

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-31-12

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES	)	
INTERNATIONAL UNION, LOCAL 503,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON,	)	CONCLUSIONS OF LAW,
DEPARTMENT OF REVENUE,	)	AND ORDER
	)	
Respondent.	)	
_____		

On May 15, 2012, the Service Employees International Union, Local 503 (Union) filed this unfair labor practice complaint against the State of Oregon, Department of Revenue (Department). The complaint, as amended on August 30 and September 4, 2012, alleges that the Department violated ORS 243.672(1)(g) by failing to comply with the terms of the September 1, 2011 Settlement Agreement (“Settlement Agreement”) between the parties. The Department filed a timely answer to the complaint.

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on October 26, 2012, in Salem, Oregon. The record closed on December 24, 2012, following receipt of the parties’ post-hearing briefs. The ALJ issued a recommended order on March 4, 2013, and on June 11, 2013, the Board heard oral arguments on Complainant’s objections to the recommended order.

Michael J. Tedesco and Nicole L. McMillan, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Complainant at hearing. Christy Te, Attorney at Law, SEIU Local 503 OPEU, Salem, Oregon, represented Complainant at oral argument.

Lisa M. Umscheid, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent.

## ISSUES

The issues are:

1. Did the Department violate the Settlement Agreement and ORS 243.672(1)(g) by:
  - a. failing to compensate employee Charles "Sonny" West at 0.5 times his regular rate of pay for hours travelled on Sunday, March 22, 2009;
  - b. failing to compensate Corporation and Cigarette Tax Auditors employed by the Department (Grievants) for meal periods during overnight travel between January 2009 and September 1, 2011, and thereafter;
  - c. failing to compensate former employees Paul Kraft, Scott Schlag, Ben Blanco, Penny Rath, and Will Traub for meal periods during overnight travel between January 2009 and September 1, 2011; or
  - d. requiring Grievants to flex their work schedules before going on overnight travel after September 1, 2011?
2. If the Department violated ORS 243.672(1)(g), what is the appropriate remedy?

## SUMMARY OF THE DECISION

For the reasons discussed below, this Board concludes that the Department breached the Settlement Agreement in violation of ORS 243.672(1)(g) by: (1) failing to compensate employee West at 0.5 times his regular rate of pay for 10.5 hours of time he worked on Sunday, March 22, 2009; (2) failing to compensate Grievants for meal periods during overnight travel for the time period between January 2009 and September 1, 2011 and thereafter; and (3) failing to compensate former employees for meal periods during overnight travel that they worked before leaving the Department. We also conclude that the Department did not require employees to flex their work schedules in violation of the Settlement Agreement and ORS 243.672(1)(g).

## RULINGS

The rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The Union is a labor organization as defined by ORS 243.650(13) and the exclusive bargaining representative of a group of State employees, including those working in the Department. The Department is a public employer as defined by ORS 243.650(20).

### Relevant Collective Bargaining Agreement Language

2. The Department and the Union were parties to a series of collective bargaining agreements (CBAs) effective July 1, 2007 through June 30, 2009; July 1, 2009 through June 30, 2011; and July 1, 2011 through June 30, 2013.

3. Article 90.5, Section 4 of the parties' CBAs provided for employees to be granted an unpaid meal period of at least 30 minutes normally scheduled in the middle of their shift. In addition, it required that the Department count an employee's entire shift as time worked if the Department required the employee to work a full shift without a lunch period.

4. Under Article 32 of the CBAs, which is entitled "OVERTIME," employees are entitled to overtime pay at the rate of one-and-one-half time for "time worked" in excess of eight hours per day or 40 hours per week. "Time worked" is defined as "[a]ll time for which an employee is compensated at the regular straight time rate of pay, except on-call time and penalty payment(s) \* \* \* but including holiday time off, compensatory time off, and other paid leave \* \* \*." At times relevant to this complaint, the Department compensated employees for overtime by crediting them with compensatory time at the overtime rate rather than the payment of wages.

5. Article 21 of the parties' 2011-2013 CBA establishes a multi-step dispute resolution process that begins with a grievance and terminates in binding arbitration. A grievance under that process is defined as "acts, omissions, applications, or interpretations alleged to be violations of the terms or conditions of this Agreement."

6. The Department employs corporate tax auditors (auditors) who are represented by the Union. During some corporate audits, the auditors travel to a corporation's out-of-state headquarters to interview necessary managers and review documents. The auditors work directly with the corporation to schedule the time the out-of-state audit will be conducted based on the availability of the necessary corporation staff and the auditors' schedules and travel preferences. Auditors may combine an out-of-state audit trip with a personal trip. Auditors must seek approval from their supervisors regarding their travel arrangements before taking the out-of-state trip.

7. Auditors record their hours worked on monthly time sheets. A time sheet reflects the number of hours an auditor records as worked each day, but does not show whether the auditor included or deducted meal break time from the hours recorded for out-of-state travel days.

8. Joe DiNicola has been employed by the Department in an auditor position since 1991. From 1991 through 2004, DiNicola included meal break time as hours worked on his time sheet for the days he traveled for an out-of-state audit. From 2004 through 2008, DiNicola took a leave of absence from the Department to serve as the Union's state-wide president.

