

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-18-06

(UNFAIR LABOR PRACTICE)

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| AFSCME LOCAL 88, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | ORDER ON COMPLAINANT'S |
| |) | MOTION FOR RECONSIDERATION |
| MULTNOMAH COUNTY, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

On February 7, 2008, this Board issued an Order which concluded that Multnomah County (County) did not unlawfully change the *status quo* in violation of ORS 243.672(1)(e) when it gave the media information about AFSCME Local 88 (AFSCME) bargaining unit members' sick leave usage, overtime pay, and discipline. 22 PECBR 279. On February 19, 2008, Complainant AFSCME filed a motion for reconsideration and requested oral argument. On March 19, 2008, this Board held oral argument on AFSCME's motion.

In a case such as this one, where no recommended order was issued, we generally grant a party's request for reconsideration. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 298 (2008). Here, we grant reconsideration to address the issues raised by AFSCME's motion.

The complaint alleged the County unlawfully changed the *status quo* without first bargaining to completion. Analytically, our first step in such a case is to identify the *status quo*. The *status quo* is established in a number of ways, including the parties' past practice or an employer policy or rule.

The parties' main arguments, and thus the focus of our Order, was the parties' past practice regarding release of information to members of the public. We

determined there were no previous requests for information about members of the AFSCME bargaining unit, and therefore no established past practice for dealing with such requests.

AFSCME does not dispute our analysis, but contends it was incomplete. According to AFSCME, the *status quo* concerning the County's response to an information request was determined by County rule, not past practice. AFSCME argues that because we failed to properly define the *status quo*, we erroneously concluded that the County did not unlawfully change the *status quo* in violation of subsection (1)(e) when it released information to the media about AFSCME bargaining unit members' sick leave, overtime, and discipline.

At the hearing and in their post-hearing briefs, the parties mentioned briefly, but did not thoroughly analyze, the County rule to which AFSCME refers in its motion for reconsideration. Instead, the parties discussed the County's past practice in regard to responding to requests from members of the public for personal information about County employees. Accordingly, we will grant AFSCME's motion to consider issues which were not fully argued by the parties at the hearing or in their post-hearing briefs.

When a labor organization alleges that an employer has made an unlawful unilateral change, we must decide (1) if the employer changed the *status quo* and (2) if the change concerns a subject which is mandatory for bargaining. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168 (2007), *appeal pending*. We begin by determining the *status quo* concerning the release of information about County employees.

AFSCME correctly notes that the *status quo* in regard to a condition of employment can be established by an employer's rule or policy. *Coos Bay Police Officers' Association v. City of Coos Bay*, Case No. UP-61-92, 14 PECBR 229, 233 (1992). AFSCME contends County rule 5-65-080 creates the *status quo* in regard to the County's response to requests for personal, confidential information about employees. County rule 5-65-080 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. * * *

“* * * * *

“(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.” (Emphasis added.)

We agree with AFSCME that this rule establishes the *status quo* in regard to the County’s response to information requests. Under this rule, the County must maintain as confidential most personal information about employees unless disclosure is required by law. The County violates this rule and changes the *status quo* if it provides information to a member of the public that the law does not require it to disclose.

The Public Records Law, ORS 192.410 through 192.505, governs access to public records by members of the public. The Public Records Law is primarily a disclosure law. “Disclosure is the norm; exclusion is the exception that must be justified by the public body.” *Guard Publishing Company v. Lane County School District*, 310 Or 32, 39, 791 P2d 854 (1990). Certain materials are exempt from disclosure under particular provisions of the Public Records Law. Crucial to this case is understanding what it means for information to be exempt. It does *not* mean the public body is prohibited from disclosing it. Except under certain circumstances, a public body *may*, but is not required to, disclose exempt information. *Guard Publishing Company*, 310 Or at 37-38. For example, ORS 192.502(2) exempts from disclosure “[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance.”

When the statute and County rule are read together, they establish the *status quo* as follows: If personal information about an employee is exempt from disclosure, and conditions that require disclosure are not met, the County cannot release the information. In this light, we will consider each of the occasions on which AFSCME alleges that the County provided information to the media in violation of County rule 5-65-080 and determine if the law required disclosure. The first such incident occurred in August 2005 when the County gave a television reporter a list of sick leave used by County employees; the list included the names, departments, and job classifications of employees with the highest usage of sick leave.

The Attorney General, the public official responsible for reviewing and ruling on petitions alleging that a state agency unlawfully withheld a public record,

concluded that ORS 192.502(2) does not exempt from disclosure records concerning the date, hours, and type of leave taken by state employees. The Attorney General found that releasing information about leave taken by employees did not constitute an unreasonable invasion of privacy, since coworkers are generally aware of the reasons a person is absent from work and the length of time the person is gone. Consequently, an ordinary, reasonable person would not expect that information about leave usage would be kept private, and would not find it highly offensive to have this information disclosed to a member of the public. Oregon Attorney General's Public Records Orders (PRO), May 5, 1994.

