EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-42/50-12

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION, DIVISION 757, Complainant, v. TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Respondent.	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, Complainant, v. AMALGAMATED TRANSIT UNION, DIVISION 757, Respondent.	

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on January 8 and 9, 2013, in Salem, Oregon. The record closed on February 26, 2013, following receipt of the parties' post-hearing briefs. On March 25, 2013, this matter was transferred to the Board for decision.

Michael J. Tedesco and Julie Falender, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Amalgamated Transit Union, Local 757.

Adam S. Collier, Attorney At Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Tri-County Metropolitan Transportation District of Oregon.

On August 9, 2012, the Amalgamated Transit Union, Division 757, (ATU or Union) filed an unfair labor practice complaint (ULP) (UP-042-12) against the Tri-County Metropolitan Transportation District of Oregon (TriMet or District). The complaint, as amended on August 30, 2012, alleges that TriMet violated ORS 243.672(1)(a), (g), and (e), as stated in the issues below. TriMet filed a timely answer on November 5, 2012.

On September 26, 2012, TriMet filed an unfair labor practice complaint against ATU (UP-050-12). The complaint, as amended on November 15, 2012, alleges that ATU violated ORS 243.672(2)(b), (c), and (d) by refusing to cooperate with TriMet's implementation of the interest arbitration award. ATU filed a timely answer on December 27, 2012.

With the consent of the parties, these complaints were consolidated for hearing and decision. The parties agreed that the issues presented in Case No. UP-42-12 are:

1. Did TriMet act contrary to ORS 243.746(3) in violation of ORS 243.672(1)(e) by amending its last best offer (LBO) health insurance proposal at the interest arbitration hearing or after the interest arbitration award was issued, or by failing to communicate its collection methodology for the implementation of its retroactive health insurance proposal?

2. Did TriMet violate ORS 243.672(1)(e) by substantially changing its LBO pension proposal at the interest arbitration hearing?

3. Did TriMet act contrary to ORS 731.036(6)(d), 743.874, or 743.876 in violation of ORS 243.672(1)(e) by informing employees that they would have to pay the difference between the cost of premiums, co-pays, deductibles, and out-of-pocket expenses under the prior health insurance plans and the cost of the LBO insurance plans?

4. Did TriMet interfere with, restrain, or coerce ATU members in or because of their rights guaranteed under ORS 243.662 in violation of ORS 243.672(1)(a) by making an LBO proposal that discontinued paying union stewards to represent employees in grievance step meetings?

5. Did TriMet breach the language in the 2003-2009 collective bargaining agreement, which guaranteed retirees an annual Consumer Price Index (CPI)-based cost-of-living adjustment (COLA) between three percent and five percent in violation of ORS 243.672(1)(g), by proposing in its LBO that retirees receive an annual CPI-based COLA with a minimum of zero percent and a maximum of seven percent?

6. Was TriMet's implementation of its LBO retroactive health insurance proposal pursuant to the interest arbitration award illegal and unenforceable in violation of ORS 243.672(1)(e)?

7. On approximately August 1, 2012, did TriMet unilaterally alter the *status quo* by notifying ATU that it was discontinuing its payment to the Recreation Trust Fund (RTF), pursuant to its implementation of its LBO awarded in interest arbitration, in violation of ORS 243.672(1)(e)?

8. On approximately August 1, 2012, did TriMet unilaterally alter the *status quo* by notifying ATU it was discontinuing its payment to the Employee Assistance Program (EAP), pursuant to its implementation of its LBO awarded in interest arbitration, in violation of ORS 243.672(1)(e)?

9. Did TriMet mislead ATU and the interest arbitrator about the impact of its proposal regarding the calculation of COLA increases for retiree pensions in violation of ORS 243.672(1)(e)?

10. If TriMet violated ORS 243.672(1)(a), (e) or (g), what is the appropriate remedy?

The parties agreed that the issues presented in Case No. UP-50-12 are:

1. Did ATU fail to bargain in good faith in violation of ORS 243.672(2)(b) by not requesting information about or asserting objections before interest arbitration that TriMet's LBO proposals on health insurance, a defined contribution plan, or the calculation of the COLA increases for retirees were too vague to be implemented, or that TriMet had failed to provide information regarding a proposed methodology for implementation of these proposals?

2. Did ATU fail to bargain in good faith in violation of ORS 243.672(2)(b) by not requesting information about or asserting objections before interest arbitration that TriMet's LBO proposals on health insurance, discontinuing pay for grievance procedure work, calculating retiree COLA increases, or the retirement formula were illegal and/or prohibited subjects of bargaining?

3. On approximately July 16 and September 19, 2012, did ATU, in violation of ORS 243.672(2)(b), (c), or (d), instruct bargaining unit members not to sign a form authorizing TriMet to deduct past health insurance premium costs from their wages or not to respond to TriMet's letter requesting repayment of health insurance premiums contrary to Article 1, Section 9, paragraph 1, of TriMet's LBO, as awarded by the arbitrator?

4. On approximately July 16 and September 19, 2012, did ATU instruct bargaining unit members not to comply with TriMet's attempt to recoup health insurance premium costs retroactive to December 1, 2009, in accordance with the interest arbitration award, contrary to ORS 243.752 and in violation of ORS 243.672(2)(c)?

5. If ATU violated ORS 243.672(2)(b), (c), or (d), what is the appropriate remedy?

For the reasons set forth below, we conclude that TriMet: (1) committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance benefits; and (2) violated ORS 243.672(1)(e) by deciding, before bargaining, to unilaterally stop payments to the RTF and EAP. We dismiss ATU's remaining allegations, as well as TriMet's allegations.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization and the exclusive bargaining representative of a strike-prohibited bargaining unit of employees at TriMet, a public employer.

2. During times relevant to these complaints, Jon Hunt was the ATU President until July 1, 2012, when Bruce Hansen ("ATU's Hansen") became the ATU President. Hansen had previously served as an ATU Executive Board member and bargaining team member.

3. During times relevant to these complaints, Fred Hansen ("TriMet's Hansen") was TriMet's General Manager until July 2010, when Neil McFarlane became General Manager. On November 14, 2011, Randy Stedman became TriMet's Executive Director of Labor Relations and Human Resources.

Background

4. ATU and TriMet were parties to a collective bargaining agreement effective December 1, 2003 through November 30, 2009 (2003-09 Agreement). The parties began negotiations for a successor agreement in October 2009.

5. During their bargaining session on November 20, 2009, TriMet's spokesperson, Executive Director of Operations Steve Banta, suggested that the parties simultaneously exchange their proposals; caucus separately to review the other team's proposal; and reconvene to discuss, ask questions about, and seek clarification of the other team's proposal. When ATU President Hunt objected to this process, the teams agreed to exchange proposals and have Banta read TriMet's proposal aloud and answer any questions. After Banta read through TriMet's proposal, Hunt expressed the union's understanding of each section of the initial proposal, and, after stating his disappointment with TriMet's proposal, stated that the union understood the proposal.

6. The parties agreed to meet in another bargaining session on December 3, 2009. Hunt later cancelled the December 3 session, notified TriMet that he was not available to meet until mid-January, and requested information related to health care benefits and premiums. On December 1, Banta notified Hunt that TriMet would provide him with the requested information, asked Hunt to meet as arranged on December 3, and stated that TriMet wanted to schedule a series of bargaining sessions and have an opportunity to more fully explain its proposals. On December 2, Hunt responded to Banta that he did not "think anyone has confusion about TriMet's proposals. They are clearly and simply stated takeaways."

7. On December 3, 2009, TriMet's Hansen encouraged Hunt to schedule another bargaining session. Hunt indicated he was not available to meet until mid-January, was unwilling to schedule another session, and believed they should meet with ATU Executive International Vice President Ron Heintzman to discuss the bargaining issues. Heintzman had been the ATU's president and bargaining spokesperson from 1988 through July 2002. TriMet's Hansen asked to have small bargaining groups meet on non-health care benefit issues in the interim, but Hunt refused.

8. On January 14, 2010, TriMet's Hansen, Hunt, and Heintzman met to discuss the bargaining issues. Between February 11 and March 22, 2010, Hansen and Heintzman exchanged e-mails in which they continued their discussions and presented bargaining proposals primarily related to health insurance. It is Heintzman's practice during bargaining not to ask an employer questions or request information about a proposal he does not like. In his experience, the employer usually drops those proposals. Heintzman believed he understood TriMet's proposals, so he did not ask TriMet's Hansen to explain them. Heintzman requested information related to certain health care costs and premiums and the level of benefits available to employees under the defined benefit retirement plan. The parties never held another face-to-face bargaining session.

9. During June and July 2010, the parties participated in several mediation sessions. On approximately July 14, 2010, TriMet filed a declaration of impasse under ORS 243.712(2)(a). On approximately July 21, 2010, the parties petitioned for interest arbitration and submitted their respective final offers and cost summaries.

10. In August 2010, ATU filed a ULP complaint (Case No. UP-016-11) alleging that TriMet engaged in bad-faith bargaining in violation of ORS 243.672(1)(e) by including new issues in its July 21 final offer. On September 12, 2011, the Board issued a decision in which it held that some of TriMet's final offer proposals were unlawful and ordered TriMet to submit a revised final offer excluding those proposals.[1] On February 16, 2012, after ATU objected that TriMet had not complied with the Board's order, the Board ordered TriMet to submit a second revised final offer.[2] On March 5, 2012, TriMet submitted its second revised final offer, which provided that the parties' successor agreement would be effective from December 1, 2009 through November 30, 2012.

11. On approximately April 29, 2012, the parties exchanged their LBOs in accordance with ORS 243.746(3). Both parties' LBOs proposed that the successor Agreement be effective December 1, 2009 through November 30, 2012.

12. On May 14 through 17, 2012, the parties proceeded to interest arbitration before Arbitrator David Gaba.

13. On July 13, 2012, Arbitrator Gaba awarded TriMet's LBO.

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[1] *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon (ATU v. TriMet)*, Case No. UP-016-11, 24 PECBR 412, *recons*, 24 PECBR 488 (2011).

[2] *ATU v. TriMet*, Case No. UP-016-11, 24 PECBR 602 (2012) (Compliance Order).

14. After the arbitration award was issued, TriMet implemented all of the provisions in its LBO, but it did not recoup amounts that it believed employees owed under its retroactive health insurance proposals.

15. The collective bargaining agreement, based on the LBO awarded by the arbitrator, expired on November 30, 2012.

Health Insurance

16. TriMet does not act as a self-insurer by providing health insurance to its employees. TriMet provides employees health insurance benefits through a fully-insured contracts with Regence Blue Cross Blue Shield of Oregon (Regence) and Kaiser insurance companies.

17. TriMet's second revised final offer proposal on health and welfare benefits provided, in relevant part:

> "The District shall pay one hundred percent (100%) of a composite rate for the medical, hospital and prescription drug, dental, convalescence and optical benefits for full-time employees, dependents of employees, and retirees not eligible for Medicare. During the term of this Agreement, ~~The~~ the benefits and specific coverage of these plans ~~shall be the same as currently provided~~ will be as set forth in the Active Employee Health Benefits Summary and incorporated herein. * * *." (Emphases and markings in original.)

18. Attached to TriMet's second revised final offer was a Regence medical plan summary dated January 1, 2011, and a Kaiser medical plan summary, effective January 1 through December 31, 2010. In that final offer, TriMet did not state the method by which it would retroactively recoup the difference between the premiums for the plans proposed in its final offer and the premiums that it had paid for benefits since December 1, 2009.

19. TriMet's LBO included the same health and welfare benefit proposal as had been included in its second revised final offer, except that TriMet included additional Kaiser medical plan summaries. TriMet did not state in its LBO the method it would use to retroactively recoup the difference between the premiums for the plans proposed in its final offer and the premiums that it had paid for benefits since December 1, 2009.

20. ATU's LBO proposed to maintain the *status quo* existing in the 2003-09 Agreement, except for Section 9, paragraph 1. Under that section, ATU proposed that TriMet would pay 98.5 percent of the composite rate for current employees effective January 1, 2011, and 97 percent of the composite rate for current employees effective January 1, 2012, based on the health insurance plans in effect on December 31, 2010. ATU did not include in its proposal the method under which TriMet would retroactively recoup amounts equal to the 1.5 percent and 3 percent of premium costs that ATU proposed employees pay in 2011 and 2012.

21. On approximately May 8, 2012, ATU Attorney Michael Tedesco asked TriMet Attorney Adam Collier about the effective date of TriMet's LBO health insurance proposal. Collier notified Tedesco that the proposal was effective December 1, 2009.

22. During the interest arbitration hearing, Attorney Tedesco objected that TriMet's LBO did not state how TriMet intended to recoup any amounts owed by employees under its health and welfare proposal and raised a number of questions about the legality of the various methods by which TriMet might attempt to recoup these amounts.

23. General Manager McFarlane testified at the interest arbitration hearing that TriMet did not plan to recoup the retroactive health insurance premiums through payroll deductions.

24. Kari Johnson, TriMet's Mercer health insurance benefit consultant, testified at the interest arbitration hearing that she had met with Executive Director Stedman in February 2012 to discuss the retroactive application of TriMet's LBO health insurance proposal and methodologies for determining what each ATU member would owe. She testified that if TriMet's LBO was awarded, TriMet would recoup from employees the difference between the premiums paid on their behalf since December 1, 2009, and the premiums that TriMet would have paid during that period if the plans proposed by TriMet had been in effect. Johnson also testified that she thought that TriMet was considering deducting the amounts owed by the ATU members from the retroactive wage increases the ATU members would receive pursuant to this Board's order, but that she was not employed by TriMet and could not speak for TriMet regarding that issue.

25. Tedesco objected to Johnson's testimony on the basis that TriMet was unlawfully correcting and clarifying its LBO at the arbitration hearing.

