

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-11

(UNFAIR LABOR PRACTICE)

JACKSON COUNTY,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
JACKSON COUNTY SHERIFF'S	)	CONCLUSIONS OF LAW,
EMPLOYEES' ASSOCIATION,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on August 12, 2012, after a hearing held on October 25, 2011, in Salem, Oregon. The record closed on November 17, 2011, following receipt of the parties' post-hearing briefs.

Joel C. Benton, Jackson County Senior Assistant County Counsel, Medford, Oregon, represented Complainant Jackson County.

Becky Gallagher, Attorney at Law, Fenrich and Gallagher, PC, Eugene, Oregon, represented Respondent Jackson County Sheriff's Employees' Association.

On April 28, 2011, Jackson County (County) filed this unfair labor practice complaint alleging that the Jackson County Sheriff's Employees' Association (Association) violated ORS 243.672(2)(b) by refusing to bargain for a successor contract after the County proposed splitting a mixed bargaining unit of employees in the Jackson County Sheriff's Department. The Association filed a timely answer.

The issues presented for hearing are:

1. Did the Jackson County Sheriff's Employees' Association refuse to bargain in good faith over Jackson County's proposal to separate a mixed unit of strike-permitted and strike-prohibited employees? If so, did this violate ORS 243.672(2)(b)?
2. If the Association violated ORS 243.672(2)(b), should a civil penalty be imposed pursuant to ORS 243.676(4)?

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a mixed bargaining unit of approximately 134 strike-prohibited and strike-permitted corrections, criminal, and traffic deputies; criminal, corrections, and civil records clerks; criminal data technicians; and court security officers employed in the Jackson County Sheriff's Department. The County is a public employer.
2. The Association and County were parties to a collective bargaining agreement (Agreement) in effect from July 1, 2008 to June 30, 2011. Human Resources Director Anthony (Tony) Keller was the County's lead negotiator and designated representative for the successor contract negotiations. Rhonda Fenrich was the Association's legal counsel and its designated representative.
3. On April 26, 2011, the parties met for their first bargaining session, which was scheduled to last approximately two to three hours.
4. Following approval of the ground rules, Fenrich began reading the Association's list of proposals, which the parties had previously exchanged. Keller then read from a prepared statement which, among other things, stated that the County intended to negotiate two separate contracts—one for the strike-prohibited and one for the strike-permitted members of the unit.
5. Surprised by this statement, Fenrich twice asked Keller if he was conditioning further bargaining on dividing the unit, but Keller did not answer the question directly. Instead, he repeated his statement that the County intended to negotiate two separate contracts for these employees and that if the Association did not agree, it would petition this Board to do so.
6. All bargaining team members present understood Keller to state that he intended to bargain two separate contracts for the strike-prohibited and strike-permitted members of the bargaining unit. Of the people present, only Fenrich took contemporaneous notes, which report

Keller as stating that they would “file a petition with ERB if we don’t agree to negotiate separate contracts.”

7. When Keller did not directly answer Fenrich’s question, she construed his silence to mean that the County was conditioning further bargaining on dividing the unit. At that point, the Association’s bargaining team exited the meeting. On her way out, Fenrich asked County Attorney Joel Benton to let her know if the County changed its position. The entire session lasted approximately six or seven minutes.

8. On May 2, 2011, following six days of no communication between the parties, Keller contacted Fenrich by e-mail, which initiated a series of exchanges. Keller wrote

“Rhonda -

“In light of your refusal to bargain any further with Jackson County, I wanted to reaffirm what I stated at the bargaining table last week: Jackson County is not conditioning bargaining on splitting JCSEA into two separate bargaining units. Jackson County has [sic] setting forth its initial proposal - a very small part of which is for two bargaining agreements with JCSEA, one covering the strike-prohibited employees and one covering the strike-permitted employees. The County’s initial proposal contained many other proposals on a wide range of topics related to employment relations. Additionally, in the spirit of good faith bargaining, the County also wanted to be upfront with JCSEA about its legal rights under PECBA. If and when JCSEA decides it wants to end its refusal to bargain with the County, the County remains ready and willing to resume bargaining on the aspects of its initial proposal and the initial proposal presented by JCSEA \* \* \*.”

