

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-47-06

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)
LOCAL 3336,)

Complainant,)

v.)

STATE OF OREGON,)
DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)

Respondent.)

ORDER ON COMPLAINANT'S
MOTION FOR RECONSIDERATION

On September 7, 2007, this Board issued an Order which concluded that the State of Oregon, Department of Environmental Quality (DEQ) violated ORS 243.672(1)(g) when it failed to comply with the terms of the Marcia Kirk settlement agreement. 22 PECBR 18 (2007). On September 21, 2007, DEQ filed a motion for reconsideration. DEQ did not request oral argument. Oregon AFSCME Council 75, Local 3336 (AFSCME) filed no response to DEQ's motion.

In cases where no recommended order has been issued, it is our practice to grant reconsideration if a party requests it. *Jefferson County v. OPEU*, Case No. UP-16-99,

18 PECBR 421 (2000). Accordingly, we grant reconsideration to address some of the issues raised by DEQ.¹

DEQ asks us to reconsider our conclusion that DEQ violated the terms of the agreement to settle Kirk's grievance when it reassigned Kirk to work other than that performed under the terms of the Receipt Authority Agreement (RAA). DEQ agrees with our statement that the settlement agreement indicated an intent to keep Kirk in a position on the RAA team as long as she met the performance goals specified in the settlement agreement. DEQ contends that the position guaranteed to Kirk "was as an equal team member with Cliff Walkey and Toby Scott. The goals related solely to Kirk and not to the team itself, and thus reveal no intent with regard to removal of the entire team."

We agree with DEQ that the settlement agreement does not speak to removal of the entire RAA team. The agreement addresses only *Kirk's* removal from her position as lead member of the hydrogeology team working at the Arlington facility in order to resolve Kirk's grievance concerning this DEQ action. The agreement does not address the job status of any other RAA team members because they were not the subject of Kirk's grievance. The composition of the RAA team has no bearing on Kirk's rights under the agreement. As DEQ concedes, the agreement guarantees Kirk a position on the team so long as her performance was acceptable and so long as work under the RAA agreement was performed. DEQ does not assert that Kirk failed to meet the performance goals established in the settlement agreement. We therefore adhere to our conclusion that DEQ violated the settlement agreement when it removed Kirk from her position on the RAA team.

This conclusion alone is sufficient to support our determination that DEQ violated the settlement agreement and ORS 243.672(1)(g). In our Order, we found a separate and independent reason for finding a subsection (1)(g) violation. We concluded that DEQ also violated the terms of the settlement agreement by failing to provide any evaluation of Kirk—written or otherwise. DEQ asks us to reconsider this conclusion. It asserts that we failed to consider a number of instances where the supervisor of the RAA team, Brett McKnight, regularly discussed the team's progress with its members and reviewed the team's written reports on their project. According to DEQ, the feedback

¹We do not address all the arguments DEQ raised in its motion. Instead, we will discuss only those issues that require additional consideration or clarification.

that McKnight gave to the RAA team was sufficient to comply with the evaluation requirements of the settlement agreement.²

Most of DEQ's arguments concerning the nature and extent of the evaluation made of Kirk and the RAA team's performance are addressed in our original decision, and we will not repeat them here. However, assuming *arguendo* that McKnight's periodic discussions and communications with the RAA team about their progress constituted the type of "team level performance review" referred to in the settlement agreement, DEQ nonetheless violated the agreement because McKnight failed to comply with his own procedure.

In May 2006, Kirk questioned McKnight about the team performance review required under the grievance settlement agreement. McKnight told her that he did not feel that a written evaluation was necessary, that he believed that the RAA project was working well, and that he would tell Kirk if he saw any problems with her performance. Thus, McKnight established a type of "evaluation by exception" process for Kirk's work: her work was considered acceptable unless he told her otherwise. McKnight never told Kirk that he saw any problems with her work.

DEQ also asks us to revise findings of fact 17 and 30, contending that these findings of fact do not "reflect the complete record." DEQ argues that additional facts should be added to these findings to demonstrate that neither Kirk nor AFSCME Chief Steward Karen Williams acted promptly in asserting Kirk's right to a *written* evaluation under the terms of the grievance settlement agreement. We decline to make the changes requested by AFSCME. The parties spent considerable time arguing whether the settlement agreement required a written evaluation, or whether an oral evaluation would

²In its motion, DEQ argues that AFSCME drafted the settlement agreement and notes that AFSCME has the burden of proof on the issue of whether the evaluation of the RAA team was sufficient to satisfy the requirements of this agreement. We find no support in the record for DEQ's contention that AFSCME was the party that drafted the settlement agreement. The settlement agreement executed by both parties on September 14, 2005 consists of a "Counter Proposed Settlement Agreement" that was written by DEQ and includes handwritten changes initialed by representatives for both parties. As the Complainant, AFSCME has the burden to show that DEQ violated the settlement agreement. On this record, AFSCME carried this burden.

suffice. As we stated in our original Order, it is unnecessary to resolve this dispute because we conclude that DEQ did not make *any* evaluation—written or otherwise—of Kirk and the RAA team.

ORDER

Reconsideration is granted. We adhere to our Order of September 7, 2007 as clarified herein.

DATED this 12th day of October 2007.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member³

This Order may be appealed pursuant to ORS 183.482.

³Member Cowan was the Administrative Law Judge (ALJ) assigned to this case when the unfair labor practice was filed and Member Rossiter was the ALJ who conducted the hearing. Normally, these Board Members would recuse themselves from this case, but to do so would make it impossible for a majority of this Board to render a decision on the motion for reconsideration.

We therefore invoke the so-called “rule of necessity.” Under this rule, a decision maker who is recused is nevertheless permitted to participate when a case could not be heard otherwise. *United States v. Will*, 449 US 200 (1980); *Oregon State Police Officers’ Assoc. v. State of Oregon*, 323 Or 356, 361, n. 3, 918 P2d 765 (1996); *Hughes v. State of Oregon*, 314 Or 1, 5, n. 2, 838 P2d 1018 (1992); and *Bobo v Kitzhaber*, 193 Or App 214, 216, n. 3, 89 P3d 1189 (2004). This is such a case. Members Cowan and Rossiter have participated in the consideration and decision of this motion.