26. In his interest arbitration award, Arbitrator Gaba indicated that TriMet's LBO lacked specificity regarding how TriMet intended to retroactively implement its health insurance proposal and stated "a proposal of this nature raises serious legal concerns and may well violate Oregon law depending on how it is implemented."

27. From December 1, 2009 through the date on which it implemented its LBO, TriMet paid premiums for employee health insurance coverage that cost more than the premiums it would have paid if the health insurance plans in its LBO proposal had been in place during this time.

Pension Benefits - Defined Contribution Plan

28. The 2003-09 Agreement provided for a defined benefit retirement plan for employees who retired after February 1, 1992. A retiree's defined benefit was determined by multiplying a benefit multiplier, established in the 2003-09 Agreement, by an employee's number of years of employment.[3]

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[3]The benefit multiplier is also referred to as the retirement base rate.

29. At the parties' November 20, 2009 bargaining session, TriMet proposed that all employees hired on or after January 1, 2010 would be eligible for the "TriMet Defined Contribution Plan for Union Employees."

30. On December 31, 2009, Heintzman asked TriMet's Hansen to provide him with calculations comparing the monthly pensions available to ATU-represented employees under the defined benefit plan in the 2003-09 Agreement and similar employees under the Public Employees Retirement System.

31. On March 22, 2010, TriMet's Hansen provided Heintzman with an outline of TriMet's framework for an agreement. He stated, in part, that "[a]s is the case with management employees, all new union employees, hired after a certain date, to be agreed upon, will be eligible for a TriMet Defined Contribution Plan. The current Defined Benefit plan for union employees would be closed, as is the Defined Benefit Plan to management employees." TriMet's Hansen did not provide Heintzman with a copy of the proposed defined contribution plan or explain the plan to Heintzman. Heintzman understood TriMet's proposals and chose not to ask questions about or seek information regarding TriMet's defined contribution proposal because he disagreed with it.

32. In its second revised final offer, TriMet proposed that "[a]ctive employees who are hired by TriMet on or after April 1, 2012, shall be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that offered to all TriMet employees."

33. In its LBO, TriMet proposed:

> "Active employees who are hired by TriMet on or after the first day of the month following the date of the Arbitrator's decision, shall be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that offered to all TriMet non-union employees."

34. TriMet's defined contribution pension plan summary for non-union employees is posted on TriMet's internal website and is accessible to all employees and ATU representatives.

35. At the interest arbitration hearing, TriMet introduced the non-union defined contribution plan summary as an exhibit. This summary had not previously been provided to ATU. During the interest arbitration proceeding, in response to questions from ATU Attorney Tedesco, TriMet's Chief Financial Officer Beth deHamel, testified:

> "Q * * * And the proposal in the last best offer talks about elements of the defined contribution plan. What elements in this document are not referred to?
>
> "A My understanding, the intent was that this document as is was the proposal to the ATU.
>
> "Q Then can you explain why the proposal doesn't say 'identical to' rather than 'elements of'?

"A No, I can't explain why. We would have to change some wording to -- you know, this talks about management employees. But the intent was that management and non -- Union and non-Union would have the same plan administered by the same company.

"Q To your knowledge, was that intent ever expressed, what you just told me?

"A I'm not sure."

36. After the interest arbitration award was issued, TriMet notified employees about the pension changes under the LBO for employees hired on or after August 1, 2012, stating that "[n]ew employees will participate in a Defined Contribution Plan that is substantially identical to the Management Defined Contribution Plan * * *."

37. On August 13, 2012, McFarland sent ATU's Hansen a draft of a defined contribution retirement plan document for ATU-represented employees hired after August 1, 2012. TriMet developed the plan after the arbitrator's award was issued based on the same elements existing in the defined contribution plan for non-union employees. Stedman requested to meet with ATU to confer about the draft and other aspects of the interest arbitration award.

38. On August 31, 2012, ATU's Hansen notified Stedman that ATU did not believe that the defined contribution pension plan could be implemented because it arose out of an illegal proposal at interest arbitration and, because the plan concerned mandatory subjects of bargaining, ATU was issuing a demand to bargain.

39. On September 5, 2012, Stedman responded that McFarland had signed the defined contribution plan document on August 20 and that the plan was implemented effective August 1, pursuant to the arbitrator's award. Stedman also told ATU's Hansen that TriMet had no obligation to bargain over the plan since it had been implemented pursuant to the interest arbitration award. Stedman asked ATU's Hansen "[i]f you believe there is any substantive difference between the plan elements of the non-union and union-represented defined contribution plans, please articulate them." ATU never identified any differences between the two defined contribution plans.

Union Steward Pay

40. Under the 2003-09 Agreement, Tri-Met was responsible for paying the salary of one union representative to participate in Steps I through III of the grievance process. At the November 20, 2009 bargaining session, TriMet proposed that ATU become responsible for paying for union representatives to attend all steps of the grievance process. TriMet included this proposal in its original final offer, with minor modifications.

41. In *ATU v. TriMet,* Case No. UP-016-11, this Board held that TriMet's union steward pay proposal was appropriately included in TriMet's final offer.[4] TriMet included this proposal in its second revised final offer.

42. In its LBO, TriMet proposed that "[e]ffective upon the first day of the month following the date of the Arbitrator's decision, the Union shall be responsible for paying its representative in any step of the grievance process."

43. During the interest arbitration hearing, TriMet presented a significant amount of evidence regarding its critical financial situation and its need to reduce costs. TriMet also presented evidence regarding the number of grievances ATU filed and the related cost to TriMet of paying for union representatives to attend the grievance meetings. TriMet's evidence showed that from 2006 to 2011, ATU had filed 1448 grievances, which resulted in TriMet paying approximately $148,000 for union stewards to represent employees in the grievance meetings. TriMet also showed that ATU had requested arbitration in 254 of the 1448 grievances, ATU had advanced 34 of those 254 grievances to either expedited or full arbitration, and TriMet had been successful in 27 of the 34 grievances.

44. During the arbitration hearing, McFarlane and Director of Workforce Development Evelyn Minor-Lawrence testified about TriMet's union steward pay proposal. When McFarlane was asked why TriMet was making this proposal, he testified that

> "Again there's a cost issue associated with this. The cost of paying for these hours has, is, and I suspect we have experts that will testify on the exact cost, but it is an element of our proposal from a cost standpoint.
>
> "The other point here is that this is a very grievance-rich environment. My numbers that stick in my brain are over 1,400 grievances over the last five years. And it has become clear that there needs to be some seriousness placed on this process, and pricing that is one step in that direction."

45. On cross examination, McFarlane testified that he was not aware if the rationale that he had testified to had been provided to ATU during bargaining.

46. Minor-Lawrence testified that under the 2003-09 Agreement, TriMet was paying the union stewards who attended the grievance meetings to do union business, not TriMet business; that these meetings had not been mutually beneficial in most cases; and that TriMet was "getting too many grievances or that the process is not being effective."

Pension Plan - Retiree COLA Increases

47. The parties' 2003-09 Agreement provided that retirement pay for existing retirees was to be increased by the general wage increases for employees during the life of the

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[4] *ATU v. TriMet*, 24 PECBR at 442-43.

Agreement. The Agreement also provided that any general wage increase for employees was based on COLAs, with a minimum of 3 percent and a maximum of 7 percent.

48. In its LBO, TriMet proposed that, effective on the issuance of the arbitrator's award, retirement pay for existing retirees would be increased by the U. S. Urban Wage Earners and Clerical Workers Consumer Price Index (CPI-U) for the previous year, with a minimum of 0 percent and a maximum of 7 percent per year. TriMet also proposed that the retirement pay for employees retiring after the arbitration award was issued would be increased each May 1 by 90 percent of the increase in the CPI-U for the previous year, with a minimum of 0 percent and a maximum of 7 percent per year.

49. During the arbitration hearing, ATU argued that TriMet's LBO proposal to eliminate the 3 percent floor for retirement increases was illegal because it took away vested or accrued benefits of existing retirees and current employees.

50. In his arbitration award, Arbitrator Gaba recognized that awarding TriMet's LBO for existing retirees and employees would likely result in litigation, but expressed his opinion that TriMet would likely prevail in such litigation.

Employee Assistance Program (EAP) and Recreation Trust Fund (RTF)

51. Article 1, Section 9, paragraph 3, of the 2003-09 Agreement included a provision on an EAP, which provided, in relevant part:

> "**Par. 3.** [EAP]
>
> "a. The [EAP] shall be separately operated and administered by the Union.
>
> "b. Effective December 1, 2003, the District shall pay $55,000 to the Association to operate and administer the [EAP]. This amount shall increase to:
>
> $57,000 on 12/01/04
> $59,000 on 12/01/05
> $61,000 on 12/01/06
> $63,000 on 12/01/07
> $65,000 on 12/01/08."

52. Article 1, Section 19, paragraph 4, of the 2003-09 Agreement provided for contributions to an RTF, as follows:

> "**Par. 4.** Upon ratification of this agreement, the District will continue to deposit into [an RTF]. This amount shall increase from the December 1, 2002 amount of $43,000 to:

$45,000 on 12/01/03
$47,000 on 12/01/04
$49,000 on 12/01/05
$51,000 on 12/01/06
$53,000 on 12/01/07
$55, 000 on 12/01/08."

53. Under TriMet's November 20, 2009 proposal, TriMet did not specifically address the EAP or RTF payments.

54. Based on its belief that it was required to maintain the *status quo* during bargaining, TriMet made annual deposits of $55,000 into the RTF and $65,000 into the EAP in 2009, 2010, and 2011.

55. In its original final offer, TriMet proposed to delete the language in the 2003-09 Agreement establishing the increased payments for the EAP and the RTF and include language under which it would annually pay $65,000 into the EAP and $55,000 into the RTF on December 1, 2009, December 1, 2010, and December 1, 2011. In *ATU v. TriMet,* Case No. UP-016-11, this Board found that these proposals were unlawful and ordered them deleted from TriMet's final offer.[5]

56. In its second revised final offer, TriMet included the language from the 2003-09 Agreement in Article 1, Section 9, paragraph 3, and Section 19, paragraph 4, as its proposal on the EAP and RTF. TriMet's cost summary for its second revised final offer did not include calculations related to the EAP or RTF.

57. In its LBO, TriMet included the same language on the EAP and RTF that had been included in its second revised final offer.

58. Before the interest arbitration hearing, ATU Attorney Tedesco and TriMet Attorney Collier attempted to stipulate to the costs related to the parties' LBOs. To assist with these discussions, on Saturday, May 12, 2012, Collier provided Tedesco with TriMet's cost summary of its LBO. That cost summary included annual payments of $55,000 for the RTF and $65,000 for the EAP in 2009, 2010, and 2011, but stated:

> "TriMet has not proposed to continue funding the [EAP] or the [RTF] in 2009, 2010, or 2011, and proposed to discontinue its funding of the Transit Exchange program altogether. Although this normally would show up as a cost savings to TriMet for the three programs in the amounts of $65,000 per year, $55,000 per year, and $18,000 per year respectively (i.e. the amount TriMet contributed to fund the three programs in 2008), TriMet continued to make payments in 2009, 2010 and 2011 in order to maintain the status quo."

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[5] *ATU v. TriMet*, 24 PECBR at 450-451.

59. Until he read TriMet's cost summary on May 13, 2012, which was the day before the interest arbitration hearing, Tedesco did not know that TriMet was proposing to stop future payments to the EAP and RTF. Before this time, ATU International Vice President Heintzman had believed that TriMet was proposing to make annual payments to the EAP and RTF of $65,000 and $55,000 respectively, as set out in the 2003-09 Agreement.

60. In his interest arbitration award, Arbitrator Gaba did not address the EAP or the RTF.

61. On August 1, 2012, Executive Director Stedman notified ATU President Hansen that TriMet would not make further payments to the EAP or RTF based on the interest arbitration award. TriMet did not request that ATU return the funds that TriMet had deposited in the EAP or RTF in 2009, 2010, and 2011.

Pension Plan - Retiree Benefit Multiplier

62. The 2003-09 Agreement provided that retirement benefits for employees who retired after February 1, 1992, would be calculated using a $42.00 per month benefit multiplier. The $42.00 benefit multiplier was then adjusted each September 1 by the amount of the general employee wage increase during the prior year. An employee's initial retirement benefit was determined by multiplying the benefit multiplier in effect at the time of the employee's retirement by their years of service. As of September 1, 2009, the existing benefit multiplier was $72.96.

63. On September 1, 2010, pursuant to the *status quo* established by the 2003-09 Agreement, TriMet increased the $72.96 benefit multiplier by 3.0 percent to $75.15. The increase was based on the total of general wage increases for employees of 0 percent on December 1, 2009 and 3.0 percent on June 1, 2010.

64. The parties' 2003-09 Agreement also provided for existing retirees' benefits to be increased by any general wage increases for employees. As a result, in February 2011, TriMet increased existing retirees' pension benefits by a COLA of 3.0 percent.

65. TriMet did not increase the benefit multiplier in September 2011 or apply a COLA to retirement benefits in February 2012.

66. In its second revised final offer, TriMet proposed that retirement pay for active employees hired before April 1, 2012, would be based on $42.00 per month for each full year of service. TriMet deleted the language that provided for the $42.00 benefit multiplier to be adjusted each year on September 1 by the amount of any employee general wage increase.

67. On April 16, 2012, ATU notified bargaining unit members that TriMet had proposed to reduce the current benefit multiplier of $75.15 per month to $42.00 per month.

68. On April 18, 2012, Executive Director Stedman sent a letter to ATU President Hunt, which stated, in part, "ATU well knows that the base rate is adjusted annually and that the current rate is $75.15. The $42 base amount is the figure stated in the expired contract. TriMet

neither proposed to change the base amount nor did it propose to reduce the currently applicable amount of $75.15."

