
Civil Rights Division - Bureau of Labor and Industries
NOTICE OF SUBSTANTIAL EVIDENCE DETERMINATION

Complainant: Nestor Alves

Respondent: Central Oregon Coast Fire And Rescue District

Case Number: STEMWB181107-41704

Investigator: Irn Coury

Filing Date: November 7, 2018

Reviewed By:

I. Jurisdiction

Oregon Revised Statutes chapters 659A, ORS 25.337, 25.424, 171.120, 345.240, 441.184, 476.576, 651.060, 651.120, 652.355, 653.060 and 654.062, and Oregon Administrative Rules chapter 839 divisions 2, 3, 4, 5, 6, 9 and 10 authorize the Civil Rights Division to accept, investigate, amend, resolve and determine complaints alleging unlawful practices in employment, housing, places of public accommodation, state government and career, professional and trade schools.

Specific facts supporting a conclusion that the Division has jurisdiction over respondent(s) are found below.

II. Synopsis

The Bureau of Labor and Industries, Civil Rights Division, finds substantial evidence of an unlawful practice based on opposition to a health and safety hazard, in that Complainant's employment was terminated in violation of ORS 659A.199.

III. Claim and Answer

On November 7, 2018, Complainant filed a complaint with the Civil Rights Division. Complainant alleged an unlawful employment practice based on opposition to a health and safety hazard, in that Respondent subjected him to different terms and conditions of employment and terminated Complainant's employment. Complainant alleges that this constitutes a violation of ORS 659A.199.

Respondent denies discriminating against Complainant. Respondent asserts that they terminated Complainant's employment because Complainant did not obtain his EMT certification in the agreed-upon period of time.

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IV. Identity of Respondent(s)

1. Respondent Central Oregon Coast Fire And Rescue District is a public body and is a person pursuant to ORS 659A.001(9).

V. Findings of Fact

1. Respondent Central Oregon Coast Fire And Rescue District employs one or more persons in the State of Oregon and is an employer pursuant to ORS 659A.001(4)(a).
2. Complainant was hired by Respondent on or around February 15, 2017 as a Firefighter and Captain.
3. Beginning in or around April or May 2017, Complainant made several complaints to Respondent's Chief, Gary Woodson, regarding the safety of Respondent's personal protective equipment.
4. In or around May 2018, Complainant reported these same safety concerns to Oregon OSHA.
5. On July 20, 2018, Respondent terminated Complainant's employment, citing a lack of EMT certification.
6. Complainant alleges that his termination was pretextual, arguing that the EMT certification was not a pre-employment requirement and that the job description provided by Respondent was not his job description. The job description itself refers to a different bargaining unit than Complainant's, and Complainant alleges that he never even saw it until after his employment had been terminated. Complainant admits that he voluntarily agreed to obtain the EMT certification, but not that it was a requirement.
7. Complainant provided approximately 198 pages (many duplicative) of documentation, comprising Complainant's entire personnel file as given to his attorney, including:
 - a) Complainant's offer of employment letter. The letter is dated "January 31", and the offer is effective February 15, 2017. The letter is signed by Chief Jim Stearns, discusses pay and hours, and makes no reference to any EMT certification. The letter reads, in part, "This position is covered by the existing bargaining agreement [...] During your initial 12 month probationary period you will be evaluated as per the terms outlined in the agreement and continued employment status will be determined."
 - b) A letter from Complainant to Respondent's Chief Gary Woodson and others, dated March 4, 2018. The letter discusses Complainant's pay.

