

In the Matter of
Petition for Declaratory Ruling
International Association of Fire Fighters, Local 3564, Petitioner
and
City of Grants Pass, Intervenor
Case No. 84-11

Declaratory Ruling by Commissioner Brad Avakian

Issued January 13, 2012

SYNOPSIS

The International Association of Firefighters, Local 3564 ("IAFF") filed a petition for a declaratory ruling on behalf of its members who were employed by the City of Grants Pass ("City") to determine whether the City is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF's firefighters, as required by ORS 652.080. The Commissioner ruled that the City was required to include authorized vacation and sick leave time when computing overtime wages for the IAFF's firefighters, as required by ORS 652.080.

The above-entitled case came on regularly for hearing before Administrative Law Judge Alan McCullough, designated as Presiding Officer ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held in writing.

Petitioner, the International Association of Firefighters, Local 3564 ("IAFF"), was represented by Sarah K. Drescher, attorney at law. Intervenor, the City of Grants Pass ("City"), was represented by Bruce Bischof, attorney at law. The Bureau of Labor and Industries ("BOLI" or "the Agency") made an appearance and was represented by case presenter Chet Nakada, an employee of the Agency.

HISTORY OF THE CASE

On June 28, 2011, the IAFF filed a petition for a declaratory ruling on the issue of whether or not the City is required to include vacation and sick leave in calculating overtime pay for firefighters. The IAFF alleged that the City currently does not include vacation and sick leave in calculating overtime pay for firefighters. On July 29, 2011, the Commissioner responded, stating that he had reviewed the petition and planned to issue a ruling on it. On August 9, 2011, the City filed a petition to intervene. On August 15, 2011, the Commissioner instructed the City to file an amended petition that addressed all the provisions in OAR 137-002-0025. On August 19, 2011, the City filed an amended petition to intervene that was granted by the Commissioner on September 8, 2011.

On September 28, 2011, the Commissioner issued a Notice of Hearing that set a hearing date of November 2, 2011, and appointed the ALJ to be the Presiding Officer in the proceeding.

On October 6, 2011, the ALJ conducted a telephonic prehearing conference with the attorneys for the IAFF and the City. During the course of the conference, the IAFF and the City orally agreed to stipulate to three facts that the ALJ, the IAFF's attorney, and the City's attorney considered necessary to resolve the legal issue in this case – whether a City is required to include vacation and sick leave in calculating overtime pay for its firefighters who are members of the IAFF. Those facts are set out in the section of this Ruling entitled Findings of Fact.

The IAFF and City both asked if the hearing could be conducted in writing as an alternative to driving to Eugene, anticipating that their oral argument at the hearing would differ little in substance from the written briefs that they planned to submit prior to the hearing. The City also requested that written briefs be simultaneously filed on

November 9, 2011, instead of November 2, 2011, the date set for hearing. The IAFF had no objection. The ALJ granted both requests.

On October 8 and October 10, 2011, respectively, the City and IAFF stipulated in writing to the facts set out in the Findings of Fact.

In an interim order issued on October 12, 2011, the ALJ confirmed the rulings made during the October 6 prehearing conference and ordered the IAFF and the City to file their written briefs on November 9, 2011. The ALJ also ruled that the Agency could elect to file a statement of Agency policy, a written brief by its counsel, or both, on that same date. The ALJ ordered the IAFF, the City, and the Agency to address the following issues, based on the stipulated facts:

1. Is the City of Grants Pass required to include vacation and sick leave time when calculating overtime wages for firefighters employed by Intervenor, as set forth in ORS 652.080?
2. Does ORS 653.269(5)(b) exempt the City of Grants Pass from complying with ORS 652.070 and 652.080?

On November 8, 2011, the City asked for an extension until November 14, 2011, to submit briefs. The IAFF did not object and the ALJ granted the City's request. On November 14, 2011, the IAFF and the City filed written briefs and the Agency filed a statement of Agency policy.

IAFF OBJECTIONS TO THE CITY'S WRITTEN BRIEF AND ATTACHED EXHIBITS

On November 18, 2011, the IAFF filed a written objection to the City's enclosure of and reference to documents related to the legislative history of the statutes at issue in its written brief. The IAFF based its objection on two grounds. First, the City's reference to these documents included facts not stipulated to by the City and IAFF, in contravention of OAR 839-050-0280(1), which states that the ALJ is bound by any prehearing stipulation of facts, whether made orally or in writing. Second, the City's inclusion of the exhibits and any argument related to that evidence constitutes

introduction of new evidence and violated the “ALJ’s order, [OAR 137-002-0040(2)] and the stipulated fact agreement between the parties.”

