

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-20-06

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, )  
LOCAL #974, )

Complainant, )

v. )

STATE OF OREGON, )  
DEPARTMENT OF CORRECTIONS, )  
TWO RIVERS )  
CORRECTIONAL INSTITUTION, )

Respondent. )

RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

In lieu of hearing, the parties submitted a full fact stipulation on December 13, 2006, and an amended stipulation on December 29, 2006. The record closed on January 8, 2007, upon receipt of the parties' post-hearing briefs. The matter was submitted directly to this Board on June 6, 2007.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, 308 S.W. Dorion Avenue, Pendleton, Oregon 97801, represented Complainant.

Heather Pauley, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

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On May 12, 2006, the American Federation of State, County and Municipal Employees, Council 75, Local 974 (AFSCME) filed this unfair labor practice

complaint alleging that the State of Oregon, Department of Corrections (State or DOC), violated ORS 243.672(1)(e) and (h) by refusing to reduce to writing and comply with the terms of an oral grievance settlement reached between the parties.

The issues are:

1. Did DOC violate ORS 243.672(1)(h) by refusing to reduce a grievance settlement to writing?
2. Did DOC violate ORS 243.672(1)(e) by refusing to comply with the grievance settlement agreement?
3. Does the settlement agreement violate the law?

#### FINDINGS OF FACT<sup>1</sup>

1. AFSCME is the exclusive representative of a bargaining unit of personnel employed by DOC at its Two Rivers Correctional Institution (TRCI). DOC is a public employer.

2. At all relevant times, AFSCME and the State were parties to collective bargaining agreements. The agreements contain a multi-step grievance procedure to resolve disputes that arise under the contract. If the grievance is not resolved at the agency level, AFSCME may appeal the grievance to the Labor Relations Unit of the Department of Administrative Services (DAS).

3. Paul McDonough is employed by DOC as a corrections officer at TRCI and is a member of the AFSCME bargaining unit.

4. From January 21, 2001 through April 4, 2001, DOC assigned McDonough to work as an out-of-class correctional corporal. During this time period, McDonough received a five (5) percent salary increase.

5. At the conclusion of McDonough's work in the out-of-class assignment, DOC did not remove the work out-of-class code from McDonough's pay status. As a result, DOC continued to pay McDonough out-of-class pay even though he was not performing out-of-class work.

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<sup>1</sup>These Findings of Fact are derived from the parties' stipulated facts and exhibits.

6. In March 2003, DOC discovered its error and determined that it had overpaid McDonough in the amount of \$2965.70. As a result, DOC negotiated a payment plan with McDonough in which it would deduct approximately \$129.00 from McDonough's paycheck for the next twenty-three months.

7. DOC payroll personnel failed to correctly enter the terms of the settlement agreement with McDonough into the computer. As a result, DOC continued to overpay McDonough for another seventeen months.

8. When DOC discovered its second error, it informed McDonough on or about September 20, 2004 that it would continue deducting approximately \$129.00 from his paycheck until December 2008.

9. When McDonough learned he was required to repay the overpayments as a result of the second error, he contacted AFSCME. AFSCME filed a grievance on McDonough's behalf alleging that he should not be required to repay the overpayments resulting from DOC's second error.

10. Shelli Honeywell is the assistant director of Human Resources for DOC and oversees the Human Resources and Payroll departments within DOC. She reports directly to the director of DOC, Max Williams.

11. Pursuant to the grievance process, on February 23, 2005, Honeywell and TRCI Human Resource Manager Billy Martin met with McDonough and his AFSCME representative to discuss the grievance. During this meeting, Honeywell proposed to stop making deductions from McDonough's salary for the overpayment that resulted from DOC's March 2003 error.<sup>2</sup> AFSCME agreed to this proposal.

12. DAS did not approve the agreement. On February 9, 2006, Labor Relations Manager Craig Cowan denied the grievance, on behalf of DAS, contending that DOC had not violated the parties' collective bargaining agreement.

13. In June of 2005, McDonough learned that DOC intended to make deductions from his salary for the overpayment until December 2008. On June 24, 2005, he sent an e-mail to Billy Martin which stated:

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<sup>2</sup>DOC stipulates that Honeywell had the authority to settle the grievance. Under the parties' grievance procedure, a party dissatisfied with Honeywell's decision is entitled to appeal the decision to DAS.