Decisions issued by the Attorney General—an official responsible for interpreting and enforcing the Public Records Law—are persuasive authority on the applicability of that law. We conclude that the County was required by law to give the reporter information about employees' sick leave usage in August 2005, and acted in compliance with its own rule when it did so.

The second incident that allegedly involved a change in the *status quo* occurred in March 2006, when a newspaper reporter asked for records of discipline imposed by the County chair's office and records of discipline imposed for improper use of County take-home vehicles. In response to this request, the County gave the reporter a copy of a letter suspending AFSCME bargaining unit member S.S. for improper use of a County credit card. The County also gave the reporter a copy of a letter suspending another AFSCME bargaining unit member, C.P., for violating a number of County policies. The two letters included employee names, addresses, and other identifying information. The County subsequently determined that the C.P. disciplinary letter was not responsive to the reporter's request, and asked the reporter to delete the letter, which the reporter did.¹

The County admits that disclosure of C.P.'s disciplinary records was a mistake, since the newspaper reporter never requested this information. The Public Records Law requires release of information only upon request. Because there was no request for the information, the Public Records Law does not apply. Accordingly, the County had no legal obligation to give the reporter this information and violated its own rule and changed the *status quo* when it did so.

The County's actions in providing the reporter with a disciplinary letter issued to S.S. violated its rule in part. Although ORS 192.501(12) exempts personnel discipline actions and materials supporting these actions from disclosure, this exemption

¹The County sent the reporter the C.P. disciplinary letter by e-mail.

does not apply to records related to alleged misuse and theft of public property by public employees. The court has reasoned that a significant and legitimate public interest requires disclosure of records concerning theft of public property by public employees. *Oregonian Publishing Company v. Portland School District No. 1J*, 144 Or App 180, 925 P2d 591 (1996), *modified*, 152 Or App 135, 952 P2d 66 (1998), *affirmed on other grounds*, 329 Or 393, 987 P2d 480 (1999). The court also declined to find records regarding theft by public employees exempt from disclosure under ORS 192.502(2), concluding that the information about theft by public employees was not information of a personal nature. *Oregonian Publishing Company v. Portland School District*, 144 Or App at 188.

Here, the County disciplined S.S. for misuse of a County credit card, an action involving alleged theft or misuse of public property. Because the County was required by law to disclose these records, it complied with its own rule and did not change the *status quo* when it did so.

However, the County was not required by law to give the reporter S.S.'s address. ORS 192.502(3) exempts from disclosure the address of a public employee unless "the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance." There is no evidence in the record that the reporter who requested disciplinary records in March 2006 provided *any* evidence that the public interest required disclosure of employee addresses. Because the County had no legal obligation to give the reporter S.S.'s address, it violated its own policy and changed the *status quo* when it provided this information to the reporter.

The third and final incident that allegedly involved a change in the *status quo* occurred in November 2006, when a reporter asked for a list of County Sheriff's Department employees, by name, who had earned the most overtime, used the most sick leave, or called in sick on Thanksgiving and Christmas. The County provided the requested list, which included the names of some AFSCME bargaining unit members.

As discussed above, the Attorney General has determined that records about public employees' usage of leave are not exempt from disclosure under the Public Records Law. Accordingly, the County was legally required to provide information about employees' sick leave usage to the reporter.

In regard to records concerning employees' overtime pay, the Attorney General has also concluded that the amount of salary received by a state employee is not information that is exempt from disclosure under the Public Records Law. The Attorney General noted that the public has a strong interest in finding out how much a public

employee is paid. Since public employees can reasonably expect that members of the public will scrutinize their salaries, disclosure of this type of data is not highly offensive to the ordinary person, and does not constitute an unreasonable invasion of privacy Oregon Attorney General's PRO, March 27, 1992. We agree with the Attorney General and conclude that the County was legally obligated to give the reporter information about AFSCME bargaining unit members' overtime earnings.

We have concluded that the County violated its own rule and changed the *status quo* when it gave reporters information it was not required by law to disclose: disciplinary records for AFSCME bargaining unit member C.P. and the address of AFSCME bargaining unit member S.S. We must next determine whether the change made by the County concerned a subject which is mandatory for bargaining.

In analyzing a scope of bargaining dispute, we first determine the subject of the dispute, and then decide whether it is one which is mandatory for negotiations. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 90, *supplemental order*, 19 PECBR 317, *ruling on recons*, 19 PECBR 344, *ruling*, 19 PECBR 473 (2001). In order to determine if a subject is mandatory, we look to the relevant statute. We consider whether the disputed matter concerns a *per se* mandatory subject under ORS 243.650(7)(a), is considered mandatory under subsection (7)(f), or is defined as permissive under subsections (7)(b), (d), (e), or (g). If none of these steps resolve the bargaining status of the subject at issue, we apply the balancing test required by subsection (7)(c). We determine whether the subject has "a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." *Federation of Oregon Parole and Probation Officers v. Washington County*, Case No. UP-70-99, 19 PECBR 411, 425 (2001); and ORS 243.650(7)(c).