69. Sometime after April 18, 2012, ATU Attorney Julie Falender and TriMet Attorney Collier had several communications about TriMet's retirement proposal. Falender asked if TriMet was proposing that the benefit multiplier continue at its current rate for each year of service or revert back to $42.00 per month for each year of service. Collier responded that TriMet was proposing to continue the benefit multiplier at its current rate for each year of service. When Falender asked Collier to provide written confirmation, Collier gave her a copy of Stedman's April 18 letter to Hunt.

70. On April 20, 2012, General Manager McFarland notified employees that "[t]he pension for vested union employees is calculated at $75.15 per year of service. This has not changed and TriMet has not proposed to change or reduce it."

71. In its LBO, TriMet proposed that the benefit multiplier for "retirement pay will be adjusted based upon the amount of any specified general wage increase (whether actual or percentage) on February 1, 1992, and each February 1 thereafter, during the life of this Agreement."

72. During the arbitration hearing, TriMet did not present any evidence indicating that the retroactive implementation of its LBO applying the general wage increases to the benefit multiplier on February 1, rather than September 1, would decrease the existing $75.15 benefit multiplier or affect current retirees' benefits.

73. After the interest arbitration award was issued, TriMet recalculated the benefit multipliers in order to retroactively determine the retirement benefits for employees who retired between November 2009 and the issuance of the arbitration award. TriMet increased the $72.96 benefit multiplier that was effective on September 1, 2009 by the general wage increases of 0 percent effective February 1, 2010; 3.51 percent effective February 1, 2011; and 4.57 percent effective February 1, 2012.[6] This changed the benefit multiplier for employees retiring during the periods specified below, as follows:

a) from September 2010 through January 2011 - decreased from $75.15 to $72.96;
b) from February 2011 through August 2011 - increased from $75.15 to $75.52;
c) from September 2011 through January 2012 - decreased from $77.40 to $75.52; and
d) from February 2012 through August 2012 - increased from $77.40 to $78.97.

74. The following table shows how TriMet calculated the benefit multipliers used to determine the benefit multiplier before and after the interest arbitration award was issued:

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[6]Although the COLA for the 2009 included a 0.73 percent in June 2009 and a 0 percent in December 2009, TriMet only applied the 0 percent COLA to the $72.96 benefit multiplier to calculate the February 1, 2010 rate because it had previously applied the 0.73 percent COLA on September 1, 2009 to calculate the $72.96 rate.

Date	General Wage Increases	Pre-Award Change to Benefit Multiplier	Pre-Award Benefit Multiplier	Post-Award Change to Benefit Multiplier	Post-Award Benefit Multiplier
12/1/08	2.27%				
6/1/09	0.73%				
9/1/09		3.0%	$72.96		$72.96
12/1/09	0.00%				
2/1/10				0.00%	$72.96
6/1/10	3.00%				
9/1/10		3.00%	$75.15		
12/1/10	0.51%				
2/1/11				3.51%	$75.52
6/1/11	2.49%				
9/1/10		3.00%	$77.40		
12/1/11	2.08%				
2/1/12				4.57%	$78.97
6/1/12	1.23%				
9/1/12		3.33%	$79.96		

75. On August 27, 2012, TriMet notified the retirees who had retired on February 1, 2010 (or who had started collecting retirement benefits on or after that date) about the retroactive effect on their benefits, based on changes to the benefit multiplier and the COLA adjustments to their pension payments in the amounts of 3.51 percent effective February 1, 2011, and 4.57 percent effective February 1, 2012.

76. Between 40 to 45 employees retired between September 1, 2009 and February 1, 2011. Patricia Butler was an ATU bargaining unit member who retired on November 26, 2010. When she retired, TriMet calculated Butler's retirement benefit using a benefit multiplier of $75.15, which resulted in a monthly joint annuity benefit of $1,795.86. In February 2011, TriMet increased Butler's monthly benefit by a 3.0 percent COLA and began paying her $1,849.74 per month.

77. After the arbitration award was issued, TriMet revised Butler's benefit calculation based on a benefit multiplier of $72.96, which resulted in an initial monthly joint annuity benefit of $1,745.53. TriMet then increased Butler's monthly benefit in February 2011 by a 3.51 percent COLA, for a monthly benefit of $1806.80, and again increased the monthly benefit in February 2012 by a 4.57 percent COLA, for a monthly benefit of $1,889.37. TriMet calculated that Butler had been paid $386.55 more in retirement benefits than she would have been entitled to under TriMet's LBO and subsequent arbitration award, but it did not seek to recoup the overpayment.

78. If TriMet had not reduced Butler's benefit multiplier and had applied the retroactive COLA increases of 3.51 percent in February 2011 and 4.57 percent in February 2012 to Butler's original retirement benefit of $1,795.86, she would have been entitled to a monthly

benefit of $1,795.86 from November 2010 through January 2011, $1,858.89 from February 2011 through January 2012, and $1,943.87 from February 2012 through January 2013.

Communications on Recoupment of Insurance Retroactive Premium Costs

79. On July 13, 2012, Executive Director Stedman contacted ATU's Hansen to seek agreement on how to implement whichever LBO was awarded in a manner that offered the best tax advantage to employees. Stedman explained that under either TriMet's or ATU's LBO, TriMet owed employees for retroactive wage increases and employees owed TriMet for retroactive insurance costs. Stedman proposed that TriMet deduct the amounts that employees owed TriMet from amounts that TriMet owed employees. Stedman also provided Hansen with a proposed Memorandum of Agreement setting out this arrangement.

80. On July 13, 2012, ATU's Hansen responded to Stedman that he did not believe that employees owed TriMet anything under its LBO insurance proposal and further stated that neither ATU nor the employees would authorize TriMet to deduct anything from the retroactive wages that TriMet owed employees.

81. On approximately July 16, 2012, after Arbitrator Gaba awarded TriMet's LBO, ATU's Hansen notified bargaining unit employees that ATU intended to pursue legal action regarding the arbitration award. He further stated:

> "It is very likely that TriMet will attempt to get you to sign an authorization for them to deduct past health insurance premium costs from the wage increases TriMet owes you. DO NOT, UNDER ANY CIRCUMSTANCES, SIGN SUCH AN AUTHORIZATION.
>
> "* * * * *
>
> "TriMet management is likely to threaten you with legal action should you refuse to sign the authorization. TriMet would have to sue every single union member individually. It would have a hard time winning such a case when the arbitrator has said, so many times, that such a deduction is likely illegal." (Emphasis in original.)

On July 23, 2012, McFarlane notified employees that the arbitration award

> "calls for employees who were in the Regence Plan at any time from December 1, 2009 to now to move to what is called a 90/10 plan. Because the move is retroactive, those employees also will owe money to TriMet for the value of out-of-pocket expenses they should have been paying under the Regence 90/10 plan. It will take some time to calculate the 'true up,' especially for employees who participated in multiple medical plans since December 2009."

82. On July 26, 2012, ATU filed a Second Motion to Compel Compliance in Case No. UP-016-11, alleging that TriMet illegally intended to deduct retroactive health insurance

premium costs from employees' retroactive wage payments. On August 27, 2012, after this Board notified ATU of its intent to dismiss the Motion, ATU withdrew the Motion.

83. On September 19, 2012, Stedman sent ATU's Hansen sample letters that TriMet had prepared to send employees and retirees regarding the retroactive implementation of TriMet's health insurance proposal. In the sample letters, TriMet provided employees with an accounting of the difference in premium costs between the medical plan(s) they had worked under since December 2009 and the plan that had been awarded in interest arbitration. Some letters notified employees of how much they owed TriMet and the employee's option to deduct this amount from their wages or pay the amount by personal check. In addition, the sample letter stated, "[i]f you do not write a personal check or sign the payroll deduction authorization form, TriMet will treat this as a failure to pay a legal debt. TriMet will exercise its right to collect the money owed through legal process and retains its right to impose appropriate discipline." The letters showed that employees owed TriMet various amounts between $20.00 and $7,080.59. TriMet never sent these letters to the employees.

84. Also on September 19, 2012, ATU notified employees and retirees that TriMet would be contacting them to demand repayment of prior premiums costs. ATU also indicated that it intended to take legal action against TriMet. ATU stated "[i]n the meantime, we ask that you cooperate with and support our actions on your behalf by NOT responding to TriMet's letter." ATU also requested that employees "stand together in solidarity and refuse to respond to TriMet's payment demand until such time as we obtain a judicial decision on this latest installment of TriMet gone crazy."

CONCLUSIONS OF LAW

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

2. TriMet violated ORS 243.672(1)(e) by amending its last best offer (LBO) health insurance proposal at the interest arbitration hearing.

3. TriMet violated ORS 243.672(1)(e) by unilaterally changing the *status quo* when it decided to discontinue payments to the RTF and EAP.

4. TriMet did not otherwise violate the Public Employee Collective Bargaining Act (PECBA), as alleged by ATU.

5. ATU did not violate ORS 243.672(2)(b), (c), or (d), as alleged by TriMet.

DISCUSSION

Health Insurance and Pension Benefits (Defined Contribution Plan)

ATU first contends that TriMet committed *per se* violations[7] of subsection (1)(e) by amending its LBO at the interest arbitration hearing with respect to: (1) its health insurance proposal; and (2) its pension proposal.[8] TriMet responds that its LBO was not amended in either respect. We agree with ATU regarding the health insurance proposal, but with TriMet concerning the pension proposal.

Under ORS 243.746(3) and OAR 115-040-0015(7)(g), parties are required to exchange their LBOs at least 14 days before the date of an interest arbitration hearing, and, with exceptions not relevant here, may not thereafter change their LBOs. ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." Although we generally analyze claims of bad-faith-bargaining by looking at the totality of a party's bargaining conduct, we have recognized that some bargaining conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith.[9] *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-07 (2007). For example, we have found the following to constitute *per se* violations of ORS 243.672(1)(e): (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; and (3) submitting a new proposal in a final offer, without subjecting that proposal to bargaining. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009); *see also City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 464-65 (1990).

Today, we hold that a party that changes its previously-submitted LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g) commits a *per se* violation of the obligation to bargain in good faith under ORS 243.672(1)(e) or (2)(b). This holding is consistent with our precedent in which we found *per se* violations for including a new issue in a final offer, implementation, or mediation (*Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamamin v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 755-56 (2007)) and for including a new issue in an LBO submitted for interest arbitration (*International Association of Firefighters, Local 2285 v. Douglas County Fire District #2*, Case No. UP-3-03, 20 PECBR 235, 241 (2003); *Marion County Law Enforcement*

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[7]We limit our discussion to specific *per se* violations, as alleged by ATU in the agreed-upon statement of the issues.

[8]ATU also contends that TriMet violated subsection (1)(e) by not "fully explaining" its health insurance proposal before the hearing. We have not held that a party *per se* violates the duty to bargain in good faith by failing to "fully explain" a particular proposal, and we do not do so here.

[9]As noted above, we limit our discussion to the specific *per se* violations alleged by ATU in the agreed-upon statement of the issues.

Association v. Marion County and Marion County Sheriff's Office, Case No. UP-65-92, 14 PECBR 25, 29-31 (1992)).[10] The rationale behind that precedent is that:

> "The PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and [for strike-permitted employees,] self help." *Blue Mountain Community College*, 21 PECBR at 754.

For strike-prohibited employees, as here, the PECBA bargaining process includes a final step of binding interest arbitration, rather than self help. ORS 243.742. Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees.

Likewise, changing an LBO runs counter to the statutorily-defined PECBA bargaining process for strike-prohibited employees. Under that process, once the mediation process fails to produce an agreement, binding interest arbitration is initiated. ORS 243.742. After selection of an arbitrator and the establishment of a hearing date, the parties must exchange their LBOs "on all unresolved mandatory subjects" not less than 14 days before the date of the hearing. ORS 243.746(3). The statute also contemplates, however, that a party might change "its position within 24 hours of the 14-day deadline," in which case, "the other party will be allowed an additional 24 hours to modify its position." *Id.* Other than that proviso, "neither party may change" its LBO package, unless the parties stipulate to do so. *Id.*; *see also* OAR 115-040-0015(7)(g).

Permitting a party to change its LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g) would render that statute and rule largely nugatory. Moreover, given that the arbitrator must award "only one of the last best offer packages submitted by the parties" (ORS 243.746(5)) and may not rewrite or modify any LBO, permitting a party to change its LBO past the permitted statutory period severely undermines the integrity of the interest arbitration. Consequently, like other similar late-stage changes in bargaining positions, such a change is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *See City of Medford*, 22 PECBR at 206-7.

Therefore, we turn to whether TriMet changed its LBO package, specifically in reference to its health insurance proposal. ATU contends that TriMet effectively amended its LBO proposal on health insurance by adding a retroactivity provision, as well as terms that would permit TriMet to recoup money from bargaining unit members, going back to December 1, 2009. ATU argues that such amendments violate subsection (1)(e). According to TriMet, there was no

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[10]In this line of cases, we have described a "new issue" as one that is not "reasonably comprehended within" prior discussions or bargaining positions, or that does not "logically evolve" from such discussions or positions. *Blue Mountain Community College*, 21 PECBR at 757-58.

official "amendment" of its LBO; rather, TriMet just provided more details about how it intended to implement its proposal. We agree with ATU.

TriMet's LBO proposed effective dates of December 1, 2009 through November 30, 2012. Some of the specific LBO proposals, however, stated that the terms of that proposal would be effective on "the first day of the month" after Arbitrator Gaba's award or would be effective as of the "issuance" of that award. With respect to health insurance, TriMet's LBO did not contain a specific effective date of the proposal. The proposal itself, however, stated that the "benefits and specific coverage" of the proposed health plans would be "as set forth in the Active Employee Health Benefits Summary * * *." The referenced summary identified a Regence plan and a Kaiser plan, and incorporated those plans into the proposed LBO. The Regence Plan listed an effective date of January 1, 2011. The Kaiser plan included a summary of medical benefits effective January 1, 2011 through December 31, 2011, and a summary of medical benefits effective January 1, 2012 through June 30, 2012.

