

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-17-08

(UNFAIR LABOR PRACTICE)

ROGUE RIVER EDUCATION)
ASSOCIATION/SOUTHERN OREGON)
BARGAINING COUNCIL/OEA/NEA,)
)
Complainant,)
)
)
v.)
)
ROGUE RIVER SCHOOL DISTRICT)
NO. 35,)
)
Respondent.)
_____)

DISMISSAL ORDER

Barbara J. Diamond, Attorney at Law, Smith, Diamond, & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

The Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA (Association) filed this unfair labor practice complaint on May 6, 2008. The Association alleges that Rogue River School District No. 35 (District) violated ORS 243.672(1)(g) when it failed to provide Jewell Allen early retirement benefits as agreed to in a memorandum of understanding. On May 19, 2008, the District filed a Motion to Dismiss. The District asserts that the alleged violation occurred on June 30, 2007, more than 180 days before the complaint was filed, making the complaint untimely under ORS 243.672(3).

By letter dated May 22, 2008, Administrative Law Judge (ALJ) Larry L. Witherell gave the Association an opportunity to show cause why the complaint should not be dismissed. On June 5, 2008, the Association responded to the Motion to Dismiss. On June 6, 2008, the District replied to the Association's response.

For purposes of this Order, we assume the allegations in the complaint are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department, Case No. UP-6-04, 20 PECBR 677, 678 (2004)*. The pertinent allegations in the complaint are as follows:

"3. Jewel Allen (Allen) is a former elementary school teacher for the District. * * * She completed 14 years of teaching for the District on or about the year 2000.

"* * * * *

"5. After teaching for 14 years for the District, Allen wished to retire at the end of the 1999-2000 school year. Under Article 25 of the parties' collective bargaining agreement in effect at the time, early retirement benefits were then available only to teachers who had taught for 15 years. * * *

"6. In order to allow Allen to retire, the parties reached a memorandum of agreement allowing Allen to access the contractual early retirement incentive [ERI] after only 14 years of employment. * * *

"7. Under the memorandum of agreement * * *, the parties agreed that Allen would access ERI after only 14 years and would be entitled to 'up to 7 years of benefits as otherwise described in Article 25, commencing July 1, 2000.'

"8. Allen retired at the end of the 1999-2000 school year and commenced receiving ERI. She received benefits * * * for school years 2000-2001, 2001-2002, and 2002-2003.

- “9. In the fall of 2003, the District had an unfilled teaching vacancy. Allen came back in October, 2003 to help the District cover. * * * Allen was given a temporary teacher contract from November, 2003 to June, 2004. * * *
- “10. From November 10, 2003 to June 11, 2004, Allen was a member of the teaching bargaining unit represented by complainant. * * * She did not receive the early retirement [benefits] during 2003-2004.
- “11. After working the temporary contract, Allen returned to her status as a retiree and recommenced receiving ERI. She received contractual early retirement benefits * * * for 2004-2005, 2005-2006, and 2006-2007.
- “12. Between the date of her early retirement and the end of the 2007 school year, Allen had received only six years of ERI.
- “13. On or about June, 2007, Allen received notice from the District that the District was terminating her early retirement incentive benefits effective June 30, 2007. * * *
- “14. As a result of the District’s discontinuation of Allen’s ERI, she became responsible for paying the entire monthly premium toward her health insurance for the 2007-2008 school year.
- “15. Allen contacted the District directly and sought to have the District recommence her ERI and pay for the seventh year of benefits. Allen was unsuccessful.
- “16. On or about December 1, 2007, Allen contacted OEA UniServ Consultant Jim Bond and notified him that her ERI had been discontinued. This was the Council’s first notice of the situation.

“17. Bond contacted the District and attempted to resolve the situation but was unable to do so.”

We have reviewed the complaint and accompanying documents, the Association’s and District’s arguments, and the pertinent legal authorities, and we conclude the complaint is untimely. Accordingly, we will dismiss the complaint. ORS 243.672(3) and OAR 115-035-0020.

