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STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

For Board Use Only

Case No. UP-008-16

UNFAIR LABOR PRACTICE COMPLAINT
Public Employment

Date Filed 3/7/16

<p>COMPLAINANT Name, address, phone number, and e-mail address Grants Pass Education Association 2945 S. Pacific Highway Medford, OR 97501 541-779-7865 jane.bilodeau@oregoned.org</p>	<p>COMPLAINANT'S REPRESENTATIVE Name, address, phone number, and e-mail address, if applicable Henry J. Kaplan Bennett, Hartman, Morris & Kaplan, LLP 210 SW Morrison Street, Suite 500 Portland, OR 97204 503-227-4600 kaplanh@bennetthartman.com</p>
<p>RESPONDENT Name, address, phone number, and e-mail address Superintendent John Higgins Grants Pass School District 725 NE Dean Drive Grants Pass, OR 97526 jhiggins@grantspass.k12.or.us</p>	<p>RESPONDENT'S REPRESENTATIVE Name, address, phone number, and e-mail address, if applicable Nancy Hungerford The Hungerford Law Firm LLP PO Box 3010 Oregon City, OR 97045 503 781-3458 nancy@hungerfordlaw.com</p>

Complainant alleges that Respondent has committed an unfair labor practice under ORS 243.672(1) (g and e), ORS 243.672(2) (_____), or ORS 243.752 of the Public Employee Collective Bargaining Act. The following is a clear and concise statement of the facts involved in each alleged violation, followed by a specific reference to the section and subsection of the law allegedly violated. (For each claim, specific dates, names, places, and actions. Attach copies of main supporting documents referred to in the statement of claims.)

I certify that the statements in this complaint are true to the best of my knowledge and information.

See attached.

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By: Henry J. Kaplan
Signature of Complainant or Complainant's Representative

Attorney
Title

March 4, 2016
Date

UNFAIR LABOR PRACTICE COMPLAINT

1. The Grants Pass Education Association (“Association”) is a labor organization within the meaning of ORS 243.650(13). The Southern Oregon Bargaining Council (“SOBC”) is the bargaining agent for the Association.

2. The Grants Pass School District (“District”) is a public employer within the meaning of ORS 243.650(20).

3. The District and the Association were parties to a Collective Bargaining Agreement covering the period from July 1, 2011 to June 30, 2015 (“CBA”). A copy of the agreement is attached as **EXHIBIT 1**.

4. On March 4, 2015, the parties commenced bargaining over a successor agreement. The parties are now in mediation.

5. Article 22 of the Collective Bargaining Agreement required the District to contribute \$50 per month (total of \$600 per year) per eligible employee to a tax-qualified flexible spending account (“FSA”).

6. On or before January 9, 2015, Association President Mickey Jarvis was informed that under IRS rules, the maximum employer contribution allowed to an FSA that receives no employee contributions was \$500 per year. The parties drafted a Memorandum of Agreement that would deposit \$500 into each eligible member’s FSA, and \$100 into a tax-qualified Health Reimbursement Account (“HRA”) instead. **EXHIBIT 2**.

7. On January 27, 2015, District Human Relations Director Dan Huber-Kantola sent a letter to Association President Jarvis and District Business Manager Sherry Ely stating that “We have worked together to develop an HRA plan for employees; we are in the process of finishing the documents that will govern the HRAs.” **EXHIBIT 3**.

8. On February 5, 2015, Association President Jarvis asked for documentation on the HRA plan. Sherry Ely replied that it was being reviewed by legal counsel, and that she hoped “to have it back today or tomorrow to send on to you for review.” **EXHIBIT 4.**

9. On March 15, 2015, District Business Manager Sherry Ely transmitted to the Association “the long-awaited HRA plan document – also attached is an updated FSA plan document.” **EXHIBIT 5.** Both documents state they were “Effective: 1/1/2015.”

10. Section 5.02 of the HRA Plan document (**EXHIBIT 5, p. 13**) States that “Section III of the Summary Plan Description shall prescribe the maximum dollar amounts, if any, that may be credited to the accounts of Employees who are active Participants for a full plan year.” However, the attached Summary Plan Description was for a “Flexible Spending Account” not an HRA. Page 6 of the FSA Summary Plan Document states that employer will make “non-elective contributions to the participant’s account of up to \$600 per plan year.” **EXHIBIT 5, p. 34.** It also states in the same section that “The FSA Plan will permit carryover of unspent non-elective contributions . . .” This implies that the entire \$600 employer funding would go into the FSA accounts. The FSA Summary Plan Description made no mention of an HRA, but was attached to the HRA Plan Document. No separate HRA Summary Plan Description was provided.

