

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-032-12

(UNFAIR LABOR PRACTICE)

FEDERATION OF OREGON PAROLE AND )	
PROBATION OFFICERS, MULTNOMAH )	
COUNTY CHAPTER, )	
)	
Complainant, )	RULINGS,
)	FINDINGS OF FACT,
v. )	CONCLUSIONS OF LAW,
)	AND ORDER
MULTNOMAH COUNTY, )	
)	
Respondent. )	
)	

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On June 10, 2013, the Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on April 11, 2013, after a hearing held in Portland, Oregon, on September 21, 2012. The record closed on November 2, 2012, following receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

Kathryn A. Short, Senior Assistant County Attorney, Portland, Oregon, represented Respondent.

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On June 25, 2012, the Federation of Oregon Parole and Probation Officers, Multnomah County Chapter (FOPPO or Federation) filed this unfair labor practice complaint against Multnomah County (County). The Federation alleged that the County had unlawfully filed a Last Best Offer (LBO) that was less favorable than its Final Offer. The County filed a timely answer to the complaint, alleging that the Federation had waived its right to file this complaint, and added a counterclaim alleging that the Federation unlawfully failed to comply with the arbitration award by refusing to sign the resulting collective bargaining agreement.

The issues are:

1. Did the County's LBO violate ORS 243.672(1)(e)? If so, what is the appropriate remedy?
2. Did the Federation waive its right to bring an unfair labor practice complaint by allegedly seeking enforcement of the collective bargaining agreement awarded by Arbitrator Whalen?
3. Did the Federation violate ORS 243.672(2)(c) or (e) by not signing the collective bargaining agreement awarded by Arbitrator Whalen? If so, what is the appropriate remedy?

We conclude that: (1) the County violated ORS 243.672(1)(e); (2) the Federation did not waive its right to bring its unfair labor practice complaint; (3) the Federation did not violate ORS 243.672(2)(c) or (e); and (4) the appropriate remedy for the County's subsection (1)(e) violation is to remand the matter to Arbitrator Whalen as detailed below.

#### RULINGS

The rulings of the ALJ were reviewed and are correct.

#### FINDINGS OF FACT

1. The Federation is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a strike-prohibited bargaining unit of parole and probation officers employed by the County, a public employer as defined by ORS 243.650(20).
2. The parties have had a series of collective bargaining agreements. The last agreement expired on June 30, 2011. The parties participated in at least ten bargaining sessions for a successor agreement. Before the events at issue, the parties tentatively agreed to 21 collective bargaining agreement articles and three addenda, leaving seven articles and two addenda in dispute.
3. On July 21, 2011, the County submitted a package proposal, with the caveat that the County could withdraw the proposal at any time. The Federation did not accept the proposal.
4. On November 1, 2011, the Federation declared impasse and filed its Final Offer. The County filed its Final Offer on November 9, 2011.
5. On March 8, 2012, the County filed its LBO. The LBO made several changes to its Final Offer. The changes that the Federation attacks are set out below.
6. The County's Final Offer *deleted* the following language from the preceding collective bargaining agreement:

“Management may require HCP [Health Care Professional] verification of absence due to non-FMLA and non-OFLA covered illness or injury under the following conditions: 1. the employee has been absent for more than three (3) days; or 2. the employee has exhausted all sick leave; or 3. management reasonably believes that the absence may not be bona fide.”

The County’s LBO *restored* that language.

7. The County’s Final Offer *deleted* the following language from the preceding collective bargaining agreement:

“Saved Holiday Bonus days must be used in the fiscal year they are awarded.”

The effect of the deletion would have been to allow unit employees to carry unused Holiday Bonus days into the next fiscal year instead of losing them. The County’s LBO *restored* this language.

8. The County’s Final Offer extended workers’ compensation supplemental benefits to 12 months. The County’s LBO reverted to the prior collective bargaining agreement terms, which provided those supplemental benefits for *three* months. Supplemental benefits bridge the gap between workers’ compensation benefits and the unit employees’ take home pay without drawing from other employee paid leave.

9. The County’s LBO withdrew changes in its Final Offer to lead worker assignment and pay provisions contained in Addendum B, and reverted to the language of the prior collective bargaining agreement.

10. On March 9, 2012, Federation attorney Daryl Garrettson e-mailed Ann Boss, County Labor Relations Manager, asking why the County had withdrawn its proposal for Addendum B and reverted to current contract language. Garrettson stated that the County’s actions could constitute “retrograde negotiations.” In response, the County submitted a revised LBO that restored the Final Offer’s Addendum B language. The Federation did not raise any other issues regarding the County’s LBO.