9. On October 24, 2005, Corporate Audit Program Manager Janielle Lipscomb responded to a question from an auditor regarding whether auditors were required to deduct meal break time from their out-of-state travel time. The auditor had indicated that some auditors were doing this and some were not. In her e-mail response to the entire audit staff, Lipscomb provided

a citation to Bureau of Labor and Industries (BOLI) Administrative Rule OAR 839-020-0050<sup>1</sup> and notified staff members that Department Human Resources Manager Kimberley Dettwyler had stated “any time we pay someone’s salary, they are considered to be ‘working.’ As such, when someone works 6 or more hours in a day, we MUST give them a lunch period. Under law, we are not allowed to give them permission to skip their lunch period.” (Emphasis in the original.) Because DiNicola was not an audit staff member at this time, he did not receive this e-mail.

10. After DiNicola returned to the Department in 2008, he followed his prior practice of including meal break time as hours worked on his time sheet for the days he traveled to an out-of-state audit.

11. Before March 3, 2009, auditors normally worked their regular 40-hour schedule during the week before an out-of-state audit, traveled on Sunday to the audit location, conducted the audit Monday through Thursday, and traveled back to Oregon on Friday.<sup>2</sup> Auditors received overtime compensation for their Sunday travel time. Under the CBA, auditors could request to work fewer hours the week before they traveled to adjust for the overtime hours during the Sunday travel.

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<sup>1</sup>OAR 839-020-0050 provides, in relevant part:

“(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.

“(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

“(c) An employer is not required to provide a meal period to an employee for a work period of less than six hours. When an employee’s work period is more than eight hours, the employer shall provide the employee the number of meal periods listed in Appendix A of this rule.

“(d) Timing of the meal period: If the work period is seven hours or less, the meal period is to be taken between the second and fifth hour worked. If the work period is more than seven hours, the meal period is to be taken between the third and sixth hour worked.

“\* \* \* \* \*

“(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods.”

<sup>2</sup>Although the parties distinguished between employees who normally worked a regular schedule (8 hours per day, 5 days per week) and those who normally worked an alternate schedule (such as 10 hours per day, 4 days per week), we use the term regular schedule in this order to include any weekly schedule the employee normally worked.

12. On March 3, 2009, the Department began requiring auditors that were traveling on a Sunday to reduce their prior week's regularly scheduled hours by an amount necessary to avoid overtime compensation for the Sunday travel.

13. On March 9, 2009, DiNicola filed a grievance alleging that the Department violated numerous articles in the parties' CBA by requiring him to limit his work schedule in the week before his Sunday travel to an out-of-state audit. DiNicola did not allege a violation of Article 90.5, Section 4, which addressed meal breaks, or refer specifically to meal break time in the grievance.

14. Before March 12, 2009, the Department compensated auditors for all overnight travel time, except for meal break time, even when the travel time exceeded their normal 8-hour or 10-hour work day. On March 12, the Department began directing auditors to only record on their time sheets the hours on out-of-state travel days that "cut across" their scheduled work day, pursuant to BOLI Administrative Rule OAR 839-020-0045(5).<sup>3</sup> Under the "cut across" rule, if an employee works a regular schedule of eight hours per day, the employee can only record up to eight hours of work on a travel day even if the employee traveled for more than eight hours. After the implementation of the "cut across" rule, DiNicola no longer included meal break time during overnight travel as hours worked on his time sheet.

15. In April 2009, the Union demanded to bargain over the Department's implementation of the "cut across" rule.

16. From May 28, 2009 through November 25, 2009, the Union filed seven group grievances alleging that the Department had violated the CBA by only compensating Grievants for time that "cut across" their normal work hours, rather than for all hours worked while in overnight travel status, and requiring Grievants to alter their 40-hour work schedules during the week before overnight travel. The grievances alleged a violation of Article 90.5 Work Schedules, Sections 2 and 3, as well as numerous other articles in the CBA. The grievances did not specifically allege a violation of Article 90.5, Section 4, which addresses meal breaks, or specifically directly refer to meal break time.

17. DiNicola was the Union representative responsible for processing the eight grievances. At Step 2 of the grievance process, Department Director Elizabeth Harchenko asked

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<sup>3</sup>BOLI Administrative Rule OAR 839-020-0045(5) provides:

"(5) Travel away from the home community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is work time when it cuts across the employee's workday. The employee is substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Time that is spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time."

DiNicola what practices the Union was alleging the Department had changed. DiNicola explained that employees were no longer being compensated for travel hours that did not “cut across” the work schedule, including meal break time. Harchenko acknowledged the Department’s practice had been altered and that it was not longer compensating for all hours of travel.

18. On September 4, 2009, the Union filed an unfair labor practice complaint (the Cut Across ULP) against the Department alleging that the “cut across” rule constituted an unlawful unilateral change in violation of ORS 243.672(1)(e). After the Cut Across ULP was filed, the Department and Union engaged in midterm bargaining, but failed to reach agreement. During bargaining, the Department’s representative was Tom Perry, State Labor Relations Manager with the Department of Administrative Services (DAS). During the negotiations, Perry told the Union team, which included DiNicola, that he wanted to resolve all issues related to the Cut Across ULP and the grievances during bargaining. Meal breaks were discussed several times during the bargaining meetings.