Fenrich responded later that day

“Tony -

“You have misrepresented JCSEA’s position regarding negotiations. I stated we were done bargaining if you were conditioning bargaining on the division of the contract between differing members in our duly certified and recognized bargaining unit. Your statement that if we did not agree to bargain two separate agreements that the County would be seeking a division of our bargaining unit is conditioning bargaining on such a division. I asked County Counsel Joel Benton to let me know if the County was going to persist with conditioning bargaining on a separate agreement for our sworn and non-sworn members.

“As you are aware this bargaining unit was certified over 20 years ago as a wall to wall unit including both strike prohibited and strike permitted employees. We will not agree to a separate collective bargaining agreement for this single bargaining unit.

We will also not agree to separating this historic bargaining unit into two separate units and see no precedent whatsoever for ERB doing so on an employer's motion where the Board has previously determined the mixed unit to be appropriate for the jurisdiction.

"We are more than willing to return to the table but will not agree to separate contracts for our members. We are fully aware of our legal rights under PECBA, including the right to bargain and arbitrate a single contract on behalf of all of our members, including those issues which are strictly related to the non-sworn members of our Association.

"Thus, if you are not conditioning bargaining on the separation of the contract between our sworn and non-sworn members please provide me with dates when your team is ready to commence bargaining."

On May 3, 2011, Keller replied

"Rhonda -

"At no point did I state that the County was absolutely conditioning bargaining on the division of the bargaining unit into two contracts. I was very clear that this issue was merely a part of the County's initial proposal. Furthermore, at no point did I state that the County would absolutely seek the division of the bargaining unit with the ERB if negotiations failed to achieve two contracts for the bargaining unit. I know exactly what I said on this point because I stated to the Association that I was reading from a prepared text on the this subject \* \* \* ."

Fenrich responded

"We will have to disagree about what was said. However, I will give these dates to my team \* \* \* ."

On May 6, 2011, Keller wrote

"Rhonda

"Thank you for the opportunity to clarify this point for you. I hope that by providing some specific examples I can help you avoid accidentally running aground of an unfair labor practice:

- "• If you want to talk to any member of the bargaining team about the weather, the chances for the ducks this year, the fishing report, politics in Salem, pending legislation, etc. - please feel free.

- “• If you want to discuss something related to our Collective Bargaining Agreements, pending demands to bargain, or whether we are ‘conditioning bargaining’ (the operative word being ‘bargaining’), then you are to exclusively communicate with me.

“Thank you again for allowing me to clarify our expectations on this point of representation. Thank you for sharing your statement regarding your bargaining stance on the two separate agreements. With regard to upcoming bargaining sessions, we will continue to discuss our proposal in terms of two separate agreements and the new numbering structure of the proposed agreement.

“We look forward to receiving your new dates for bargaining soon.”

9. Keller waited six days to initiate contact with the Association because he had never had a bargaining representative refuse to bargain. Shortly thereafter, the parties resumed bargaining and, during the ensuing 150 days, met approximately six times without reaching a new Agreement. Keller did not attend at least two of the bargaining sessions, but sent his deputy, Eric Serra, to represent the County.

10. On September 20, 2011, the County filed a Redesignation Petition pursuant to ORS 243.682(1) and OAR 115-025-0000(1)(e), seeking to divide the bargaining unit into two separate units.

11. On September 23, 2011, the Association declared impasse and the parties entered mediation.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Association did not violate ORS 243.672(2)(b) when it refused to bargain based on its understanding that the County was conditioning bargaining on the division of a mixed unit into two separate bargaining units.

#### DISCUSSION

As the complainant in this case, the County bears the burden of going forward with the evidence and proving the matters asserted. ORS 183.450(2). We review the claims under a preponderance of evidence standard, meaning that the facts are more likely true than false. *Gallant v. Board of Medical Examiners*, 159 Or App 175, 180, 974 P2d 814 (1999); *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case No. UP-68/69-91, 15 PECBR 115, 118 (1994).