11. On March 22 and 23, 2012, the parties held an interest arbitration hearing before Arbitrator Kathryn Whalen pursuant to ORS 243.742. At that hearing, the Federation stated, for the first time, that other provisions of the LBO were not the same as the Final Offer.

12. On May 11, 2012, Arbitrator Whalen issued her opinion awarding the County’s LBO. The pertinent part of the arbitrator’s award follows:

“The Federation has submitted proposals that would change existing contract articles concerning Workers Compensation, (Article 12), Holiday Bonus Carry-over (Article 8) and Retiree Medical Insurance (Article 22). The County’s LBO proposes the status quo; that is, that current language should remain

unchanged. Of these proposed changes, it is the Federation's proposals about Workers Compensation that are the most significant.

"The Federation proposes that an employee absent from work due to an on-the-job injury may select the option of submitting his/her Workers Compensation payment in return for a regular paycheck paid by the County.

"The County argues that this proposal for continuation pay without a cap is unprecedented. The County contends that although MCDSA and MCCDA contracts provide for continuation pay, these contracts differ from the Federation's proposal in significant ways. First, these other contracts provide that employees are not eligible for continuation pay until they have ten years seniority with the County. Second, the employee is entitled to choose continuation pay only once in his or her career with the County.

"According to the County, the Federation's proposal without limitations creates an uncapped, ongoing liability for the County that cannot reasonably be predicted or properly budgeted. As a result, the public interest is not well served by this uncapped liability that no other jurisdiction offers.

"The Federation contends its intent is that the above language is limited by the earlier paragraph in Article 12 in which the Federation has proposed a limit on supplemental benefits of 12 months. The Federation asserts that this time limitation was communicated repeatedly at the bargaining table and reinforced in its Post Hearing Brief.

"I have reviewed the continuation pay language of the MCDSA and MCCDA contracts. The County is correct that these agreements provide for continuation pay in lieu of supplemental benefits only to employees with 10 or more years seniority and are an option only once in an employee's career. These other contract provisions provide detailed procedures and specifications in connection with the receipt of continuation pay. The Federation's proposal does not mirror these contract provisions.

"At hearing, Mitchell acknowledged that the Federation's proposals are different from that of the other contracts. He said he was not sure why but believed the language of the other agreements was complex; and the Federation felt the need to provide different language that did not have the 10-year seniority and once in a life-time restrictions.

"As the proponent of new language, the Federation bears the burden of convincing me that the status quo should be changed. I find the evidence is insufficient to justify the Federation's proposed continuation pay language and the County has raised legitimate concerns about it.

“The Federation also proposed that throughout the period an employee receives Workers Compensation benefits, the County will continue full retirement contributions as though the employee was still working their full or part-time work schedule.

“At hearing, the County asserted that this proposal is illegal. According to the County, it would be unlawful for it to do so because the definition of “salary” in the PERS statute excludes Workers Compensation benefits; that is such benefits are non-subject salary. In support of this argument, the County relies upon a decision by the PERS Board in which Workers Compensation benefits were not considered in calculating the final average salary of a fire fighter.

“The Federation responds to the County’s illegality claim with a number of arguments: (1) The case cited by the County concerns calculating average salary; it does not state that it would be illegal for an employer to make a full retirement contribution to PERS while an employee is on time loss; (2) the County’s illegality argument is untimely as it was not raised at any time in bargaining and such behavior should not be rewarded—especially when the County is wrong about its assertions; (3) if the Federation’s proposal is unlawful, then so is the current contract language which provides for retirement contributions for an appropriate amount on supplemental benefits; and (4) in other County agreements, namely those with MCDSA and MCCDA, the County has agreed to the same language the Federation is proposing.

“While I have considered all of the above arguments, arbitration is not the authoritative forum to decide an issue concerning the legality of a proposal. Regardless of what I may think, my opinion is not a final or binding determination of this matter.

“Further, and more importantly, it is not necessary for me to make a legal conclusion about this issue. As explained above, I have other concerns with the Federation’s Workers Compensation proposal as drafted. It is on these grounds that I find the County’s proposal better serves the interest and welfare of the public.

“Although the Federation’s other proposed language changes are in dispute, the evidence and arguments indicate that these are not significant when compared to the Workers Compensation issue addressed in detail above.” (Internal citations omitted.)

13. The arbitrator concluded,

“This case is a close call. Neither wage proposal was significantly favored by secondary criteria. The Federation’s Workers Compensation proposal gives the

County's LBO the edge. I conclude the County's LBO is more consistent with the interest and welfare of the public."