DISCUSSION

ORS 243.672(3) states that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” Here, the District agreed in writing to provide Jewell Allen seven years of early retirement benefits. On June 30, 2007, after providing Allen the benefits for only six years, the District terminated her benefits. The Association filed this complaint on May 19, 2008, more than 180 days after the District terminated Allen’s benefits. The Association asserts that it did not learn of the District’s action until December 2007. According to the Association, the 180-day statute of limitations does not begin to run until it learned of the change. Because the Association filed its complaint within 180 days of the date it learned about the alleged violation, the Association asserts the complaint is timely. The legal issue before us is whether the 180-day statutory clock starts to run when the District implemented the change or, instead, when the Association learned about it.

We begin with the words of the statute. Under ORS 243.672(3), the complaint must be filed “not later than 180 days following the occurrence of an unfair labor practice.” To apply this provision, we must determine when the unfair labor practice occurred. We again look to the statute. The Association asserts that the District violated ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations * * *.” Under the plain words of the statute, the alleged unfair labor practice occurred when the District violated the written agreement to provide Allen with early retirement benefits for seven years. According to the complaint, this violation occurred on June 30, 2007, more than 180 days before the complaint was filed.

Many of our cases support this reading of the statute. In *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 19 (1996), *adh’d to on recons*, 17 PECBR 75 (1997), this Board stated that “the 180-day period for filing a (1)(e) complaint regarding a change in compensation begins when the change occurs.” To support this proposition, this Board cited *Salem-Keizer Association of Classified*

Employees v. Salem-Keizer School District, Case No. UP-104-90, 13 PECBR 89, 93 (1991); and *Oregon School Employees Association v. Clatsop Community College*, Case No. UP-13-87, 10 PECBR 774 (1988). In *OSEA v. Clatsop Community College*, the employer suspended a scheduled pay raise on July 1, 1986. The union filed a complaint on February 3, 1987. This Board dismissed the complaint as untimely because the unfair labor practice occurred when the employer suspended the raises on July 1, 1986, more than 180 days before the complaint. Similarly, the employer in *SKACE v. Salem-Keizer School District* unilaterally changed employment benefits at the beginning of the 1989-1990 school year. The union did not file a complaint until September 1990, more than 180 days after the change. This Board dismissed the complaint as untimely. Even though *OSEA v. Clatsop Community College* and *SKACE v. Salem-Keizer School District* both involved subsection (1)(e) allegations, the same principle applies to complaints alleging contract violations under subsection (1)(g)—a violation occurs for purposes of ORS 243.672(3) when the employer implements a change.¹

The Association asserts that the limitations period began when it discovered the change rather than when the change occurred. Over the years, our cases have inconsistently applied either a discovery rule or an occurrence rule to determine when the 180-day limitations period begins under ORS 243.672(3). In some cases, we applied a rule that the discovery of wrongdoing triggers the 180-day limitations period; in other cases, as noted above, we concluded that the limitations period begins when the change occurs. We recently listed cases on both sides of the controversy. *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506 (2008). We also noted that in *Huff v. Great Western Seed Co.*, 322 Or 457, 909 P2d 858 (1996), the Oregon Supreme Court held that a statute facially similar to ORS 243.672(3) did not include the discovery rule. *TriMet v. ATU*, 22 PECBR at 510 n 5. See also *Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 26 P3d 817 (2001) (there is no discovery rule in a statute of limitations that requires a complaint to be filed within two years of the date on which death, injury or damage “occurs”). In *TriMet v. ATU*, however, we did not need to resolve the conflict. We determined that even if we applied the more lenient discovery rule, portions of the complaint were still untimely.

¹Unilateral change cases under subsection (1)(e), and contract cases such as this one under subsection (1)(g), both assert unlawful changes in working conditions. Subsection (1)(e) cases allege a change that violates the *status quo*; subsection (1)(g) cases allege a change that violates the contract. We see no reason to treat changed working conditions differently for statute of limitations purposes, depending solely on whether the change is alleged to violate the *status quo* or a contract. The general rule for statute of limitations purposes is that the violation occurs when the employer makes the change.

