

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-12-06

(UNFAIR LABOR PRACTICE)

LABORERS' INTERNATIONAL UNION)
OF NORTH AMERICA, LOCAL 483,)
)
Complainant,)
)
v.)
)
CITY OF PORTLAND,)
)
Respondent.)
_____)

DISMISSAL ORDER

Michael R. Dehner, Field Representative, Laborers' Local 483, 1125 S.E. Madison Street, Suite 206, Portland, Oregon 97214-3600, represented Complainant.

Lory J. Kraut, Deputy City Attorney, City Attorney's Office, City of Portland, 1221 S.W. 4th Avenue, Suite 430, Portland, Oregon 97209, represented Respondent.

On March 23, 2006, Laborers' International Union of North America, Local 483 (Union or Local 483) filed this unfair labor practice complaint which alleged that the City of Portland (City) violated the applicable collective bargaining agreement, and hence ORS 243.672(1)(g). Specifically, it alleged the City granted unpaid union leave to Bruce Easley, a Union officer and bargaining team member, but then refused to provide him the insurance benefits he was entitled to under the contract when he returned to active employment.

The City moved to dismiss the complaint on several grounds, including the Union's failure to exhaust its contract remedies. See *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978). Before the

Administrative Law Judge (ALJ) decided the motion, the Union amended its complaint. The amended complaint abandoned the subsection (1)(g) claim and alleged instead that the City bargained in bad faith in violation of subsection (1)(e) when it unilaterally changed a working condition, *i.e.*, its past practice of providing insurance benefits to employees when they return to work after an unpaid leave.

The City again moved to dismiss. The gist of its argument is that “the Amended Complaint represents nothing more than a poorly disguised contract dispute ‘cast in duty to bargain rhetoric.’” We agree that the amended complaint fails to state a claim for relief under subsection (1)(e), and we will therefore dismiss it.¹

For purposes of deciding whether to dismiss a complaint without a hearing, we assume that all the facts alleged in the complaint are true. *Service Employees International Union Local 503 v. State of Oregon, Judicial Department*, Case No. UP-6-04, 20 PECBR 677, 678 (2004). The Board can also rely on undisputed facts discovered during its investigation of the complaint.² *Upton v. Oregon Education Association*, Case No. UP-58-06, 21 PECBR 867 (2007); *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 498 n. 2 (1993). This Board decides whether a fact is in dispute regardless of the characterization by the parties. *Id.*

The amended complaint alleges the following provision of the collective bargaining agreement:

“Permanent full-time employees shall be eligible as provided herein for medical, dental, vision and life insurance coverage the first of the month following the date of hire. Permanent full-time employees shall cease to be eligible as provided herein for medical, dental, vision and life insurance coverage as of the last day of the month following the date of unpaid

¹The City also urges us to dismiss the amended complaint on grounds that the Union failed to exhaust its contract remedies. The exhaustion doctrine does not apply here. “[E]xhaustion is not required where the complaint is alleging a unilateral change in violation of (1)(e)” *Southwestern Oregon Community College Classified Federation v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993). In addition, because of our disposition of the case, we need not decide the City’s assertion that the Union waived its right to bargain over the benefits at issue.

²ORS 243.676(1)(b) requires the Board to investigate unfair labor practice charges to determine if a hearing is warranted. The Board may dismiss a complaint without hearing if, after the investigation, it determines that no issue of law or fact exists. *Id.*

leave status or of their separation from active employment. Medical, dental, vision and life insurance benefits will be paid at 100% of the city contribution for those employees who have a Standard Hours designation of at least seventy-two hours in a pay period in a benefits eligible, budgeted position.

“Following an authorized unpaid leave, a permanent full-time employee shall be eligible for medical, dental, vision and life insurance as provided herein on the first calendar day of the month in which said employee returned to active employment.” (Emphasis in original.)

The amended complaint further alleges that the City approved an unpaid leave of absence for bargaining unit member Easley for December 2 through 29, 2005; that Easley returned from this leave on December 30, and then began a second approved unpaid leave from January 3 through January 26, 2006; and that Easley returned from his second leave on January 27. The Union asserts that because Easley returned to work from his leaves at the end of December and January, he is entitled to full insurance coverage beginning on the first calendar day of those months. The City asserts Easley is not entitled to benefits for those months because he did not work the contractual minimum number of hours during the pay periods. The City does not dispute that Easley meets all of the other eligibility requirements for the benefits.

Local 483 paid Easley’s health insurance premiums for December 2005 and January 2006 in order to maintain his insurance coverage. The Union’s prayer for relief in the amended complaint is the same as in the original complaint: It seeks an order requiring the City to reimburse it for the money it spent to maintain Easley’s insurance coverage, together with interest. The Union also seeks an order directing the City “to provide insurance coverage to any regular full-time employee returning to active employment during the entire month in which they return to active employment, without regard to how many or few hours are worked during that month.”

DISCUSSION

The original complaint alleged a breach of contract under subsection (1)(g). The amended complaint differs from the original in just three respects. First, it drops the

subsection (1)(g) claim and substitutes a subsection (1)(e) claim.³ Second, it adds a new paragraph as follows:

“Under the applicable collective bargaining agreement, established City policy, and enforceable past practice, employees returning to active employment are eligible for City-paid benefits for the month in which they return to active employment, without regard to how many or few hours worked during that month.” (Emphasis added.)