14. Also on May 11, 2012, the Federation filed a grievance alleging that the County violated a Memorandum of Agreement - Temporary Employees. The record does not reveal whether the Federation had received Arbitrator Whalen's award before filing the grievance. Although almost all of the text of the memorandum had previously been agreed to in 2008, the grievance alleged a violation of a managerial signature requirement for certain actions by temporary employees agreed to on April 18, 2011, the same date as the parties agreed to Article 1 of the collective bargaining agreement. That agreed version of Article 1 stated in part: "[e]ffective the date of this agreement, the parties agree to the April 18, 2011 memorandum of agreement relating to the usage of temporary employees as set forth in that memorandum and incorporated herein." On May 24, 2012, the County sustained the grievance in part and denied it in part, despite acknowledging that the grievance was untimely and filed at the wrong step.

15. On June 22, 2012, Jeff Heinrich, County Labor Relations Manager, sent the Federation a draft collective bargaining agreement consistent with the arbitrator's award for review and signature.

16. On July 13, 2012, Garrettson notified Heinrich that the Federation would not sign the contract because the County had committed an unfair labor practice.

17. On June 25, 2012, the Federation filed this action.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County submitted an LBO that included three regressive proposals when compared to its Final Offer, in violation of ORS 243.672(1)(e).
3. The Federation did not waive its right to bring this unfair labor practice complaint.
4. The Federation did not violate ORS 243.672(2)(c) or (e).

#### Standards for Decision

The steps of the bargaining process for strike-prohibited bargaining units are set out in ORS 243.712 and ORS 243.736 through 243.756. Unless changed by agreement of the parties, they must table bargain for 150 days, and, if necessary, proceed through mediation, impasse, and the submission of Final Offers to the mediator and LBOs to the interest arbitrator. The Federation alleges that the County's LBO, which contained three regressive proposals that had not been bargained over, represented bad-faith bargaining prohibited by ORS 243.672(1)(e).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Although we generally analyze claims of bad-faith-bargaining by looking at the totality of a party’s bargaining conduct, we have recognized that some bargaining conduct is so inimical to the bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith.<sup>1</sup> *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-7 (2007). Here, we find that the County’s inclusion of three regressive proposals in its LBO constitutes a *per se* violation of its good-faith-bargaining obligation. We reason as follows.

“The [Public Employee Collective Bargaining Act] PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and [for strike-permitted employees,] self help.” *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007).

For strike-prohibited employees, the PECBA bargaining process includes a final step of binding interest arbitration, rather than self help.<sup>2</sup> ORS 243.742. Interest arbitration is initiated by filing a petition with this Board, and is accompanied by a final offer filed with the mediator. ORS 243.742(2). After the selection of an arbitrator and the establishment of a hearing date, the parties must exchange their LBOs “on all unresolved mandatory subjects” not less than 14 days before the date of the hearing. ORS 243.746(3). The statute also contemplates, however, that a party might “change its position within 24 hours of the 14-day deadline,” in which case, “the other party will be allowed an additional 24 hours to modify its position.” *Id.* Other than that proviso, “neither party may change” its LBO package, unless the parties stipulate to do so. *Id.*; see also OAR 115-040-0015(7)(g).

Thus, the statutory scheme anticipates (and allows) that a party’s Final Offer and LBO may differ. However, any such change is not unfettered. As described above, the PECBA bargaining process is “designed to help the parties identify and narrow their disputes.” *Blue Mountain Community College*, 21 PECBR at 754. Consequently, we have disapproved of

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<sup>1</sup>For example, we have found the following to constitute *per se* violations of ORS 243.672(1)(e): (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation, which had not been subjected to bargaining; (3) including a “first-time” proposal in a final offer without bargaining over (or at least offering to bargain over) that proposal. See *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08, 23 PECBR 583, 605-6 (2010); *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009).

<sup>2</sup>Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees.

conduct that “expands rather than narrows the scope of the parties’ bargaining dispute, thereby making agreement less likely.” *Id.* This is particularly true “late in the bargaining process” and even more so at the points of Final Offer/mediation and LBO/interest arbitration. We have held that several actions in the late stages of bargaining constitute *per se* violations of the obligation to bargain in good faith. *See id.* at 755-56 (injecting new issues in mediation, a final offer or implementation *per se* violates the duty to bargain in good faith); *see also Hood River County*, 23 PECBR at 605-6 (union violated ORS 243.672(2)(b) by including a first-time proposal in a final offer without bargaining over, or at least offering to bargain over, that proposal).<sup>3</sup>

As previously indicated, the rationale behind these holdings is similar—those actions frustrate the bargaining process and expand, rather than narrow, the scope of the parties’ dispute, regardless of any subjective bad faith. *See Blue Mountain Community College*, 21 PECBR at 754. Thus, those types of actions contravene the principles of the PECBA, including: (1) the development of harmonious and cooperative relationships between public employers and their employees; (2) full acceptance of the principles and procedures of collective negotiation to alleviate various forms of strife and unrest; (3) discouraging unresolved disputes because they are injurious to the public, the governmental agencies, and public employees; (4) encouraging practices fundamental to the peaceful adjustment of labor disputes; and (5) obligating public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations. *See* ORS 243.656.

