EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-05-10

(UNFAIR LABOR PRACTICE)

KEITH APPLEBY, Complainant, v. GRADUATE TEACHING FELLOWS FEDERATION, AFT LOCAL 3544, Respondent.	)	DISMISSAL ORDER

Keith Appleby, Eugene, Oregon, Complainant, appeared *pro se*.

Michael J. Tedesco and Darci G. Van Duzer, Attorneys at Law, Tedesco Law Group, Lake Oswego, Oregon, represented the Respondent.

On October 8, 2010, Keith Appleby (Appleby) filed an unfair labor practice complaint against the Graduate Teaching Fellows Federation, AFT Local 3544 (Federation). He alleged that the Federation violated internal union election procedures and interfered with Appleby's ability to run for office and participate in the election contrary to ORS 243.672(2)(a) and (b).[1] On December 20, 2010, Appleby filed an amended complaint which added an allegation that the Federation colluded with the University of Oregon (University) to influence the outcome of the election in violation of ORS 243.672(1)(b).

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[1]On October 8, 2010, Appleby filed a second complaint against the Federation and the University of Oregon, Case No. FR-06-10. This Dismissal Order only addresses the claims in Case No. FR-05-10.

On November 15, 2010, the Administrative Law Judge (ALJ) requested clarification of Appleby's employment status at the University at the time of the events raised in the complaint. By letter dated January 12, 2011, the ALJ told Appleby that she would recommend that this Board dismiss this complaint unless Appleby could show cause why the complaint should not be dismissed. On January 31, 2011, Appleby submitted his response.

This Board investigates unfair labor practice charges to determine if a hearing is warranted. After the investigation, this Board may dismiss a complaint without hearing if it determines that no issue of law or fact exists that warrants a hearing. ORS 243.676(1)(b). For the reasons explained below, we conclude that the complaint fails to state a claim for relief under ORS 243.672(1)(b), (2)(a), or (2)(b), and dismiss it.

For purposes of this Order, we assume that the well-pled facts in the complaint are true. *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 also rely on undisputed facts we discovered during our investigation. ORS 243.676(1)(b); *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).

We summarize the complaint, the attached exhibits, and the undisputed facts as follows:

1. The Federation is a labor organization that represents a bargaining unit of approximately 1,300 graduate teaching fellows and research assistants (GTFs) at the University, a public employer. Article 1, Section 1, of the 2010-2012 collective bargaining agreement between the University and the Federation provides that "[t]he bargaining unit as certified by the Employment Relations Board (ERB) consists of 'All graduate students with GTF appointments (service awards) employed by the University of Oregon, excluding supervisors and confidential employees.'"

2. Article 4, Section 6 of this collective bargaining agreement provides that

> "GTFs who are Union members and who, for any reason, temporarily discontinue their status as a GTF with the University shall, upon their return to University employment, be reinstated as members of the GTF Union following notice provided by the Union to the University."

3. Article Three of the Federation bylaws, which govern Federation operations, define two types of Federation members: (1) regular members, who are GTFs who are Federation bargaining unit members; (2) associate members, who are graduate students regularly enrolled in the University who are not Federation bargaining unit members.[2] Article Three, Section Two (d) provides that associate members are eligible to hold elected or appointed Federation positions.

4. Appleby is a graduate student enrolled in the University. The University initially granted Appleby service awards for four years of employment (nine terms of .4 FTE employment and three terms of .2 FTE employment with the Department of Sociology. Appleby also obtained additional employment through the University's Labor Education and Research Center (LERC).

5. Prior to January 1, 2010, LERC employed Appleby as a GTF. Effective January 1, 2010, Appleby resigned from this employment for personal reasons, but continued as a University graduate student.[3] At the time of his resignation, Appleby had one term of his service award funding remaining from the Department of Sociology. Between January 1 and September 15, however, Appleby did not work for the University and the University paid him no salary. Appleby resumed working for the University on September 15.

6. During the period January 1 until September 15, University records reflected that Appleby's employment status was still "active." As a result, in June 2010, Appleby was denied the right to liquidate his retirement account.

7. During the period January 1 through September 15, Appleby paid dues to the Federation. Until sometime in May, Appleby also served as the Federation's Vice President for Political Education.