“Do you remember in the meeting February 23, 2005 that Shelli Honeywell had said that I would only have to pay back the first part of the overpayment and the state would take responsibility for the other half? I’m not to [*sic*] sure what is going on but I’m hearing little things now that DAS is saying something different.”

Martin responded: “that was the gist of the conversation.”

14. On June 16, 2005, McDonough e-mailed Honeywell about the situation:

“At our meeting on Wednesday, February 23, 2005 we filed a grievance against the State of Oregon (DAS). I was just informed that DAS had told Ms. Washburn that they would not be honoring our resolution to the grievance. You stated that I would only have to payback the first part. Now I’m told that somebody at DAS said your decision is not good? I don’t understand?”

Honeywell responded:

“I am working with DAS still, but they are still telling me no. When I committed to a solution with you, I was not aware that DAS would have a concern. They have the authority to say no in this situation. I am sorry for all of the confusion and that all of this has happened. We are still trying to see if there is a compromise.”

15. The applicable contract provisions are as follows:

Article 13, Section 4, of the parties 2001-2003 and 2003-2005 collective bargaining agreements provides:

“Section 4. Recoupment of Wage and Benefit Overpayments/ Underpayments.

“a. Overpayments. In the event that an employee receives wages or benefits from the Agency to which the employee is not entitled, regardless of whether the employee knew or should have known of the overpayment, the Agency shall notify the employee in writing of the overpayment which will include information supporting that an overpayment exists and the amount of wages and/or benefits to be repaid. For purposes of recovering overpayments by payroll deduction, the following shall apply.

“b. In the event the employee does not receive the wages or benefits to which the record/documentation has for all times indicated the employer agreed the employee was entitled, the Agency shall notify the employee in writing of the underpayment. This notification will include information showing that an underpayment exists and the amount of wages and/or benefits to be repaid. The Agency shall correct any such underpayment made within a maximum period of two (2) years before the notification.

“c. This provision shall not apply to claims disputing eligibility for payments which result from this agreement. Employees claiming eligibility for such things as leadwork, work out-of-classification pay or reclassification must pursue those claims pursuant to the timelines elsewhere in this Agreement.”

Article 13, Section 5, of the parties 2005-2007 collective bargaining agreement provides:

“Section 5. Recoupment of Wage and Benefit Overpayments/  
Underpayments.

“a. Overpayments. In the event that an employee receives wages or benefits from the Agency to which the employee is not entitled, regardless of whether the employee knew or should have known of the overpayment, the Agency

shall notify the employee in writing of the overpayment which will include information supporting that an overpayment exists and the amount of wages and/or benefits to be repaid. For purposes of recovering overpayments by payroll deduction, the following shall apply.

“1. The employee with or without Union representation and the Agency shall meet and attempt to reach mutual agreement on a repayment schedule within thirty (30) calendar days following written notification  
\* \* \*”

### CONCLUSIONS OF LAW

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

2. DOC violated ORS 243.672(1)(h) by refusing to reduce the grievance settlement to writing.

This case involves a dispute over an alleged overpayment of a state employee's wages and the right of the parties to collectively bargain a resolution of that dispute.

AFSCME alleges that DOC violated ORS 243.672(1)(h) by refusing to reduce the parties' oral grievance settlement to writing and sign it. Subsection (1)(h) makes it an unfair labor practice for a public employer to “[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign such contract.” To establish a subsection (1)(h) violation, AFSCME must prove that the parties reached an agreement, the agreement was not contingent upon approval or ratification, and DOC refused to reduce the agreement to writing and sign it. *Redmond Education Association v. Redmond School District 2J*, Case No. C-5-78, 4 PECBR 2086 (1978), *aff'd* 42 Or App 523, 600 P2d 943, *rev den* 288 Or 173 (1979).

DOC concedes that each of the criteria are met: the parties reached an oral agreement resolving McDonough's grievance, Honeywell had the authority to settle the grievance, the settlement was not contingent upon DAS's approval, and DOC refused to reduce the agreement to writing and sign it.