In the forum’s view, the “facts” referred to in OAR 839-050-0280(1), as applied to this declaratory ruling, consist of any substantive facts related to the actual payment or nonpayment of overtime wages to the IAFF firefighters by the City. As an example, the terms of the collective bargaining agreement are a substantive fact. Therefore, any history related to collective bargaining between the City and IAFF constitutes a substantive fact and will not be considered by the forum in this ruling. In contrast, legislative history related to adoption or amendment of the statutes at issue is neither a non-stipulated fact nor “other evidence” that is subject to exclusion. As discussed in the section of this Declaratory Ruling entitled “Opinion - Reasons Relied Upon in Support of Proposed Ruling,” the forum is required to consider legislative history when it is offered by a party as an aid to interpreting a statute and does so in this ruling, giving it appropriate weight. However, the forum does not consider any substantive facts as defined earlier in this paragraph or argument related to such facts that were not among the stipulated facts set out in the Findings of Fact.

PROPOSED DECLARATORY RULING & INTERVENOR'S REQUEST FOR ORAL ARGUMENT

On December 5, 2011, the ALJ issued a Proposed Declaratory Ruling that contained the following proposed Declaratory Ruling:

“ORS 653.269(5)(b) does not exempt the City of Grants Pass from complying with ORS 652.070 and 652.080. The City of Grants Pass is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF firefighters it employs, as set forth in ORS 652.080.”

The Proposed Declaratory Ruling stated that Petitioner, Intervenor, and the Agency had the right to present oral argument to the Commissioner before the Commissioner issued

a Declaratory Ruling, and that such request must be made in writing and filed within 10 days of the issuance of the Proposed Declaratory Ruling.

On December 9, 2011, Intervenor, through counsel Bruce Bischof, timely requested oral argument before the Commissioner. Petitioner and the Agency did not request oral argument. On December 27, 2011, the ALJ issued an interim order setting the time, date, and location for oral argument at 10:30 a.m., January 18, 2012, at the Workers' Compensation Board, Salem Oregon. The interim order also noted that oral argument did not include presentation of any additional exhibits were not part of the record to date.

On January 9, 2012, Intervenor, through counsel Bischof, filed written notification with the Commissioner stating that Intervenor "does not seek oral argument in this matter." Intervenor also notified the Commissioner that Intervenor would be represented "[f]rom this point forward" by Gregory A. Chaimov, attorney at law.

On January 12, 2012, the ALJ telephoned Ms. Drescher and Mr. Bischof and gave them official notice that oral argument was cancelled.

FINDINGS OF FACT

1. The City of Grants Pass ("City") is an incorporated city in Oregon that employs four or more firefighters on a full-time basis in a regularly organized fire department.

2. All firefighters employed by the City are members of the International Association of Fire Fighters, Local 3564 ("IAFF"). The City and IAFF are parties to a collective bargaining agreement ("CBA").

3. The City calculates overtime pay to firefighters based on the language of Article V of the CBA ("Hours and Overtime"), which is attached to and incorporated into these stipulated facts as Exhibit A.

4. Exhibit A contains the following language:

"ARTICLE V - HOURS AND OVERTIME

"5.1 Workweek. Regular Shift Employees: The work week for regular shift employees, to the extent consistent with the operating requirements of the public safety department fire services, and recognizing the necessity for continuous service by such department throughout the week, shall consist of an average of 56 hours as scheduled by the department director or other responsible authority and such scheduling shall be consistent with the scheduling method presently being used. There shall be a five-day 8-hour-per-day work schedule, between Monday and Saturday, for personnel assigned to fire prevention. Employees assigned to prevention will be subject to reassignment to a 56-hour shift with fourteen day's notice.

"The fire prevention assignment may rotate every 2 years with 60 days notice.

"Employees assigned to fire prevention shall receive assignment pay at the rate of 5% of their base hourly wage for all hours worked in the assignment.

"Employees assigned to fire prevention, or the City, may request in writing a meeting to negotiate a four day, 10 hour schedule. Such meeting shall take place within 30 days of the request.

"5.2 56 Hour Work Shift Normal Workday. Regular Shift Employees: The work shift for regular shift employees shall be 24 hours in length. (For the purpose of computing overtime, the 24-hour long day shall be used). Except for emergencies and cleanup and maintenance required following an emergency to maintain the operational readiness of the Fire Services, employees will not normally be required to work in excess of 9 hours, inclusive of meal periods, during any 24 hour work shift, such nine hour "normal workday" shall be scheduled with regular starting and quitting times so far as this is consistent with the operating needs of the department. In no instances will the 'normal workday' nor work in excess of the 'normal workday' be utilized by the City for disciplinary purposes.

"5.3 Regular Hours. Regular Shift Employees: In the case of shift employees the hours of the shift shall be consecutive including rest periods and meal periods.

"5.4 40 Hour Work Shift. Each regular shift employee shall be scheduled to work on a regular shift, and each employee shall have regular starting and quitting times. This shall apply with the following exception: Those employees whose special assignment requires a flexible work schedule. These will include firefighters serving in Prevention. Their work shift will be flexible within a 40-hour week. Therefore, for the purpose of overtime, these employees shall work a 40-hour week, and overtime shall be paid after 40 hours in a 7-day period and not after 8 hours in a 24-hour period.

