[03-27-03] Redmond Police Officers' Association, Complainant v. City of Redmond, Respondent / Case No. UP-62-02

An expedited hearing was held before Administrative Law Judge B. Carlton Grew on January 14, 2003, in Redmond, Oregon. Following the hearing, the record was transferred to the Board.

John Hoag, Attorney at Law, P.O. Box 42021, Eugene, Oregon 97404, represented Complainant.

Bruce Bischof, Attorney at Law, 747 S.W. Mill View Way, Bend, Oregon 97702, represented Respondent.

The Redmond Police Officers' Association (Association) and the City of Redmond (City) are parties to a collective bargaining agreement with a term of July 1, 2000, through June 30, 2003. In October 2002, the City notified the Association of its desire to open negotiations for a successor agreement. The parties agreed to meet on November 11, 2002.

The contract provides that notice of an intent to reopen must be made by November 1, and arguably requires an exchange of proposals by that date. The Association delivered its proposals to the City's police chief on October 31, 2002. The City delivered its proposals to the Association president on November 5, 2002. At the first bargaining session, the Association told the City that the City's proposals were untimely, and that the Association would not negotiate about the City's proposals. The City would not schedule additional bargaining sessions until the Association agreed to bargain about the City's proposals.

The Association filed this unfair labor practice complaint on December 10, 2002. The complaint alleged that the City violated ORS 243.672(1)(e) by refusing to schedule additional bargaining sessions, and by refusing to tentatively agree to existing contract articles on which there were no proposals. The Association requested expedited consideration, which the Board granted. The City filed an answer, admitting and denying certain allegations of the complaint, and an affirmative defense and counterclaim alleging that the Association acted improperly by refusing to bargain about the City's proposals. The Association filed a response in which it admitted and denied allegations raised by the City.

The issue is: Did the City refuse to bargain in good faith, in violation of ORS 243.672(1)(e), by refusing to schedule additional bargaining sessions?

Having the full record before it, the Board makes the following:

RULINGS

1. In a January 2, 2003 pre-hearing letter, this Board directed the parties to exchange exhibits and exhibit lists by January 10, 2003. The letter informed the parties that failure to comply, absent a showing of

good cause, might result in the Board refusing to accept the exhibits. At hearing, counsel for the Association objected to the City's exhibits because the City did not exchange exhibits as directed.

The City did provide an exhibit list to the Association as required. While it did not provide copies of the actual exhibits, a review of those exhibits indicates that, with the possible exception of Exhibit R-4, the Association had copies of the other City exhibits. Two of them are documents created by the Association. Under the circumstances, the Association was not prejudiced or surprised by the City's exhibits. The exhibits are received.

2. The pre-hearing letter also directed the parties to exchange witness lists by January 10, 2003. The City did not provide the Association its witness list in advance of the hearing. The Association objected to the testimony of the City's witnesses on the basis that the City failed to comply with this Board's pre-hearing directive.

The purpose of directing parties to exchange exhibit lists, exhibits, and witness lists is to avoid surprise and streamline the hearing process. When a party, absent a showing of good cause, does not comply with the directive to exchange, it shows a disrespect for this Board, for the opposing party, and for the hearing process.

The City did not comply with the directive to exchange witness lists and did not make any showing of good cause for its failure. Any testimony of the City's witnesses that goes beyond rebuttal will not be considered.

3. The City filed an answer, affirmative defense, and counterclaim. The City did not pay any fee for filing its counterclaim. The Association tendered a fee for filing an answer to the counterclaim.

Board rules do not contemplate the circumstances that arose here. It is rare for parties to file counterclaims. Since the advent of filing fees in 1995, we have reviewed such filings on a case-by-case basis to determine whether additional fees were necessary.

The Association contends that we should disregard the City's pleading and evidence because the City did not pay the required filing fee. We examined the City's pleading in this case and determined that it was more in the nature of an affirmative defense than a complaint. Therefore, no fee was required. The Association's fee for answering the City's pleading was returned.

4. .In its complaint, the Association also charged that the City was unlawfully refusing to tentatively agree to existing contract articles on which no proposals had been made. The City denied that allegation in its answer. The Association introduced a letter from the Association's counsel to the City's counsel, but produced no additional evidence to support its allegation. That element of the complaint is dismissed.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of nonsupervisory, nonconfidential employees of the City's police department. The City is a public employer.