19. In October 2009, DiNicola notified Department employees that the Union had proposed that the Department “should continue its past practice of compensating employees for all travel hours, with one exception. We proposed that while in travel status to a temporary work location, employees would be required to deduct an unpaid meal break - - whether or not the employees actually had an opportunity to take such a break.”

20. At the conclusion of bargaining, the Department implemented its last proposal, under which the “cut across” rule would apply to all out-of-state audit travel effective January 8, 2010. Auditors were retroactively compensated for all out-of-state travel hours, except meal break time, from March 2009 through January 7, 2010. In January 2010, the Department retroactively compensated Auditor West for four hours worked on March 22, 2009, at the 1.5 overtime rate, for a total credit of six hours compensatory time.

21. On March 5, 2010, the Union withdrew the Cut Across ULP complaint because the Department had implemented the remedy that it had requested.

22. On May 10, 2010, Union Attorney Joel Rosenblit, HR Manager Dettwyler, and Labor Relations Manager Perry signed a document setting out the key provisions in the settlement of the eight grievances. One provision required the Department to retroactively compensate auditors for all hours in travel status from January 8, 2010, until the compensatory time was reinstated. For reasons not relevant here, the Union subsequently refused to sign a final settlement document incorporating the key provisions and demanded to arbitrate the grievances. The Department, which believed a settlement agreement had been reached, implemented the key settlement provisions and refused to go to arbitration. The Union then filed a ULP alleging a refusal to arbitrate, which the parties subsequently resolved by agreeing to submit the eight grievances to arbitration.

23. On November 5, 2010, Lipscomb sent the tax auditors who reported to her a reminder that during travel days they needed “to take into account a 30 minute unpaid meal period for any time worked over 6 hours.”

24. Before the September 1, 2011 grievance arbitration hearing, the Department's attorney, Sylvia Van Dyke, discussed the grievances with Marc Stefan or Michael Tedesco, who were attorneys representing the Union. Van Dyke told either Stefan or Tedesco that one option the Department was considering was to not alter the schedules the week before travel, but to impose a process under which the Department would compare the overtime travel cost with the per diem travel cost and require the employee to stay over the weekend if the per diem cost was less. Tedesco or Stefan told Van Dyke that DiNicola did not think it was likely that the Department would take this approach.<sup>4</sup>

#### September 1, 2011 Arbitration and Settlement

25. On August 30, 2011, Van Dyke and the Union's attorney, Naomi Loo, exchanged, but were unable to agree on, the arbitration issue statements. Although using different wording, both Loo's and Van Dyke's arbitration issues addressed whether the Department could (1) require auditors to alter their schedules the week before travel without an employee's consent, and (2) compensate employees for travel time only for hours that "cut across" an employee's normal work hours.

26. On September 1, 2011, Arbitrator Sylvia Skratek convened the arbitration hearing on the eight grievances. The Union was represented by attorneys Tedesco and Loo. DiNicola was also present. The Department was represented by Van Dyke. Neither Tedesco nor Van Dyke specifically mentioned meal break time in their opening statements. After the parties concluded their opening statements, at the arbitrator's suggestion, they recessed the hearing and engaged in settlement discussions.

27. Van Dyke initially met separately with Tedesco and asked whether the Union would entertain a settlement in which the Department agreed to rescind its "cut across" rule and recognize all hours auditors actually spent traveling, as long as any settlement was non-precedent setting and was limited to the issues raised in the eight grievances. After consulting with DiNicola, Tedesco told Van Dyke that the Union was agreeable to the concept she had outlined and asked her to provide the Union a draft settlement agreement. The draft provided, in part, as follows:

- "1. Employer will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time, but the state may require Grievants to adjust their schedules during audit weeks.
- "2. The Employer will recognize all hours Grievants are scheduled to be traveling on overnight travel as compensable work time."

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<sup>4</sup>Because DiNicola did not recall this conversation occurring during the September 1 settlement negotiations and Van Dyke testified that this conversation occurred either before September 1 or during the September 1 negotiations, we conclude the discussion likely occurred before September 1.

28. The parties continued to negotiate over the language of the settlement agreement. Van Dyke met with Tedesco alone and, at times, with Tedesco, Loo, and DiNicola to talk about changes to the wording in the proposed language. The parties did not specifically talk about meal breaks.

29. On September 1, 2011, the parties executed the Settlement Agreement, the stated purpose of which was to resolve and settle the eight grievances. The Settlement Agreement provides, in relevant part, as follows:

#### “RECITALS

- “2. On March 9, 2009, DiNicola and SEIU filed a grievance claiming the State violated the CBA by requiring him to modify his work schedule during weeks when DiNicola was in travel status (the ‘individual grievance’).
- “3. On May 28, June 30, July 29, August 28, September 29, October 30, and November 25, 2009, Grievants and SEIU filed grievances which (a) claimed the State violated the CBA by requiring Grievants to modify their work schedules during weeks when they were in overnight travel status, and (b) claimed the State violated the CBA by changing the manner in which travel time was calculated so that employees were no longer paid for all time spent in overnight travel status, but only for time that cut across normal work hours (plus time spent driving or working) (collectively, the ‘group grievances’).