8. Between February and May, Appleby concurrently ran for various Federation offices as part of an internal union election process. During this time, Appleby alleges that a number of Federation representatives, including members of the

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[2]Membership in a union's bargaining unit is defined by a contractual recognition clause or a Board certification, while membership in the union itself is generally defined by the union's bylaws. As in this case, the definition of union membership may be broader than the definition of the members of the bargaining unit. In addition, membership in the union is generally voluntary, while all designated employees are members of a bargaining unit whether or not they belong to the union.

[3]All subsequent events occurred during 2010.

Elections Committee, interfered with his right to participate in the election by engaging in a negative campaign against Appleby, harassing him about a campaign flyer at a Federation Executive Board meeting, unreasonably denying his request for distribution of campaign literature, acting in a biased manner, providing other candidates unequal access to members, failing to provide a reasonable opportunity to campaign, failing to publish information about when ballots were due, providing unequal access to a list of Federation Women's Caucus members, criticizing him for telling members in campaign literature that the Federation's staff representative was leaving, failing to comply with his request to distribute campaign literature through e-mail, ending the election period early, and leaving the ballots in an unsecured location to which his opponents' supporters had access.

9. On May 7, the Federation announced the results of the election. Appleby did not win any of the positions for which he ran.

10. On December 10, University representatives gave Appleby a copy of an e-mail he had previously sent to a Federation representative. The e-mail was apparently provided to the University as a precursor to a disciplinary conference that University representatives Yeh and Friestad had with Appleby in April of 2010.

Discussion

Based on our review of the complaint, the accompanying exhibits, and the relevant legal authorities, we conclude that the allegations in the complaint do not state a claim on which relief can be granted, and dismiss the complaint.

ORS 243.672(1)(b) Claim

The complaint alleges that Federation representatives worked with the University to influence the outcome of the election and harass Appleby in violation of ORS 243.672(1)(b). Under ORS 243.672(1)(b), it is a violation for "a public employer or its designated representative" to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." ORS 243.650(20) defines a public employer as the State of Oregon and certain political subdivisions, including cities, counties, and school districts. ORS 243.650(21) defines a public employer representative as "any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues."

The Federation is a labor organization and the respondent in this complaint. Subsection (1)(b) applies only to a public employer or its representative. The complaint alleges no facts which would support a finding that the Federation was specifically designated by the University, a public employer, "to act in its interests in all matters

dealing with employee representation, collective bargaining and related issues." The only factual allegation in the complaint related to this alleged violation is that the Federation colluded with the University by giving it an e-mail that Appleby had sent to one of the Federation's representatives. Standing alone, this allegation, even if true, is insufficient to bring the Federation within the statutory definition of a public employer. Accordingly, Appleby has failed to state a claim for relief against the Federation under ORS 243.672(1)(b).

ORS 243.672(2)(a) Claim

The complaint also alleges that the Federation interfered with Appleby's right to participate in the internal election process in violation of ORS 243.672(2)(a). Under ORS 243.672(2)(a), it is an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed in ORS 243.650 to 243.782." ORS 243.662 provides that "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing * * *." On its face, this statute confers rights only on "public employees." As a threshold matter, we must determine if Appleby was a "public employee" at the time he was allegedly harmed. The statute defines "public employee" as "an employee of a public employer." ORS 243.650(19). There is no dispute that the University is a public employer under the statute. The question is whether Appleby was an employee of the University at the relevant time. The statute does not define "employee," so we give it its ordinary meaning. *PGE v. Bureau of Labor,* 317 Or 606, 611, 859 P2d 1143 (1993). We begin our analysis of Appleby's claim by interpreting these statutes.

