

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING)
EMPLOYEES OF OREGON,)
)
Complainant,)
)
v.)
)
STATE OF OREGON, DEPARTMENT)
OF ADMINISTRATIVE SERVICES,)
)
Respondent.)
_____)

ORDER ON RECONSIDERATION

On June 17, 2013, this Board issued an order concluding that the State of Oregon, Department of Administrative Services (State) violated ORS 243.672(1)(e) and (1)(a) when it unilaterally changed the *status quo* established by three different articles in its expired collective bargaining agreement with the Association of Engineering Employees of Oregon (Association). 25 PECBR 525 (2013). On July 1, 2013, the State filed a petition seeking reconsideration of portions of our order. The Board granted the State’s motion for reconsideration and heard oral arguments on the State’s petition on August 14, 2013.¹

The State also requested that the Board grant it the opportunity for “rehearing” so that it could submit additional evidence regarding the evolution of the use of e-mail as a workplace communication tool and the impacts and costs to the employer of allowing Association-related messages to be sent and received on its e-mail system. We only reopen the record at the request of a party when: (1) the evidence is material to the issues in dispute; and (2) the evidence was either unavailable at the time of the hearing or there was a “good and substantial” reason the evidence was not offered at the hearing. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-16-11, 24 PECBR 488 (2011) (Ruling on Reconsideration). We apply this standard in cases where the parties have submitted the

¹As this case was submitted directly to the Board on stipulated facts, no recommended order was issued. In such cases, we generally grant reconsideration upon the request of a party. *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality*, Case No. UP-47-06, 22 PECBR 54, 54-55 (2007).

issues to the Board based on stipulated facts as well as to cases where hearings have been held. *Teamsters Local 223 v. City of Medford*, Case No. UP-53-10, 24 PECBR 225, 226-27 (2011) (Ruling on Reconsideration).

The State has not asserted that any potential evidence was unavailable at the time the stipulated facts and joint exhibits were submitted to the Board or provided any explanation as to why the evidence was not submitted before the close of the record. Nor has the State offered any compelling reasons why we should reopen the record to accept any new evidence. Accordingly, the request does not meet the standards we apply to requests of this type. Therefore, the request for rehearing and to reopen the record is denied.

Issues on Reconsideration

The State requests that we reconsider the portions of our order holding that it violated ORS 243.672(1)(e) and (1)(a) when, during the hiatus period, it unilaterally prohibited employees and Association representatives from using the State's e-mail system for Association-related communications. The State alleged that we erred in our analysis of the (1)(e) allegation by: (1) improperly applying the requirements of ORS 243.650(7)(b); (2) improperly applying the provisions of ORS 243.650(7)(d); (3) improperly applying the balancing test under ORS 243.650(7)(c); and (4) narrowly applying the "purely contractual rights" exception to the *status quo* doctrine. Finally, the State alleges that because it prohibited the sending or receiving of Association-related messages on the State e-mail system for lawful reasons, we incorrectly concluded that the State violated ORS 243.672(1)(a). We will address each of the assertions separately.

Application of ORS 243.650(7)(b)

We begin with the State's claim that we improperly applied ORS 243.650(7)(b), which excludes from the definition of "employment relations" any "subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995." The State reasserts its argument that in *Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986), we decided the subject at issue to be a permissive, nonmandatory subject of bargaining. As previously explained, the subject at issue in *Department of State Police* was "the off-duty use of State vehicles." 9 PECBR at 8806.² The subject here is the use of the State's e-mail system by the Association and Association-represented employees to communicate about union business. Simply put, these cases

²The observation in *Department of State Police* that the "determination by an employer of the use of its equipment is an inherent management right essential to that employer's ability to determine its level of services, assignment of duties, and the general operation of the employer's enterprise," (*id.*) was *dicta*. As we previously explained, the State's interpretation of *Department of State Police*—*i.e.*, that it held that any use of any employer equipment constitutes a permissive subject of bargaining—cannot be reconciled with the numerous cases both before and after *Department of State Police* holding that all sorts of equipment (including vehicles and communication systems) are mandatory for bargaining. Consequently, we do not address the State's argument that any subject determined to be permissive before June 6, 1995, is permissive under ORS 243.650(7)(b), even if that determination was overruled before June 6, 1995. We are skeptical, however, of that argument.

involved two different subjects. Consequently, we adhere to our determination that this Board did not determine before June 6, 1995, that the use of an employer's e-mail system by a union and its represented employees to communicate about union business was a permissive, nonmandatory subject of bargaining.³ Therefore, this subject is not permissive under ORS 243.650(7)(b).