Here, the subject at issue is the employer's disclosure of personal information about employees that the employer is not required by law to disclose. This subject is not one addressed by ORS 243.650(7)(a), (b), (d), (e), (f), or (g). Accordingly, we utilize the balancing test mandated by subsection (7)(c) to decide whether the release of personal information about employees is a mandatory subject for bargaining.

We have found that public employees have a strong interest in protecting their privacy, noting that "[t]he protection of individual privacy is a cornerstone of American jurisprudence." *Oregon AFSCME Council 75 v. State of Oregon, DPSST*, 19 PECBR at 93. Consistent with this principle, we concluded that a background check procedure that unreasonably intruded into employees' private lives was a mandatory subject for negotiations. Accordingly, we found that the employer changed the *status quo* in violation of subsection (1)(e) when it adopted this unreasonably intrusive procedure

to check into the backgrounds of candidates for promotion. *Oregon AFSCME Council 75 v. State of Oregon, DPSST*, 19 PECBR at 98.

We have also found other subjects mandatory for bargaining when they have a significant impact on an individual's privacy rights. We have determined that proposals concerning an employee's personal life outside of the work place are mandatory. *Springfield Education Association v. Springfield School District*, Case No. C-278, 1 PECBR 347, 363 (1975), *aff'd in part*, 24 Or App 751, 547 P2d 647, *modified*, 25 Or App 407, 549 P2d 1141 (1976), *order on remand*, 3 PECBR 1950 (1978), *aff'd*, 42 Or App 93, 600 P2d 425 (1979), *aff'd as modified*, 290 Or 217, 621 P2d 547 (1980), *order on remand*, 3 PECBR 1970 (1981); and *Executive Department, Oregon State Police v. Oregon State Police Officers Association*, Case No. UP-11-85, 8 PECBR 7874, 7897 (1985). We have also concluded that the methods and procedures used to test employees for drug and alcohol use are mandatory. We reasoned that "employees have a significant personal privacy interest [in drug and alcohol] testing reliability, while the employer had no countervailing interest in unduly invading employees' privacy or obtaining unreliable test results." *International Association of Fire Fighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533, 549 (2001), citing *Federation of Oregon Parole and Probation Officers v. State of Oregon, Department of Corrections*, Case No. UP-117-89, 12 PECBR 816, 823 (1991), *aff'd*, 114 Or App 214, 834 P2d 519, *opinion vacated and remanded for recons*, 116 Or App 572, 841 P2d 704 (1992), *on recons*, 14 PECBR 693, 701 (1993).

Here, the subject at issue has as significant an impact on employees' privacy rights as does an intrusive background check, a proposal about an employee's personal life, and the procedures for testing employees for drug and alcohol use. An employee clearly has a strong desire to maintain the privacy of material contained in the employer's personnel records, and understandably does not wish personal information to be given to members of the public. On the other side of the scale, an employer has no legitimate interest in revealing personal information about an employee, if the law does not require the employer to do so. We conclude that an employer's disclosure of personal information about an employee that the employer is not legally required to disclose is a mandatory subject for bargaining. Consequently, the County unilaterally changed the *status quo* in violation of subsection (1)(e) when it gave reporters a copy of C.P.'s disciplinary records and S.S.'s address.

As a remedy for the County's unlawful actions, we will order the County to cease and desist from disclosing personal information about AFSCME bargaining unit members that it is not required by law to disclose. ORS 243 676(2)(b). In cases of this type, we normally order a make-whole remedy for employees affected by the employer's unlawful actions. *Oregon AFSCME Council 75 v. State of Oregon, DPSST*, 19 PECBR at 98.

Here, however, it is not possible to order an appropriate make-whole remedy. The County has already made the disclosures we have found unlawful; there is no way to reverse this process. We find it understandable that AFSCME bargaining unit member C.P. was upset and embarrassed when the County gave a reporter a copy of a disciplinary letter issued to him. However, we cannot fashion a remedy that would address the effects of the County's actions. We also note that the County minimized the damage it caused when it realized its mistake and promptly asked the reporter to delete the C.P. disciplinary letter.

ORDER

Reconsideration is granted. This Board's Order of February 7, 2008 is adhered to except as modified herein. The Order is modified as follows:

1. The County shall cease and desist from disclosing personal information about AFSCME bargaining unit members that it is not required by law to disclose.
2. The remainder of the complaint is dismissed.

DATED this 9th day of April 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.