On May 8, 2012, six days before the scheduled May 14 interest arbitration, ATU counsel inquired about the effective date of TriMet's LBO health insurance proposal. On May 9, TriMet counsel left a voicemail for ATU's counsel, stating that the proposal was effective December 1, 2009.

At the interest arbitration hearing, TriMet submitted extensive evidence in the form of documents and witness testimony in support of its LBO health insurance proposal. That evidence demonstrates that TriMet's proposal was retroactive to December 1, 2009. For example, under its proposal, TriMet presented evidence that it intended to recoup money from bargaining unit members to pay for increased health insurance premiums. ATU protested, claiming that TriMet's LBO health insurance proposal did not state that it was retroactive or that, under that proposal, TriMet would be able to recoup money from bargaining unit members. ATU further argued that TriMet had not specified how it intended to implement the retroactive proposal or recoup money from bargaining unit members under its LBO health insurance proposal.

TriMet's LBO on health insurance is vague regarding the effective date. Although the LBO proposal itself includes an effective date of December 1, 2009, various other proposals in that document contained different effective dates. Moreover, the plan summaries indicate varying effective dates of January 1, 2011 and January 1, 2012. No plan summaries were attached to the proposal with an effective date of December 1, 2009. Even more problematic, however, is the absence of a recoupment provision in TriMet's LBO; that additional contractual provision was not announced until after TriMet submitted its LBO, and the methodology by which TriMet would capture that money was not explained until the third day of the interest arbitration hearing.

We find that TriMet substantively changed its LBO regarding health insurance to include both retroactivity and recoupment provisions. We disagree with TriMet's assertion that those provisions merely provided more "detail" regarding its health insurance proposal and did not amount to a "change." Although TriMet is correct that a party in an interest arbitration proceeding may provide additional evidence or explanation as to why its LBO should be implemented, that is not an accurate characterization of what TriMet did in this matter. TriMet's LBO failed to contain sufficient language relative to what it advanced at the interest arbitration

hearing (namely, provisions stating that its proposal was retroactive and that it would be entitled to recoup the differences in premiums paid with what "should have" been paid in the event that its LBO was implemented).

TriMet also argues that it attempted to "reach out" to ATU after the arbitration hearing in an attempt "to reach an agreement regarding how to recoup employee health insurance contributions and to minimize the tax impact on [employees]." TriMet asserts that ATU rebuffed those efforts. The difficulty with TriMet's argument rests with when it first attempted to "reach out" to ATU to discuss this issue—namely, *after* it had submitted its LBO and *after* the arbitration proceeding. Although we acknowledge that TriMet belatedly attempted to collectively bargain this issue, it does not cure TriMet's actions in bypassing the collective bargaining process and not subjecting that proposal "to the crucible of the PECBA's dispute resolution process." *See Blue Mountain Community,* 21 PECBR at 758; *see also Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7956-57 (1985).

Therefore, for the foregoing reasons, we find that TriMet committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance at the interest arbitration.

We turn to the pension proposal. TriMet's LBO included a proposal that active employees "hired by TriMet on or after first day of the month following the date of the Arbitrator's decision, shall only be eligible for and become a participant in a Defined Contribution Plan, which shall have the same elements as that currently offered to all TriMet non-union employees."

ATU alleges that TriMet substantively amended the pension proposal at the interest arbitration hearing by introducing never-before-heard details about that proposal. Specifically, ATU argues that TriMet provided testimony at hearing specifying: (1) that the union and non-union plan would be "the same"; (2) who the plan manager would be; and (3) that employees would have the ability to self-direct investments.[11]

We disagree that these details constituted substantive changes to the LBO pension proposal. ATU's first argument is dependent on our finding that the phrase "the same elements," as used in the LBO, is different from "the same." We decline to split that semantic hair. Rather, we find that the phrase "the same elements" adequately conveyed to ATU that the LBO pension proposal for union employees would be "the same" as "that currently offered to all TriMet non-union employees."

We also disagree with ATU's contention that additional details submitted at the interest arbitration regarding the pension plan (*e.g.*, the identity of the plan manager and that employees could self-direct investments) constituted a substantive change in the proposal itself. Unlike the health insurance proposal discussed above, the evidence submitted at the interest arbitration

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[11]ATU also contends that TriMet did not "fully explain" its LBO proposal. As noted above regarding the health insurance proposal, we do not find that such an allegation, even if true, constitutes a *per se* violation of subsection (1)(e).

hearing regarding the pension proposal is better characterized as explanatory in nature, designed to assist the arbitrator in making an informed assessment about the proposal. The added details about the plan did not substantively change the terms of that plan. Finally, we note that the specifics of the "non-union plan" as identified in the LBO was available to all employees and union officers on TriMet's website.

In sum, we find that TriMet did not substantively change its LBO pension proposal after it was exchanged with ATU. Therefore, we will dismiss this claim.

Insurance Code/Prohibited Subjects of Bargaining

We next turn to ATU's allegation that TriMet violated ORS 243.672(1)(e) by including prohibited subjects of bargaining in its LBO and then submitting those prohibited subjects to interest arbitration. ATU specifically alleges that TriMet's LBO violated certain statutes (discussed below) "by informing employees that they would have to pay the difference between the costs of premiums, co-pays, deductibles, and out-of-pocket expenses under the prior health insurance plans and the cost of the [LBO] insurance plans."

A proposal that is prohibited by law is considered a prohibited subject of bargaining. *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 598, 54 P3d 1043 (2002). Thus, proposals that necessarily violate statutes are prohibited, and insisting on an illegal, and therefore prohibited, subject of bargaining (even short of impasse) constitutes bad-faith bargaining.

Here, ATU contends that TriMet's LBO violated ORS 731.036(6)(d), ORS 743.874, and ORS 743.876. We address each contention, in turn.

ORS 731.036 provides a list of "[p]ersons completely exempt from application of Insurance Code." As relevant to ATU's assertion that TriMet's LBO on health insurance violates subsection (6)(d), that provision exempts

> "[c]ities, counties, school districts, community college districts, community college service districts or districts, as defined in ORS 198.010 and 198.180, that either individually or jointly insure for health insurance coverage, excluding disability insurance, their employees or retired employees, or their dependents, or students engaged in school activities, or combination of employees and dependents, with or without employee or student contributions, if all of the following conditions are met:
>
> "(d) Enrollees must be provided copies of summary plan descriptions."

By its terms, ORS 731.036(6)(d) exempts certain entities from the Insurance Code, so long as certain provisions are met. The statute does not create any substantive rights. Thus, we do not see how TriMet's LBO on health insurance violates that provision. Ostensibly, ATU is arguing that TriMet was required by ORS 731.036(6)(d) to provide all bargaining unit members with a summary plan description as part of its LBO health insurance proposal, and that TriMet's

failure to do so rendered that proposal "illegal." Simply put, that is not what ORS 731.036(6)(d) says; rather, that subsection sets forth what certain entities must provide to be exempt from the Insurance Code. Therefore, ORS 731.036(6)(d) is inapposite, and we we will dismiss ATU's allegation that TriMet violated ORS 243.672(1)(e) by submitting a proposal at interest arbitration purportedly in violation of ORS 731.036(6)(d).

We discuss ORS 743.874 and ORS 743.876 in tandem because ATU's reliance on these provisions for its bad-faith bargaining charge under ORS 243.672(1)(e) is defective for the same reasons. ORS 743.874 governs insurer estimates of costs for *in-network procedures* or services, and provides that an

> "insurer offering a health benefit plan as defined in ORS 743.730 must establish a procedure for providing to an enrollee in the plan a reasonable estimate of an enrollee's costs for an in-network procedure or service covered by the enrollee's health benefit plan, in advance of the procedure or service, when an enrollee or an enrollee's authorized representative provides the following information to the insurer:
>
> "(a) [t]he type of procedure or service;
> "(b) [t]he name of the provider;
> "(c) [t]he enrollee's member number or policy number; and
> "(d) [i]f requested by the insurer, the site where the procedure or service will be performed." ORS 743.874(1).

Other subsections of ORS 743.874 set forth what must be included in a cost estimate, the procedures that must be covered, certain disclosures, and how the information in the section must be made available.

ORS 743.876 is a related statute that governs estimates of costs that insurers must provide for *out-of-network* procedures or services. It contains similar requirements as ORS 743.874, with the caveat that the requirements concern "out-of-network" (rather than "in-network") procedures or services.

Both ORS 743.874 and ORS 743.876 concern an insurer's obligations to establish a procedure for providing enrollees with reasonable advance cost estimates for certain procedures, once an enrollee provides notice of a future procedure. We fail to see (and ATU has not established) the relationship between the Insurance Code provisions and the alleged violation of ORS 243.672(1)(e), which requires TriMet to bargain in good faith with ATU. To begin, the cited provisions apply to the entities that provide health insurance to ATU's members, *i.e.*, Regence and Kaiser, and not to TriMet itself. Even assuming that these provisions could be interpreted as applying to TriMet, ATU has not submitted evidence establishing that TriMet's LBO on health insurance violates either statute. That proposal does not contain a provision permitting TriMet (or its insurers) to act in violation of ORS 743.874 or ORS 743.876. Therefore, we will dismiss ATU's claim alleging that TriMet violated ORS 243.672(1)(e) by submitting an allegedly "illegal" proposal at interest arbitration concerning ORS 743.874 and ORS 743.876.

We also will dismiss ATU's complaint that TriMet violated ORS 243.672(1)(e) by "implementing an unenforceable collective bargaining agreement." That assertion is contingent on finding that TriMet's LBO proposal, which was awarded by Arbitrator Gaba, violated the Insurance Code. As set forth above, we have concluded that ATU has not established that TriMet's LBO proposal violated that Code. Therefore, we will dismiss this allegation.

Pension Plan - Retiree Benefit Multiplier

We next address ATU's argument that TriMet bargained in bad faith in violation of ORS 243.672(1)(e) by allegedly "misleading ATU and the arbitrator as to the true impact of its proposal regarding the retiree pension base rate." According to ATU, after Arbitrator Gaba issued his award, "TriMet learned that there were unintended consequences associated with retroactively changing retirees' monthly pension rates," but TriMet nevertheless retroactively implemented such a change "to the detriment of ATU retirees." We disagree with ATU's assertions.

We assume, without deciding, the correctness of the premise of ATU's argument—namely, that misleading a party or an interest arbitrator regarding a proposal or LBO is inconsistent with the requirement to bargain in good faith. This record, however, does not establish that TriMet misled either ATU or the arbitrator regarding the retiree pension base rate. To the contrary, the record shows that TriMet's LBO proposed changing the date of the pension benefit multiplier from September 1 to February 1 for each year of the agreement. The record further shows that TriMet did not present evidence at the interest arbitration on the effect (if any) of changing the multiplier date. Indeed, as even ATU recognizes, it was not until after Arbitrator Gaba issued his award that TriMet first realized that changing the multiplier date from September to February would affect monthly pension rates. Thus, we fail to see, as ATU alleges, how TriMet deceived ATU or Arbitrator Gaba regarding an "unintended consequence" of changing the benefit multiplier date.[12]

RTF and EAP

ATU next alleges that TriMet violated ORS 243.672(1)(e) by unilaterally altering the *status quo* when it discontinued payments to the RTF and EAP after Arbitrator Gaba issued his award. For the following reasons, we agree with ATU that TriMet's actions regarding the RTF and EAP violated subsection (1)(e).

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." In general, a public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a subject that is mandatory for bargaining. An employer must generally bargain about its decision to change a

[12]We further note that TriMet's LBO included the benefit multiplier date change, and that neither party presented evidence or argument on the effect of that date change in the interest arbitration proceeding. Thus, the record is devoid of evidence that either party believed that merely changing the date of the benefit multiplier would have an effect, much less a significant effect, on the monthly pension benefits ultimately received.

mandatory subject of bargaining before making the decision. Although an employer is not required to bargain about a decision to change a permissive subject, it is obligated to bargain regarding the impact of that decision on mandatory subjects before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013).

When reviewing an allegation of an unlawful unilateral change, we consider: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177 (2013) (*AOCE*) (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 897 (2005)); *see also Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 457 (2013). We need not apply our analysis in a mechanical manner, however, and may proceed to a particular step if that step will be dispositive of the issue. *Jackson County*, 25 PECBR at 457; *see also Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761-62 (2012).

We begin with the "preliminary step in any unilateral change claim—whether there has been a change in the status quo." *AOCE*, 353 Or at 184. To make that determination, we consider "[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition." *Id.* (quoting *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, 14 PECBR 229, 233 (1993)). In doing so, we look "to a variety of sources, including not only the terms of a current or an expired collective bargaining agreement, but work rules, policies, and an employer's 'pattern of behavior.'" *AOCE*, 353 Or at 184 (quoting *Coos Bay*, 14 PECBR at 233); *Jackson County*, 25 PECBR at 457-58.

Here, the parties dispute the *status quo* regarding TriMet's payments to the RTF and EAP. In our prior order, we determined that TriMet's final offer proposals regarding the RTF and EAP violated ORS 243.672(1)(e) because those proposals impermissibly introduced "new issues" into the bargaining process at a late stage. *ATU v. TriMet*, Case No. UP-016-11, 24 PECBR 412, 449-51 (2011). In doing so, we concluded that the expired 2003-2009 agreement required TriMet to "annually increase its payments" to those funds by $2,000 each year. *Id.* As of 2008, TriMet was obligated to pay $55,000 to the RTF and $65,000 to the EAP.[13] We further concluded that by proposing in its final offer "to eliminate annual increases" in those payments, TriMet's final offer proposals impermissibly "capped" those payments at those 2008 amounts. *Id.* Consequently, we ordered TriMet to cease and desist from including new issues in its final offer, and to submit a revised final offer that did not include proposals that introduced "new issues." *Id.* at 451-53. We further ordered TriMet to eliminate its proposal to cap the contribution amounts to the RTF and EAP at the 2008 level. *Id.* at 453.

