

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-18-06

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 88,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
MULTNOMAH COUNTY,)	CONCLUSIONS OF LAW
)	AND ORDER
Respondent.)	
_____)	

This matter was submitted directly to this Board on October 30, 2007, following a hearing before Administrative Law Judge (ALJ) Vickie Cowan on November 16 and 17, 2006, in Portland, Oregon. The record closed with the submission of post-hearing briefs on January 8, 2007.

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

Kathryn A. Short, Assistant County Counsel, Multnomah County, 501 S.E. Hawthorne Boulevard, Suite 500, Portland, Oregon 97214, represented Respondent.

On April 26, 2006, AFSCME Local 88 (AFSCME) filed an unfair labor practice complaint against Multnomah County (County). In its complaint, AFSCME alleged that the County violated of ORS 243.672(1)(e) when it unilaterally changed its past practice in regard to releasing information to the public about bargaining unit members' sick leave usage, overtime pay, and discipline. The District denied the allegations in the complaint.

The issue presented is: Did the County unilaterally change its past practice in violation of ORS 243.672(1)(e) when it released information to members of the public about AFSCME bargaining unit members' sick leave usage, overtime pay, and discipline?

RULINGS

1. At the hearing, AFSCME offered Exh. C-22, Executive Rule No. 0300, "Complying with a Public Records Request from the Media." The County offered no objections to the admission of the exhibit. The ALJ did not rule on the admission of Exh. C-22. Exh. C-22 is admitted into evidence.

2. Also at the hearing, the County offered Exh. E-1, copies of an e-mail exchange between a reporter for The Oregonian and County Counsel Agnes Sowle. AFSCME objected to the admission of this exhibit on the grounds that it was hearsay and because it was not given to AFSCME in advance of the hearing as required by the ALJ's prehearing order. *See* OAR 115-010-0068(4) The ALJ deferred ruling on the admission of Exh. E-1.

Exh. E-1 is not admitted into evidence. The County did not explain why it did not give Exh. 1 to AFSCME prior to the hearing in accordance with the ALJ's prehearing order. *See Central Linn Education Association v. Central Linn School District*, Case No. UP-7-96, 17 PECBR 194, 195 (1997) (an exhibit offered at hearing will not be admitted without adequate explanation as to why it was not exchanged in accordance with the ALJ's prehearing order).

3. All other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. AFSCME is a labor organization and the exclusive representative of a group of employees in the County classified service. The County is public employer.

2. AFSCME and the County were parties to a collective bargaining agreement which was in effect from July 1, 2004 through June 30, 2007. Article 17, "Disciplinary Action," Section IV, Manner of Accomplishing Reprimands, provides:

"If the County has reason to reprimand an employee, every reasonable effort will be made to accomplish the reprimand in a manner that will not embarrass the employee before other employees or the public."

3. County Rule 5-65-080, "Reference Checks and Other External Records Requests," provides in relevant part:

"(A) The following data will normally be revealed regarding a current or former employee in response to reference checks: name, classification title, department status, salary, hire date, and termination date. A director or supervisor who responds to a request for a personal reference on a current or former employee will respond in good faith with verifiable, objective and truthful information.

"(B) Supervisors performing reference checks may review the personnel files of county employees who have applied for jobs under their supervision.

"(C) When other requests for records are received regarding a current or former employee, the county will only release name, classification title, department status, salary, hire date, and termination date. Other records are considered confidential and will not be revealed to outside sources except as required by law or as expressly authorized in writing by the employee."

4. On February 2, 2002, County Chair Diane Linn implemented Executive Rule No. 266, "Complying with a Public Records Request from the Media." The rule provided, in relevant part:

"a. The Oregon Public Records Law (ORS 192.410 to 192.505) governs requests for public records. The law provides that most records in government files are accessible for public review.

"b. Exemptions exist to public records law, but the burden to establish that an exemption applies to a specific record is on the County. Exemptions include records containing personal information and those protected by attorney-client privilege.

"* * * * *

"d. The law applies only to public records that already exist. It does not require the County to create new records or perform research. For example, if the County receives a

request for a list of its 100 highest paid employees and no such list exists, the County is not required to create such a record.”¹

5. During the past few years, County Counsel Sowle has received and considered requests for disciplinary records concerning approximately seven employees, none of whom were members of the AFSCME bargaining unit. In all these cases, Sowle determined that she was obligated to release the requested records under the provisions of the public records law.