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- c) A letter from Chief Woodson to Complainant dated March 7, 2018. The letter states, in part, “After I started as Fire Chief on March 1, 2017, you mentioned to me that you thought your pay scale was incorrect and that you had been promised that your starting rate would be at Step 4 which is \$52,150 per year. Because there was nothing in writing confirming this, I had to check with the previous Fire Chief as well as research the initial job offer and job requirements. What I found was that when you were offered the job that it was agreed that you would be paid at step 4 of the scale and it was also understood that you were a California licensed EMT, but you were to obtain your Oregon EMT license within 6 months of your hire date.”
- d) A letter from Chief Woodson to Complainant dated March 19, 2018. The letter repeats word-for-word the content of the letter dated March 7, 2018, but then continues. Part of what this letter states that was not present in the March 7, 2018 letter is, “At this point you have not met the EMT licensing requirements that are required for your position. Therefore, you will have 90 days from today March 19th until June 19th, 2018 to obtain your Oregon EMT license and present a copy to the district. [...] If you fail to obtain your Oregon EMT license within the 90 day period we will be forced to terminate your employment for not complying with or having the required certifications for the position.”
- e) An email dated March 21, 2018 from Complainant to Chief Woodson. The email states, in part, “I have requested approval twice to attend an EMT refresher course, which is required in order to take the National Registry test and obtain my Oregon EMT, which you have denied both times. There is a class starting yesterday that I requested approval for since the one at CCFD was canceled, which you also denied. The two EMT refresher courses that you wanted me to attend, in order to save the department money, were canceled. The EMT refresher course that was in Pendleton in December of 2017 that I requested to attend, you would not approve either.”
- f) A letter from Chief Woodson to Andy Parker, the President of the Newport Professional Fire Fighters Association, concerning Complainant. The letter is dated April 25, 2018, and states, in part, “We [Chief Woodson and Respondent’s Board of Directors] also discussed your request to reimburse Mr. Alves for expenses relating to the EMT refresher course that he attended. The board feels as this was a pre-employment requirement to be on Oregon licensed EMT that the district will not provide any reimbursement at this time. But when he provides us with an Oregon EMT license we can re-consider this.” The letter later states, “[Complainant] has had over 14 months to obtain his [Oregon EMT] license but has not gotten it and therefore we must put a deadline of 60 days for Mr. Alves to obtain his Oregon EMT license. He will have until June 25, 2018 to submit an Oregon EMT license to us. If he does not meet the June 25th deadline we will need to meet and discuss his future with the fire district.”

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- g) Complainant’s pre-termination and termination letters. The letters are dated July 5, 2018 and July 30, 2018, respectively, and are signed by Chief Woodson. Both state, in part, “you were given a deadline of June 25th to obtain your Oregon EMT license. The obtaining of this license was not only a pre-employment requirement, but it is also a requirement of the State of Oregon for you to be able to actually engage in the essential functions of your position. The District has been more than patient and generous in granting you extensions and time to fulfill this requirement.”
- h) A letter dated July 8, 2018 from Dustin Joll to Respondent’s Board of Directors. The letter states, in part, “[Chief Stearns and Mr. Joll’s] ongoing discussion turned toward Nestor’s lack of Oregon EMS certification. The conclusion of this conversation was that since COCFRD no longer holds a Lincoln County Ambulance Service Area, an EMS certification is superfluous at best, and, at worst, an unnecessary District expenditure in terms of salary and additional fees for periodic recertification. Chief Stearns and I agreed to present the possibility of hiring Nestor to you, the Board of Directors, at the upcoming Board meeting. I did present this to the Board in the January 2017. [...] We discussed his EMS standing, the fact that EMS standing is not as important now that the District does not hold an ASA, and the fact that should goals change in that regard, the District and its employees have a newly ratified contract to facilitate that change.”
- i) An undated seven-page letter from Melissa Steinman, the President of the Central Oregon Coast Volunteer Association, to Respondent’s Board of Directors. The letter addresses multiple concerns regarding Chief Woodson, including “his failure to put safety as a top priority”, citing the following examples:
 - a. In October 2017, Ms. Steinman and Chief Woodson discussed a service offered by the Special District Association of Oregon (SDAO) to review Respondent’s facilities and equipment, but as of the following January, Chief Woodson had not taken action regarding the service.
 - b. In December 2017, firefighters brought to Chief Woodson’s attention that tires on one of the fire engines were more than ten years old and needed to be replaced, per NFPA and USDOT guidelines. However, Chief Woodson was reluctant to approve the purchase of new tires, stating that he has never changed out tires just because they were ten years old.
 - c. Chief Woodson was provided a list of people who needed new turnouts in November 2017, but fittings for the turnouts did not happen until May 2018. As of July 18, 2018, the turnouts had not been issued, and at least one firefighter had been fighting interior structural fires in improperly fitting turnouts.
 - d. Chief Woodson retrieved expired saline flushes from the trash that cadets had thrown out because they were expired and placed them

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back in the ambulance. Chief Woodson told Ms. Steinman that lubricant which had been expired for years was okay to use because it was still sealed.