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[13]Because the payments were required to be paid each December and the agreement expired November 30, 2009, December 2008 reflects the last payments owed by TriMet under that agreement.

Consistent with our prior order, TriMet then submitted a revised final offer that retained the current contract language regarding the RTF and EAP. As we previously stated in our prior final order, that language required TriMet to eliminate capping contributions to the RTF and EAP at the 2008 level and restore the annual $2,000 increases. As such, consistent with our prior order, we interpret TriMet's revised final offer and LBO proposals to continue those annual $2,000 increases to the RTF and EAP.[14] Thus, when Arbitrator Gaba awarded TriMet's LBO, TriMet was obligated to continue payments to the RTF and EAP consistent with those increases.

Instead, in August 2012, TriMet announced that it was *ceasing* payments altogether, purportedly because of Arbitrator Gaba's award.[15] Specifically, TriMet contends that its termination of the payments to the RTF and EAP was lawful because its LBO, which was awarded by Arbitrator Gaba, eliminated those payments altogether. Thus, according to TriMet, Arbitrator Gaba's award set a new *status quo* with respect to such payments—*i.e.*, that no payments were required.

We disagree with TriMet's contentions, as doing so would necessitate finding that TriMet's revised final offer and LBO proposed *ceasing* all payments to the RTF and EAP. Such a finding, however, would be incompatible with our prior order, which barred TriMet from even capping those amounts in its revised final offer, much less eliminating them entirely. Therefore, consistent with our prior order, we interpret TriMet's revised final offer and LBO as continuing to propose annual $2,000 increases to the RTF and EAP. Thus, when Arbitrator Gaba awarded TriMet's LBO, TriMet was required to pay those annual increases. Consequently, when TriMet unilaterally decided to stop payments to the RTF and EAP in August 2012, it unlawfully changed the *status quo* and violated subsection (1)(e).

Our determination that TriMet made unlawful unilateral changes regarding the RTF and EAP payments is further supported by TriMet's conduct in drafting and presenting its LBO. Specifically, TriMet's LBO proposed "current contract language except" certain specified "changes." The LBO also stated that all changes were "set forth in the attached pages in 'track-changes' format," followed by a list of identified specific changes. None of those specifically-identified "changes," however, concerned the RTF or EAP. Moreover, when TriMet made changes to the contract language in the previous agreement, it indicated as much in its LBO with "track changes" markers, such as striking out proposed deletions and underlining proposed additions. In TriMet's LBO, the provisions regarding the RTF and EAP were left untouched. As noted above, the "current contract language" (as determined by our prior final order) required TriMet to continue payments to the RTF and EAP with annual $2,000 increases. Finally, Arbitrator Gaba's award made no mention of TriMet purportedly changing its obligation to pay $2,000 annual increases to the RTF and EAP. Thus, we conclude that TriMet's LBO

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[14]TriMet does not assert that it made a change in its revised final offer and its LBO regarding payments to the RTF and EAP.

[15]We note that, during the hiatus period, TriMet continued to pay only the *2008* contribution amounts (*i.e.*, $55,000 to the RTF and $65,000 to the EAP) in 2009, 2010, and 2011. ATU did not allege that TriMet violated subsection (1)(e) by unilaterally changing the *status quo* in 2009, 2010, and 2011 by not paying the annual $2,000 increases in December of each year. Therefore, we limit our discussion to the August 2012 unilateral change of stopping the payments entirely.

proposal of "current contract language" (except as otherwise identified), continued those annual $2,000 increases.

In sum, consistent with our prior order, when Arbitrator Gaba awarded TriMet's LBO, that LBO included continued payments to the RTF and EAP, with annual $2000 increases. Consequently, in August 2012, when Arbitrator Gaba awarded TriMet's LBO, the *status quo* was that TriMet would pay $63,000 to the RTF and $73,000 to the EAP in December 2012. There is no dispute that TriMet changed that *status quo* by deciding in August 2012 not to make those payments. Moreover, TriMet does not dispute, and we find, that the change concerned a mandatory subject of bargaining, and that TriMet did not exhaust its duty to bargain. *See AOCE* 353 Or at 177. Therefore, we hold that TriMet violated ORS 243.672(1)(e) by deciding, *before bargaining*, to unilaterally stop payments to the RTF and EAP. *See Three Rivers*, 254 Or App at 575 (an "employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision") (emphasis in original).[16]

Pension Plan - Retiree COLA Increases

We now turn to ATU's argument that TriMet violated ORS 243.672(1)(g) by proposing an "LBO that breached the 2003-2009 collective bargaining agreement." ORS 243.672(1)(g) makes it an unfair labor practice for an employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *." We disagree with the premise of ATU's claim—namely, that an LBO *proposal* can, in and of itself, violate a provision of a prior collective bargaining agreement.[17] Simply put, an LBO *proposal to change* a prior contract

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[16]We reject TriMet's argument that we lack the authority to decide the subsection (1)(e) unilateral change claim because ATU was purportedly required to exhaust the grievance process under a now-expired agreement. Where, as here, "a union alleges a violation of *non-contractual statutory rights* under subsections of ORS 243.672 *other than (1)(g) and (2)(d)*, this Board does not require parties to exhaust their grievance process." *Portland Police Association v. City Of Portland*, Case Nos. UP-25/26/27-11, 25 PECBR 481, 487 (2013) (emphases in original); *see also Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993). Although we generally follow a practice of holding an unfair labor practice complaint in abeyance pending the resolution of a simultaneous grievance process, there is no such simultaneous grievance process pending in this matter that would cause us to hold this proceeding in abeyance. *See City of La Grande v. La Grande Police Association, Teamster Local 670*, Case Nos. C-40/45-81, 6 PECBR 4808, 4814 (1981) (it is our policy to postpone processing a subsection (1)(a) complaint while the parties are processing a pending grievance that addresses the issues raised in a complaint); *Oregon School Employees Association v. Astoria School District 1*, Case No. UP-52-91, 13 PECBR 474, 479 (1992) (it is this Board's practice to postpone processing a subsection (1)(e) unilateral change claim pending completion of a simultaneous grievance process). As ATU was not required to file a grievance regarding this claim, TriMet's assertion is without merit.

[17] There is a theoretical exception—an agreement could contain a provision prohibiting one party or the other from *proposing* a change to that provision (even after the contract expires). In that theoretical example, a proposal violating that contractual provision could violate subsection (1)(g).

provision does not *actually change* that provision—it merely proposes to do so; consequently, Therefore, we will dismiss this claim.[18]

Union Steward Pay

We next turn to ATU's allegation that TriMet "interfered with, restrained, or coerced ATU members in and because of the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)."[19] ATU claims that TriMet violated subsection (1)(a) by "offering an LBO proposal that retaliates against ATU members for filing grievances"; that LBO proposed discontinuing the practice of TriMet paying union stewards to represent employees in grievance meetings.

ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees "in" or "because of" the exercise of rights guaranteed in ORS 243.662. ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

To determine if an employer violated the "because of" portion of subsection (1)(a), we examine the employer's reason for the disputed action. If the employer acted "because of" an employee's exercise of rights protected by the PECBA, the employer's actions are unlawful. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). In order to show a violation of the "because of" prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986).

When we analyze an employer's actions under the "in" the exercise portion of subsection (1)(a), the employer's motive is irrelevant. We focus only on the effect of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer violates the "in" the exercise prong of subsection (1)(a). *Portland Assn. Teachers*, 171 Or App at 623-24. An "in" violation may be either derivative or independent. An employer who commits a "because of" violation also generally commits an "in" violation because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. An employer's actions may also independently violate the "in" the exercise prong. *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 40, 259 P3d 932 (2011).

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[18] Consequently, we express no opinion on whether TriMet's ultimate implementation of its LBO proposal, pursuant to Arbitrator Gaba's award, violated ORS 243.672(1)(g).

[19] We assume, without deciding, that a (1)(a) violation can arise via a bargaining proposal.

We first consider whether TriMet decided to propose to stop paying union stewards to attend grievance meetings "because of" employees' exercise of protected rights. We begin our analysis by examining the record to determine the reason TriMet acted. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). This is a fact determination. *Portland Assn. Teachers*, 171 Or App at 626-27.

We then decide if TriMet's reasons were lawful or unlawful. If the reasons were lawful, we will dismiss the allegation. If the reasons are unlawful, or if a lawful reason is a pretext for unlawful conduct, we will find a violation of the "because of" prong of subsection (1)(a). If we find that the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. Under that analysis, we determine whether TriMet's "unlawful motivation—as one of two or more coinciding reasons for the employment action—was a sufficient factor to attribute the decision to it." *Portland Assn. Teachers*, 171 Or App at 639. In other words, we determine "whether the employer would not have taken the disputed action but for the unlawful motive." *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007).

Here, ATU contends that TriMet proposed to stop paying union stewards to attend grievance meetings because ATU filed "so many" grievances. According to ATU, filing grievances constitutes the exercise of "protected rights," and, therefore, any proposal issued "because of" the number of grievances filed necessarily violates subsection (1)(a).

TriMet contends that it made the proposal "to both reduce [its] costs and to make the grievance process more effective." According to TriMet, it "received little or no benefit from paying union stewards to represent employees in grievance step meetings * * *." Given TriMet's financial situation, TriMet contends that not paying union stewards to attend grievance meetings was a logical way to save money without affecting services provided to the public.

On this record, we agree with TriMet. The record shows that paying stewards to attend grievance meetings cost TriMet approximately $150,000 over a six-year period, not including lost production time. TriMet's representatives (McFarlan and Minor-Lawrence) testified that the proposal was made as part of a broader attempt to cut costs. Although those representatives also referenced the large number of grievances filed by ATU, the cost to TriMet for paying stewards to attend grievance meetings is interlinked with the number of grievances—*i.e.*, the more grievance meetings, the larger the cost to TriMet. After considering the record as a whole, we find that TriMet's proposal to no longer pay union stewards to attend grievance meetings was not "because of" employees exercising protected rights of filing grievances; rather, we find that the proposal was made "because of" the cost to TriMet and its conclusion that such payments yielded it little to no benefit. Therefore, we will dismiss this complaint.[20]

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[20]Even if we concluded that TriMet made the proposal for "mixed motives," we would nevertheless dismiss the complaint. Specifically, we would determine that the overriding reason for the proposal was the cost savings, coupled with TriMet's belief that it realized no benefit from paying stewards to attend grievance meetings. That reason is lawful, and we would conclude that TriMet would have made the same proposal, regardless of any alleged unlawful motive (retaliation for ATU filing grievances on behalf of its members). *See Cove School District #15*, 22 PECBR at 221.

We next determine whether TriMet's proposal to discontinue the practice of paying union stewards to represent employees in grievance meetings violated the "in" the exercise of prong of subsection (1)(a). Having already dismissed the "because of" claim above, we do not find a derivative "in" the exercise of violation.

We must now decide whether ATU has established an independent "in" the exercise of claim under ORS 243.672(1)(a). As previously stated, in analyzing such a claim, we apply an objective standard to determine whether the natural and probable consequence of TriMet's proposal would be to chill employees in their willingness to engage in protected activities; neither motive nor the extent to which employees actually were coerced is controlling. *Clackamas County*, 243 Or App at 40; *Portland Assn. Teachers*, 171 Or App at 624.

We do not believe that the mere *proposal* to stop paying union stewards to represent employees in grievance meetings would have such natural and probable "chilling" consequences. Collective bargaining is a dynamic process. It is not uncommon for a party to engage in "hard bargaining" or to make proposals that the other party finds objectionable, inequitable, or harsh. "Bluff, bluster, and posturing, while not encouraged, are common." *Blue Mountain Community College*, 21 PECBR at 751. Both parties and the affected employees are generally aware of such bargaining tactics, particularly, where, as here, the parties are not strangers to the back-and-forth of bargaining.

Moreover, when bargaining for a new contract, both parties typically review terms and conditions in the existing or expiring contract and evaluate which terms they wish to retain, modify, or eliminate. Both parties often also consider adding new terms. A party likewise generally expects that the other will have its own position as to what the new collective bargaining agreement will look like. Although the existing or expiring agreement codifies current contractual rights, the parties are aware that the expiration of that agreement brings an end to those rights, unless retained by the successor agreement.

Thus, in most instances, it is unlikely that a mere bargaining proposal would have the natural and probable consequence of chilling employees in their willingness to engage in protected activities. Likewise, we find nothing exceptional regarding TriMet's proposal to discontinue the practice of paying union stewards to represent employees in grievance meetings, a practice that was contractually agreed to under the old, expired agreement. As set forth above, TriMet believed that it derived little to no benefit from that contractual obligation, and, consequently, proposed eliminating it from the successor agreement.

In asserting otherwise, ATU advances the following series of propositions that purportedly flow from TriMet's proposal: (1) ATU representatives had to spend additional time at TriMet facilities to accommodate grievance meetings and were "forced to use unpaid time to attend" those meetings; (2) because scheduling the grievance meetings is "more challenging," some ATU members are going into grievance meetings "without representation"; (3) because it is "more challenging to have representation at grievance meetings * * *, it is more challenging for bargaining unit members to exercise their PECBA-protected rights"; and (4) as a result, employees will be more reluctant in the future to exercise their protected rights. "In other words," according to ATU, "members would learn from this experience that, in the future, it will be more challenging for them to engage in certain protected activities."