"5.5 Meal Periods. Regular Shift Employees: In the case of shift employees, meal periods shall be granted during each shift. To the extent

consistent with the operating needs of the Fire Services, each meal period will be scheduled in a manner consistent with the operating requirements of the division.

"5.6 Rest Periods. Regular Shift Employees: In the case of shift employees, a rest period of 15 minutes shall be permitted for all employees during each half of the normal workday. Rest periods shall be scheduled in accordance with the operating requirements of the department.

"5.7 Holiday Routine. Employees working on named holidays as defined in Section 6.1, shall be required to respond to calls and to perform maintenance, clean up, and scheduled duties. Upon completion of the above, employees will be on 'holiday routine' and shall be allowed free time in the same manner as time outside the nine (9) 'normal workday'.

"5.8 Overtime. The City shall have the right to assign overtime work as required in the manner deemed to be the most advantageous and consistent with the requirements of municipal service and public interest.

"Shift employees who work hours annexed consecutively to the end of the work shift shall receive overtime pay in thirty minute increments for hold over purposes.

"Regular Shift Employees: Shift employees shall be compensated at the rate of 1½ times their respective 56 hour per week regular hourly rate as set forth in Exhibit 'A' for overtime work under the following conditions:

"1. All time worked as a Firefighter or Fire Corporal in excess of the regularly scheduled work shift for that employee (e.g., in excess of 24 hours in any one workday).

"2. All time worked as a Firefighter or Fire Corporal in excess of 204 hours in a 27 calendar day for 24-hour duty schedule fire service non-exempt employees.

"3. Forty-Hour Employees: Overtime for 40-hour employees shall be time worked (1) in excess of 8 hours for a specific job class in a workday for employees working five 8 hour shifts, or (2) in excess of 10 hours for a specific job class in a workday for employees working four 10 hour shifts, and (3) in excess of 40 hours in any work week.

"4. Employees assigned to on-call fire prevention shall be paid \$100.00 a month in addition to overtime and callback earned.

"5.9 No Pyramiding. In no event shall any employee compensation be received twice for the same hours.

"5.10 Callback. Employees called back to work shall receive overtime pay for hours worked, and if called back shall be credited with not less than 3 hours time. Overtime for the purpose of this section shall be compensated for at 1½ the 56-hour hourly rate, unless the employee works a 40-hour workweek, in which case, overtime will be at the 40-hour rate.

"This section applies only when callback results in hours worked which are not annexed consecutively to one end or the other of the work shift. This section does not apply to schedule overtime (such as meetings and project work), or overtime annexed to the beginning of the shift, or holdover times annexed to the end of the work shift.

"It shall be considered callback if an employee ends the employee's shift and has not been previously required to extend the employee's regular shift as holdover (such as when called back on an alarm or emergency).

"Employees who are scheduled to attend meetings and/or complete project work on their designated days off will be credited with not less than two (2) hours.

"5.11 Distribution of Overtime. The Public Safety director will maintain a procedure for distributing overtime among the employees in as equitable a manner as possible. In distributing overtime, such things as special qualifications and desires the employee(s) shall be considered.

"5.12 Work Schedules. All shift employees, to the extent consistent with operating requirements, shall be scheduled to work a regular work shift, and each shift shall have regular starting and quitting times. Work schedules showing the employee's shift, workdays, and hours shall be posted for 7 days prior to their effective date. Except for emergency situations and for the duration of the emergency, changes in work schedules shall be posted 3 days prior to the effective date of the change. Failure to comply with the terms of this section shall result in time and one-half pay for all the time worked outside the employee's timely scheduled workweek.

"The existing work schedules (48/96) shall remain in effect for the life of the Agreement.

*The regular rate is that rate which complies with the FLSA. (In the event that an employee elects to be compensated to overtime compensatory time such time shall be applied at 1½ times the greater of the actual time worked or at a minimum number of hours required under Section 5.10. (Callback).

"5.13 Work Changes. Changes by the City and hours of work as set forth in this Article shall be done in accordance with the following procedure: The City shall give the Union 30 days prior written notice, specifying the desired changes. Bargaining in accordance with statutory requirements will then occur.

"5.14 Station Transfer. The City shall pay to any bargaining unit employee, not already on duty, who is required to transfer to a station other than the one in which the employee had been scheduled to work, 30 minutes of overtime per trip to compensate the employee for the time spent in organizing equipment and driving to the new station. The parties here to agree that 30 minutes is a reasonable amount of time for performing the tasks involved in a Station transfer."

STATUTES IN ISSUE

“652.060 Maximum working hours for firefighters.

“(1)(a) No person employed on a full-time basis as a firefighter by any regularly organized fire department maintained by any incorporated city, municipality or fire district and that employs not more than three persons on a full-time basis as firefighters shall be required to be on regular duty with such fire department more than 72 hours a week. However, any affected incorporated city, municipality or fire district shall be deemed to have complied with this paragraph and ORS 652.070 if the hours of regular duty required of firefighters employed by it average not more than 72 hours a week over each quarter of the fiscal year of the employing city, municipality or fire district.