Third, the amended complaint adds an introductory phrase to the original paragraph 10:

“Respondent unilaterally modified a working condition which is a mandatory subject for bargaining when, on or about December 5, 2005, it announced that it would not provide benefits coverage to any employee who did not work his or her ‘standard hours.’” (New language italicized.)

The amended complaint thus continues to expressly allege a breach of the collective bargaining agreement, and it further alleges that the City bargained in bad faith when it changed its policy and practice regarding eligibility for the contractual insurance benefits. At its core, the amended complaint alleges nothing more than a garden-variety dispute over the meaning and application of a contract provision. Resolving the amended complaint would require this Board to determine whether the City deprived Easley of insurance benefits he was entitled to under the contract. As such, the claim properly belongs under ORS 243.672(1)(g) which specifically makes it an unfair labor practice for a public employer to violate the terms of a labor contract.⁴ Under our caselaw, the amended complaint fails to state a claim for relief for 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

³Local 483 apparently dropped its subsection (1)(g) claim because it recognized the claim would likely be dismissed under the *West Linn* exhaustion of remedies doctrine. Although Local 483 may have successfully avoided an exhaustion defense, its amended complaint must nevertheless state a valid claim under its new subsection (1)(e) theory.

⁴ORS 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 * * *.”

complaint under ORS 243.672 (1)(g).” *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04, 20 PECBR 850, 851 (2005). In *Oregon AFSCME Council 75*, we dismissed an allegation that a public employer’s breach of contract violated subsection (1)(e). The same reasoning applies here.

The result is no different if we go beyond the complaint and consider Local 483’s attempt to clarify its position in response to the City’s motion to dismiss. The response asserts that the contract fails to address certain questions about the insurance benefits, and it argues that the City needs to bargain over those unanswered questions. For example, Local 483 asserts that the contract does not identify whether there are any preconditions to receiving the insurance benefits, and it asks whether the City can add conditions not identified in the contract. It also notes that the contract fails to define crucial terms in the contract such as “standard hours” and “active employment.” Such questions, however, call for contract interpretation, not further bargaining. Otherwise, every dispute over how to interpret or apply a contract would become an occasion for bargaining rather than for a proceeding to resolve the parties’ competing interpretations.

Local 483 also asserts that the City departed from its past practice of providing insurance benefits to employees when they return from an approved unpaid leave. This argument does not help the Union; to the contrary, it further demonstrates that this is, in essence, a dispute about the meaning of the contract. The parties’ past practice in applying a contract provision is an aid to interpreting the meaning of that provision. *Oregon School Employees Association v. Lincoln County School District*, Case No. UP-10-92, 14 PECBR 503, 508 (1993) (past practice is the “most reliable aid” in construing ambiguous contract language); *Goodman v. Continental Casualty Co.*, 141 Or App 379, 389, 918 P2d 438 (1996) (the parties’ conduct in performing a contract can be persuasive evidence of the contract’s meaning); *Tarlow v. Arntson*, 264 Or 294, 300, 505 P2d 338 (1973) (how the parties conduct themselves under a contract is instructive of what they intended); *see generally* Elkouri and Elkouri, *How Arbitration Works* at 623 (BNA 6th ed. 2003). In this context, the parties’ past practice concerning the insurance article is an aid to interpreting that article. It does not create a new and separate bargaining obligation.⁵

⁵The Union’s confusion is understandable. When an employer changes a working condition, we use past practice in two very different ways, depending on whether the working condition at issue is covered by a labor contract. Here, the amended complaint alleges the working condition (insurance benefits when an employee returns from an approved unpaid leave of absence) is covered by the contract. When the changed working condition is covered by a contract, we use past practice as an aid to interpreting the contract. *See* the cases cited above in

Local 483 has not raised an issue of law or fact that warrants a hearing. The gravamen of its amended complaint is that the City breached the labor contract in violation of subsection (1)(e). Under the statute and our cases, a breach of contract does not violate subsection (1)(e). We will dismiss the amended complaint because it fails to state a claim for relief.

ORDER

The amended complaint is dismissed.

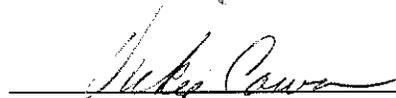
DATED this 8th day of August 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member



Vickie Cowan, Board Member

This Order may be appealed pursuant to ORS 183.482.

the text. It is only when the working condition is *not* covered by the contract that we use past practice to determine whether the employer has an obligation to bargain before it can change the working condition. *E.g., Riddle Association of Classified Employees v. Riddle School District #70*, Case No. UP-114-91, 13 PECBR 654, 662 (1992) Local 483 confuses these different uses of past practice. It asserts the City must bargain before it can change the past practice regarding the application of the contractual insurance provision. In other words, it seeks to obtain a result (a bargaining obligation) which is available only when the changes concern issues *not covered* by a contract, even though the amended complaint alleges that the working condition here *is covered* by the contract.