Application of ORS 243.650(7)(c)

We now turn to the State's contention that we improperly balanced the subject at issue under ORS 243.650(7)(c).⁴ Under that subsection, we balance the impact on management's prerogative regarding the subject against the impact on employee wages, hours, or other terms and conditions of employment. On reconsideration, the State contends that our order did not sufficiently identify the effect on public employee wages, hours, and other terms and conditions of employment, with respect to the use of the State's e-mail system by the Association and Association-represented employees to communicate about union business. We adhere to our determination, with the following supplementation.

The Association is the certified exclusive representative of the employees in the bargaining unit for "purposes of collective bargaining with respect to employment relations." ORS 243.666(1). Because of this exclusive status, this Board has long held that union/association rights pertaining to the use of employer facilities and communication systems constitute "employment relations"—i.e., are mandatory for bargaining. *See Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347, 355 (1975); *Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279, 1 PECBR 446, 456 (1975); *South Lane Education Association v. South Lane School District No. 45J*, Case No. C-280, 1 PECBR 459, 473-74 (1975), *aff'd*, 42 Or App 93, 600 P2d 425 (1979); *aff'd as modified*,

³The State also asserts that once we concluded that the subject at issue in *Department of State Police* was different from the subject at issue in this case, there was no need for further discussion comparing and contrasting the equipment at issue in *Department of State Police* with the equipment at issue in this case. *See* 25 PECBR at 540. We agree with the State and we do not incorporate that additional discussion as part of our resolution of this case.

⁴The State also contests our conclusion that the subject at issue has more than an "insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment." *See* ORS 243.650(7)(d). As set forth in our prior order and explained below in our balancing test, we adhere to our conclusion that the impact on public employee wages, hours, and other terms and conditions of employment is significant and outweighs the impact on management prerogatives, which is also substantial. It necessarily follows that the subject has more than an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment, and is not, therefore, permissive under subsection (7)(d).

In addition, the State asserts that our prior order mischaracterized the holding of *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 720 (1996). To clarify, we cited that case for the proposition that the focus of our analysis in a scope-of-bargaining case is subject based, not proposal based. 25 PECBR at 542. We adhere to that proposition and citation.

Springfield Education Assn. v. School Dist., 290 Or 217, 621 P2d 547 (1980).⁵ Inherent in those holdings is the recognition that union access to employer communication systems has a significant effect on public employee wages, hours, and other terms and conditions of employment that generally outweighs the impact on management's prerogatives regarding the employer's communication systems.⁶ This is so in part because, as the exclusive bargaining representative of public employees, the union negotiates the wages, hours, and other terms and conditions of employment for its represented employees.

Moreover, the certified labor organization commonly plays a vital role in presenting grievances on behalf of its employees, and bears the statutory obligation to fully and fairly represent those employees. See ORS 243.672(2)(a). We have recognized that the duty of fair representation significantly impacts the represented employees' wages, hours, and other terms and conditions of employment, and also provides a benefit to the employer. See *Springfield School District No. 19*, 1 PECBR at 350. Thus, we have long held that provisions that "assist the incumbent labor organization in its duty of fair representation are within the scope of mandatory bargaining." *South Lane School District No. 45J*, 1 PECBR at 474. As noted above, we have specifically determined that provisions concerning union access to an employer's communication systems for purposes of union-related communications assist the union in its duty of fair representation and are, therefore, mandatory for bargaining.

We do not find that the employer's communication system at issue here—e-mail—warrants a different result from our longstanding practice regarding other employer-owned communication systems. Rather, consistent with our previous holdings concerning union access to other employer communication systems, we continue to find that the use of the State's e-mail system by the Association and its represented employees to communicate about union business has a greater impact on public employee wages, hours, and other terms and conditions of employment than on management's prerogatives.