We are not persuaded by ATU's contentions for multiple reasons. To begin, ATU's arguments are premised on the *implementation* of the LBO proposal that was awarded by Arbitrator Gaba; the stipulated issue, however, is whether the *proposal* violated subsection (1)(a). In any event, although the chain of events put forth by ATU is *possible*, we do not conclude that it is the *natural and probable consequence* of ATU's proposal. *See Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988) (employer's lawful promotion of a bargaining unit member did not violate subsection (1)(e) because, although it may have had the possible effect of chilling protected activity, it did not have the natural and probable effect of doing so). To hold otherwise would mean that employees would be naturally chilled in exercising their protected rights whenever an employer does not pay for a union steward to represent them in a grievance meeting. We do not believe that such a proposition is borne out in practice. In other words, we disagree with ATU that employees are naturally and probably chilled in the exercise of their protected rights when an employer does not pay for a union steward to attend a grievance meeting.

Consequently, because we conclude that, when objectively viewed, TriMet's proposal to discontinue paying union stewards for their participation in grievance meetings would not have the natural and probable consequence of chilling "union members generally in their exercise of protected rights," we will dismiss this claim. *See Portland Assn. Teachers*, 171 Or App at 624.

Finally, we address our dissenting colleague's assertion that we have "narrowly construed ATU's complaint and failed to consider all of the issues that were properly before us." According to the dissent, we should "have considered the issues raised by ATU in a more comprehensive manner" and "found additional violations of ORS 243.672(1)(e) and (1)(g)." This assertion, however, begs the question—what were the issues raised by ATU?

The record establishes that, after ATU filed its complaint, a veteran ALJ reviewed that complaint and identified the issues precisely as set forth in our order. The ALJ then informed the parties that she had so identified the issues and provided the parties with the opportunity to object to or modify those issues. Neither party elected to do so. Moreover, at the hearing, the ALJ again identified the issues as set forth above in our order, and *both parties agreed that those were the issues to be decided.* Finally, neither party requested before the hearing, during the hearing, after the hearing, or in submissions to this Board, to modify or expand the list of issues to include those addressed by the dissent. In that regard, the dissent stands alone.

To the extent that the dissent suggests that the parties' agreed-on identification of the issues is not the best source for determining the issues before us, we respectfully disagree. Moreover, even if we were to agree with the dissent to look elsewhere to find "the issues raised by ATU," we would begin by looking at the issues identified by the parties in their post-hearing briefs. ATU's post-hearing brief identifies, in the same numerical order, the 10 issues that we have identified as before us. Thus, although the dissent asserts that we have "ignored" issues "raised by ATU," we submit that we have identified each (and only) every issue that the parties have put before us.

The dissent's reliance on prior cases also misses the mark. In each case cited by the dissent, this Board addressed an alternate legal theory regarding an issue that was undisputedly before the Board. Here, the dissent has not just proposed an alternative legal theory, but rather has identified and addressed new issues that neither party agreed were before us.[21] Moreover, none of the cases cited by the dissent concerned a situation where, as here, after the filing of a complaint, an ALJ identified the issues to be decided, and *both parties agreed with those issues in their entirety.*

In sum, the dissent does not dispute that we have identified and decided the issues exactly as identified by the ALJ and as agreed to by both parties. Rather, the dissent nevertheless faults the majority for not reformulating the issues to address conduct that *could be* considered unfair labor practices if the parties had asked us to decide those issues.[22] In this matter, an ALJ and seasoned practitioners representing the parties have all identified and agreed in specific details to each issue that should be addressed. In such circumstances, we should not tell the parties what the issues could or should have been. We believe that the best practice of this Board is to decide the contested issues that the parties have asked us to decide. Therefore, we decline to join the dissent in expanding the issues before us.[23]

TriMet's Claims (UP-50-12)

We turn now to TriMet's allegations that ATU committed unfair labor practices. TriMet first contends that ATU violated ORS 243.672(2)(b), (c), and (d) and ORS 243.752 by instructing its members not to cooperate with TriMet's attempts to enforce Arbitrator Gaba's award. In relevant parts, ORS 243.672 makes it an unfair labor practice for a labor organization to: (1) refuse to bargain collectively in good faith with the employer (subsection (b)); (2) refuse or fail to comply with any provision of ORS 243.650 to 243.782 (subsection (c)); and (3) violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them (subsection (d)).

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[21]There is a distinction. For example, the dissent cites *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County,* Case No. UP-77-96, 17 PECBR 451, 465-66 (1998), for the proposition that we considered the union's argument that the employer breached a settlement agreement in a manner not asserted in its complaint for purposes of a (1)(g) breach-of-contract claim. What the dissent has done here, however, is markedly different. To put this in the context of *Wallowa County*, the dissent's position would have us decide any breach of any settlement agreement (or presumably any agreement), merely because the union alleged a (1)(g) claim. In other words, the dissent confuses the issue to be determined with the legal theory by which that issue is resolved.

[22]Although the dissent asserts that the disputed issues are "clear," the dissent's own analysis belies such an assertion. Specifically, the dissent also characterizes ATU's claims as "somewhat difficult to parse," and "not artfully pled," characterizations that we do not associate with "clear." What is "clear," we would submit, is the agreed-on issues.

[23]As we decline to address issues not before us, we take no position on the dissent's determination of those issues.

According to TriMet, ATU violated each of these provisions by instructing its members to not cooperate with TriMet's attempts to recoup retroactive health insurance payments. For the following reasons, we disagree with TriMet that ATU's communications with its members were unlawful.

TriMet's claims are based on two letters ATU sent to its members. First, on July 16, 2012, a few days after Arbitrator Gaba issued his July 13 award, ATU posted on its website a letter to members stating:

> "It is very likely that TriMet will attempt to get you to sign an authorization for them to deduct past health insurance premium costs from the wage increases TriMet owes you. DO NOT, UNDER ANY CIRCUMSTANCES, SIGN SUCH AN AUTHORIZATION.
>
> "* * * * *
>
> "TriMet management is likely to threaten you with legal action should you refuse to sign the authorization. TriMet would have to sue every single union member individually. It would have a hard time winning such a case when the arbitrator has said, so many times, that such a deduction is likely illegal." (Emphasis in original.)

Second, after TriMet sent ATU "sample letter statements" regarding what ATU members would owe in retroactive health insurance payments, ATU sent a letter to its members on September 19, 2012, letting them know that TriMet would soon be mailing members a letter regarding the recoupment of health insurance payments. ATU told the members that it intended to take legal action against TriMet. ATU further stated:

> "[i]n the meantime, we ask that you cooperate with and support our actions on your behalf by NOT responding to TriMet's letter." (Emphasis in original.)

Finally, ATU asked the employees to "stand together in solidarity and refuse to respond to TriMet's payment demand until such time as we obtain a judicial decision on this latest installment of TriMet gone crazy."

We first address TriMet's contention that these two letters constitute a refusal to bargain in good faith. Because TriMet has not identified any of the totality-of-conduct factors that we traditionally use in assessing such bad-faith-bargaining claims, and has instead asserted that specific acts in and of themselves establish bad-faith bargaining, we interpret TriMet's claims as alleging *per se* bad-faith bargaining. As set forth above, we find that some conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *City of Medford*, 22 PECBR at 206-07. We have limited *per se* bad-faith-bargaining determinations to conduct that falls so far outside the range of reasonable bargaining behavior that no further analysis of a party's good or bad faith is necessary.

Here, we do not find that ATU's communications with its own members regarding its perceptions on the legality of TriMet compelling employees to authorize wage deductions indicates bad-faith bargaining, much less constitutes a *per se* violation of the duty to bargain in good faith. Likewise, informing members that it intended to bring a future legal action in the event that TriMet attempted to recoup money from members also does not, on its own, indicate that ATU was bargaining in bad faith. Therefore, we will dismiss this claim.

We next address TriMet's subsection (c) and (d) claims together because they are premised on the same legal theory: namely, that ATU's letters constituted a refusal or failure to comply with the final and binding award of Arbitrator Gaba. The difficulty with TriMet's theory is twofold. First, nothing in Arbitrator Gaba's award expressly authorized TriMet to compel recoupment. Indeed, Arbitrator Gaba's award indicated skepticism regarding the legality of any such collection scheme. Moreover, Arbitrator Gaba's award did not speak to, much less bar, ATU from communicating with its members on that issue.

Second, TriMet acknowledged that it has not taken any steps to retroactively implement its health insurance LBO, or to recoup payments from employees. Indeed, TriMet did not send the "sample letter statements" to employees that triggered ATU's September 19 letter to its members. Thus, we do not find that ATU failed or refused to comply with provisions purportedly in Arbitrator Gaba's award, which TriMet itself has never even sought to implement.

Consequently, for these reasons, we do not find that ATU's July 16 and September 19, 2012 communications with its members constituted a refusal or failure to comply with Arbitrator Gaba's award in violation of ORS 243.672(2)(c) or (d). Therefore, we will dismiss these claims.

Finally, we address TriMet's allegations that ATU violated ORS 243.672(2)(b) by not requesting information about or asserting objections before the interest arbitration hearing began that: (1) TriMet's LBO proposals on health insurance, a defined contribution plan, or the calculation of the COLA increases for retirees were too vague to be implemented or that TriMet had failed to provide information regarding a proposed methodology for implementation of these proposals; and (2) TriMet's LBO proposals on health insurance, discontinuing pay for grievance procedure work, calculating retiree COLA increases, or the retirement formula were illegal and/or prohibited subjects of bargaining. In short, TriMet asserts that ATU *per se* violated subsection (2)(b) by not requesting sufficient information about the specific aforementioned TriMet proposals or by failing to assert objections to those proposals before the interest arbitration hearing commenced.

We have not held that a party's failure to request additional information regarding specific proposals or to "object" to such proposals before an interest arbitration hearing begins is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. *See City of Medford*, 22 PECBR at 206-7. We decline to extend our limited categories of *per se* bad-faith-bargaining violations to include inadequate requests for "additional information" or purportedly not "objecting" to a party's proposals before an interest arbitration hearing commences. Although such failures might be considered as part of analyzing the totality of a party's bargaining conduct (or as part of a defense to another party's bad-faith-bargaining claim), they are not so hostile to

the bargaining process, such that a party violates the PECBA without any showing of subjective bad faith. Therefore, we will dismiss these complaints.

Conclusion

In sum, we find that TriMet has not established any of the alleged violations set forth in its complaint. With respect to ATU's allegation, we conclude that TriMet: (1) committed a *per se* violation of ORS 243.672(1)(e) when it amended its LBO regarding health insurance benefits; and (2) violated ORS 243.672(1)(e) by deciding, *before bargaining*, to unilaterally stop payments to the RTF and EAP. We dismiss ATU's remaining allegations.

Remedy

We have found that TriMet violated ORS 243.672(1)(e) by amending its LBO regarding health insurance benefits and by deciding, before bargaining, to unilaterally stop payments to the RTF and EAP. As a remedy for those violations, we will order TriMet to cease and desist from violating ORS 243.672(1)(e). ORS 243.676(2)(b).

We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80 (2005). Thus, with respect to the payments to the RTF and EAP, we will award the "usual remedy," and will order TriMet to restore the *status quo ante*, which requires TriMet to pay $63,000 to the RTF and $73,000 to the EAP, both of which should have been paid in December 2012. We will further order TriMet to maintain the *status quo* regarding payments to the RTF and EAP, until such time as the parties have reached agreement or have exhausted their bargaining obligations under the PECBA.[24]

We will also order that TriMet is prohibited from recouping any past health insurance premiums purportedly owed by ATU-represented employees related to TriMet's LBO, which was awarded by Arbitrator Gaba. We decline to vacate Arbitrator Gaba's award and remand the matter to him to conduct another interest arbitration hearing, as requested by ATU. Although we would generally order such a remedy in a typical case where a party changes its LBO in violation of ORS 243.746(3) and OAR 115-040-0015(7)(g), this is not a typical case. We find that such a remedy could further aggravate, rather than improve, the parties' contentious relationship, which has already resulted in multiple unfair labor practice proceedings arising out of the bargaining over the 2009-2012 collective bargaining agreement. Additionally, ordering such a remedy could further complicate and frustrate the parties' ongoing bargaining for a future successor contract. Under these circumstances, we conclude that remanding the matter to Arbitrator Gaba is not necessary to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

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[24]As set forth above, the *status quo* consists of annual $2,000 increases to both the RTF and EAP.

ORDER

1. TriMet shall cease and desist from violating ORS 243.672(1)(e).

2. Within 30 days of the date of this order, TriMet shall restore the *status quo* regarding payments to the RTF and EAP, including, but not limited to, paying $63,000 to the RTF and $73,000 to the EAP.

3. TriMet shall maintain the *status quo* regarding payments to the RTF and EAP, including annual $2,000 increases consistent with this order, until such time as the parties have reached agreement or have exhausted their statutory bargaining obligations.

4. TriMet shall not attempt to recoup any past health insurance premiums purportedly owed by ATU-represented employees concerning TriMet's LBO.

DATED this 19th day of July, 2013.

Kathryn A. Logan

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Weyand, Concurring in Part and Dissenting in Part.

I concur with my colleagues in the majority of the conclusions set forth above, including the holdings that: (1) TriMet violated ORS 243.672(1)(e) by amending its LBO regarding health insurance benefits; (2) TriMet violated ORS 243.672(1)(e) by discontinuing payments to the RTF and EAP; (3) TriMet did not violate subsection (1)(e) by changing its LBO proposal establishing a defined contribution plan for new hires; (4) TriMet did not violate ORS 243.672(1)(a) by proposing to discontinue the practice of paying union stewards for their time spent representing employees in grievance meetings; (5) ATU did not meet its burden of proof on its claim that TriMet's health insurance LBO violated the cited insurance code provisions; and (6) ATU did not violate its duty to bargain in good faith as alleged in TriMet's complaint.

I respectfully dissent from the remainder of the order. The majority narrowly construed ATU's complaint and failed to consider all of the issues that were properly before us. I would have considered the issues raised by ATU in a more comprehensive manner, and in doing so, I would have found additional violations of ORS 243.672(1)(e) and (1)(g).