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization or its designated representative to “[r]efuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative.” The County alleges the Association violated ORS 243.672(2)(b) when the Association’s bargaining team walked out of their initial bargaining session and refused to bargain any other proposals. The Association contends that it reasonably construed Keller’s statements to mean that the County was conditioning further bargaining on dividing this longstanding mixed unit over its objections.

This Board distinguishes between mandatory, permissive, and prohibited subjects of bargaining, and has defined the parties’ obligations to bargain over and agree to proposals which fall into these categories. The parties may not reach agreement on a prohibited subject of bargaining. The parties may negotiate, but are not required to negotiate or reach agreement on, a permissive subject of bargaining. The parties must negotiate, but need not agree to, a mandatory subject of bargaining. *In the Matter of Redmond School District 2J v. Redmond Education Association*, Case No. C-154-77, 3 PECBR 1564, 1570 (1977). A proposal to change the composition of a bargaining unit concerns a permissive subject for bargaining. *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman, v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 765 (2007). While it is not *per se* unlawful to make proposals on permissive subjects, a party acts illegally if it conditions settling the agreement over a permissive subject and over the other party’s objection. *Bend Police Association v. City of Bend and City of Bend v. Bend Police Association*, Case Nos. UP-44/48-03, 20 PECBR 611, 630 (2004); citing *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9486 (1987).

When examining a refusal to bargain, we first determine whether the refusal was so inimical to the negotiation process that it constitutes a *per se* violation of the good faith bargaining duty. If we do not find a *per se* violation, we next evaluate a party’s actions under the totality of the circumstances test we use to determine bad faith surface bargaining. *International Association of Firefighters Local #1431 v. City of Medford and City of Medford v. International Association of Firefighters #1431*, Case Nos. UP-32/35-06, 22 PECBR 198, 209 (2007). In applying the totality of conduct standard, we analyze multiple factors, including (1) dilatory tactics; (2) contents of proposals; (3) behavior of the party’s negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Id.* at 207.

Here, we do not find, nor does the County assert, a *per se* violation of the Association’s duty to bargain in good faith. We next evaluate the Association’s conduct under the totality of the circumstances. We find that the Association’s refusal to bargain was not based on dilatory or obstructionist tactics, but on a mistaken belief that the County was conditioning further bargaining on dividing the unit. Surprised by the County’s proposal, Fenrich twice asked Keller if the County was conditioning further bargaining on dividing the unit, but he did not deny the question or further clarify his comments. At that point, Fenrich concluded the County was doing exactly that and informed Keller that the Association would not agree to this condition. On the way out of the bargaining room, she asked the County’s attorney to let her know if the County changed its mind.

The Association's refusal to continue bargaining was based on a misunderstanding, but it was a misunderstanding that was immediately conveyed to the County and entirely within the County's purview to correct. When the County clarified that it was not conditioning further bargaining on dividing the unit, the parties promptly resumed bargaining. Under these facts, we cannot conclude that the Association's refusal undermined the bargaining process. The County argues that valuable bargaining time was lost due to the delay caused by the Association's refusal to bargain, but it presented no credible evidence to suggest that six extra days of bargaining would have made any difference in the outcome of the parties' negotiations.

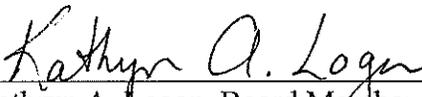
Based on the totality of these circumstances, we conclude that the County did not meet its burden of proving the Association violated its duty to bargain in good faith. Accordingly, we will dismiss the complaint.

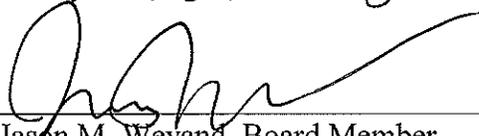
ORDER

The complaint is dismissed.

DATED this 5 day of November, 2012.

  
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Susan Rossiter, Chair

  
\_\_\_\_\_  
Kathryn A. Logan, Board Member

  
\_\_\_\_\_  
Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.