theories, so that the ALJ could determine whether to recommend that the complaint be dismissed. On February 2, 2005, the Union responded to the ALJ's inquiry by filing an amended complaint. The ALJ concluded that the

amended complaint failed to state a claim for relief

When this Board decides whether to dismiss a complaint without a hearing, we assume that the facts alleged in the complaint are true. *SEIU v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004).

The amended complaint alleges that the Department violated the on-call provision of the contract which states:

“Employees on forest fire assignment who are off duty shall be considered on call *unless the Employer notifies the employee otherwise.*”

The violation allegedly occurred when the Department required employees who apply for a position as a fire crew supervisor to sign a form with the following paragraph concerning on-call status:

“I am aware employees on forest fire assignment who are off duty and are not ‘on call’, or qualified for On-Call Pay, unless specifically assigned by the Fire Camp Leader/Supervisor, and the assignment for on-call status is documented on the daily Fire Camp Roster.”

The Union asserts that these actions constitute bad-faith bargaining, a violation of ORS 243.672(1)(e), in two respects: (1) the Department made “an effort * * * to unilaterally reject a provision of the Contract”; and (2) the Department “circumvented the Union and negotiated directly with employees.”

The Union’s first claim alleges a contract violation. The legislature specifically made it an unfair labor practice to violate a CBA ORS 243.672(1)(g). The Union has opted not to assert its claim under subsection (1)(g). Instead, it alleges that the contract violation constitutes bad-faith bargaining under subsection (1)(e). In 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).¹ The Union’s first claim fails to state a claim upon which relief can be granted, and we will dismiss it.

¹We note that the parties’ CBA contains a grievance procedure that culminates in binding arbitration. Any complaint under subsection (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).

The Union's second claim asserts that the Department circumvented the Union and dealt directly with employees on the topic of on-call status. As a general rule, a public employer must deal with the exclusive representative regarding employment relations rather than directly with employees. *Cascade Unified Education Association v. Cascade School District No. 5*, Case No. UP-31-98, 18 PECBR 590, 602 (2000). Here, however, the CBA expressly requires the Department to deal directly with employees on the issue of on-call status: "Employees on forest fire assignment who are off duty shall be considered on call unless the Employer notifies *the employee* otherwise." Based on this plain and unambiguous contract language, we conclude that the Union has clearly and unmistakably waived any right it may have had to prohibit the Department from holding direct discussions with individual employees about their on-call status. The Department had some its employees sign a form that concerned notice of on-call status. As such, the Department's actions were expressly authorized by the contract. In light of the contractual waiver, there can be no direct dealing violation, and we will dismiss this claim.

Even if we assume, as we must, that all of the facts in the amended complaint are true, the Union would not prevail as a matter of law on either of its claims. In these circumstances, there is no reason to hold a hearing. We will dismiss the complaint because it fails to state a claim for relief.

ORDER

The complaint is dismissed.

DATED this 23 day of February 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.