- e. “Chief Woodson is willing to save a few dollars by leaving expired saline (and who knows what else) on the ambulance to be administered to a patient in an IV. He saves money by getting SCBAs [self-contained breathing apparatuses] from surplus that are very very used, but "technically" still good. Several of the SCBAs arrived with vomit inside the masks. The way those masks work, the regulator is attached to the mask, so vomit [is] inside all of the internal parts of the effected masks. He purchased light bars for [vehicle #] 7230 that were "cheaper" from an unknown manufacturer in China, which cost hundreds more dollars to install because the wiring is not standard. Today, the light bar is inoperable and has taken down the rear lights as well, effectively taking [vehicle #] 7230 out of service since it is not road legal without break lights and blinkers.”
 - f. Chief Woodson planned an extrication demonstration during Beachcombers, and Ms. Steinman found numerous safety issues with this event, including:
 - i. Combined with the other events the District was doing for Beachcombers, they were understaffed.
 - ii. Chief Woodson did not properly prepare the participants for the extrication itself with no pre-event planning or training.
 - iii. Chief Woodson did not make sure the tank of the car that was being used had a safe level of gasoline.
 - iv. Chief Woodson asked Ms. Steinman to pretend to cut the battery cables, which would have left a live battery connected with a risk of explosion.
 - v. None of the participants had been issued extrication gloves.
 - g. When Ms. Steinman and others have tried to raise their safety concerns with Chief Woodson, their concerns often go unresolved. When they then bring their concerns to the board of directors, and a board member brings it to Chief Woodson, they face retaliation.
8. Respondent a written position statement in answer to this complaint. It stated:
- a) Respondent denied discriminating against Complainant.
 - b) Respondent denied that Complainant made reports regarding safety concerns to Chief Woodson.
 - c) Respondent denied treating Complainant differently.
 - d) Respondent terminated Complainant’s employment because he did not obtain his Oregon EMT certification, which is listed as a requirement in Complainant’s job description.

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9. Respondent provided documentation in support of their argument, including:
 - a) Complainant's offer of employment letter. The letter is dated "January 31", and the offer is effective February 15, 2017. The letter is signed by Chief Jim Stearns, discusses pay and hours, and makes no reference to any EMT certification. The letter reads, in part, "This position is covered by the existing bargaining agreement [...] During your initial 12 month probationary period you will be evaluated as per the terms outlined in the agreement and continued employment status will be determined."
 - b) Complainant's job description. The description reads that the bargaining unit is "YES-IAFF 1660." The description states that a "State of Oregon EMT-B certification" is a requirement for the position. The description is not signed.
 - c) A letter from Chief Woodson to Complainant dated March 19, 2018. The letter reads, in part, "At this point you have not met the EMT licensing requirements that are required for your position. Therefore, you will have 90 days from today March 19th until June 19th, 2018 to obtain your Oregon EMT license and present a copy to the district. [...] If you fail to obtain your Oregon EMT license within the 90 day period we will be forced to terminate your employment for not complying with or having the required certifications for the position."
 - d) Complainant's pre-termination letter. The letter is dated July 3, 2018, and is signed by Chief Woodson. It states, in part, "you were given a deadline of June 25th to obtain your Oregon EMT license. The obtaining of this license was not only a pre-employment requirement, but it is also a requirement of the State of Oregon for you to be able to actually engage in the essential functions of your position. The District has been more than patient and generous in granting you extensions and time to fulfill this requirement."
 - e) An affidavit signed by Jim Stearns on December 21, 2018. It states that he hired Complainant, discussed with Complainant the requirement that Complainant his Oregon EMT license, and relayed to Complainant that it was his expectation that Complainant would receive his Oregon EMT license within six months of his employment.

10. On March 5, 2019, BOLI requested that Respondent provide "all notes and/or minutes from board discussions and decisions regarding Complainant's employment, including, but not limited to, his hiring, the possibility of reimbursement for certification, and the termination of his employment." In response to the request, Respondent stated that they had "reviewed all minutes from the time of Mr. Alves' hire up until the conclusion of his employment. There is no refence [*sic*] or discussion of Mr. Alves employment situation with the Board. As a practical matter, the Board is not involved in the employment process for employees other than the Fire Chief."

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11. On February 12, 2019, the Division interviewed John Townley. He stated:
 - a) When he began volunteering with Respondent, he did not have his EMT certification, but he was allowed to go on calls.
 - b) Everyone on paid staff has their EMT certification.

12. On March 5, 2019, the Division interviewed Jim Stearns. He stated:
 - a) He was the interim chief for Respondent for six months, at the end of 2016 and the beginning of 2017.
 - b) He hired Complainant and consulted with Dustin Joll throughout the process.
 - c) When asked if it was a condition of employment that Complainant obtain his Oregon EMT certification, he stated that it was understood and that he was amazed that it was not in writing.
 - d) He discussed the issue of Complainant obtaining his EMT certification with Complainant and Dustin Joll.
 - e) He did not remember a specific timeframe for Complainant obtaining his EMT certification but expected him to start the process immediately.
 - f) He first learned about Complainant having issues with his EMT certification when he received a phone call from Chief Woodson trying to find out what he had discussed at the time of hire. He did not remember when that happened, but he thought that Chief Woodson wanted this information to pass along to Respondent's attorney.