“\* \* \* \* \*

#### “AGREEMENT

“NOW, THEREFORE, the parties agree as follows:

- “1. The Employer will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time. However, the Grievants agree to work 8-hour days, Monday through Friday, while conducting an audit at an out-of-state-location. Grievants are not waiving their right to overtime compensation for hours worked in excess of 8 per day or 40 per week, pursuant to the CBA.
- “2. The Employer will recognize all hours traveling during overnight travel as compensable work time.
- “3. From January 2009 through September 1, 2011, the Employer will compensate Grievants for .5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5.

“\* \* \* \* \*

“7. This Agreement shall in all respects be interpreted, enforced, and governed under the laws of the State of Oregon. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either party.

“\* \* \* \* \*

“9. This Agreement is the sole and entire agreement between the parties relating to the Grievances. No change or modification of this Agreement is valid unless it is in writing and signed by all of the parties to this Agreement. All signatories below acknowledge this is the complete Settlement Agreement and no part of the grievances remains unresolved. This Agreement becomes effective on the date of the final signature below.”

Events Subsequent to the Settlement Agreement

30. In October 2011, the Department compensated the Grievants for the compensatory time or pay due for overnight travel time during the period between January 2009 and September 1, 2011, excluding meal break time. The Department credited Grievant West with 1.25 hours of compensatory time for hours worked on March 22, 2009.

31. In November 2011, DiNicola notified HR Manager Dettwyler by e-mail that he believed West was due 5.25 compensatory time hours for March 22, 2009. DiNicola also notified the Department that the deduction of meal break time from the retroactive compensatory time credited to the Grievants was not consistent with the Settlement Agreement because the meal break deduction was instituted as part of the “cut across” rule in March 2009.

32. After the Settlement Agreement, the Department instituted a “least-cost method” for analyzing auditors’ proposed overnight travel. Under this method, an auditor is required to compare the cost of traveling on a normal work day and staying in the audit city during the weekend preceding the audit, such as a trip from Friday through Friday or Monday through Monday, with the cost of overtime incurred by traveling on a day not part of the auditor’s normal workweek schedule, such as a trip from Sunday through Friday or Monday through Saturday. The costs of staying over the weekend include the hotel room, meals, hotel parking, other hotel fees, and airport parking expenses. Auditors are not compensated for their time during the weekend. The overtime cost is based on the number of hours the auditor is in travel status on a Saturday or Sunday multiplied by their overtime rate, which includes other payroll expenses such as social security, insurance, and workers’ compensation. Auditors are required to select the least cost option for out-of-state travel. If the least-cost option results in the auditor staying in the audit city over the weekend and the auditor does not want to do this, the auditor can chose to travel on a Saturday or Sunday and flex his or her regular schedule in the prior week to offset the overtime cost.

33. From September 2011 through August 2012, auditors took 99 out-of-state audit trips. In 16 of the trips, auditors flexed their hours in the week before their out-of-state travel. In three of these 16 trips, it was less expensive for the auditor to stay the weekend in the audit city under the least-cost method. Some employees voluntarily flex their hours in the week before travel based on personal preference. Some employees dislike having to complete the least-cost-comparison worksheet.

34. Auditor Teresa Pullen normally works a ten-hour-per-day, four-day-per-week schedule. In early May 2012, Pullen submitted a travel request and least-cost-analysis worksheet to her supervisor, Kathryn Lolley, for an overnight trip to Pittsburgh. The estimated cost of staying over the weekend was \$413.66. Pullen provided two options under the overtime cost analysis. One estimate included an overnight flight, which cost \$510.00, and resulted in 26.5 hours of overtime for a cost of \$1,540.90.<sup>5</sup> The second estimate included an overnight flight, which cost \$609.00, and resulted in 17.5 overtime hours for a cost of \$1,017.45. The estimated overtime costs were much higher than those submitted by other employees. Lolley denied Pullen's travel request due to several errors on the spreadsheet and expressed concern about the amount of compensatory time.

35. Because the overtime costs for travel on a weekend were substantially higher than the cost of staying over a weekend, Pullen intended to submit a request for a Monday through Monday trip. However, she mistakenly prepared a request that included travel to the audit city on a Monday and returning on Saturday. Lolley declined the request and directed Pullen to change the dates to reflect a Monday to Monday trip and correct errors in the related costs. The Department does not require auditors to take overnight flights, so Lolley also suggested that Pullen use a different non-stop airline flight, which cost \$685.00.

36. A Monday to Monday trip meant Pullen would have to spend the weekend in Pittsburgh away from her family. Lolley suggested to Pullen that if she did not want to stay over the weekend, she could flex her work hours the week before she traveled to reduce the amount of overtime that would be incurred. At some point previously, Pullen had mentioned to Lolley that she wanted to flex her regular work schedule so she could spend time preparing for her daughter's wedding in September. To do this, Pullen was required to submit a travel request for a Sunday through Friday trip and state that she wanted to voluntarily flex her normal work schedule the week before the travel. Pullen did not like either choice, but decided to flex her hours. Lolley approved Pullen's third travel request, which included the \$685 airline flight. This trip resulted in two hours of overtime compensation at a cost of \$116.29.

