

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-008-13

(UNFAIR LABOR PRACTICE)

INTERNATIONAL BROTHERHOOD OF	)	
ELECTRICAL WORKERS, LOCAL UNION	)	
NO. 659,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
EUGENE WATER & ELECTRIC BOARD,	)	CONCLUSIONS OF LAW,
	)	AND ORDER
	)	
Respondent.	)	
_____	)	

Paul C. Hays, Attorney at Law, Portland, Oregon, represented Complainant.

Jeffery J. Matthews, Attorney at Law, Eugene, Oregon, represented Respondent.

On December 3, 2013, Administrative Law Judge (ALJ) Larry L. Witherell issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. See OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

When parties do not file objections, they fail to preserve challenges to a recommended order and lose the opportunity to present argument to the Board. See OAR 115-010-0090; OAR 115-035-0050(2) and (3)(a); *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 880 (2013) (exercising our discretion to adopt the ALJ’s conclusions where no objections regarding those conclusions were preserved); *Jackson County Sheriff’s Employees’ Association v. Jackson County Sheriff’s Department*, Case No. UP-023-11, 25 PECBR 449, 459 (2013) (as neither party objected to a portion of the ALJ’s conclusions, we considered any objections to that portion of the conclusion waived). Although the Board must issue a final order, we need not draft a completely new order. Thus, where, as here, parties do not file timely written objections to a recommended order, we will exercise our discretion to deem any objections waived and unreserved, and we will

generally adopt the recommended order as our final order. *See Klamath County Fire District #1*, 25 PECBR at 880-81; *see also Fred Meyer Stores v. Godfrey*, 218 Or App 496, 504, 180 P3d 98 (2008) (under ORS 183.482(8)(b), an agency has the authority to establish its own rules regarding preservation of issues, and the circumstances that suffice to constitute adequate preservation are within the province of the agency creating the standards, so long as those standards do not exceed the grant of authority from the legislature to the agency).<sup>1</sup> Our caveat in situations such as this is that the final order is only binding on the named parties, and we will not consider such orders precedential in cases involving other parties.

Despite the lack of any objections to the ALJ's recommended order, which concluded that no unfair labor practice was established, our dissenting colleague disapproves of our approach requiring parties to comply with our longstanding rules concerning objections to a recommended order. *See* OAR 115-010-0090; OAR 115-035-0050(2).<sup>2</sup> Rather, the dissent would have members of this Board act as if objections had been filed whenever a particular member takes issue with a recommended order to which neither party has objected. Presumably, even where a party did file objections, the dissent would have this Board expand those objections as we see fit. For the following reasons, we do not believe the dissent's approach to be a wise one.

To begin, our approach honors our longstanding rule that parties have 14 days to file specific written objections to a recommended order. Under the dissent's approach, that rule is rendered meaningless because everything is preserved for our review, regardless of whether any objections, timely or untimely, are filed. We see little purpose in requiring parties to object to a recommended order (as our rules require), and then essentially telling the parties that there is no need to file any objections because everything is purportedly "fair game" on Board review. Indeed, such an approach undermines a fundamental principle of a preservation requirement, which is to promote fairness to both parties in making and responding to arguments.

The dissent proposes to cure this lack of fairness by "providing the parties with notice of the Board's concerns" whenever the Board is contemplating a possible reversal of an

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<sup>1</sup>In *Fred Meyer Stores*, the "preservation" rule at issue was announced in an adjudication of a workers' compensation claim, rather than through the formal rulemaking process. "Agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both." *Trebesch v. Employment Division*, 300 Or 264, 273, 710 P2d 136 (1985). *Accord Centennial School Dist. No. 28J v. BOLI*, 169 Or App 489, 508, 10 P3d 945 (2000). As we explained in *Klamath County Fire District #1*, we long ago adopted rules requiring that objections to a recommended order be filed and served on other parties within 14 days. As also explained in that case, we have authority under ORS 243.766(3) to "[c]onduct proceedings on complaints of unfair labor practices \* \* \* and take such actions with respect thereto as [we] deem[] necessary and proper." Consistent with our rules and the discretion afforded to us by statute, we generally (in the absence of good cause shown) will require a party to file timely objections to a recommended order in accordance with our rules in order to preserve any challenges to such an order.