13. On April 24, 2019, the Division interviewed Dustin Joll. He stated:
 - a) He was Respondent's Captain and EMS Coordinator at the time of Complainant's hiring.
 - b) He did not have the power to hire Complainant, but he was heavily involved in the process of hiring him.
 - c) Complainant's lack of EMT certification was discussed at this time, but it was a moot point because the fire station did not have an ambulance at the time.
 - d) He was not aware of any obligation for Complainant to obtain his EMT certification, and he did not recall any conversations that might have suggested as much.
 - e) He presented Complainant's candidacy to Respondent's Board of Directors and explained to them why Complainant's lack of EMT certification was not an issue.
 - f) Local 1660 is not the local that represented Complainant, and the job description offered by Respondent with that local on it is not the job description they were using when they hired Complainant.

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14. On May 14, 2019, the Division interviewed Respondent's Fire Chief Gary Woodson. He stated:
- a) He began working for Respondent on March 1, 2017.
 - b) He did not recall Complainant ever raising concerns regarding training.
 - c) Complainant did bring him concerns regarding protective equipment, and Chief Woodson's response would be to tell Complainant to bring him a proposal, which Complainant did not do.
 - d) He first learned of the requirement that Complainant obtain his EMT certification around April 2017. At that time, Complainant questioned his own pay rate, and Chief Woodson contacted Chief Stearns regarding Complainant's pay. In speaking with Chief Stearns, Chief Stearns told Chief Woodson about the requirement.
 - e) Chief Woodson also knew about the requirement because it was in Complainant's job description. The particular job description that Chief Woodson is referring to was not in Complainant's file. Rather, Chief Woodson found on Respondent's computer.
 - f) Chief Woodson never denied requests by Complainant to attend EMT refresher classes, but he did deny him reimbursement for them.
 - g) Chief Woodson's conversations with Respondent's Board of Directors regarding Complainant's EMT certification consisted merely in briefing the board about personnel matters.
15. On October 7, 2019, the Division interviewed Casey Wittmeir. He stated:
- a) He had problems with his turnouts not fitting, and Complainant raised that issue with him.
 - b) He believes that Complainant also raised that issue with Chief Woodson on his behalf, and he does not believe that he would have received properly fitting turnouts had Complainant not raised the issue on his behalf.
16. On October 30, 2019, the Division interviewed Melissa Steinman. She stated:
- a) Ms. Steinman was the President of the Central Oregon Coast Volunteer Association during Complainant's employment.
 - b) When asked what she knew about this case, Ms. Steinman stated that Complainant's employment had been terminated because he opposed safety hazards.
 - c) She witnessed Complainant raising safety concerns with Chief Woodson.
 - d) She witnessed Chief Woodson prioritizing cost-saving over safety, prioritizing convenience over safety, and not taking appropriate safety measures because he has always done things differently.
 - e) She knew that Complainant had difficulties having Chief Woodson address his safety concerns because Complainant would raise concerns with Chief Woodson, and those concerns would not be addressed. Complainant would then have to turn to volunteers to raise those concerns with Chief Woodson in order for appropriate action to be taken.

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VI. Summary

It is not in dispute that there were conversations regarding Complainant's lack of Oregon EMT certification before his hiring, nor is it in dispute that Respondent determined to hire Complainant even though he did not have the certification. No agreement was ever signed by Complainant and Respondent regarding Complainant's EMT certification, and neither Complainant nor Dustin Joll believed that there had been such a requirement. Respondent pointed to what they described as Complainant's job description. However, Chief Woodson himself admitted that the job description was not in Complainant's personnel file, and it is not signed. Both Complainant and Dustin Joll deny that this was Complainant's job description and assert that the bargaining unit named on the job description was not Complainant's bargaining unit. OAR 839-005-0010 states, "[i]f the respondent rebuts the evidence with evidence of a legitimate non-discriminatory reason, but there is substantial evidence that the respondent's reason is a pretext for discrimination, the division will conclude there is substantial evidence of unlawful discrimination." Respondent's assertion that Complainant failed to fulfill a pre-employment agreement is not supported by the evidence.

Complainant alleges that Chief Woodson harbors animus toward his protected activity. In her letter to Respondent's Board of Directors and at interview with the Division, Melissa Steinman attested to said animus and provided multiple examples demonstrating it. According to OAR 839-005-0010 if "the division finds the individual's protected class membership was also a motivating factor in the respondent's action, the division will determine there is substantial evidence of discrimination." The pretextual nature of Respondent's stated reason for terminating Complainant's employment and the corroboration of Chief Woodson's animus constitute substantial evidence that Complainant's safety complaints were a motivating factor in Respondent's action.

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VII. Determination

The Bureau of Labor and Industries, Civil Rights Division, finds SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE, in violation of ORS 659A.199.

Irn Coury
Senior Investigator
Civil Rights Division