#### CONCLUSIONS OF LAW

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

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<sup>5</sup>Pullen testified that she incorrectly entered the number 26.5 into the spreadsheet, which is Exhibit C-22 at page 1, rather than the correct number 25.5. Because the amount is not determinative here, we use the 26.5 hours that was on the spreadsheet she submitted.

2. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate employee West at 0.5 times his regular rate of pay for hours he worked on Sunday, March 22, 2009.

3. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate Grievants for meal periods during overnight travel from January 2009 through September 1, 2011, and thereafter.

4. The Department breached the Settlement Agreement and violated ORS 243.672(1)(g) by failing to compensate former employees Paul Kraft, Scott Schlag, Ben Blanco, Penny Rath, and Will Traub for meal periods during overnight travel from January 2009 through September 1, 2011, and thereafter.

5. The Department did not breach paragraph 1 of the Settlement Agreement by implementing the least-cost method after September 1, 2011.

### DISCUSSION

At issue here is whether the Department breached the parties' Settlement Agreement in violation of ORS 243.672(1)(g). Subsection (1)(g) makes it an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations \* \* \*." A written grievance settlement is a "contract with respect to employment relations," within the meaning of subsection (1)(g). *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County (SEIU v. Wallowa County)*, Case No. UP-77-96, 17 PECBR 451, 462 (1997), *adhered to on recons*, 17 PECBR 536 (1998). Therefore, a breach of a settlement agreement constitutes a violation of subsection (1)(g). *Oregon AFSCME Council 75, Local 3336 v. State of Oregon Department of Environmental Quality (AFSCME v. DEQ)*, Case No. UP-47-06, 22 PECBR 18, 28 (2007).

The key facts in this case are not in dispute, but the Department and the Union disagree about how the relevant provisions of the Settlement Agreement apply given those facts. Accordingly, in order to determine whether the Settlement Agreement was breached, we must interpret the language contained in the writing to determine the parties' intent. Settlement agreements are interpreted in the same manner as collective bargaining agreements, by following the rules of contract construction as applied by the courts. *SEIU v. Wallowa County*, 17 PECBR at 462-63, citing *OSEA v. Rainier School District No. 13*, 311 Or 188, 194, 808 P2d 83 (1991). Those rules require this Board to first examine the text of the disputed contract language in the context of the document as a whole to determine whether the language is ambiguous. "A contract is ambiguous if it can reasonably be given more than one plausible interpretation." *Portland Police Assoc. v. City of Portland*, 248 Or App 109, 113, 273 P3d 192 (2012), citing *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004). If the contract is unambiguous, it must be enforced according to its terms. *Rainier School Dist. No. 13*, 311 Or at 194. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence to ascertain the parties' intent. Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and rely on appropriate maxims of contract construction.

*Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005), citing *Yogman v. Parrott*, 325 Or 358, 361-65, 937 P2d 1019 (1997).

Sonny West Compensatory Time Credit

The parties' dispute over the amount of compensatory time owed to West under the Settlement Agreement arises out of the language in paragraph 2, which provides that the affected auditors are to be compensated for ".5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5." The Union argues that under this language, the Department was required to compensate West for 5.25 hours. The Department argues that West was only entitled to 1.25 hours of compensation for that day under the Settlement Agreement. For the reasons discussed below, the Department breached the Settlement Agreement in violation of ORS 243.672(1)(g) by failing to credit West with a total of 5.25 hours of compensatory time for March 22, 2009.

Each party's positions can best be understood by looking at the different manners in which they calculate the amount owed to West for the time worked on March 22. The parties agree that West worked 14.5 hours on March 22, for which he was paid 14.5 hours at the straight-time rate in March 2009. They also agree he was later credited with 6 hours of compensatory time for March 22 based on 4 hours of work at the 1.5 overtime rate. The Department calculated that it owed West 1.25 additional hours under the Settlement Agreement as follows:

Total hours worked:	14.50 hours
Multiplied by 1.5 overtime rate:	<u>x 1.50</u>
Total hours compensation due:	21.75 hours
Minus 14.5 hours compensation at straight time rate:	-14.50 hours
Minus 4 hours compensation at 1.5 overtime rate:	<u>- 6.00 hours</u>
Total compensation due:	1.25 hours

The Union calculates the Department owes West 5.25 hours as follows:

Total hours worked on March 22:	14.5 hours
Minus hours worked compensated at 1.5 rate in January 2010:	<u>- 4.0 hours</u>
Total hours not compensated at 1.5 rate:	10.5 hours
Multiplied by .5 rate	<u>x .5</u>
Total compensation due:	5.25 hours

The Union's calculations are based on the language in the Settlement Agreement, which sets out the method the Department is to use to calculate the amount of compensation due employees. We find that language unambiguous. Under that language, West is entitled to be compensated at the .5 rate for 10.5 hours of work because he had not previously been compensated for those hours at the 1.5 rate.

