

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-06

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75,)	
)	
Complainant,)	
)	ORDER ON
v.)	COMPLAINANT'S
)	MOTION FOR
STATE OF OREGON, DEPARTMENT)	RECONSIDERATION
OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

On January 29, 2009, this Board issued an Order which found that the State of Oregon, Department of Corrections (DOC) did not unilaterally change the *status quo* in violation of ORS 243.672(1)(e) when it implemented a March 2006 sick leave policy without notifying or bargaining with AFSCME Council 75 (AFSCME) about the policy. 22 PECBR 958.

On February 10, 2009, AFSCME filed a motion for reconsideration and also requested oral argument. At our request, the parties responded to questions about the issues raised by AFSCME's motion.

We grant reconsideration to address some of the issues raised in AFSCME's motion and to clarify our Order. AFSCME contends that reconsideration is appropriate because we based the conclusions in our Order on arguments that were neither raised by the parties nor considered by the Administrative Law Judge (ALJ). In our Order, we held that DOC's actions in implementing the March 2006 sick leave policy were not a unilateral change in the *status quo* because they were authorized by the parties' collective bargaining agreements. AFSCME argues that the conclusion on which our decision rested—that DOC had contractual authority to adopt the March 2006 sick leave policy—was an affirmative defense that DOC never timely pled. According to AFSCME, we erred when we decided the case on the basis of an affirmative defense that was waived by DOC's failure to assert it. We disagree.

In regard to AFSCME's contention that neither party raised language in the applicable collective bargaining agreements as an issue, we note that AFSCME attached copies of the parties' 2005-2007 agreements to its complaint. Copies of these agreements were also admitted as joint exhibits at the hearing. Accordingly, both parties knew and understood that the collective bargaining agreements were relevant evidence in this case.

Next, we turn to AFSCME's argument that contractual authority is an affirmative defense which is waived if a respondent does not plead it in its answer. OAR 115-035-0035(1); *Lebanon Education Association v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 326 (2008). We begin our analysis in a unilateral change case by determining what is the *status quo*, which may be established by an expired collective bargaining agreement, past practice, work rule, or policy. *Lebanon Education Association*, 22 PECBR at 360. As DOC correctly notes, the expired collective bargaining agreement is usually at issue in unilateral change cases, since these cases most often arise during the hiatus period after a contract has expired.

The Oregon Court of Appeals acknowledges that a current collective bargaining agreement may also define the *status quo*. In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 209 Or App 761, 149 P2d 319 (2006), the union alleged that DOC unlawfully refused to bargain over proposed changes in the bid schedules for employee shifts and days off in violation of subsection (1)(e). DOC contended that the parties' then-current collective bargaining agreement authorized it to make the disputed changes. The court agreed:

“* * * if the CBA [collective bargaining agreement] authorizes an employer to act unilaterally with respect to certain conditions of employment, then changing those conditions is not a change in the status quo, and a failure to bargain before changing them cannot be an unfair labor practice.”
209 Or App at 769 (Citations omitted).

Thus, language in a parties' current collective bargaining agreement is relevant to determining the *status quo* in a unilateral change case. It is not, as AFSCME asserts, relevant only to an affirmative defense that is waived if a respondent never properly pleads it.

Accordingly, we did not err when we considered provisions in the parties' collective bargaining agreements concerning sick leave to determine the *status quo*. We concluded that contract language established the *status quo* and that DOC did not unlawfully change this *status quo* when it adopted the March 2006 sick leave policy.¹

¹Consistent with our clarification and application of the court's decision in *AOCE v. DOC*, we offer the following suggestion to practitioners. In the past, complainants in

(continued. .)

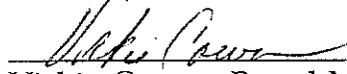
Even if AFSCME is correct—that we improperly based our conclusions on an affirmative defense that DOC never raised—it would not change the outcome of this case. In addition to dismissing AFSCME’s complaint on the grounds that DOC made no unlawful change in the *status quo*, we dismissed AFSCME’s complaint on the alternative grounds that DOC’s adoption and implementation of the March 2006 sick leave policy was permitted under ORS 243.706(1)(b).² The legality of DOC’s actions under this statutory provision is an issue which is separate from the legality of any alleged change in the *status quo*. For this reason, we reject AFSCME’s argument that the outcome of this case would change even if we decide that the issue of DOC’s contractual authority is an affirmative defense which we cannot consider because DOC never raised it.

ORDER

Reconsideration is granted. AFSCME’s request for oral argument is denied. We adhere to our Order of January 29, 2009 as clarified herein.

Dated this 10th day of April 2009.

*Paul B. Gamson, Chair


Vickie Cowan, Board Member


Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson Concurring.

(... continued)

unilateral change cases have not found it necessary to address the provisions in a current collective bargaining agreement in their pleadings. Now, we suggest that unions would be well-advised to allege that an employer’s unlawful actions are not authorized by the terms of a collective bargaining agreement.

²ORS 243.706(1)(b) provides: “Public managers have a right to change disciplinary policies at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.”

In the underlying case, AFSCME witnesses admitted to systematically abusing sick leave.³ Examples in the record include employees who used it for paid time off to go hunting⁴ and employees who used it to get a paid day off when they could not obtain a desired vacation day.⁵ DOC notified the employees it would no longer tolerate their practices and described in detail how it would administer the existing sick leave program. AFSCME asserted that this notice constituted an unbargained—and hence unlawful—change in employee working conditions. In essence, AFSCME argues that the right to abuse sick leave is the *status quo* which DOC can change only after it bargains to completion.

I cannot conceive of any way in which the purposes and policies of the PECBA would be furthered by requiring an employer to bargain before it can take actions to stop sick-leave abuse. The essence of a binding past practice is that employees can reasonably expect it to continue. I do not believe employees could reasonably expect to continue abusing sick leave with impunity. It is black-letter labor law that an employer that was previously lax in enforcing its rules of conduct can resume enforcing the rules if it first provides notice that it intends to do so.⁶ The parties' contract lists the proper uses for sick leave. In my view, DOC did not commit an unlawful unilateral change when it indicated it would enforce those limitations.⁷

Because I believe this analysis adequately resolves the complaint, I do not see a need to reach a number of the issues decided by my colleagues. I therefore concur in the result but not in the reasoning.



Paul B. Gamson, Chair

³Transcript (tr.) at 23-24

⁴Tr. at 105-106

⁵Tr. at 18, 23-24, 133-134, 184-185, and 208-209

⁶*See, e.g.,* Elkouri & Elkouri, *How Arbitration Works* 994-995 (6th ed. 2003); Brand, *Discipline and Discharge in Arbitration* 81-83 (BNA 1998).

⁷If, in a particular instance, an employee is denied sick leave or is disciplined for alleged abuse of sick leave, the employee remains entitled to challenge DOC's actions under the contractual grievance procedure