2. The Association and the City are parties to a collective bargaining agreement with a term of July 1, 2000 to June 30, 2003.

3. Article 28, Duration of Agreement, of the current contract provides, in part:

"* * * * *

"This Agreement shall be automatically renewed from year to year, after the above dates, unless either party notifies the other in writing, no later than November 1, prior to the date of termination, that it wishes to terminate or modify any of the provisions of this Agreement, along with copies of each side's proposal, at which point negotiations will commence within fifteen (15) calendar days of one side having given notification. * * *."

4. By letter dated October 7, 2002, the City notified the Association of its intent to open the contract for bargaining. The City requested the Association to identify dates for negotiations.

5. Prior to October 31, Association President Tracey Miller had some informal discussions with City Police Chief Lane Roberts about successor contract bargaining. Roberts was not a member of the City's bargaining team for successor bargaining with the Association, however. Both agreed that the central issues would be wages and insurance.

6. Up until about October 28, 2002, the Association was revising its contract proposal. Between October 28 and October 31, Miller prepared the Association's proposal for submission and drafted a cover letter to accompany it.

7. On the morning of October 31, 2002, Miller delivered the Association's contract proposal to Roberts. He did so at the direction of the Association's attorney, who advised him to deliver the proposals on or before October 31 because of the contractual November 1 deadline.

8. Roberts was scheduled to have surgery later that day. He gave a copy of the Association's proposals to his assistant to convey to the City's human resources director, Sharon Harris. His assistant put the proposals in the City's internal mail system on October 31 for delivery.

9. Harris was out of her office or in meetings on October 31 and November 1 and did not see the proposals until November 4.

10. When she received the Association's proposals, Harris delivered the City's proposals to the Association by placing them in Miller's work mailbox. Miller received the City's proposals on

November 7, 2002.

11. At the first bargaining session on November 11, 2002, the Association told the City that the City had missed the contractual November 1 date for submitting its proposals. The Association stated that it would not consider the City's proposals in bargaining because the proposals were untimely.[(1)]

12. After the Association told the City that the City's proposals were untimely, the City refused to schedule any additional bargaining sessions as long as the Association was unwilling to consider the City's proposals. The City indicated its willingness to bargain as long as the Association would agree to recognize the City's proposal.

13. The Association continues to refuse to recognize the City's contract proposal, and no additional bargaining has taken place.

CONCLUSIONS OF LAW

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

2. The City refused to bargain in good faith, contrary to ORS 243.672(1)(e).

DISCUSSION

This is a case of a bargaining process gone awry. There is little dispute about the material facts. The Association provided the City a copy of its proposals for a successor agreement by November 1. The City did not provide a copy of its proposals to the Association by that date. During the first bargaining session, the Association took the position that the City's proposals were untimely and that the Association would not negotiate about them. In response, the City took the position that it would not schedule any additional bargaining sessions until the Association relented and agreed to consider the City's proposals. The consequence of this posturing is that no bargaining occurred following the initial session.

As explained below, we conclude that the City acted unlawfully in refusing to schedule additional bargaining sessions. While we appreciate the City's frustration with the position taken by the Association, the City's response was not commensurate with its obligations to bargain in good faith under the Public Employee Collective Bargaining Act (PECBA).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." Following the Association's statement that the City's proposals were untimely and would not be considered, the City refused to meet for further bargaining.

This Board has considered similar conduct in various cases over the years. In *City of Central Point v.*

IAFF, Local 1817, Case Nos. UP-44/53-95, 16 PECBR 458 (1996), the union submitted a tentative agreement for ratification by its members. After the tentative agreement was rejected, the union submitted a new proposal to the city that included terms more favorable to the union than those in the tentative agreement. The city refused to participate in mediation, contending that the union acted unlawfully by increasing its demands. This Board held that the city continued to have an obligation to bargain after the union rejected the tentative agreement.

In *Lane County v. Lane County Peace Officers Association*, Case Nos. UP-102/105/109-93, 15 PECBR 53 (1994), the county submitted a proposal to the union, which the union's representative felt was unacceptable. In response, he cancelled a scheduled bargaining session and refused to discuss the county's proposal prior to mediation. This Board concluded that the representative's refusal to bargain at all about the county's proposal violated the union's duty to bargain in good faith. This Board also held that the representative's belief that negotiations would be futile did not justify his refusal to meet.