The same is true here. Even if we assume *arguendo* that the discovery rule applies, the complaint is still untimely. Board cases that apply the discovery rule hold that the limitations period begins when the union knew *or reasonably should have known* about the change.² We conclude that under established caselaw, the Association reasonably should have known of the change when it was implemented, more than 180 days before the complaint. *Morrow County* is illustrative. There, the employer changed its pay practice in October 1995, the union learned of the action in March 1996, and it filed an unfair labor practice complaint in June 1996. The union argued that the complaint was timely under the discovery rule. We rejected that argument. We explained that

“[m]onitoring of unit members’ employment conditions, whether they are established in a negotiated contract or by past practice, is a primary responsibility of the exclusive representative. It would derogate the basic purposes of the limitation period to toll its running, after a change in working conditions is implemented and its effects are fully apparent, simply because the labor organization leadership did not become aware of the change for some period of time. To effectuate the purposes of ORS 243.672(3), we find that when the effects of a change are manifest to the employees, the exclusive representative must be presumed to be on notice that the change occurred. To put it in terms of our discovery rule, the union ‘reasonably should have known’ of the change at that time.” *Morrow County*, 17 PECBR at 19.

Subsequent cases have reaffirmed the *Morrow County* holding that a union should reasonably know about a change in conditions when the employees become aware of the change. In *Oregon School Employees Association v. Astoria School District*, Case No

²The Association argues that only its “actual knowledge” of the change should commence the statute of limitations. This position is contrary to our cases defining the contours of the discovery rule. *E.g.*, *Association of Professors of Southern Oregon State College v Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93, 15 PECBR 347, 357 (1994) (the 180-day limitations period begins with the occurrence of the act constituting the violation, “or when the injured party knew, *or reasonably should have known*, of the action” (emphasis added)); and *Ken Rasmussen v Federation of Parole and Probation Officers*, Case No. UP-54-90, 12 PECBR 299, 300-301 (1990) (same).

UP-40-02, 20 PECBR 46 (2002), the union alleged that on September 7, 2001, the employer violated ORS 243.672(1)(e) when it unilaterally assigned bargaining unit work to non-bargaining unit bus drivers. The union filed its complaint on May 31, 2002, more than 180 days after the assignment. The union argued that the discovery rule should apply because “there had been a large turnover in bus driving personnel, making it difficult to ascertain who was a regular driver” and “[b]ecause the [employer] did not provide the requisite notice” to the union. *Id.* at 46-47. We rejected the argument and dismissed the complaint as untimely. “The fact that there has been extensive turnover in personnel is no reason to depart from our long-standing rule.” *Id.* at 48.

In another reaffirmation of *Morrow County*, we held that a union reasonably should have known about allegedly unlawful agreements with new employees at the time the agreements were made. We noted that “* * * the Association, exercising reasonable diligence as the exclusive representative of the bargaining unit, knew, or reasonably should have known, of the written Agreements.” *Washington County Police Officers Association v. Washington County Sheriff’s Office*, Case No. UP-12-02, 20 PECBR 274, 277 (2003) ³

In the alternative, the Association argues that this Board should recognize an exception to *Morrow County*. The Association observes that our cases impute knowledge to the union concerning changes in *employee* working conditions, and Allen is a retiree who is no longer a District employee. According to the Association, we should not impute knowledge to it regarding non-bargaining unit members. We disagree. The Association entered a contract with the District and is bound to monitor it just as it would any other contract. Allen became aware of the change no later than June 30, 2007. We follow *Morrow County* and hold that when Allen became aware of the change in her benefits, the Association was presumed to be on notice that the change occurred.

The District ceased paying Allen her early retirement benefits on June 30, 2007. The 180-day limitations period began to run on that date.⁴ The complaint was

³We have held that “certain circumstances” might toll the statute of limitations, as, for example, where the employer and the employees conspire to conceal the actions from the union. *Oregon School Employees Association v. Astoria School District*, Case No. UP-40-02, 20 PECBR 46, 47-48 (2002). The Association does not assert fraud, conspiracy to conceal, or any other type of wrongdoing that might toll the statute.

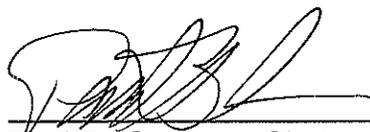
⁴We note that the Association does not allege that the District’s actions constituted a continuing violation of the contract, *i.e.*, that the District committed a new contract violation each month it denied Allen her retirement benefits.

filed more than 180 days later and is therefore untimely under ORS 243.672(3). Accordingly, we will dismiss the complaint.

ORDER

The complaint is dismissed.

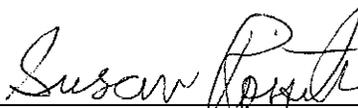
DATED this 20th day of June 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.