As discussed in our prior order, e-mail has become commonplace in today's workplace and has achieved a relevance surpassing other communication systems (bulletin boards, inter-office mail) that this Board previously determined to be mandatory for bargaining. This is particularly true in a bargaining unit like the Association's, where employees are spread across three separate agencies. The ability of employees and Association representatives to access the State's e-mail system greatly assists the Association in its duty of fair representation, which necessarily involves: (1) negotiating for public employee wages, hours, and other terms and conditions of enforcement; (2) monitoring employer compliance with contractual provisions on wages, hours, and other terms and conditions of employment; and 3) enforcing and grieving those same contractual provisions.

⁵The three cited cases were consolidated for purposes of appeal before the Court of Appeals and the Supreme Court.

⁶Although *Springfield* was decided before the 1995 amendments that, *inter alia*, added subsections (7)(c) and (d), the courts have recognized that subsection (7)(c) codified the balancing test that this Board used in *Springfield et al.* to determine whether a subject that is not expressly listed in subsection 7(a) is a condition of employment. See *Eugene Police Employees' Association v. City of Eugene*, 157 Or App 341, 354, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999). Therefore, even though these cases were decided before the statutory exception of (7)(c) was added, they are still instructive.

Like union access to older employer communication systems, Association access to the State's e-mail system facilitates communication between the Association and its represented employees so that the Association can fully and fairly represent those employees, which significantly impacts the employees' wages, hours, and other terms and conditions of employment.

Access to the State's e-mail system by the Association and its represented employees to communicate about union business has other significant impacts on public employee wages, hours, and other terms and conditions of employment, beyond assisting the Association in its duty of fair representation. Specifically, such access provides an efficient and reliable method for the Association and its represented employees to: (1) send and receive communications before contract negotiations to identify what issues employees would like to have addressed through negotiations, including wages, hours, and other terms and conditions of employment, such as benefits, "just-cause" provisions, and layoff procedures; (2) communicate about potential bargaining proposals, draft proposals, or counterproposals; (3) send notices of meetings or other opportunities to discuss bargaining issues; (4) update employees about proposals made by the Association and the State, and solicit and receive feedback on those proposals; (5) plan or discuss concerted activities to support the contract campaign; (6) announce the terms of a tentative agreement and prepare for and conduct the ratification process; (7) discuss potential grievances under the contract; (8) discuss changes in the workplace that might trigger the obligation of the State to engage in interim bargaining; (9) provide for Association representation in disciplinary investigations; (10) send employee grievances to representatives of the employer and the Association; and (11) solicit and receive information in support of grievances, interim bargaining efforts, unfair labor practices or other contract administration matters. This list is by no means exhaustive, but it demonstrates that the use of the State's e-mail system by the Association and its represented employees has direct and substantial effects on employees' wages, hours, and other terms and conditions of employment.

We recognize, as the State argues, that the State's e-mail system is not the only communication method available to the Association and its represented employees. To be sure, there are other ways in which the Association and its represented employees could communicate about public employee wages, hours, and other terms and conditions of employment, including use of the bulletin boards, the postal service, intra-office mail, personal e-mail systems, the Association's own e-mail system, or home visitation. The existence of such alternatives does not mean, however, that access to the State's e-mail system does not have a substantial impact on public employee wages, hours, and other terms and conditions of employment. This is particularly true because the State's e-mail system provides a more efficient and effective communication system than older, traditional systems whose use has long been considered mandatory for bargaining. Of the options currently afforded to the Association and its represented employees, the e-mail system is the communication system that likely has the most significant, direct effect on employees' wages, hours, and other terms and conditions of employment.

The State further contends that we should not look at its e-mail system “in a vacuum,” but rather in the context of a larger “technological revolution.” Specifically, the State argues that the proliferation of computers, internet access, “smart phones,” and social-media sites lessens the impact of the subject on public employee wages, hours, and other terms and conditions of employment. We agree with the State to a point. The increasing availability of other instantaneous and two-way communication technologies shifts the balance slightly towards a finding that the use of the State’s e-mail system by the Association and its represented employees to communicate about union business should be permissive under our balancing test. However, as set forth above and in our prior order, the impact on employee wages, hours, and other terms and conditions of employment remains significant, as the State’s e-mail system provides public employees and their exclusive bargaining representative with the more reliable, accessible, and relevant communication system with respect to employment relations.