The Department nevertheless contends that this results in West being compensated for a total of 25.75 hours for March 22 (14.5 hours + 6 hours + 5.25 hours), when he only would have

been entitled to 21.75 hours of compensation if the Department had paid him for 14.5 hours at the 1.5 overtime rate in March 2009. This 4 hours of difference in the amount of total compensation due West occurs because the Department credited West for 4 hours of compensatory time in January 2010 at a 1.5 overtime rate rather than the .5 rate, even though it had already paid him for those 4 hours at the straight-time rate in March 2009.

The Department asserts that paying West a total of 25.75 hours for the time worked on March 22 is inconsistent with the parties' intent under the Settlement Agreement. Yet the language in that agreement setting out the method for calculating the amount due is both specific and clear. The Settlement Agreement also includes no provision for adjusting the amount due based on the Department's prior duplicate payment of the 4 hours of straight-time compensation or the total compensation that would have been due in a day if paid at the 1.5 overtime rate. The Department also did not rely on any other language in the Settlement Agreement in support of its position. Although the Department claims that the application of the language in the Settlement Agreement to West's situation is unfair, we are bound to enforce the language agreed to by the parties within the context of the Settlement Agreement as a whole, which is the best evidence of the parties' intent. *See Rainier School Dist. No. 13*, 311 Or at 194 (if the contract is unambiguous, it must be enforced according to its terms).

#### Meal Periods

The Union alleges that the Department violated the Settlement Agreement (and therefore ORS 243.672(1)(g)) in two distinct ways: first, by failing to retroactively compensate the Grievants for their meal periods during overnight travel between January 2009 and September 2011; and second, by requiring auditors to continue to deduct meal periods from their travel hours after the Settlement Agreement was executed.<sup>6</sup> The Union relies on the language in paragraphs 2 and 3 of the Settlement Agreement. The disputed language states as follows:

- "2. The Employer will recognize all hours traveling during overnight travel as compensable work time.
- "3. From January 2009 through September 1, 2011, the Employer will compensate Grievants for .5 times their regular rate of pay for travel time that took place on weekends which has not already been compensated at the rate of 1.5."

The Union asserts that these two provisions, read in conjunction with one another, require the Department to provide employees on overnight travel with paid meal periods going forward and retroactive to January 2009. The Department views the language differently; arguing that the compensable travel hours only includes time worked and not unpaid meal periods. It points out

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<sup>6</sup>The Union also argues that this Board should order the Department to pay the Grievants, who are no longer employed by the Department, penalty wages under ORS 652.150(1). However, the Union did not allege such a violation in the complaint and, even if it did, we do not have jurisdiction over such claims. The enforcement of ORS 652.150(1) resides within the authority of the Oregon Bureau of Labor and Industries and the courts. ORS Chapter 652.165 and 652.310 - 652.414.

that paid meal periods are not expressly included in the paragraphs above, rendering the language ambiguous. The Department further argues that extrinsic evidence supports its assertion that unpaid meal periods were not intended to be included as compensable time, either prospectively or retroactively to January 2009.

We begin our analysis by determining whether the Settlement Agreement is ambiguous—that is, whether the language is susceptible to more than one plausible interpretation when considering the context of the contract as a whole, including the circumstances in which the Settlement Agreement was made. *Portland Police Assoc.*, 248 Or App at 116-17; *Tualatin Employees' Association v. City of Tualatin*, Case No., UC-012-12, 25 PECBR 565, 572 (2013). We conclude that the disputed language is not ambiguous, and that the Union's interpretation of the Settlement Agreement is consistent with the intent of the parties embodied in the writing.

When we interpret agreements, we give words their plain and customary meaning. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-05-06, 22 PECBR 224, 232 (2008). Paragraph 2 states in no uncertain terms that “all hours traveling during overnight travel” are considered as compensable time. The parties agreed to use extraordinarily broad language to define what “overnight travel” should be compensable—“all.” *Webster's Third New International Dictionary*, 54 (unabridged ed 2002) defines “all” as “**1a**: that is the whole amount or quantity of” or “**1b**: as much as possible : the greatest possible\* \* \* \*.” It is difficult to conceive of a way to more broadly define what would be treated as compensable time. Had the parties intended a more narrow definition of this term, they would not have used this term, and accepting the Department's argument would require us to read into this plain language an unwritten exception for meal periods, something we are not willing to do. *See* ORS 42.230 (in interpreting agreements, the court's role “is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.”).

Indeed, as we understand the Department's argument, it acknowledges that, standing alone, paragraph 2 would unambiguously support the Union's interpretation. The Department argues, however, that paragraph 3 modifies or limits the expansive definition of compensable time, thereby rendering the Settlement Agreement as a whole ambiguous. Specifically, the Department asserts that using the phrase “travel time” in paragraph 3, instead of “all hours traveling” in paragraph 2, changes the meaning of the Settlement Agreement. We do not assign such import to the slight difference in wording in paragraphs 2 and 3. We see no persuasive argument that merely changing the phrase “all hours traveling” to “travel time” materially altered the agreement between the parties, much less redefined or narrowed the sweeping phrase “all hours traveling.” Had the Department intended to qualify “all hours traveling” to exclude meal breaks (or any other time), we believe that it would have done so expressly, rather than just use the phrase “travel time” in a subsequent paragraph.