11. On September 4, 2015 District Human Resource Administrative Assistant Levi Clark sent an email asking to set up a meeting with the Association representatives “to discuss the HRA plan document.” **EXHIBIT 6.** On September 5, 2015 Association UniServ Consultant Jane Bilodeau sent District Human Resources Director Huber-Kantola a reminder to confirm “an extension to file a grievance regarding the district’s implementation of a HRA plan.” **EXHIBIT 7.**

12. On September 8, 2015 District business manager Sherry Ely informed the Association that 107 (out of approximately 305) bargaining unit members are affected by the HRA

plan. **EXHIBIT 8.** That day, Human Resources Director Huber-Kantola confirmed extension of timelines for a grievance, and confirmed a meeting scheduled for September 11 “to discuss the HRA plan document and hopefully an MOA regarding the HRA contribution instead of an FSA contribution.” **EXHIBIT 9.** Also, that day, Association President Jarvis asked for clarification about the effective date for the HRA and asked “When were they funded?” **EXHIBIT 10.**

13. On September 11, 2015, the District for the first time provided the Association with a copy of the HRA Summary Plan Description. **EXHIBIT 11.** Page 6 of the Summary Plan Description states that the HRA will be funded with employer contributions of \$600. **EXHIBIT 11, P. 36.** Page 10 of the HRA Summary Plan Description states that if expenses are eligible for reimbursement under both the HRA and the FSA, then “the FSA pays out first and the HRA pays out last.” **EXHIBIT 11, P. 40.**

14. On October 30, 2015 the Association grieved the District’s failure to fund the FSA as required by Article 22 of the expired Collective Bargaining Agreement.

15. Currently the District is not funding the FSA with any employer contributions at all. The District has not funded the FSA, in either 2015 or 2016, with any employer contributions. The Association first learned of this change on September 11, 2015.

VIOLATION OF PROVISIONS OF WRITTEN CONTRACT

ORS 243.672(1)(g)

16. ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer or its designated representative to “[v]iolate the provisions of any written contract with respect to employment relations.

17. The Collective Bargaining Agreement constitutes a written contract with respect to employment relations as defined in ORS 243.650(7).

18. District's refusal to fund employee FSA accounts in accordance with Article 22 of the Collective Bargaining Agreement a violation of that Agreement, and therefore, constitutes a violation of ORS 243.672(1)(g).

BAD FAITH BARGAINING

(ORS 243.672(1)(e))

19. In the alternative, ORS 243.672(1)(e) requires a public employer and the exclusive representative of its employees to bargain in good faith over changes to the terms and conditions of employment for bargaining unit members and over the impact of such changes on other terms and conditions of employment for bargaining unit members. This duty to bargain in good faith continues following expiration of a contract requiring the employer to maintain the status quo regarding mandatory subjects of bargaining while it exhausts its duty to bargain in good faith.

20. In this case, the District unilaterally implemented changes to its FSA contributions without notice or bargaining. Those changes also had an effect on terms and conditions of bargaining unit members concerning access to health insurance coverage and benefits.

21. The District's failure to announce changes to health insurance coverage and compensation as required by ORS 243.698 constitutes a violation of ORS 243.698(2) and ORS 243.672(1)(e).

22. The District's unilateral implementation without first exhausting its duty to bargain in good faith under either ORS 243.698 or to maintain the status quo following expiration of the contract constitutes a violation of ORS 243.672(1)(e).

CIVIL PENALTY ALLEGATIONS

23. In this case, the District offered an MOA governing the period beginning January 1, 2015 which it failed to follow, and then changed its approach completely while negotiations were

pending for a new collective bargaining agreement, without informing the Association or its representatives. Its actions were deceptive and misleading.

24. If the District believed that Article 22 was rendered invalid by operation of law, its remedy was to bargain under the savings clause of Article 29.B. of the Agreement. The District began bargaining with the Association, but implemented a solution different from the one bargained with the Association without notifying the Association of its reversal of position.

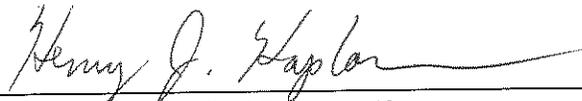
WHEREFORE, the Association requests the following relief:

1. An order finding that the District violated ORS 243.672(1)(g) when it refused to fund the FSA account in accordance with the terms of Article 22, or the terms of the MOA discussed with the Association;
2. In the alternative, an order finding that the District violated ORS 243.672(1)(e) when it failed to provide adequate notice of its intent to change the funding of the FSA accounts and impact insurance coverage for bargaining unit members, failed to maintain the status quo, and unilaterally implemented those changes.
3. An order requiring the District to cease and desist from refusing to fund FSA accounts as required by Article 22, to the extent consistent with IRS limitations;
4. An order requiring the District to make bargaining unit members whole for the difference in FSA funding between the amounts they were actually provided, and what they should have been paid under Article 22, up to the IRS limits.
5. An order requiring the District to post notice for a reasonable period of time and in a noticeable place stating that the District has been found in violation of ORS 243.672(1)(e) and is ordered to cease and desist from such conduct in the future;

6. An order awarding civil penalty in the amount of \$1,000.00;
7. An order awarding reimbursement of the Association's filing fee;
8. An order awarding all reasonable representation costs to the Association pursuant to ORS 243.676(2)(d) and OAR 115-035-0055; and
10. Any other relief deemed just and equitable by the Employment Relations Board.

DATED this 4 day of March, 2016.

BENNETT, HARTMAN, MORRIS & KAPLAN LLP



Henry J. Kaplan, OSB No. 830559
Of Attorneys for Complainant Association