We next turn to the State’s argument that we gave “short shrift” to the impact on management’s prerogatives. Specifically, the State argues that we failed to grasp the importance of its property rights, the concerns about employees spending work time to communicate about union business, and the potential harm that might arise from the use of its e-mail system for Association-related communications. We acknowledged these impacts in our original order and reiterate here that those impacts are significant. But this does not end the inquiry. We must still balance the overall impact of the subject on management’s prerogatives against the impact on employee wages, hours, and other terms and conditions of employment.

After doing so again on reconsideration, we continue to conclude that the impact on management’s prerogatives does not outweigh the impact on employee wages, hours, and other terms and conditions of employment. In adhering to our conclusion, we note that some of the impacts on management’s prerogatives identified by the State (including primarily the financial costs of providing, maintaining, and upgrading its e-mail system; the costs of internet security; and the potential difficulties in ensuring that employees are performing work rather than spending time on non-work e-mails) apply not only to the use of its e-mail system for Association-related communications, but also more broadly to the entire State e-mail system. These costs and concerns are implicated more by the question of whether the State should establish and maintain an e-mail system for its employees at all. The question before us is solely whether the State is obligated to bargain over the use of its *existing e-mail system* for Association-related communications.

Additionally, the impacts on management’s prerogatives here are also limited by the contractual agreement reached by the parties. Specifically, the agreement retains and reinforces many of the prerogatives that the State contends we have minimized, including: (1) the overall right to control the e-mail system; (2) the right to trace, review, audit, and intercept use of its e-mail system without notice; and (3) limits on the contents, length, and recipients of e-mails. Additionally, usage of the State’s e-mail system by the Association and its represented employees to communicate about union business: (1) must occur on non-working time; (2) may not result in any additional costs to the State; and (3) may not adversely affect the use of or hinder the performance of an Agency’s computer system for Agency business. Finally, the State is held harmless against any actions taken against the Association or its agents that are a direct result of the use of e-mail under the parties’ agreement.

In sum, we have carefully reconsidered our balancing of the subject at issue. Having done so, as modified above, we adhere to our original order and conclude that the subject of the use of the State's e-mail system for Association-related communications has a greater impact on employee wages, hours, and other terms and conditions of employment than it does on management's prerogatives. As a result, the subject is mandatory for bargaining.

"Purely contractual rights" exception to the *status quo* doctrine

The State objects to our application of the "purely contractual rights" exception to the *status quo* doctrine described in *Oregon School Employees Association, Chapter 7 v. Salem School District 24J*, Case No. C-273-79, 6 PECBR 5036, 5046 (1982). The State points to language from *Oregon University System v. Oregon Public Employees Union, Local 503*, Case No. UP-61-98, 19 PECBR 205 (2001), *recons*, 19 PECBR 431 (2001), *rev'd on other grounds*, 185 Or App 506, 60 P3d 567 (2002), to support its assertion that the use of an employer's e-mail system is a purely contractual right that should not survive the expiration of a collective bargaining agreement. In *OUS*, we noted that:

"the general rule in the private sector is that a union and its members do not have a statutory right to use the employer's equipment to communicate. [Footnote omitted.] In both the private sector and under the Public Employee Collective Bargaining Act [PECBA], the subject of access to the employer's equipment for union communications is typically mandatory for bargaining. * * * Thus, if a right to use equipment exists, it must be found in the collective bargaining agreement." *OUS*, 19 PECBR at 434 (Order on Reconsideration) (citing *NLRB v. Proof Co.*, 242 F2d 560, 562 (7th Cir.), *cert den*, 355 US 831 (1957); *Springfield School District*, 1 PECBR at 355).

The State posits that since we previously held that the right to use the employer's e-mail system must be found in a collective bargaining agreement, it must be a "purely contractual" right under the *Salem School District 24J* case.

We disagree. The cited language only stands for the proposition that the PECBA does not specifically require that a public employer allow a labor organization to utilize its equipment for union communications. It does not address whether the subject should be included in the exceptions to the *status quo* doctrine, but it does demonstrate why we described the term "purely contractual rights" as inapt. If we applied the term "purely contractual right" literally, as urged by the State, we would effectively eliminate the *status quo* doctrine because a significant portion of every collective bargaining agreement consists of rights conferred solely by that contract. For the reasons set forth in our original order, we continue to hold that a narrow reading of these exceptions is the correct approach.