“(1)(b) No person employed on a full-time basis as a firefighter by any regularly organized fire department maintained by any incorporated city, municipality or fire district and that employs four or more persons on a full-time basis as firefighters shall be required to be on regular duty with such fire department more than 56 hours a week. However, any affected incorporated city, municipality or fire district shall be deemed to have complied with this paragraph and ORS 652.070 if the hours of regular duty required of firefighters employed by it average not more than 56 hours a week over each quarter of the fiscal year of the employing city, municipality or fire district.

“652.070 Overtime pay for firefighters.

“(1) Every affected incorporated city, municipality and fire district shall put into effect and maintain a schedule of working hours required of regularly employed firefighters which shall not be in excess of the average hours established by ORS 652.060, and which shall provide for at least 48 consecutive hours off-duty time in each seven-day period. Any affected incorporated city, municipality or fire district failing so to do shall pay to every regularly employed firefighter as additional pay for every hour of regular duty required of and performed by the firefighter over and above the average hours established by ORS 652.060 a sum equivalent to one and one-half times the regular hourly rate of pay at the time of such default. However, in the case of replacement for any authorized leave, vacation or temporary vacancy, regularly employed firefighters in a department employing four or more persons on a full-time basis as firefighters may elect to work in excess of 56 hours a week at not less than their regular hourly rate of pay.

“(2) Nothing in subsection (1) of this section requires payment of one and one-half times the hourly rate of pay to a volunteer firefighter for hours of duty performed in excess of the average hours established by ORS 652.060.

“652.080 Computing hours on duty for purposes of ORS 652.060 and 652.070.

“In computing the average or total number of hours a week for the purposes of ORS 652.060 and 652.070, authorized vacation or sick leave time shall be considered as time on regular duty.

“653.268 Overtime for labor directly employed by public employers.

“(1) Labor directly employed by any public employer as defined in ORS 243.650 shall be compensated, if budgeted funds for such purpose are available, for overtime worked in excess of 40 hours in any one week, at not less than one and one-half times the regular rate of such employment. If budgeted funds are not available for the

payment of overtime, such overtime shall be allowed in compensatory time off at not less than time and a half for employment in excess of 40 hours in any one week.

“(2) Nothing in this section shall prevent a labor organization under the National Labor Relations Act or ORS 243.650 to 243.782 or other employees from negotiating additional overtime pay requirements with a public employer.

“653.269 Exceptions to ORS 653.268; rules.

“The provisions of ORS 653.268 relating to pay for overtime shall not apply to:

“* * * * *

“(3) Employees of a public employer, as defined in ORS 243.650, who are employed in fire protection * * *.

“* * * * *

“(5) Employees exempted from overtime:

“* * * * *

“(b) By a collective bargaining agreement expressly waiving application of ORS 653.268.”

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter. ORS 651.050; ORS 652.060, 652.070, and 652.080.

2) The Commissioner of the Bureau of Labor and Industries has the authority to issue a declaratory ruling in this matter. ORS 651.050; ORS 183.410; OAR 137-002-0010 to 137-002-0060.

3) Petitioner’s members’ hours of work and the method by which Intervenor is required to calculate overtime pay for Petitioner’s members is governed by ORS 652.060, 652.070, and 652.080.

4) Intervenor is required to consider authorized vacation and sick leave time taken by Petitioner’s members as time on regular duty and include it when computing overtime wages for firefighters employed by Intervenor. ORS 652.080.

OPINION - REASONS RELIED UPON IN SUPPORT OF RULING

INTRODUCTION

Petitioner (“IAFF”) is a labor organization that represents firefighters employed by Intervenor, the City of Grants Pass (“City”). BOLI is the state agency charged with enforcing Oregon’s wage and hour laws. The City computes overtime due to Petitioner’s members (“firefighters”) based on the terms contained in its collective bargaining agreement with the IAFF, rather than the terms in ORS 652.070 and 652.080. According to the statements submitted by the IAFF, the City, and the Agency, (collectively referred to as the “participants”) the IAFF filed a complaint with BOLI in January 2011 alleging that the City is violating ORS 652.070 and 652.080 by not including vacation and sick leave taken when computing overtime pay for its firefighters.¹ Through this declaratory ruling, the IAFF and the City seek to clarify whether the City is obligated to include vacation and sick leave time as set out in ORS 652.070 and 652.080 when computing overtime.

THE PARTICIPANTS’ POSITIONS

The IAFF argues that the City is obligated to include vacation and sick leave time in its overtime calculations pursuant to ORS 652.070 and 652.080. In its statement of Agency policy, the Agency supports the IAFF’s position, attaching the following three exhibits to its statement of Agency policy: (1) Field Operations Manual, Vol. I – Wage Collection (“Firefighter Overtime”); (2) March 22, 2011, letter from BOLI Wage and Hour Division Compliance Manager Gerhard Taeubel to the City setting out the Agency’s position regarding payment of overtime to the City’s firefighters; and (3) Pages 41, 42, and 45 from BOLI’s 2009 publication “Wage and Hour Laws,” published by BOLI’s Technical Assistance for Employers Program.