I.
The Majority Erred by Construing the Issues Too Narrowly

We ordinarily consider a claim or affirmative defense raised by a party if the pleadings or subsequent proceedings are sufficient to put the opposing party on notice of the claim and a reasonable opportunity to respond to the claim has been provided. We give parties some latitude when construing their arguments, and on several occasions, this Board has considered arguments advanced by a party even if they were not originally asserted with the level of clarity that we would normally expect. For example, in *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County,* Case No. UP-77-96, 17 PECBR 451, 465-66, *recons*, 17 PECBR 536 (1998), we considered two claims raised by the union that were not clearly pled. First, we considered the union's (1)(a) claim under both the "in" and "because of" prongs of ORS 243.672(1)(a), even though the complaint only alleged a violation of the "because of" prong. Second, in an allegation that the employer violated ORS 243.672(1)(g), we considered the union's argument that the employer breached a settlement agreement in a manner not asserted in its complaint. *Id.*

The employer sought reconsideration of our order, arguing that we should not have considered the union's alternate (1)(g) theory because it did not have adequate notice to respond to that claim. On reconsideration, we acknowledged that the union's complaint did not allege the specific interpretation of the settlement agreement that we adopted. But we ultimately concluded that, based on the pleadings and the contested case process, the employer had adequate notice of the issue to present a defense to the claim. We also stated that "this Board is not confined to an interpretation of the agreement that is urged by either party." *Wallowa County,*17 PECBR 536, 538 (1998) (Order on reconsideration); *See also McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School Distric #40t,* Case No. UP-4-97, 17 PECBR 539, 540 (1998) (we considered a second (1)(g) claim that was not plead in the initial complaint over employer's objections, concluding that in light of specific paragraphs of the complaint and one of the stipulated facts, the employer had sufficient notice of the claim to be able to respond); *Lincoln City Police Employees' Association v. City of Lincoln City,* Case No. UP-43-98, 18 PECBR 323, 344 (1999) (considering an employer's affirmative defense of exhaustion in a (1)(e) case even though they did not plead it as an affirmative defense as required by our rules because the union had sufficient notice and opportunity to respond to the affirmative defense because it was raised in the hearing.)

The record before us makes it clear that the primary issues raised by ATU are assertions that: (1) TriMet's retroactive reduction of health insurance benefits is illegal and prohibited for bargaining; and (2) TriMet's modification of the pension benefits promised to employees in the previous collective bargaining agreement was unlawful under ORS 243.672(1)(g) and (1)(e). The majority opinion addresses these issues not in the broad sense they were raised, but in the narrowest sense allowed by the agreed upon issue statements. I believe the narrow construction of these important issues was erroneous, and in fact ignores rather than resolves the primary disputes between the parties.

I begin by addressing ATU's contention that TriMet's retroactive health insurance reductions were unlawful and prohibited for bargaining. At different times, ATU asserts that the proposals are illegal under the Oregon Insurance Code, the PECBA, Oregon wage and hour laws limiting the reasons an employer may make deductions to an employee's paycheck, and general

contract law theories. ATU most clearly advanced the assertion that the retroactive application of the insurance proposals violates the Oregon Insurance Code. The majority decision, in which I concur, focuses on this assertion only. And while I agree with the conclusion we reached, I believe that our analysis should have continued and considered the legality of TriMet's proposals more broadly. Such a broad construction would be consistent with ATU's complaint, brief, and the conduct of the contested case proceedings.

Despite the multiple theories raised by ATU, at its heart, its claim boils down to a simple scope-of-bargaining question: is TriMet's proposal retroactively reducing insurance benefits prohibited for bargaining? This is the issue before us.

And when we review the bargaining status of a proposal, our choices are not constrained to accepting one party or the other's legal characterization of that subject (nor in a case requiring us to interpret a contract are we bound to accept either party's interpretation of that agreement if it is incorrect). To the contrary, we are bound to consider the subject under our well established analytical framework to determine whether it is mandatory, permissive or prohibited for bargaining. By way of example, consider a hypothetical situation where the parties disagree over the bargaining status of a subject, with the labor organization asserting the subject was mandatory because it involved indirect monetary benefits, and the employer claiming the proposal was permissive for bargaining under ORS 243.650(7)(b) (subjects determined to be permissive by the Board prior to 1995 continue to be permissive). If either assertion was legally correct, we would certainly adopt that position in our conclusions. But if neither party asserted the correct legal conclusion, we would continue our analysis and determine independently whether the proposal was permissive, mandatory or even prohibited for reasons not asserted by the parties. This is the approach we should follow in this matter, as neither party correctly analyzed the status of TriMet's retroactive reductions in health insurance benefits.

Based on the record, TriMet had sufficient notice of the breadth of ATU's claims to respond to this more broadly viewed claim, and in fact did so. TriMet offered extensive legal argument specifically rebutting the assertion that its retroactive health insurance proposals violated Oregon insurance law. However, it also asserted more general arguments concerning the legality of proposals that retroactively reduce insurance benefits. TriMet cited to two cases in defense of its position, arguing:

> "Finally, it should be noted that the Oregon Supreme Court has held that there is nothing unlawful about retroactive proposals. *See Springer v. Powder Power Tool Corporation,* 220 Or 102 (1960) ('We believe this [retroactive] language is clear and free from ambiguity. Since the parties have agreed that the contract should be effective as of April 1 1953, we are bound to construe it as if it were made on that date.') Similarly ERB has held that an employer does not commit a ULP by implementing a retroactive health insurance proposal. *See Oregon AFSCME Council 75, Local 2936 v. Coos County,* [Case No. UP-15-04] 21 PECBR 360, 387-92 (2006).
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> "Thus, TriMet's LBO health insurance proposal clearly is not illegal and does not violate any provisions of Oregon law." (TriMet's Post-Hearing Brief at 23-24).

The inclusion of this argument demonstrates that TriMet had sufficient notice and opportunity to make arguments about the legality of its proposals. As a result, the issue, as broadly formulated, was properly before us and should have been considered.

The majority also erred by narrowly framing the issues regarding the pension multiplier and retiree COLA changes in TriMet's LBO. The majority summarily dismissed the claim, reasoning that merely making a proposal cannot violate ORS 243.672(1)(g) under these circumstances. But a common sense reading of the record demonstrates that ATU was not asserting that TriMet violated subsections (1)(e) and (1)(g) by merely "proposing" the pension changes in its LBO. To the contrary, ATU was clearly arguing that TriMet violated the terms of the prior collective bargaining agreement by submitting and subsequently implementing new contract terms that reduced benefits promised to employees in the prior contract. The majority's erroneous construction of the claim ignored this issue, and I believe that we should have considered the claim on its merits instead.

Finally, TriMet's change to the COLAs and pension multipliers for retirees was made retroactive and negatively impacted a significant number of employees who retired prior to the interest arbitration award. This aspect of the implementation of TriMet's LBO raises unique legal concerns that the majority does not address. Those issues are too important to ignore and must be resolved, even though they were not artfully pled.

II.
TriMet's Retroactive Reductions in Health Insurance Benefits Violated ORS 243.672(1)(e).

ATU contends that the retroactive reduction of health insurance benefits under TriMet's LBO was illegal and prohibited for bargaining. As a preliminary matter, I note that proposals for the retroactive application of collective bargaining agreements are commonplace in labor relations. In most cases, there is nothing inherently unlawful about such proposals. In fact, making agreements retroactive can assist parties in reaching a mutually agreeable contract in many situations.

But TriMet's retroactive proposals on health insurance are unusual. TriMet seeks to turn back the clock three years by creating the legal fiction that the reduced health insurance benefit levels it proposed in its LBO were in place for the three years prior to the interest arbitrator's award. Standing alone, this legal fiction might not render the proposal prohibited for bargaining, but TriMet takes the legal fiction a step further, stating its intent to recoup moneys it believes it is owed by its employees by virtue of the retroactive health insurance proposals. For some employees, this "debt" may be as much as $7,000, depending on the employee's benefit choices. It is this purported debt owed by employees for benefits already received that renders the LBO unlawful and prohibited for bargaining.[25]

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[25]Our remedy in this case, which includes an order prohibiting TriMet from recouping moneys it claims are owed by its employees under its insurance LBO, arguably renders my concerns about the retroactivity of the insurance proposals moot. However, I am concerned that our decision could be read to suggest that TriMet's proposals were otherwise lawful, and would have been enforced had TriMet not violated ORS 243.672(1)(e) by modifying its LBO proposal. Our order should not be construed in such a manner, but the issue is simply too important not to address directly.

TriMet's retroactive reduction in health insurance benefits is inconsistent with the obligation to bargain in good faith under ORS 243.672(1)(e). We have long held that an employer violates subsection (1)(e) if it unilaterally changes mandatory subjects of bargaining during the hiatus period.[26] As a result, PECBA requires that employers maintain the *status quo* in effect at the expiration of a contract (on mandatory subjects of bargaining) until a new contract is agreed to or the PECBA dispute resolution procedures are exhausted. This requirement is known as the *status quo* doctrine.

The *status quo* doctrine serves many important functions in labor relations and is integral to achieving PECBA's lofty goals. It provides individual employees, labor organizations, and employers with some level of certainty on important issues, both economic and non-economic, during the course of negotiations. The doctrine also helps balance the scales during negotiations and provides an incentive to the parties to reach an agreement in a reasonable time frame. Both of these functions are consistent with PECBA's stated purposes of avoiding labor strife and establishing greater equality of bargaining power between public employers and public employees. *See generally* ORS 243.656(3).

This Board is obligated to make decisions that promote, rather than contradict, these goals. Allowing an employer to submit an LBO (or implement a final offer in strike-permitted units) that retroactively reduces benefits or wages would eviscerate the utility of the *status quo* doctrine. If an employer can retroactively reduce or take away benefits, wages, or other rights of employees, then the employer can unwind the *status quo* after the fact, and the doctrine becomes nothing but a temporary roadblock that can be easily circumnavigated.

Such an approach would be incompatible with ORS 243.756, which in the context of a strike-prohibited group like ATU's bargaining unit, codifies the *status quo* for wages and health insurance. ORS 243.756 requires that:

> "During the pendency of arbitration proceedings that occur after the expiration of a previous collective bargaining agreement, all wages and benefits shall remain frozen at the level last in effect before the agreement expired, except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise."

Allowing the retroactive reduction in benefits and wages is contrary to the requirements of this statute, as well as to the *status quo* doctrine developed under ORS 243.672(1)(e). As a result, TriMet's retroactive reduction in health insurancebenefits is unlawful and prohibited for bargaining.

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[26]The hiatus period is the common term for the period of time between the expiration of an existing collective bargaining agreement and either the signing of a new contract, or the conclusion of the PECBA required bargaining procedures.

While at first glance it may appear inequitable to prohibit the retroactive reduction of wages and benefits while permitting the negotiation of retroactive increases in these areas, the differentiation is supported by by the law and equitable notions of fundamental fairness. PECBA itself implicitly recognizes that retroactive improvements in the *status quo* are different than retroactive impairments of the same. The act *does* contain a provision that specifically authorizes arbitrators to award retroactive *increases* in wages and benefits. ORS 243.752(2) states that

> "[t]he arbitration panel may award increases retroactively to the first day after the expiration of the immediately preceding collective bargaining agreement. At any time the parties, by stipulation, may amend or modify an award of arbitration."

Notably, there is no corresponding language authorizing the award of a retroactive decrease. This absence demonstrates legislative approval of retroactive changes that benefit employees, and by inference, supports a conclusion that retroactive reductions were not authorized by the legislature or, at a minimum, were meant to be treated differently.

In addition, Oregon contract law recognizes that prospective changes in employee wages and benefits are generally allowed, while retroactive changes are generally not. This rule stems from the courts' determination that an employer's promises of pay and benefits to an employee in exchange for the employee's services is a unilateral offer of an employment contract. The employee may accept that offer by subsequently performing the required work, and an enforceable contract is created. *See Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or 445, 453-54, 510 P2d 339 (1973). For at-will employees, this employment contract may be modified unilaterally in many situations, but not in all. In *Olson v. F & D Publishing Co., Inc.*, 160 Or App 582, 982 P2d 556 (1999), the court acknowledged that an employment contract may be unilaterally modified, but only prospectively. The court stated that:

> "[Defendants] base their argument on the principle that an employer may unilaterally modify an at-will employee's contract and that the employee impliedly accepts the modification by continuing to work after learning of it. [Footnote omitted.] *See Fish v. Trans-Box Systems, Inc.,* 140 Or App 255, 914 P2d 1107 (1996); *Albrant v. Sterling Furniture Co.,* 85 Or App. 272, 736 P2d 201, *rev den,* 304 Or 55, 742 P2d 1186 (1987). Defendants acknowledge that the legal principle they invoke only applies prospectively. As they correctly admit, "[a]n employer cannot inform an [at-will] employee that wages have been retroactively reduced * * *. Wages for past work within the employment relationship are 'earned' and 'vested.'" 160 Or App at 588.

The courts have consistently resolved similar disputes over an employer's reduction or elimination of employment benefits by reviewing whether the pay or benefits at issue are earned or vested before or after the change is made. Various types of benefits have been found to be included in the "earned" and "vested" category of compensation that may not be reduced once the employee completes the necessary service to vest in the particular benefit. Several of these cases will be discussed below in the section analyzing pension issues.

The decisions under Oregon contract law reflect notions of equity as applied to the employment relationship, and the general principle that employees should be able to count on an employer's promises if they perform their part of the bargain. TriMet's employees earned and vested in their health insurance benefits by performing the work required by the employer at the time the insurance benefits were paid. This is a classic example of consideration paid for work already performed, and both parties to the agreement have adequately performed their obligation under the employment contract. TriMet may not retroactively and unilaterally unwind its performance of its obligations to its employees, even through the award of its LBO through interest arbitration, and then demand repayment for the benefits the employees earned and vested in during the *status quo* period. Employees cannot through any corresponding legal fiction retroactively dissolve their performance under the employment contract. That is to say that employees cannot retroactively quit their jobs as a result of the decreased compensation, or retroactively accept alternate employment that might have provided greater compensation. The employees' only options are prospective.