6. In August 2005, a reporter for television channel KGW contacted Travis Graves, the County’s human resources director, and asked for information regarding sick leave usage by County employees. Graves provided the reporter with a list of sick leave used by County employees recently compiled by the County payroll department as part of a County program to reward employees for not using sick leave. The list Graves initially provided to the reporter did not include names or other identifying data for the employees, and did not include leave taken by employees under the Family Medical Leave Act (FMLA).

7. The KGW reporter asked for names and other identifying information for employees on the sick leave usage list provided by Graves. Graves consulted with the office of County Counsel; the office advised Graves that under the applicable public records law and County policy, the County must provide the reporter with the additional information requested. Graves gave the reporter a list that included the names, departments, and job classifications of employees with the highest usage of sick leave. Neither Graves nor any other County representative told AFSCME about the information supplied to the reporter, and the County never offered to bargain over the release of the sick leave list to the media.

8. On November 28, 2005, KGW broadcasted a special report regarding sick leave usage by Multnomah County employees. Bargaining unit member C.C. viewed the report and became concerned that information about his use of sick leave may have been given to the reporter. C.C. contacted Graves, and got a copy of the list that had been provided to the KGW reporter. C.C. discovered his name on the list, and found that he was shown as having used 95.25 hours of sick leave. C.C. had taken this sick leave because of a work-related injury, and was disturbed that he may have been

¹On August 24, 2006, the County Chair implemented Executive Rule No. 0300, “Complying with a Public Records Request from the Media,” which superseded Executive Rule No. 266. Sections a, b, and d of Executive Rule No. 266 are identical to those in Rule No. 0300, however.

falsely portrayed as an abuser of sick leave. C.C. contacted AFSCME representatives and demanded that AFSCME take action regarding the County's release of information concerning employees' use of sick leave. AFSCME representatives were unaware that the County had published the sick leave list until C.C. told them about it.

9. On March 15, 2006, Kimberly Wilson, a reporter for The Oregonian newspaper, contacted County Counsel Sowle and requested the following materials:

“* * * [A]ny public documents that relating [sic] to personnel issues that the chair's office has been involved in that are public record. The time frame would be Oct. 1, 2005 to the present.”

10. After Sowle asked Wilson to clarify or narrow her request, Wilson asked for the following:

“* * * [A]ny public documents that relate to complaints about, examination of allegations or investigations into employee wrongdoing where discipline was or was not imposed by the chair's office. The time frame would be Oct. 1, 2005 to the present.

“In addition, can I have any documents that show the county employees authorized to take home county vehicles? And may I have any record of discipline imposed on employees for violating county rules regarding use of take home vehicles from Oct. 1, 2005 to the present?”

11. Sowle determined that two letters, in which discipline was imposed on bargaining unit members, were responsive to Wilson's request, and should be provided to Wilson under the Public Records law. Sowle electronically sent Wilson these two letters but did not redact names, addresses, and other identifying information about the employees who had been disciplined.

In one letter provided to Wilson, dated December 6, 2005, the County suspended AFSCME bargaining unit member S.S. for five days without pay for S.S.'s improper use of County credit cards. The County also required S.S. to reimburse the County for \$1,357.30 in expenditures that were found to have been made in violation of applicable County policies and procedures. Because the decision to discipline S.S. was made by a staff member in the County Chair's office, Sowle believed that the December 6, 2005 letter was responsive to Wilson's request.

In the second letter provided to Wilson, dated March 13, 2006, the County suspended AFSCME bargaining unit member C.P. for 30 days for a number of violations of County policies, including unauthorized use of a County vehicle, insubordination, failing to fulfill responsibilities as an employee, soliciting donations for a basketball program on County time, misconduct, operating a motor vehicle in an unsafe manner, and failing to provide truthful information to management about his activities.

12. After she sent Wilson the March 13 letter concerning C.P., Sowle read the letter again and realized that the discipline imposed did not involve misuse of a County take home vehicle. Sowle contacted Wilson, told Wilson that she had erroneously sent her C.P.'s disciplinary records, and asked Wilson to delete the letter concerning C.P. from her records. Wilson agreed to do so.