The City argues that it is entitled to compute overtime for firefighters in accordance with the terms of the collective bargaining agreement between the City and

IAFF based on the exemption set out in ORS 653.269(5)(b). In support of the arguments set out in its brief, the City provided 13 exhibits to illustrate the legislative history of ORS 652.060, 652.070, 652.080, 653.268, and 653.269. All references to legislative history in this Opinion are drawn from those exhibits.

The participants' arguments differ considerably and are independent of one another because they were simultaneously submitted. Among them, the participants urge a broad canvas of possibilities, covering the gamut from "plain language" to "general statutory maxim," as the proper means of interpreting the statutes at issue in this ruling.

AN OVERVIEW OF THE STATUTES AT ISSUE.

ORS 652.060(1)(b) establishes maximum working hours for firefighters employed by "any regularly organized fire department maintained by an incorporated city * * *that employs four or more persons on a full-time basis as firefighters." ORS 652.070(1) requires that firefighters in this category be paid overtime pay "for every hour of regular duty required of and performed * * * over and above [56 hours a week]" and sets out the conditions under which overtime pay must be paid. ORS 652.080 provides that "authorized vacation or sick leave time shall be considered as time on regular duty" in computing overtime pay. ORS 653.268 regulates overtime pay for "labor directly employed by public employers." ORS 653.269 sets out exceptions to the provisions of ORS 652.268.

THE CITY'S ARGUMENTS

As a prelude to a comprehensive analysis of the statutory schemes at issue, the forum summarizes the City's detailed arguments as to why it should prevail. In brief, the City contends that ORS 652.070 and 652.080 do not apply to the City and the IAFF because:

(1) ORS 653.268, not ORS 652.080, is the general overtime statute that governs payment of overtime by the City to firefighters. ORS 652.060 and 652.070 “are no longer relevant” because the IAFF’s position that firefighters are entitled to be paid overtime based on the provisions of ORS 652.060, 652.070, and ORS 652.080 would cause the Public Employee Collective Bargaining Act to be “distorted by statutes enacted prior to the passage of the * * * (PECBA)”; and

(2) ORS 653.269(5)(b) exempts the City from paying overtime to employees covered “by a collective bargaining agreement expressly waiving application of ORS 653.268.” The collective bargaining agreement between the City and IAFF contains language in Sections 5.8 and 5.12 that expressly waives application of ORS 653.268 by providing a different method of computing overtime.

The City bases its first argument on legislative history, Oregon appellate case law, and “[p]artial application of the maxim ‘*cessant ratione legis, cessat lex*’” – translated in the City’s brief as “[w]hen the reason of the law ceases, the law itself also ceases.” Its second argument rests on the application of ORS 653.268 and 653.269(5)(b) to the specific language in the collective bargaining agreement.

Alternatively, the City argues that the IAFF has waived any right to have overtime calculated under ORS 652.070 and 652.080 because the IAFF has negotiated contracts “for years” without raising that exception. The forum disregards this argument because it is based on an unstipulated fact. OAR 137-002-0040 provides that “[n]o testimony or other evidence shall be accepted at the hearing.” The City’s proffered history of negotiation with the IAFF is substantive evidence that falls into the category of “other evidence.” Accordingly, the forum does not consider this argument.

APPLICABILITY OF ORS 653.268 & ORS 653.269 – THE CITY’S ARGUMENT

The City argues that the general overtime rule for public employees found in ORS 653.268,ⁱⁱ not ORS 652.070 and 652.080, governs payment of overtime by the City to firefighters. The City points to the legislative history of those statutes, focusing on the chronological dates of their enactment and comments made to legislative committees,

Oregon appellate court cases, and the maxim of statutory interpretation earlier referred to in support its argument. Those arguments are summarized below.

A. Legislative History.

As stated earlier, ORS 652.080 was enacted in 1959. In 1969, the Legislature amended ORS 652.060 and 652.070 to adopt a 56 hour work week and overtime threshold for firefighters employed by any incorporated city, municipality and fire district employing four or more full-time firefighters. The legislative history provided by the City suggests that this amendment was adopted, at least in part, based on statements before the House Committee on Local Government that local governments were refusing to negotiate maximum hours per work week with firefighters and could not be forced to negotiate, as there “is no compulsory bargaining act for public employees in the state and firemen have no right to strike.”ⁱⁱⁱ

In 1973, the Legislature adopted the Public Employees Collective Bargaining Act (“PECBA”),^{iv} giving public employees to right to collectively bargain for the first time. According to the City, this newly-acquired power of firefighters to negotiate the substantive terms of their working conditions eliminated the need for the older statutory overtime provisions contained in ORS 652.070 and 652.080 and made them “irrelevant.”

B. Oregon Appellate Cases.

The City cites four Oregon appellate cases in support of its position.