"An employee is commonly understood to be a person who is employed by another. *Webster's Third New Int'l Dictionary* 743 (unabridged edition 2002)." *Mossberg v. University of Oregon,* 240 Or App 490, 496, 247 P3d 331 (2011). If the drafters of the law intended to protect persons other than employees, they would have used a term unrelated to current employment status, such as "individual" or "person. " *Id.*[4]

At the time the events occurred upon which Appleby's allegations are based, Appleby had resigned from his GTF position. Although he had a service award with the University that might result in future re-employment, he did not work for the University

[4]In *Mossberg,* the Oregon Court of Appeals concluded that OAR 571-003-000(1), which makes a grievance procedure available to "employees," refers only to current employees; the court noted that if the legislature intended the procedure to be available to others, it would have used another term "not intrinsically connected to current employment status."

during the period the allegedly unlawful acts occurred. Accordingly, Appleby was not a public employee and is not entitled to pursue a claim against the Federation under subsection (2)(a). *See Baker School District No. 5J v. Baker Education Association and Don Shore,* Case No. C-47-78, 5 PECBR 3057, 3067 n 8 (1980) (allegations against a union under ORS 243.672(2)(a) were dismissed partially on the grounds that the allegedly unlawful acts were directed against individuals who were not working for an Oregon public employer).

Appleby argues, however, that he should be considered a University employee because his status is comparable to that of a seasonal employee, a teacher on summer recess, or an adjunct professor who has no teaching assignment during a particular academic term. According to Appleby, these individuals are considered employees, even though they may have regular or intermittent periods of unemployment.

Assuming without deciding that seasonal employees, teachers, and adjunct professors are employees under ORS 243.650(19), their status differs significantly from Appleby's. All these individuals have some assurance of continued employment. Appleby, however, had none at the time he filed his unfair labor practice complaint: he had voluntarily resigned his position as a GTF and severed his employment relationship with the University.

Appleby also contends that by allegedly attempting to block his participation in the Federation elections, the Federation breached its duty to fairly represent him. Under ORS 243.672(2)(a), a labor organization is obligated to fairly represent all employees in the bargaining unit for whom it is the exclusive representative. *Robert T. Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department,* Case No. FR-002-09, 24 PECBR 1 (2010).

A labor organization's "duty to represent an individual exists only if it is the exclusive representative of a bargaining unit and it is in a position to assert PECBA rights on behalf of an individual who is in that bargaining unit." *Reidy v. Oregon Public Employees Union,* Case No. UP-73-87, 10 PECBR 180, 182 (1987). Neither an employer nor a union has a legal obligation to bargain about the employment relations of retirees or former employees who voluntarily resigned their employment with the employer and who, as a result, are no longer members of the bargaining unit. *Hadley v. Multnomah County Deputy Sheriff's Association and Multnomah County,* Case No. FR-1-08, 22 PECBR 416, 419 (2008). After an employee resigns, there is no reason for the union to represent the employee. *Chan v. Clackamas Community College,* Case No. UP-13-05, 21 PECBR 563, 576 (2006).

Here, the Federation bargaining unit includes only GTFs "with GTF appointments (service awards) *employed* by the University." (Emphasis added.) During the time that the Federation allegedly interfered with Appleby's right to participate in the internal election

process, Appleby was not employed by the University: he had resigned. Although he had a service award which allowed for possible future employment, he was not working for the University and not on the University's payroll. Accordingly, Appleby was not a member of the Federation bargaining unit whom the Federation was obligated to fairly represent under ORS 243.672(2)(a).

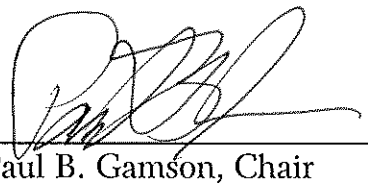
ORS 243.672(2)(b) Claim

ORS 243.672(2)(b) makes it an unfair labor practice for a public employee or a labor organization to refuse to bargain in good faith with a pubic employer. The complaint includes no factual allegation that the Federation either had an obligation to bargain with, or, for that matter, failed to bargain with the University. Therefore, Appleby has failed to state a claim for relief under ORS 243.672(2)(b).

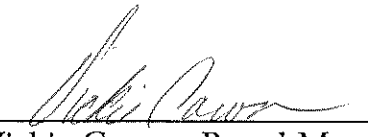
ORDER

The complaint is dismissed.

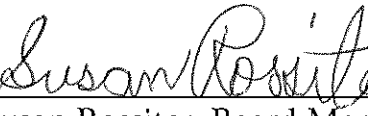
DATED this 31 day of March 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.