13. Neither Sowle nor any other County manager notified AFSCME about the disciplinary records given to Wilson, or offered to bargain with AFSCME about providing these records to Wilson.

14. In November 2006, a reporter for The Oregonian contacted the County Sheriff's Office and asked for a list of employees, by name, who had earned the most overtime, had used the most sick leave, or had called in sick on Thanksgiving or Christmas. A manager from the Sheriff's Office provided this information to the reporter. Most of the names on the list were not members of the AFSCME bargaining unit, but the names of a few AFSCME bargaining members appeared on the list. Jennifer Ott, the human relations director for the Sheriff's Office, sent a copy of the list to a number of County managers and AFSCME representatives. Becky Steward, president of the AFSCME bargaining unit, protested the County's actions. When Steward asked that the information requested not be released to reporter, she was told that the information had already been given to the reporter.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The County did not unilaterally change the *status quo* in violation of ORS 243.672(1)(e) when it released information about bargaining unit members' sick leave usage, overtime pay, and discipline.

Under ORS 243.672(1)(e), an employer's duty to bargain in good faith includes the obligation to negotiate to completion with a labor organization before

changing the *status quo* in regard to a mandatory subject of bargaining that is not addressed in the parties' collective bargaining agreement. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007) (citing *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89 (2001)).

Here, AFSCME asserts that the County unilaterally changed the *status quo* when it gave the media information in August 2005, March 2006, and November 2006 about bargaining members' sick leave usage, overtime pay, and discipline. AFSCME contends that before August 2005, the County never released this type of information to members of the public. According to AFSCME, the County violated subsection (1)(e) when it failed to notify AFSCME about the change it made in the *status quo* and failed to complete the bargaining process required by the Public Employee Collective Bargaining Act (PECBA). ORS 243.698.²

We must first determine the *status quo*, which may be created through past practice, work rule, or policy. Here, AFSCME contends that the parties' past practice establishes the *status quo*. As the party making this assertion, AFSCME bears the burden of proving the existence of a past practice. *AOCE v. State of Oregon, Department of Corrections*, 22 PECBR at 165. In labor relations, a past practice is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. Acceptability means that both parties know about the conduct and consider it an acceptable method for dealing with a particular situation. Mutuality means the practice arose from a joint understanding by the employer and the labor organization. *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005).

The record here shows that prior to August 2005, when the first incident occurred that gave rise to this unfair labor practice, no one had ever asked the County for information about AFSCME bargaining unit members' sick leave use, overtime hours, or discipline.³ Thus, there is no proof of any established pattern in the County's responses to requests for such information about AFSCME bargaining unit members that is clear, consistent, and occurring over a long period of time.

²AFSCME does not allege that the County's actions violated the parties' collective bargaining agreement. Consequently, we do not decide this issue.

³Although the record contains some evidence regarding the County's responses to requests for disciplinary records for employees who were not members of the AFSCME bargaining unit, this is not relevant to our inquiry. The County's conduct in relation to employees outside of the AFSCME bargaining unit cannot serve to establish precedent for its actions with regard to the AFSCME bargaining unit.

Simply stated, AFSCME failed to prove a past practice that established the *status quo* concerning the County's release of the type of information at issue here. Accordingly, the County did not unlawfully change the *status quo* in violation of ORS 243.672(1)(e) when it gave the media information about AFSCME bargaining unit members' sick leave usage, overtime pay, and discipline in August 2005, November 2006, and March 2006. The complaint is dismissed ⁴

ORDER

The complaint is dismissed.

DATED this 7th day of February 2008.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

*Board Member Cowan is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.

⁴AFSCME alleges that under the Public Records Law, the County was not required to disclose some of the information it gave to the media. AFSCME contends that in some cases, the materials provided were outside of the scope of the requests and that in other cases, the law prohibited release of the information. We have concluded that the County's actions did not violate the PECBA. We have no authority to consider whether the County properly interpreted and applied the Public Records Law in deciding how to respond to the media's August 2005, November 2006, and March 2006 requests. If AFSCME believes that the County's actions violated provisions of the law other than the PECBA, it may pursue remedies available under the applicable statutes.