<sup>2</sup>Our dissenting colleague notes that he is unaware, with exceptions noted, of this Board taking the approach in this case. We are similarly unaware of any prior Board taking the position advocated by the dissent—namely, reversing the conclusions of a recommended order despite no party filing any objections to that order.

unobjected-to recommended order. We would then, according to the new process advanced by the dissent, entertain “additional briefing and oral argument on the issues” that no party has objected to. Although acknowledging that “this approach would certainly add time to the process,” that consequence is of little concern to the dissent because we will be “providing the parties with the opportunity to be heard on the issues [before] a decision.”<sup>3</sup>

The dissent overlooks that the parties already have been provided “with the opportunity to be heard” on any and all issues contained in a recommended order. The parties have elected to forego any further opportunity by not filing any objections. The dissent, however, would have this Board express its dissatisfaction when litigants choose not to file objections to a recommended order by effectively having this Board act as if objections had been filed on behalf of one (or conceivably even both) of the parties. We do not believe this to be a proper role for this Board.

Moreover, this Board exists to resolve disputes. Where, as here, both parties in a contested case have elected not to file any objections to a recommended order, they have effectively indicated that they are satisfied with the resolution of their particular dispute. In our view, the dispute is resolved. It is not the role of this Board to continue “resolving” a dispute where the parties have indicated that one no longer exists.<sup>4</sup>

Additionally, we are not, as the dissent characterizes it, merely “reticent to disturb a recommended order’s outcome when neither party objects.” Rather, finding no objection to the order of the ALJ, we are adopting that order, with the understanding that neither party has preserved any challenge to that order. As previously described, we believe that we have the authority to establish our own rules regarding preservation of issues, so long as the standards do not exceed the grant of authority from the legislature to the agency. *See Fred Meyer Stores*, 218

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<sup>3</sup>Although the dissent suggests that we should “at a minimum, engag[e] in a formal rulemaking process” before following our already existing rule requiring parties to timely object to a recommended order, the dissent’s unprecedented approach presumably requires no such “formal rulemaking process.”

<sup>4</sup>The dissent’s approach (which advocates effectively reversing an uncontested recommended order) presents additional problems. To begin, a party who prevailed in a recommended order is not aggrieved and therefore would not be objecting to that order. Under our current rules, if the nonprevailing party also does not file objections, there will be no oral argument and no opportunity (or reason) for the prevailing party to advocate why the recommended order should be adopted. Under the dissent’s approach, it is entirely proper for this Board to then switch the prevailing and nonprevailing parties. As a matter of fairness, we do not agree with this approach, nor do we believe that the dissent’s purported “answer” to this issue is compelling.

Additionally, this Board routinely tells parties at oral argument that we will not consider any issues that have not been objected to. We believe that it is inconsistent to hold parties who have complied with our rules (by filing timely objections) to a stricter standard than those who have expressly decided not to file any objections. Under the dissent’s approach, a party who files timely objections is foreclosed from raising any non-objected-to issue before this Board, yet a party who has chosen not to object at all effectively preserves any potential issue for our review. We fail to see the wisdom of such an approach.

Or App at 504; *see also* ORS 243.766(3). Indeed, it is not uncommon for agencies to establish such rules (*see Fred Meyer Stores*) or for appellate courts to do so (*see* ORAP 5.45). To the extent that the dissent is suggesting that those administrative and judicial bodies are eschewing their obligations merely by requiring parties to identify any objections or exceptions to an underlying order, we disagree.

The dissent has also identified “several practical concerns” about our approach. First, with respect to these parties, the dissent contends that this order has not provided the parties with a resolution to the question presented. To the contrary, we have issued a final order adopting the recommended order as our own and dismissing the complaint in the absence of any objections to that order. The dissent asserts that although “the legal case may be over, the underlying dispute may not be resolved conclusively.” This assertion identifies a fundamental misconception about what this Board does. The “legal case” *is* the “dispute” that we are asked to resolve. Thus, when the “legal case” is over, so is the “dispute,” as far as this Board is concerned.<sup>5</sup>

We also take issue with the dissent’s broad swipe that by requiring parties to follow our rules concerning objections, we are doing “little to promote labor peace.” We are puzzled as to how our approach somehow disturbs “labor peace,” as we are unaware of any labor unrest resulting from our approach.

The final point of the dissent merits little discussion. Respectfully, we disagree that the majority’s approach is going to result in “decreased agency efficiency.” To the contrary, we submit that the efficiency of the agency will be increased.