ORS 243.672(1)(a)

We concluded in our original order that the State violated both the "because of" and "in" prongs of ORS 243.672(1)(a) when it prohibited employees and Association representatives from utilizing its e-mail system for union-related communications. In doing so, we found that the

prohibition was not based on any legitimate or lawful motives, but rather that the State's actions were taken "because of" protected activities of bargaining unit members. The State contends that we erred in this conclusion. It asserts that the prohibition was based on a single lawful reason: its purported belief that use of e-mail for Association-related communications under Article 71 involved a permissive subject of bargaining.

We do not agree, however, that the State acted for the reason that it asserts. Immediately after the contract expired, the State issued directives prohibiting *only* Association-related communications over its e-mail system. It did so while specifically noting that other personal use of the e-mail system was still allowed per the applicable agency policies. As previously explained, this prohibition was facially discriminatory and demonstrated that the State prohibited employees and Association representatives from using the State's e-mail system "because of" protected activities. Therefore, we find the State's purported reason for its conduct—that it merely barred Association-related communication because it believed the subject to be permissive for bargaining—to be a pretext for its unlawful conduct. Consequently, the State violated subsection (1)(a). See *Wy'east Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 146 (2007) (if all of an employer's reasons for its conduct are unlawful under subsection (1)(a), or if the employer's supposedly lawful reasons are only a pretext for its unlawful conduct, the complainant will prevail); *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004) (same).

However, even if we accepted the State's assertion that it was at least in part motivated by the mistaken belief that it was allowed to change the *status quo* upon expiration of the contract, our conclusion would be the same. In situations where we find that an employer acts for both lawful and unlawful reasons, we determine whether the employer's unlawful motive "was a sufficient factor to attribute the decision to it." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 639, 16 P3d 1189 (2000). Alternately stated, we determine "whether the employer would not have taken the disputed action but for the unlawful motive." *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007).

As noted above, at the same time that the State informed employees and Association representatives that no Association-related communications were allowed on the State e-mail system, it clarified that any other personal use allowed for under existing policies was still allowed. These directives, which were e-mailed to all employees in the bargaining unit, establish that the primary, if not the only, motivating factor for the prohibition was that the State's e-mail system was being used to engage in protected activity—namely, to communicate regarding Association matters. Thus, even under a mixed motive analysis, we would find that the State would not have discontinued the use of its e-mail system for Association-related communications "but for" its unlawful motive, in violation of subsection (1)(a).

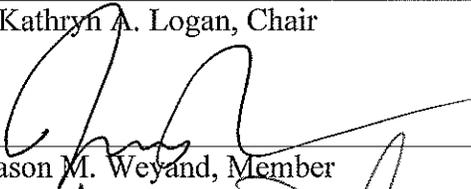
As a result, we adhere to our original order and continue to hold that the State violated ORS 243.672(1)(a) when it prohibited Association-related messages from being sent on its e-mail system.

ORDER

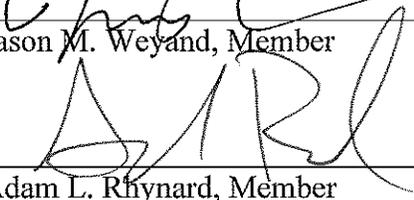
1. The State's request for reconsideration is granted.
2. We adhere to our order as explained and clarified above.
3. The State's request for a rehearing and to reopen the record is denied.

DATED this 19 day of September 2013.

*Kathryn A. Logan, Chair



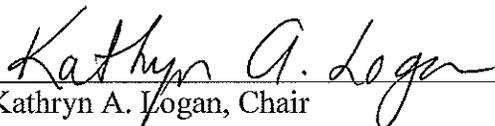
Jason M. Weyand, Member



Adam L. Rhynard, Member

*Chair Logan, Concurring in Part, Dissenting in Part:

I respectfully dissent from the portion of this reconsideration order that holds that the State violated ORS 243.672(1)(e). As I stated in the initial order, when the balancing test is applied, there is a "greater impact on management's prerogative than on employee wages, hours and other terms and conditions of employment," rendering this subject to be permissive.



Kathryn A. Logan, Chair

This Order may be appealed pursuant to ORS 183.482.