Allowing the collective bargaining process to be unfold in this fashion would trample the rights of individual employees while undermining the effectiveness of the system of collective bargaining set forth under PECBA. This would severely compromise, not promote, the purposes of the PECBA. Thus, standing alone, TriMet's proposals on health insurance violate the PECBA and are prohibited for bargaining. But TriMet's retroactive reduction in health insurance benefits and corresponding efforts to recoup the value of past benefits provided to employees also requires, or at least allows, TriMet to breach the employment contracts it has made with its employees. A proposal that requires a public employer to breach such contracts is contrary to public policy, unlawful, and prohibited for bargaining.[27]

TriMet points to our decision in *Oregon AFSCME Council 75, Local 2936 v. Coos County,* Case No. UP-15-04, 21 PECBR 360 (2006), to support its claim that the retroactive insurance proposal was lawful. In that case, we rejected the union's allegation that the emloyer's health insurance proposals amounted to a *per se* violation of subsection (1)(e) because they retroactively changed the *status quo*. However, our decision in that case is easily distinguished from the present matter. In *Coos County,* the employer's proposal was not retroactive in the same sense that TriMet's proposal is. The County proposed that it would contribute a fixed amount of

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[27]TriMet's proposal may also be prohibited under other statutes as well, depending on what actions it intended to take to recoup the moneys it believes it is owed from its employees by virtue of the retroactive application of its LBO proposal. Under ORS 652.610(3) an employer may not "withhold, deduct or divert any portion of an employees wages" unless the deduction falls within one of the enumerated exceptions in the statute. The only exception that arguably would apply is contained in subsection (d), which allows for payroll deductions authorized by a collective bargaining agreement. However, as noted above, TriMet did not propose any specific method of collection, let alone a contract proposal that included an agreement to deduct money from employee paychecks to satisfy the "debt" allegedly owed as a result of retroactively reduced health insurance benefits. Thus, it does not appear that TriMet could lawfully seek to recoup the moneys through payroll deductions. Because TriMet has not consistently committed to any particular collection methodology, this concern is speculative and need not be addressed in detail. In addition, our order prohibiting the recoupment of these "debts" conclusively renders this concern moot.

money annually to pay for employee insurance premiums. The proposed contribution was limited to the ongoing plan year that was only partially concluded, and the employer prospectively reduced its monthly insurance premium contributions to achieve the needed cost savings (achieved through averaging the needed savings over the entire year). *Id.* at 387-92. The County did not create a legal fiction that it retroactively reduced the monthly premiums it had already paid, then claim that employees owed the county moneys as a result of overpayments. Nor did the county make any effort to recoup the value of benefits paid during the *status quo* period.

We found that the County had consistently proposed this approach throughout bargaining, with the numbers shifting based upon when an agreement was reached. As a result, there was no conduct so inimical to the PECBA that a *per se* violation of subsection (1)(e) occurred. Further, in footnote 19, we correctly inferred that the County's approach did not in fact retroactively change the *status quo*, and the implementation of the County's insurance proposal would not have changed even if the effective date of the proposal had been changed to a future or present date. *Id.* at 388-90.

Had TriMet followed the same approach taken by the employer in *Coos County*, it would not have violated (1)(e). But TriMet elected to take the legal fiction of retroactivity several steps further than Coos County, and truly sought to retroactively modify the *status quo.* As a result, TriMet's proposal was unlawful and prohibited for bargaining. By submitting this proposal to interest arbitration and subsequently implementing the LBO, TriMet violated ORS 243.672(1)(e).

III.
TriMet's Retroactive Reductions in Pension Benefits Violated ORS 243.672(1)(g).

ATU asserts that TriMet violated the 2003-2009 collective bargaining agreement, and by extension ORS 243.672(1)(g), when it proposed and implemented its LBO modifying pension benefits. This is an unusual (1)(g) claim, as it involves a claim based upon a collective bargaining agreement that has by its terms expired. However, certain terms contained in a collective bargaining agreement survive the expiration of the agreement. *Executive Department v. FOPPO,* 92 Or App 331, 758 P2d 410 (1988). In three separate cases involving the same parties, we held that an employer's elimination or modification of retiree benefits under expired collective bargaining agreements violated the expired contracts and subsection (1)(g). *See McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40,* Case No. UP-78-94, 16 PECBR 107, 124-25 (1995) (employer violated subsection (1)(g) by changing the health insurance plan for retired teachers in a manner contrary to the terms of expired collective bargaining agreements); *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40,* Case No. UP-71-95, 16 PECBR 481, 486-89 (1996) (employer violated subsection (1)(g) by refusing to pay the health insurance premiums for retired teachers as required by the terms of expired collective bargaining agreements); *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40,* Case No. UP-4-97, 17 PECBR 539, 545-47 (1998) (employer violated subsection (1)(g) by refusing to provide retirees the open enrollment period it provided to current employees and by failing to offer some retirees the indemnity plan, as required by the terms of expired collective bargaining agreements).

We have also held that once an employee vests in a benefit earned under a prior collective bargaining agreement, the employee's benefit cannot be subsequently reduced or eliminated, even by successor collective bargaining agreements. In *Enterprise Education Association v. Enterprise School District No. 21,* Case No. UP-16-04, 21 PECBR 49, 60-62 (2005) (Chair Gamson concurring in part, dissenting in part), we concluded that an employer violated the provisions of an expired collective bargaining agreement, and ORS 243.672(1)(g) when it reduced retiree health benefits even though the successor contract agreed to by the union authorized the change. The majority explained that, while the union could permissibly agree to eliminate future benefits employees who have not yet retired, benefits for employees who have already vested could not be changed. *Id.*

The complainant sought reconsideration of portions of our order, including the majority's dismissal of a (1)(g) claim brought on behalf of teachers who had not yet retired, but had already begun receiving a pre-retirement stipend during the hiatus period. On reconsideration, we adopted the rationale in Chair Gamson's dissent to the original order, and held that because the teachers had completed the required service to receive the pre-retirement stipend before the new collective bargaining agreement was signed, they had vested in their right to the stipend and it could not be taken away. *Enterprise Education Association v. Enterprise School District No. 21,* Case No. UP-16-04, 21 PECBR 202, 203 (2005) (*Order on recons*).

ATU asserts that the LBO proposal removing the 3 percent COLA floor for retirees violates the prior collective bargaining agreement. I am not convinced that ATU met its burden of proof on this matter as it applies generally to retirees. However, after the interest arbitration award was issued, TriMet announced that it was modifying the pension multiplier by retroactively applying its LBO terms. The net result was that employees who retired between September 2010 and January 2011 had their multiplier rate decreased from $75.15 to $72.96, decreasing the retirees' monthly benefits by $2.19 per month for each year of service. Similarly, employees who retired between September 2011 and January 2012 had their multiplier rate decreased from $77.40 to $75.52, reducing their monthly benefit by $1.88 per year of service. Other employees who retired during the *status quo* period, based upon their specific retirement dates, actually saw their benefit increase by virtue of the retroactive application of the COLA changes.

The impact of TriMet's retroactive change is exemplified by ATU bargaining unit member Patricia Butler, who retired on November 26, 2010, which was during the *status quo* period. When she retired, TriMet calculated Butler's retirement benefit using a benefit multiplier of $75.15, and due to her years of service, she began receiving a monthly benefit of $1,795.86. Also during the hiatus period, TriMet increased Butler's monthly benefit by 3 percent in February of 2011, raising her benefit to $1,849.74 per month. After the arbitration award, TriMet retroactively reduced Butler's base benefit multiplier from $75.15 to $72.96, reducing her original base monthly benefit to $1,745.53. TriMet then increased Butler's monthly benefits by the COLA amounts set forth in its LBO, resulting in a monthly benefit of $1,889.37.[28]

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[28]TriMet calculated that Butler had been overpaid during the *status quo* period, but as of the hearing it had not sought to recoup the overpayment.

The impact of TriMet's retroactive change in Butler's benefit multiplier will continue for the entire time she receives pension benefits from TriMet. Every future COLA she receives will be reduced by virtue of this change, compounding the financial impact of the benefit multiplier reduction each and every month. As noted in the findings of fact, if TriMet had not reduced Butler's benefit multiplier and had applied the retroactive COLA increases only, she would be currently entitled to a monthly benefit of $1,943.87, rather than $1,889.37. That is a difference in excess of $50 per month, a sum that is certainly substantial, and the number will only grow with time.

Oregon law recognizes that the adoption of a pension plan or other benefit plan is an offer for a unilateral contract, and the tender of part performance by an employee can accept the employer's offer. *See Crawford v. Teachers' Ret. Fund Ass'n,* 164 Or 77, 99 P2d 729 (1940) (a teacher who had completed the prerequisite duty entitling him to a pension had a vested contractual right that could not be substantially impaired); *Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or. 445, 453, 510 P2d 339 (1973). Once the offer is accepted by the employee and part performance is tendered sufficient to meet the applicable vesting requirements, the employer cannot unilaterally reduce or eliminate the benefit.

In *Harryman v. Roseburg Fire Dist.*, 244 Or 631, 420 P2d 51 (1966), the Oregon Supreme Court held that an employee was entitled to be paid for unused sick leave at the termination of his employment when the payment was authorized at the time he was employed. The court reached this conclusion even though, subsequent to the employee's hire and during his employment, the District enacted a change discontinuing the payout of unused sick leave. The court held that the employee had accepted employment upon the assumption that the payout for unused sick leave was part of the compensation for his work, and that provision was a part of his contract of employment and could not later be taken away by the employer. *Id.* at 634-35.

The Supreme Court considered a similar issue in the collective bargaining environment in *McHorse v. Portland General Electric Company*, where it considered the contractual nature of a disability plan. The employer ceased paying benefits to an employee who had been previously found to be disabled. The employer claimed that the employee was not actually disabled or, in the alternative, if he was disabled, that it could terminate the plan at will. The court held that:

> "The courts have viewed plans such as these differently, depending on whether or not the plan calls for a contribution by the employee to the plan; however, it would seem that in the situation where the employee has satisfied all conditions precedent to becoming eligible for benefits under a plan, the better reasoned view is that the employee has a vested right to the benefits. This view sees the employer's plan as an offer to the employee which can be accepted by the employee's continued employment, and such employment constitutes the underlying consideration for the promise. *Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or. 445, 510 P.2d 339 (1973); *Ball v. Victor Adding Machine Company*, 236 F2d 170 (5th Cir 1956); *Jacoby v. Grays Harbor Chair & Mfg. Company*, 77 Wash 2d 911, 468 P2d 666 (1970). This approach seems particularly appropriate to the instant case, as here the plan was the result of a negotiated labor

contract. See *Vallejo v. American R. Co. of Porto Rico*, 188 F2d 513 (1st Cir. 1951). Therefore, we view this plan not as a gratuity but as a contract which forms part of the consideration flowing between the employer and his employees." 268 Or 323, 331, 521 P2d 315 (1974)

Here, TriMet made certain promises to Ms. Butler and other similarly situated employees who retired during the hiatus period. The promises were that they would receive, for their lifetime, pension benefits based upon the multiplier that was in effect when they retired. After the interest arbitration award, TriMet retroactively recalculated these benefits and broke those promises, causing a reduction in pension benefits that will continue and even expand based upon the compounding effect of the change to the multiplier. This broken promise violates the prior collective bargaining agreements that the employees retired under, and as a result, TriMet violated ORS 243.672(1)(g).

IV.
TriMet's Retroactive Reductions in Pension Benefits Violated ORS 243.672(1)(e).

TriMet also violated ORS 243.672(1)(e) when it retroactively changed the pension multiplier rates. ATU raised concerns prior to the interest arbitration that TriMet was proposing to reduce the pension multiplier, albeit in a more severe manner than what ultimately ended up occurring. In response, TriMet representatives stated in writing on multiple occasions that it was not proposing a reduction in the current multiplier. These statements were not ambiguous. TriMet Executive Director Stedman wrote that "TriMet neither proposed to change the base amount nor did it propose to reduce the currently applicable amount of $75.15." In keeping with these representations, TriMet produced no testimony or evidence during the arbitration that it was going to retroactively apply its LBO proposals on the multiplier rate. ATU, and presumably the arbitrator, reasonably did not believe that such a retroactive application was part of TriMet's LBO. In fact, TriMet representatives testified that at the time of the interest arbitration, it too was unaware that its own proposal would be implemented retroactively.

These facts support two possible conclusions: (1) TriMet deliberately mislead ATU and the interest arbitrator regarding the retroactive impact of the pension multiplier rate changes; or (2) TriMet was truly unaware that the LBO would be implemented on a retroactive basis, but chose to proceed with the implementation even though it was inconsistent with its representations to ATU and the interest arbitrator. ATU focused the majority of its argument on the allegation that TriMet deliberately mislead it and the arbitrator, but also argued the alternative assertion in its brief. The majority only reviewed whether TriMet deliberately misrepresented its position at the arbitration hearing. I agree with the majority that TriMet did not deliberately misrepresent its LBO proposal at the arbitration, but it seems apparent that it implemented the arbitrator's award in a manner that was inconsistent with its own understanding of its LBO proposal. A party that implements an LBO inconsistently with its original proposal violates ORS 243.672(1)(e). *See Roseburg Education Association v. Roseburg School District No. 4,* Case No. UP-26-85, 8 PECBR 7938, 7956-57 (1985). TriMet could have implemented its pension changes prospectively, consistent its representations before and during the interest

arbitration hearing. It chose instead to implement the LBO retroactively. Accordingly, I conclude that TriMet violated subsection (1)(e) by retroactively reducing the pension multiplier and COLAs for existing retirees.

*Jason M. Weyand, Member