The earliest case is *Wagner v. Columbia Hospital District*, 259 Or 15, 485 P2d 421 (1971), a pre-PECBA case. An employee alleged she was wrongfully discharged based on her religious convictions that forbade her to join a union when her employer and union conspired to require her to join the union or be fired. The issue was whether she was required to submit her claim to binding arbitration. The City cites *Wagner* for

the proposition that “in the ‘normal situation,’ [modern firefighters] should[] be bound, like any other public employee, by a properly negotiated collective bargaining agreement.” Included in the *Wagner* court’s discussion of the case is the language: “Also, in the ‘normal situation,’ individual employees are bound by the terms of labor agreements between employers and the unions who are their representatives, including contract provisions for arbitration.” *Id.* at 23. The court went on to hold that plaintiff’s submission of her claim to binding arbitration pursuant to the contract between the employer and the union would have been useless and futile and reversed the lower court’s decision requiring her to submit her claim to arbitration. *Id.* at 28-29.

The remaining three cases are tendered to support the City’s proposition that “Oregon Appellate Courts have repeatedly found that modern firefighters are well-served by the PECBA.” In *City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 292 Or 266, 639 P2d 90 (1981), the Supreme Court considered whether the PECBA trumped a “home rule” city ordinance that allowed the city’s voters to arbitrate unresolved labor disputes. The court held that the PECBA’s provision requiring post-impasse arbitration by a state arbitrator controlled over a conflicting city ordinance. *Id.* at 288. In *International Association of Firefighters, Local 314 v. City of Salem*, 68 Or App 793, 684 P2d 605 (1984), the Court of Appeals considered whether the City of Salem engaged in an unfair labor practice by refusing to bargain collectively over firefighters’ safety proposal concerning the minimum number of firefighters on a fire scene. The court held that substantial evidence supported the ERB’s determination that a firefighters’ proposal relating to the number of firefighters at a fire scene was a mandatory subject of collective bargaining. *Id.* at 799. In *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, 305 Or 275, 751 P2d 770 (1988), the Supreme Court considered whether the City of Portland was required to collectively

bargain with firefighters regarding a city-initiated change in vacation scheduling policy and held that that collective bargaining was required. *Id.* at 285.

C. General maxim of statutory construction.

The City urges the forum to apply a general maxim of statutory construction -- “*cessant ratione legis, cessat lex*” (translated in the City’s brief as “[w]hen the reason of the law ceases, the law itself also ceases”) -- to bolster its argument that ORS 652.070 and 652.080 have been superseded by the PECBA and general overtime rule for public employees found in ORS 653.268. This is an extrinsic canon that looks outside the text and context of the statutes at issue. Because this issue can be resolved by a text and context analysis that leaves no uncertainty, the forum may not and does not resort to using this maxim as an interpretive aid. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as subsequently modified by State v. Gaines*, 346 Or 160, 164-65, 171-73, 206 P3d 1042 (2009) (“If the legislature’s intent remains unclear after examining legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty”).

ORS 653.269(5)(B) – THE CITY’S ARGUMENT

The City contends that the terms of the collective bargaining agreement expressly waive application of ORS 653.268 in Sections 5.8 and 5.12. Based on the forum’s determination that ORS 653.268 does not apply to the City’s computation of overtime for its firefighters, *infra*, the terms of the collective bargaining agreement regarding payment of overtime are immaterial. Accordingly, the forum engages in no further discussion of whether any terms of the collective bargaining agreement constitute an express waiver of ORS 653.268.

THE CITY MUST FOLLOW THE PROVISIONS OF ORS 652.070 AND 652.080 IN COMPUTING OVERTIME FOR FIREFIGHTERS

Simply put, the question of statutory interpretation before the forum is which statutory scheme -- ORS chapter 652 or ORS chapter 653 -- governs payment of overtime to the IAFF's firefighters. ORS 652.060, 652.070, and 652.080 establish a maximum workweek of 56 hours for firefighters employed "by any incorporated city,"^v require that overtime must be paid for hours worked in a workweek over 56,^{vi} and additionally require that "authorized vacation or sick leave time" must be included in any overtime computations. The IAFF's firefighters are "firefighters"^{vii} and the City is an

“incorporated city”^{viii} under the provisions of ORS 652.060 and ORS 652.070. ORS 653.268 sets out the general overtime rule for “labor directly employed by any public employer as defined in ORS 243.650” and requires that overtime be paid for all hours worked over 40 in a workweek “if budgeted funds for such purpose are available” unless an exception in ORS 653.269 applies. The City is a “public employer” as defined in ORS 243.650(20) of the PECBA and the IAFF’s firefighters are employed by the City. Although not a stipulated fact, the forum infers from the stipulated facts that the firefighters also perform labor for the City. If ORS 653.268 governs payment of overtime to the firefighters and they fit within one of the cited exceptions, the City is entitled to pay firefighters overtime according to the collective bargaining agreement. If ORS 652.070 and 652.080 govern computation of overtime, the City must compute overtime as required by those statutes.