DOC argues, however, that the agreement is void because it is *ultra vires*. *Ultra vires* is defined as “[u]nauthorized; beyond the scope of power allowed \* \* \* by law.” *Black’s Law Dictionary* (7th ed 1999) at 1525. *Also see Sims v. Besaw’s Café*, 165 Or App 180, 208, n. 1, 997 P2d 201 (2000) (an *ultra vires* act is one performed without any authority to act on the subject).

DOC cites Article IX, Section 4, of the Oregon Constitution, ORS 293.295, 293.240, and 292.063 as authority for its argument. According to DOC, these authorities prohibit it from agreeing that McDonough need not repay the entire amount of the salary overpayment.

We begin our analysis by examining the pertinent subconstitutional law to determine whether DOC’s claim may be satisfied by statute. *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992).

ORS 292.063 deals with the precise issue here: collection of a wage overpayment from a state employee. ORS 292.063 provides, in pertinent part:

“(1) When a state employee receives payment of salary or wages in an amount greater than the employee’s entitlement, the amount of overpayment *may* be deducted from salary or wages earned by the employee ” (Emphasis added.)

The crucial word is “may.” “May” denotes permission or authority. *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 747 (2007). By using the word “may,” the legislature gave DOC the discretion to collect wage overpayments from a state employee, but does not require it to do so. Here, in return for AFSCME’s agreement to settle the grievance, DOC agreed to exercise its discretion and not collect part of the alleged overpayment from McDonough. The plain language of the statute permits such an agreement.

We disagree with DOC’s contention that ORS 293.240 and ORS 293.295 prohibit the agreement with AFSCME. ORS 293.240 applies to debts that a state agency

is unable to collect after making reasonable efforts to do so and establishes a procedure for writing off such debts.<sup>3</sup> Here, there is no uncollectible debt. DOC had the means and ability to collect the money that McDonough allegedly owes it as a result of salary overpayments. ORS 292.063. In addition, ORS 293.240(3) provides that the statute “does not apply to debts owed to a state agency for which a procedure for compromise, release, discharge, waiver, cancellation or other form of settlement” applies. There are at least two such statutory procedures that apply here. First, ORS 292.063 authorizes DOC to deduct the amount of any salary overpayments from an employees’ wages, if it chooses to do so. Second, ORS 243.650(7) and 243.672(1)(g) allow collectively bargained grievance procedures. The McDonough agreement was a result of the grievance procedure. These procedures for compromise and discharge of the debt make ORS 293.240 inapplicable here.<sup>4</sup>

ORS 293.295 provides that a “claim for payment from any moneys in the State Treasury” may be paid only if the claim is approved by the State agency that incurred the obligation; if provision for payment is made “by law and appropriation”; if any expenditure on which the claim is based is authorized by law; and if the claim is otherwise lawful. According to DOC, any payments to McDonough under the settlement agreement are forbidden because the legislature has not authorized DOC to make them. We disagree.

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<sup>3</sup>ORS 293.240 provides, in relevant part:

“\* \* \* (1) If a state agency has made all reasonable efforts to collect money owed to it \* \* \* the agency may certify to the Secretary of State the amount of the money [owed] \* \* \*

“(2) If the Secretary of State finds that the debt is uncollectible \* \* \* the Secretary of State shall direct the agency to write off the debt \* \* \*

“(3) This section does not apply to debts owed to a state agency for which a procedure for compromise, release, discharge, waiver, cancellation or other form of settlement thereof for reasons other than uncollectibility is by law made specially applicable to such state agency.”

<sup>4</sup>DOC cites two cases to support its contention regarding the requirements of ORS 293.240 and 293.295—*Carruthers v. Port of Astoria*, 249 Or 329, 333, 438 P2d 725 (1968); and *J. R. Simplot Co. v. Dept. of Agriculture*, 340 Or 188, 131 P3d 162 (2006). Neither of these cases apply to overpayment of State employee wages and are not relevant to the issues in this case.

The requirements of ORS 293.295 were satisfied when the legislature approved DOC's biennial budget, a portion of which was designated for employee wages. DOC then had authority to disburse money within the limits of its budget. The budget neither defines McDonough's salary nor prevents DOC from using the appropriated money to settle salary disputes.