Even if we were to agree with the Department that the language is at least susceptible to more than one plausible interpretation, our result would not change if we resorted to extrinsic evidence of the parties' intent. The language strongly supports the Union's interpretation, and the language itself is the best evidence of the parties' intent. For us to interpret the Settlement

Agreement in a different manner, the Department would have to produce compelling extrinsic evidence in support of its alternative interpretation. Here, both parties offered extrinsic evidence concerning the grievances that led to the arbitration hearing and the signing of the Settlement Agreement after opening statements were made at the arbitration hearing. The Department's primary evidence in support of its interpretation of the language included the grievance documents, the statement of the issues offered by the parties at the hearing, and the testimony of Van Dyke, that meal times were not discussed specifically as part of the settlement negotiations. The Union also offered the related grievance documents to support its interpretation, as well as the testimony of DiNicola about communications that occurred during the initial steps of the grievance procedure and the Union's understanding of the intent of the Settlement Agreement.

Taken as a whole, the extrinsic evidence provides some context to the Settlement Agreement, but does not support the Department's interpretation of the disputed language. Viewed in the light most positive to the Department, the extrinsic evidence demonstrates at best that the Union did not address with great specificity the breadth of its concerns about unpaid meal breaks. We find, however, that the Union did raise the issue of unpaid meal breaks as part of the settlement-related grievances. Specifically, at a Step-2 grievance meeting, when Harchenko asked DiNicola about the reasons for the grievance, DiNicola expressly identified meal break time as one period in which employees were no longer being compensated for travel hours. Although subsequent discussions on the issue of meal periods were not extensive or specific, the parties ultimately settled on the following language: "[t]he Employer will recognize all hours traveling during overnight travel as compensable work time." Thus, any lack of specificity regarding "meal periods" is not sufficient to overcome the best evidence of the parties' intent: the highly persuasive and probative nature of the terms contained in the Settlement Agreement itself.

Moreover, the grievance documents do contain broad language alleging that the Department violated the contract by "failing to compensate grievants for all hours worked" and having supervisors instruct "business division tax auditors to not report all hours worked on Revenue timesheets." Thus, the grievances can reasonably be construed as incorporating the Union's concerns about unpaid meal periods, even though these concerns were not explicitly incorporated into the grievance form. This is consistent with Mr. DiNicola's un-rebutted testimony that he spoke with Department Director Harchenko about the Union's meal period concerns during the initial steps of the grievance process. Thus, the extrinsic evidence provides some additional support for the Union's interpretation of the Settlement Agreement.

In sum, even assuming for the sake of argument that the provisions of the Settlement Agreement were ambiguous, the extrinsic evidence presented by the parties does not dictate a result other than the one we reached above. For the foregoing reasons, we conclude that the Department violated the terms of the Settlement Agreement and ORS 243.672(1)(g) when it failed to compensate Grievants for meal periods during overnight travel.<sup>7</sup>

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<sup>7</sup>The Settlement Agreement defines the term "Grievants" in a manner that includes former employees Kraft, Schlag, Blanco, Rath, and Traub. The failure to compensate these former employees also violated the Settlement Agreement for the same reasons set forth in our analysis above.

We next address the Department's affirmative defense that the Union's allegations regarding meal break time should be dismissed for failure to exhaust the grievance process contained in the collective bargaining agreement. *See West Linn Education Association v. West Linn School District No 3JT*, Case No. C-151-77, 3 PECBR 1864, 1868-71 (1978). The Department has the burden of proving this affirmative defense. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-58/112-88, 11 PECBR 370, 380 (1989); OAR 115-035-0035(1). A party is only required to resolve its dispute through a grievance process before proceeding with a subsection (1)(g) claim when it has agreed to do so. *AFSCME v. DEQ*, 22 PECBR at 29. Here, the Union alleges a violation of the Settlement Agreement, not the CBA. The Settlement Agreement neither includes its own grievance process nor incorporates the grievance process in the parties' CBA. In addition, the CBA grievance process only covers violations of the CBA, and as a result, is not applicable here. Therefore, the Department failed to carry its burden of proof on this affirmative defense.

### Least-Cost Method

The Union also alleges that the Department's implementation of the least-cost method violates the Settlement Agreement. The Union argues that the purpose of the Settlement Agreement was to stop supervisors from requiring auditors to reduce their hours during their workweek before traveling to offset overtime accrued during weekend travel. It asserts that it understood that the Settlement Agreement meant that the Department would revert back to the previous system of allowing auditors to work their regular 40-hour work schedule the week before their Sunday travel day and be credited compensatory time at the overtime rate for the weekend travel. Instead, the Union argues, the Department is using the least-cost method to pressure, manipulate, and even coerce auditors into reducing their regular schedules in violation of the Settlement Agreement. The Union also asserts that the Department has manipulated the least cost comparison analysis to make the cost of compensatory time appear more expensive by including other payroll costs and has not implemented the model in a manner to consistently minimize travel costs and expenses, which is supposed to be the model's purpose.