The forum follows the analytical framework set out by the Oregon Supreme Court in *PGE* and *Gaines* to determine the meaning of the statutes being considered and which set of statutes the City must rely on in its computation of overtime to its firefighters. Accordingly, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. A text and context analysis necessarily includes application of rules of statutory construction set out in ORS chapter 174. The extent of the forum's consideration of any legislative history and the evaluative weight the forum gives to it is for the forum to determine. *Gaines*, at 171-72. See also ORS 174.020(3). If the legislature’s intent remains unclear after examining text, context, and legislative history, the forum may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Id.* at 164-65, citing *PGE*.

The forum begins by examining ORS 652.060, 652.070, and 652.080. All three statutes exclusively target firefighters and ORS 652.050 defines specific terms that appear in those statutes. Under ORS 652.060(1)(b), an incorporated city that employs four or more firefighters on a full-time basis (“covered employer”) may only require those firefighters to be on “regular duty” for 56 hours a week.^{ix} Once that threshold number of hours has been exceeded, ORS 652.070(1) requires overtime be paid “for every hour of regular duty required of and performed by the firefighter.”^x There are two statutory exceptions, neither of which apply here.

ORS 652.080, enacted ten years earlier in 1959, provides that “[i]n computing the average or total number of hours a week for the purposes of ORS 652.060 and 652.070, authorized vacation or sick leave time *shall* be considered as time on *regular duty*.” (emphasis added). As used in ORS 652.080, the forum interprets the term “authorized vacation or sick leave time” to be accrued vacation or sick leave time actually used by firefighters. Such leave time must be considered as time on “regular duty,” the type of work designated by the legislature to be counted both in determining hours per week that a covered employer can require firefighters to work and that a covered employer must use to compute overtime. Read in conjunction with ORS 652.060(1)(b) and 652.070(1), the use of the mandatory word “*shall*” in ORS 652.080 leaves the latter statute susceptible to only one interpretation – a covered employer, the City in this case, is required to consider authorized vacation and sick leave taken by firefighters as time on regular duty and include it when computing overtime wages.

Based on this conclusion, the forum concludes that the City is obligated to compute and pay overtime wages to the IAFF's firefighters as set out in ORS 652.060, 652.070, and 652.080 *unless* the forum adopts the conclusion urged by the City -- that these statutes no longer apply.

The forum notes that the City offered no legislative history, case law, or other argument to show that the legislature intended a different interpretation than the one cited above at the time it enacted ORS 652.080.

ORS 653.268, in contrast to ORS 652.060, 652.070, and 652.080, is a general overtime statute. As stated earlier, it applies to all "[l]abor directly employed by any public employer as defined in ORS 243.650" and requires that overtime be paid for all hours worked over 40 in a workweek "if budgeted funds for such purpose are available." There is no dispute that the IAFF firefighters are directly employed by the City or that the City is a "public employer" within the meaning of ORS 653.268. ORS 653.269 excepts employees in a number of specific categories from the overtime requirements of ORS 653.268. Among those exceptions are "[e]mployees of a public employer * * * who are employed in fire protection * * * activities"^{xi} and "[e]mployees exempted from overtime * * * [b]y a collective bargaining agreement expressly waiving application of ORS 653.268."^{xii} The forum finds that "fire prevention"^{xiii} and "fire protection" have similar meanings.^{xiv} By performing "fire prevention" activities, the IAFF firefighters also

engage in “fire protection” activities and thereby fall within the exception in ORS 653.269(3).^{xv} Based on that exception, the forum concludes that the overtime requirements of ORS 653.268 do not apply to the City and the IAFF firefighters. Having reached this conclusion, the forum need not also determine whether the exception in ORS 653.269(5)(b) applies based on the specific language in Section 5 of the CBA.

Having concluded that firefighters are not entitled to overtime under ORS 653.268 based on the exemption in ORS 653.269(3), the forum must then conclude that the IAFF’s firefighters have no statutory entitlement to overtime pay if it accepts the City’s argument that ORS 652.060, 652.070, and 652.080 do not apply to its firefighters.^{xvi} This requires acceptance of the City’s premise that the legislature implicitly repealed ORS 652.060, 652.070, and 652.080 by enacting the PECBA, ORS 653.268, and the various exceptions in ORS 653.269. The forum concludes otherwise.

The forum relies on ORS 174.010 and 174.020 to determine if there is an inconsistency between these two statutory schemes and, if so, how to resolve it. Those statutes provide, in pertinent part:

“174.010 General rule for construction of statutes. In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

“174.020 Legislative intent; general and particular provisions; consideration of legislative history. (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

“* * * *”

“(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.”