In *Clackamas County Peace Officer's Association v. Clackamas County Sheriff's Department*, Case No. UP-41-86, 9 PECBR 9174 (1986), the county refused to make any proposals in bargaining until the union modified its intial proposal. The county contended that the union's initial proposal was outrageous. This Board concluded that the county's action was unlawful. A party's obligation to bargain is not excused by the fact that the other party's proposals are unreasonable.

In *Corvallis School District v. OSEA*, Case No. C-82-82, 6 PECBR 5409 (1982), the union refused to bargain about proposals not listed in the district's contract reopener notice. The union relied on contract language that it alleged required such specific notice. This Board concluded that the contract language, which could be interpreted in different ways, was not a sufficiently clear waiver of the district's right to bargain over such proposals. Therefore, the union's refusal to bargain violated ORS 243.672(2)(b).

Here, the City argues that its refusal to bargain after the first session was justified because the Association manipulated the process to insure that the City would not submit its proposals by November 1. The City also asserts that the parties have not strictly complied with the November 1 date in the past, so it was unreasonable for the Association to refuse to bargain about the City's proposals.[(2)] For the reasons expressed in the cited cases, we reject the City's defenses.

The obligation to bargain in good faith is not contingent on the reasonableness of the other party's position. The City was obligated to meet with the Association to bargain over the Association's proposals for a successor contract. The fact that the parties also have a dispute about whether the City's proposals are subject to negotiations did not relieve the City of its PECBA obligation to bargain over the Association's proposals.

The dispute over the validity of the City's proposals could be resolved in several ways. The City could file an unfair labor practice complaint alleging that the Association's refusal to consider the City's proposals is a violation of the Association's duty to bargain in good faith and/or a violation of the parties' contract.[(3)] The City could continue to advance its proposals in the bargaining process, either directly or

as counter-proposals, and ultimately present the question to an interest arbitrator, if bargaining does not resolve the dispute.[(4)] The City took neither of these alternatives, instead choosing to refuse to bargain to protest what it felt was the Association's unreasonable conduct. While the PECBA recognizes a party's ability to engage in self-help at some times, the circumstances here did not warrant the action taken by the City.

The City argues that the Association manipulated the process in an attempt to make the City default on its obligation to exchange proposals. There is nothing in this record that supports a conclusion that the parties agreed to a date after November 1 for the exchange of contract proposals. Even if we were to agree, however, that the Association had attempted to lull the City into missing the November 1 deadline,[(5)] the Association's conduct would not excuse the City from its obligation to bargain. As pointed out above, the City had legitimate options it could have exercised. Refusing to bargain was not among them.

The City's refusal to schedule additional bargaining sessions resulted in no bargaining after the initial session. We will order the City to cease and desist from its unlawful refusal to bargain. The appropriate remedy for the City's violation is to order the City to return to the bargaining table to resume negotiations with the Association for a successor agreement.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain with the Association.

2. The City is ordered to resume negotiations for a successor agreement with the Association within 14 days, or as soon as possible thereafter.

DATED this 27th day of March 2003.

1. Miller was unaware until that day that the Association's counsel was going to take the position that the City's proposals were untimely and would not be considered.

2. The only evidence relative to this assertion is a letter to the City from the Association's representative concerning the 1998 negotiations. That letter does not support the City's past practice claim.

3. The City's affirmative defense and counter-claim does not directly allege either.

4. Alternatively, the Association could continue bargaining over the City's proposals, while filing a grievance under the parties' contract alleging that the City violated Article 28. We note that this approach--negotiate and grieve--was approved by this Board in *City of Portland v. Portland Police Association*, Case No. UP-26-99, 18 PECBR 605 (2000).

The Association suggests that the City failed to exhaust its remedies because it did not file a grievance. Our review of the parties' agreement does not establish that the City had the right to file a contractual grievance.

5. We offer no opinion on whether the contract actually requires an exchange of proposals by November 1. For purposes of this complaint, it is sufficient that the parties are of the opinion that it does, though the City contends that adherence to that date was not required here.