The Department argues that it is not requiring auditors to adjust their schedules the week before they travel in violation of the Settlement Agreement. Instead, it is requiring auditors to stay over the weekend when doing so is less expensive than the overtime cost, which the Settlement Agreement does not prohibit. In addition, it is allowing auditors to voluntarily adjust their prior week's schedule in lieu of complying with this requirement. The Department asserts that it explained during the discussions leading up to the Settlement Agreement that it believed it had the right to implement a least-cost method that could result in employees being required to stay over the weekend, and the Union did not object.

The language in the Settlement Agreement at issue here is in paragraph 1, which states in relevant part that the Department "will not require Grievants who are on alternate or regular work schedules to adjust their alternate or regular work schedules for travel time." The parties' Settlement Agreement on this language was in response to the claims in DiNicola's grievance and the seven group grievances that the Department had required the auditors "to modify their work schedules during weeks when they were in overnight travel status." Because the parties did not define the word "require" in the Settlement Agreement, we refer to the dictionary to determine the

ordinary meaning of that word. *Yogman v. Parrott*, 325 Or at 362. Relevant here, “require” means “**5**: to impose a compulsion or command upon (as a person) to do something : demand of (one) that something be done or some action taken : enjoin, command, or authoritatively insist (that someone do something).” *Webster’s* at 1929. “[C]ompulsion” is based on the act of or agency to compel. *Id.* at 468. Among other definitions, “compel” means to “**c**: force by authority, code, or custom[;] **2a**: to force or cause irresistibly : call upon, require, or command without possibility of withholding or denying[;] **3a**: to domineer over so as to force compliance or submission: demand consideration or attention.” *Id.* at 463.

There is no dispute that the Department requires the auditors to stay over the weekend within the meaning of that word, if that is the least cost alternative. However, on its face, the Settlement Agreement does not prohibit such a requirement. The Union also does not assert that this requirement in itself violates the Settlement Agreement. It argues, however, that by requiring auditors to stay over the weekend and then allowing them to agree to flex their schedules to avoid staying over the weekend, the Department is, in effect, requiring the auditors to flex their prior week’s schedules.

Because the Department would apparently not violate the Settlement Agreement if it required the auditors to stay over the weekend without allowing them the option of flexing their schedule the week before travel, it is difficult to understand how allowing them this option does violate the Settlement Agreement. The Department has presented the auditors with an option, which they may choose to exercise or not. This does not come within the definition of the word “require” under the Settlement Agreement. Although we agree with the Union that the auditor may be faced with making an “unpalatable decision” between staying over the weekend and flexing their schedules, we do not agree that making an unpalatable decision in itself constitutes a compulsion or a demand. The auditor still makes the choice.

There is also no evidence that the supervisors used duress, coercion, or unethical tactics in pressuring employees into flexing their schedules. The Union’s argument that the mere fact the supervisor presented the information directly to an employee in itself constitutes coercion or manipulation is unpersuasive. A supervisor notifying employees that they are required to stay over the weekend and suggesting that they could voluntarily adjust their schedule if they did not want to stay over the weekend, without some evidence of coercive or manipulative actions, does not constitute coercion.

Auditor Pullen’s testimony is also insufficient to prove that the Department required the auditors to adjust their schedules in violation of the Settlement Agreement. Pullen testified that she felt intimidated by the least-cost-analysis process because she did not like filling out the paperwork; her supervisor denied her initial requests; and she was faced with two options, neither of which were good. Although the least-cost-analysis paperwork certainly requires an expenditure of time, it is not coercive in itself. In addition, Pullen’s requests were primarily denied because of the errors that she made on the requests. And, although Pullen did not feel that either of the choices she faced were good options, she was not compelled or commanded to adjust her schedule. She was told she was required to stay the weekend based on the cost analysis, but that she could agree to adjust her schedule the prior week to avoid this result, which she chose to do.

Finally, we address the Union's argument that the Department's least-cost method is not valid because: (1) it does not require auditors to take the least expensive airline flight; and (2) it has inflated the cost of compensatory time so that the cost of overtime is generally the more expensive option. We disagree with this contention. The evidence shows that, at most, the least-cost method resulted in auditors flexing their schedules rather than staying over the weekend in three out of 99 trips between September 2011 and August 2012. Therefore, if the Department's intent was to inflate expenses and costs so that the cost of overtime is generally the more expensive option, it has done a very poor job. In addition, although the auditors receive no wages at the time the compensatory time is credited, they certainly receive wages when the compensatory time is taken. And, although it is true that the Department did not require employees to take red-eye airline flights, this factor does not affect the least-cost analysis.

ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to credit Sonny West with a total of 5.25 hours of compensatory time for the 10.5 hours he worked on March 22, 2009. Within 10 days of the date of the Board's final order, the Department shall credit West with 4.00 hours of compensatory time.

2. The Department shall cease and desist from violating ORS 243.672(1)(g) by failing to recognize meal periods taken during overnight travel as compensable time. Within 30 days of this Order, the Department shall make all Grievants and former employees whole for meal periods that have not been recognized as compensable time from January 2009, until the Order is fully implemented.

3. The other claims are dismissed.

DATED this 5 day of August, 2013.

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\*Kathryn A. Logan, Chair

  
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Jason Weyand, Member

  
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Adam Rhynard, Member

\*Chair Logan did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.