Likewise, we hold that a regressive proposal on a mandatory subject of bargaining (without any countervailing concessions) occurring between a Final Offer and an LBO is so inimical to the PECBA and its carefully-structured bargaining process that it amounts to a *per se* violation of the obligation to bargain in good faith, even without a showing of subjective bad faith. Simply put, at this stage of the bargaining process, the requisite statutory process has effectively ended, and the parties are putting their differences into the hands of an arbitrator. By regressing on a mandatory subject of bargaining between the submission of the Final Offer and the LBO (when the requisite bargaining has ceased),<sup>4</sup> a party undermines the previous collective efforts of the parties to narrow their disputes and effectively negates previous good-faith bargaining. Moreover, permitting such conduct would engender less confidence in the PECBA bargaining process because both parties would be wary of the other submitting regressive proposals just weeks before the interest arbitration. Such wariness could taint the entire bargaining process and encourage parties to attempt to strategically “game” the process in violation of the policies of the PECBA. Therefore, although the statute envisions that there might

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<sup>3</sup>*Cf. Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District 35*, Case No.UP-62-09, 23 PECBR 767, 791-93, *recons*, 23 PECBR 878 (2010) (declining to find that the employer engaged in *per se* bad-faith bargaining by allegedly making regressive proposals in mediation because, as a factual matter, the allegedly regressive proposals were not made in mediation).

<sup>4</sup>Although statutorily-required bargaining has ceased, the parties may continue to bargain.

be some changes in a party's Final Offer and LBO, such changes must narrow, rather than expand, the scope of the parties' dispute. Consequently, a party that makes regressive proposals on mandatory subjects of bargaining during this period commits a *per se* violation of the obligation to bargain in good faith under subsection (1)(e) or (2)(b).<sup>5</sup>

Applying those principles here, we find that the County committed a *per se* violation of ORS 243.672(1)(e) by making three regressive proposals on mandatory subjects of bargaining in its LBO by reverting to prior contract language in: (1) requiring health care professional verification of absence under certain circumstances; (2) requiring that saved Holiday Bonus days be used in the fiscal year in which they are awarded; and (3) limiting workers' compensation supplemental benefits to three months. With respect to each of these proposals, the County withdrew proposals that had been in its Final Offer that were more favorable to bargaining unit members, and reverted in its LBO to the less favorable language of the prior collective bargaining agreement. The County does not dispute that those three proposals were regressive, and does not contend that it made other changes to its Final Offer that were more favorable to bargaining unit members. Consequently, we find that the County violated ORS 243.672(1)(e).

Because the County's unlawful action changed the terms of the offer before the interest arbitrator, we conclude that the Federation had no duty to sign or implement the contractual result of the interest arbitration, and we will dismiss the County's counterclaim.

### Waiver

The County also contends that the Federation waived its statutory right to bring its subsection (1)(e) complaint because it purportedly "relied on" the County's LBO as awarded by Arbitrator Whalen when it filed a grievance under a Memorandum of Agreement amended during the bargaining process. "Under Oregon law, a waiver is the intentional relinquishment of a known right." *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE*) (internal quotations omitted). We generally consider a "waiver" argument concerning a subsection (1)(e) charge to be an affirmative defense. *Id.*; see also *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 457 n 2 (2013); *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 439 n 4, *recons*, 22 PECBR 571 (2008). As the Respondent on the subsection (1)(e) claim, the County has the burden of proving that affirmative defense. OAR 115-035-0042(6); *Portland Firefighters' Association, Local 43, IAFF v. City Of Portland*, Case No. UP-14-07, 23 PECBR 165, 167 (2009) (Order on Reconsideration).

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<sup>5</sup>We do not decide whether a regressive proposal on a mandatory subject of bargaining would *per se* violate the duty to bargain in good faith if it was accompanied by a significant concession on another issue. However, we would likely review that question in light of the well-established understanding that the purposes and policies of the PECBA are enhanced by actions that move the parties toward an agreement and narrow, rather than expand, the scope of the parties' dispute.