In sum, we believe that the approach we have taken provides optimum fairness to both parties, effectively uses our administrative resources, and honors our longstanding rules. We disagree with the dissent’s contrary belief.

#### ORDER

1. The Board adopts the recommended order as the final order in this matter.<sup>6</sup>

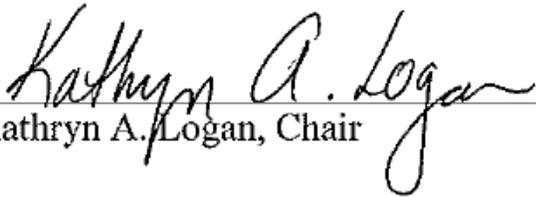
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<sup>5</sup>We have limited the precedential effect of this order to the parties in this proceeding. The dissent believes that, by proceeding in this fashion, we are foregoing a teaching moment for other potential litigants. We see little problem with certain cases being limited to the parties involved in a dispute—not every case needs to provide “precedent” for other parties; we have plenty of cases that do precisely that.

<sup>6</sup>Because this case will be afforded no precedential value beyond these parties, we do not believe that publication of the recommended order would benefit the bar or the public.

2. The amended complaint is dismissed.

DATED this 14 day of January 2014.

  
Kathryn A. Logan, Chair

\*Jason M. Weyand, Member

  
Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Weyand Dissenting

I respectfully disagree with my colleagues that the complaint should be dismissed. To the contrary, I would conclude that the Respondent violated ORS 243.672(1)(e) by refusing to bargain with the Complainant. However, due to the procedural approach taken by the majority, and the clear declaration that this order has no precedential value outside of the parties, I will forego an extended discussion of the underlying merits as it would serve little purpose. Instead, I write to address my concerns about the procedure by which the majority reached their decision.

In their order above, my colleagues chose to adopt the recommended order's dismissal of the amended complaint without expressly agreeing with or incorporating the ALJ's analysis. Instead, they summarily adopt the recommended order because they deem any objections to that outcome waived or unreserved.<sup>7</sup> The majority also announced that the final order would have

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<sup>7</sup>In two recent cases, *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 459 (2013), and *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871 (2013), we adopted only a portion of the ALJ's underlying legal conclusions without incorporating or approving of the analysis itself based on the parties' failure to object to those conclusions. Despite my reservations about taking this approach, I joined in the opinions because the ultimate conclusions of law in those cases were in my opinion correct. My concerns were reflected in footnote 7 of *Klamath County Fire District #1*, which noted that I would have incorporated an analysis expressly finding that the subjects at issue were mandatory for bargaining rather than applying the preservation standard to reach our decision. *Id.* at 880. These two decisions are now being cited in support of the process from which I am dissenting. If it were possible to take a mulligan on those decisions, I would certainly do so and instead of joining the majority in this aspect of the decisions, I would write a concurrence noting my concerns.

no precedential value outside of the parties to the case. To my knowledge, other than the two cases cited above, this approach has never been taken by the Board in a contested case proceeding. For a variety of reasons, I do not believe that this practice is one in which this Board should engage absent a legislative change or, at a minimum, engaging in the formal rulemaking process.<sup>8</sup>

As an initial matter, I agree that, consistent with our rules, we may conclude that a party has waived its ability to raise arguments challenging the recommended order's conclusions if it fails to file timely objections. Should a party file untimely objections, we can clearly refuse to consider those objections. Where I part ways with the majority is in our view of what the Board's role should be if neither party objects to a recommended order, particularly in cases where there are questions about the validity of the legal conclusions contained in the recommended order. The majority believes it appropriate to adopt recommended orders on a non-precedential basis as set forth above, at least in certain cases. In cases where a recommended order is free from clear legal errors, I agree that we should adopt it as our final order if neither party objects. However, in those cases, I would continue to adhere to our historical practice of adopting the recommended order in its entirety and have that final order serve as future precedent.

Unlike the majority, however, I believe that we can and should modify clear legal errors in a recommended order even if no objections are filed. This approach could result in this Board making small modifications to a recommended order's legal analysis that do not disturb the ultimate outcome of the case, as is the current practice, or it could result in the Board reversing an ALJ's ultimate conclusions if the legal error is significant. My colleagues are understandably reticent to disturb a recommended order's outcome when neither party objects. But it is the three members of this Board who sign the final orders, and who are vested with the ultimate responsibility to ensure that cases are decided in a manner consistent with the Public Employee Collective Bargaining Act (PECBA). We are an agency of the State of Oregon and a quasi-judicial body. As such, I believe that we have an obligation to take every reasonable step we can to ensure that final orders we issue apply the PECBA correctly, regardless of whether a party files an objection to a recommended order.