First, the forum determines if the two statutory schemes at issue can be interpreted in a way “as will give effect to all.” ORS 174.010. ORS 652.080 was

enacted in 1959 to require “authorized vacation and sick leave” to be used in the computation of overtime for firefighters.^{xvii} ORS 652.060 and 652.070 were amended in 1969 to establish a 56 hour maximum workweek for firefighters and require overtime pay for additional hours. No legislative history was provided to show what year ORS 653.268 and 653.269 were originally enacted. If the latter statutes were enacted before 1959 and the legislature intended them to govern overtime pay for firefighters, the legislature’s enactment of ORS 652.080 in 1959 and amendment of ORS 652.060 and 652.070 in 1969 shows that it changed its mind. If ORS 653.268 and 653.269 were enacted later, then the legislature could have repealed ORS 652.050 through 652.080, had it intended to abrogate firefighters’ statutory entitlement to overtime pay. In either event, the forum concludes that the legislature’s choice to leave both statutory schemes in place reflects the legislature’s intent to create a statutory entitlement for firefighters that is distinct and separate from the general overtime provisions in ORS 653.268, while at the same time maintaining a general overtime statute and an exceptions statute regulating overtime for other categories of public employees.

Assuming, *arguendo*, that there is an inconsistency between the two statutory schemes, the forum would still conclude, based on ORS 174.020, that the City is obligated to pay its firefighters overtime under the provisions of ORS 652.060 through 652.080. As pointed out by the City, ORS 653.268 is a general overtime statute governing labor employed by public employers. In contrast, ORS 652.050 through 652.080 set working hours and establish a method of computing overtime pay for a particular group – firefighters. Based on ORS 174.020, the forum concludes that ORS 652.070 and 652.080 controls overtime pay for firefighters because it refers to a particular group of employees, as opposed to the general group consisting of “labor

employed by public employees” whose overtime is regulated by ORS 653.268 and the exceptions contained in ORS 653.269.

The City’s argument that ORS 652.050 through 652.080 should not apply because they “are no longer relevant” is really an argument that those statutes have been impliedly repealed by ORS 653.268, 653.269, and the PECBA. The determination that the statutory schemes at issue are consistent, as related to the City’s firefighters, makes this issue moot. The forum also notes that none of the four appellate cases cited by the City are on point or controlling and the forum finds no language in *City of Roseburg*, *City of Salem*, or *City of Portland* stating that “modern firefighters are well-served by the PECBA.”

DECLARATORY RULING

ORS 653.269(5)(b) does not exempt the City of Grants Pass from complying with ORS 652.070 and 652.080. The City of Grants Pass is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF firefighters it employs, as set forth in ORS 652.080.

ⁱ This is included as background information only, as the validity of any wage claims filed by the IAFF’s members is not an issue in this declaratory ruling.

ⁱⁱ *Formerly* ORS 279.340.

ⁱⁱⁱ Statements of State Sen. Lent and Glen Whallon, Oregon State Fire Fighters Assn., April 23, 1969.

^{iv} See ORS chapter 243.650 to 243.782.

^v Again, the 56 hour threshold only applies to covered employers who employ four or more firefighters.

^{vi} *Id.*

^{vii} ORS 652.050 defines “firefighter,” as the term is used in ORS 652.060 and ORS 652.070, as “a person whose principal duties consist of preventing or combating fire or preventing loss of life or property from fire.” Article V, Section 5.1 of the collective bargaining agreement refers to “fire prevention,” “fire prevention assignment,” and “[e]mployees assigned to prevention” in the context of duty assignment. Based on the above, the forum concludes that the IAFF’s firefighters fall within the definition of “firefighter” in ORS 652.060 and ORS 652.070.

^{viii} See Finding of Fact #1.

^{ix} ORS 652.060 was amended in 1969 to establish the 56 hour limit.

^x ORS 652.070 was amended in 1969 to require overtime pay for regular duty hours over 56 in a workweek for incorporated cities with four or more regularly employed fulltime firefighters.

^{xi} ORS 653.269(3). See also OAR 839-020-0210(1)(a), adopted pursuant to ORS 653.269(3), that exempts public employees engaged in “Fire protection activities” from the overtime pay requirements of ORS 653.268.

^{xii} ORS 653.269(5)(b).

^{xiii} See *fn. 7*.

^{xiv} In the absence of statutory definition for “fire prevention” and “fire protection,” the forum assumes the legislature intended to give those words their “plain, natural, and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). In *Webster’s Third New Int’l Dictionary* (Unabridged ed 2002), the relevant definition of “prevention” is “**5**: the act of preventing or hindering : obstruction or thwarting of action, access, or approach <~prevention of forest fires>.” *Id.* at 1798. “Protecting” means “the act of protecting.” *Id.* at 1822. “Protect” means “to cover or shield from that which would injure, destroy, or detrimentally affect : secure or preserve usu. against * * * harm.” *Id.*

^{xv} See *fn. 7*.

^{xvi} ORS 653.269(5)(b) exempts employees from the overtime pay requirements of ORS 653.268 if a collective bargaining agreement expressly waives application of ORS 653.268, but does not require that the collective bargaining agreement mandate overtime pay in order for that waiver to be effective.

^{xvii} “Firefighters” refers to those firefighters referenced in the provisions of ORS 652.050, 652.070, ORS 652.080, and 652.080.