The County argues that “[b]y grieving the MOA, the Federation tacitly accepted the enforceability of the successor collective bargaining agreement awarded by Arbitrator Whalen.” We do not agree that the Federation’s filing of a grievance (and therefore preserving any claims as part of its duty to represent its members) constitutes “tacit acceptance” of the County’s LBO, as awarded by Arbitrator Whalen. In any event, the Federation’s actions do not amount to the “intentional relinquishment” of the Federation’s statutory right to file a subsection (1)(e) complaint. Indeed, such a conclusion would be hard to square with the Federation’s refusal to sign the collective bargaining agreement that was consistent with the County’s LBO, as awarded by Arbitrator Whalen.

We further note that the basis of the Federation’s grievance concerned a provision that was agreed to during the bargaining process, *before* the *unresolved* matters were submitted to interest arbitration. This further supports our conclusion that the Federation did not clearly evince an intent to ratify the agreement issued by the arbitrator.

The County also argues that the Federation waived its claims because it objected to one, but not all, of the regressive changes in the County’s LBO, thus “lying in the weeds” to bring this action. The Federation did, however, raise the issue during the arbitration, and there is no evidence that the County lacked the opportunity to cure these defects before submission of the arbitral record for decision.

### Remedy

We turn to the remedy. FOPPO asks us to award its LBO. Alternatively, it asks us to vacate Arbitrator Whalen’s award, which awarded the County’s LBO, and direct the parties to resubmit LBOs consistent with their Final Offers to Arbitrator Whalen, or another mutually-agreed-on arbitrator.

The County contends that FOPPO’s proposed remedies are excessive, and, at most, we should strike the County’s three regressive LBO proposals and incorporate its three Final Offer proposals, which were more favorable to FOPPO’s members.<sup>6</sup> The County reasons that, to do otherwise, would unduly destabilize finality of interest arbitration awards. The County further argues that nothing in Arbitrator Whalen’s award indicates that the three regressive proposals played a role in her awarding the County’s LBO.

We are reluctant to determine what Arbitrator Whalen would or would not have done had the County not submitted an invalid LBO. However, we also are disinclined to send the parties back to “square one,” when the record before us does not indicate whether the three regressive proposals were material to Arbitrator Whalen’s award. Therefore, we remand the matter to Arbitrator Whalen to determine whether the three proposals would change her award. Specifically, the County’s LBO is modified by rescinding the three regressive LBO proposals and replacing those proposals with the language used in its Final Offer. FOPPO’s LBO shall remain the same. Arbitrator Whalen may then determine whether to adhere to her prior award,

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<sup>6</sup>There is nothing prohibiting the parties from agreeing to this change.

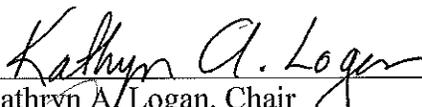
award FOPPO's LBO, or order a new hearing (or allow additional evidence or submissions by the parties). In the event that Arbitrator Whalen adheres to her determination to award the County's LBO (as modified by this order) or decides to award FOPPO's LBO, such a determination shall be made within 60 days from the date of this order. If Arbitrator Whalen determines that further proceedings are necessary, she shall set dates and places for hearing pursuant to ORS 243.746(3) and proceed in a manner consistent with ORS 243.746(4), (5), and (6).<sup>7</sup>

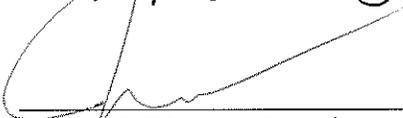
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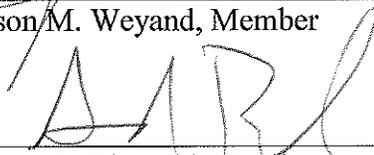
The County will cease and desist from bad-faith bargaining by submitting regressive proposals in its LBO. The County will retract those regressive proposals from its LBO and replace them with the corresponding proposals in its Final Offer.

In the absence of an agreement between the parties within 30 days from the date of our order, the parties will resubmit their LBOs to Arbitrator Whalen, consistent with this order. Arbitrator Whalen will then determine whether to adhere to her prior award, award FOPPO's LBO, or order a new hearing (or allow additional evidence or submissions by the parties). Arbitrator Whalen's costs, if any, will borne equally by the parties.

DATED this 3 day of July 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>7</sup>Although our order sets forth the LBOs to be submitted to Arbitrator Whalen, our order should not be construed as restricting the parties from attempting to resolve their dispute or to further narrow the scope of their dispute. To that extent, the parties would still be able to submit LBOs not less than 14 calendar days before the date of hearing set by Arbitrator Whalen. *See* ORS 243.746(3). However, any such LBO modification must be consistent with this order.