If a recommended order were issued tomorrow that erroneously determined that a prohibited subject of bargaining was mandatory, then held that a public employer or labor organization violated the PECBA by refusing to bargain over that subject, I believe it would be incumbent on this Board to correct that legal error, even if, for whatever reason, neither party filed objections. Likewise, if a recommended order were issued dismissing a complaint after erroneously holding that a clearly mandatory proposal was permissive, I believe we would be obligated to correct the legal error when issuing our final order. Given the quality of our ALJs and most parties' willingness to file objections to conclusions of law with which they do not agree, this type of situation is unlikely to occur with any frequency. However, I personally cannot embrace a process that would result in Board members signing their names to final orders

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<sup>8</sup>While we may have the legal authority to make this type of change via the contested case process, I do not believe that we should. Utilizing the formal rulemaking process would provide this Board the opportunity to hear from the public and the parties that appear before us on the pros and cons of such a change, as well as the opportunity to discuss alternative processes, including the process I have suggested below to deal with non-objector cases that may contain clear legal errors.

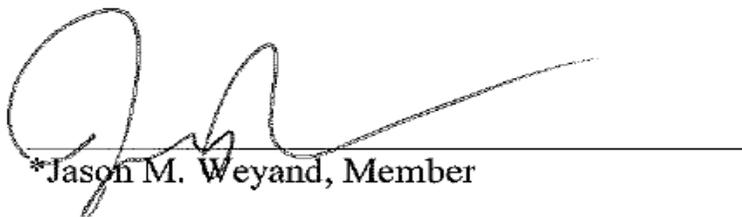
adopting recommended orders that they believe to be inconsistent with the PECBA. I believe that the Board has the authority to correct legal errors even absent objections from the parties, and should exercise that authority in cases such as the one before us today.

In cases where such a reversal is a possibility, I would provide the parties with notice of the Board's concerns and afford them an opportunity to submit additional briefing and offer oral argument on the issues. Although this approach would certainly add time to the process, it would ensure that the Board's final orders apply the PECBA correctly while still providing the parties with the opportunity to be heard on the issues prior to a decision.

I also have several practical concerns about the overall utility of the final order in this case. First, this order does not provide the parties with a resolution to the question of whether the Respondent was obligated to bargain over the subject at issue in the complaint. While the legal case may be over, the underlying dispute may not be resolved conclusively because the case was ultimately decided on a matter of procedure rather than on the merits. In my opinion, such a procedural victory for one party does little to promote labor peace. Also, this non-precedent setting case is by definition incapable of providing other parties that might be on the verge of a similar dispute with guidance that might help them avoid litigation. Nor does it inform the ALJs whether the Board found the recommended order's analysis correct or whether we disagreed with it. Should they be faced with the same issue a second time, instead of having clear precedent to follow, they will instead need to reinvent the wheel, resulting in decreased agency efficiency. I believe our traditional final orders that fully set forth the basis for our decision and the applicable legal analysis are better suited to the needs of the parties, the ALJs, and by extension, the public.

My colleagues disagree, characterizing their chosen approach as merely requiring adherence to our rules setting timelines for filing objections. They further claim that under my approach these rules would be "rendered meaningless," and parties would have no reason to file objections. I disagree. I do not believe that my approach or the majority's approach is inconsistent with the rules or renders them meaningless. The rules cited simply require the parties to file objections within 14 days of the recommended order's issuance. If no objections are filed within that time, the Board *may* disregard any late filed objections in making our final determination on the case. Nothing in these rules prohibit the Board from considering legal errors not raised in the objections of the parties. The only limitations set forth under our rules on the scope of our review of a recommended order are contained in OAR 115-010-0095(3) and OAR 115-035-0050(3)(c), which state that we may only consider information contained within the record.

For these reasons, I do not see any compelling reason to adopt the process put forward by the majority. Therefore, I cannot join my colleagues in the decision above, and I respectfully dissent from the order.



\*Jason M. Weyand, Member