Finally, we address DOC's argument that Article IX, Section 4, of the Oregon Constitution prohibits the agreement reached between DOC and AFSCME regarding the alleged overpayment of McDonough's salary. Article IX, Section 4, provides: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." As discussed above, DOC derives general authority to make salary payments to its employees from the legislative process, and specific authority to resolve employee salary overpayments from ORS 292.063. The agreement between DOC and AFSCME to resolve McDonough's overpayment grievance will not require DOC to make unlawful, unauthorized appropriations.

We conclude that DOC did not exceed its authority under State law or the Oregon Constitution when it reached an oral agreement with AFSCME to resolve a dispute over McDonough's wages. Accordingly, the oral agreement between AFSCME and DOC was not *ultra vires*.

When parties to collective bargaining reach agreement, they must reduce it to writing and sign it. ORS 243.672(1)(h). One primary purpose of the Public Employee Collective Bargaining Act (PECBA) is "to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations." ORS 243.656(5).

Here, the parties disputed the amount of salary McDonough was overpaid. DOC chose to settle the dispute through collective bargaining. Once DOC reached an agreement, it was bound by law to reduce that agreement to writing and sign it. ORS 243.672(1)(h). The State violated subsection (1)(h) by refusing to reduce the agreement to writing and sign it. We will order the State to reduce the agreement to writing and sign it.

2. DOC did not violate ORS 243.672(1)(e) by repudiating a grievance settlement.

ORS 243.672(1)(e) requires public employers to bargain in good faith with the exclusive representative of its employees. AFSCME argues that the State violated subsection (1)(e) by repudiating the oral grievance settlement. In support of its argument, AFSCME cites *Portland Police Association v. City of Portland*, Case No. UP-34-91, 13 PECBR 371 (1991); and *OPEU v. State of Oregon, Department of Transportation*, Case Nos. UP-23/44-97, 17 PECBR 593 (1998). These cases do not support AFSCME's position. In *Portland Police Association v. City of Portland*, we declined to address the issue of whether repudiation of a grievance settlement agreement violated subsection (1)(e) because we concluded there was no repudiation. We did, however, describe the theory as "problematic." 13 PECBR at 372 n. 1. We similarly avoided the issue in *Department of Transportation* because we concluded that no agreement was reached. See also *North Clackamas Education Association v. North Clackamas School District*, Case No. UP-51-04, 21 PECBR 629 (2007).

We cannot avoid the issue here. The parties reached an oral agreement and DOC repudiated it. We must therefore decide whether DOC's actions, in addition to violating subsection (1)(h), also violate subsection (1)(e). We conclude they did not.

This case involves a collective bargaining dispute. AFSCME alleged that DOC violated the parties' collective bargaining agreement when it deducted alleged overpayments from McDonough's wages. The parties reached an oral agreement to settle the dispute, but DOC refused to reduce the agreement to writing and comply with it. The PECBA addresses only the breach of a written agreement. Breach of a written agreement reached as the result of collective bargaining violates ORS 243.672(1)(g). The PECBA does not expressly make it an unfair labor practice to breach an oral agreement. Instead, the legislature requires the parties to reduce oral agreements to writing and sign them. ORS 243.672(1)(h) and (2)(e). Thereafter, a party can enforce the written agreement under ORS 243.672(1)(g) or (2)(d), or through an applicable grievance procedure. *LIUNA v. City of Portland*, Case No. UP-12-06, 22 PECBR 12 (2007).

We have never found that a repudiation of an oral agreement constitutes a subsection (1)(e) violation. Based on the language and structure of the PECBA, we decline to do so here. The proper method to enforce an oral agreement is to reduce it to writing, and then submit any dispute over an alleged breach to an arbitrator or to this Board under subsection (1)(g). See *Reynolds School District No. 7 v. Reynolds Education Association*, Case Nos. UP-22/25-88, 10 PECBR 788, 806 (1988).

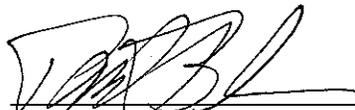
The State did not violate subsection (1)(e) and we will dismiss this allegation.

ORDER

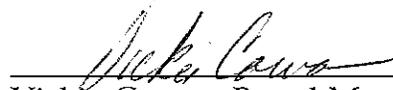
1. DOC shall cease and desist from violating ORS 243.672(1)(h). It shall immediately reduce to writing and sign the McDonough grievance settlement agreement.

2. The remainder of the complaint is dismissed.

DATED this 11<sup>th</sup> day of January 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.