



payments? If so, did this conduct violate ORS 243.672(1)(e), prior settlement agreements and consent decrees between the parties, and ORS 243.672(1)(g)?

2. Should TriMet be ordered to pay a civil penalty to ATU?
3. Are ATU's claims inconsistent with the past practice of the parties; and if so, has ATU waived these claims, or is it estopped from bringing these claims?
4. Did ATU fail to provide notice to TriMet of its intent to bring this action contrary to the past practice of the parties and in violation of ORS 243.672(2)(b)?<sup>1</sup>
5. Should sanctions be imposed on ATU regarding its financial secretary/treasurer's compliance with a TriMet subpoena and on TriMet regarding its compliance with two ATU subpoenas?<sup>2</sup>

### RULINGS

The rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

1. TriMet is a public employer as defined by ORS 243.650(20). ATU is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of approximately 2,000<sup>3</sup> TriMet employees.
2. TriMet and ATU were parties to a collective bargaining agreement in effect from 2003 to 2009. The contract contained a maintenance of benefits provision with respect to medical, hospital, prescription drug, dental, convalescence, and optical benefits.<sup>4</sup> On November 17, 2006, ATU filed a grievance alleging that TriMet violated this provision when TriMet and Regence, the medical insurance carrier, changed the prescription plan to increase the cost to employees of certain prescription drugs effective January 1, 2005. The benefit was changed from an employee co-payment of \$5 per prescription to a tiered system where employee co-payments for prescriptions varied; for some prescriptions, employees paid 20 percent of the cost. TriMet refused to arbitrate the grievance on the grounds of timeliness, and ATU filed an unfair labor practice (ULP) seeking to compel

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<sup>1</sup>TriMet withdrew its counterclaim after the hearing.

<sup>2</sup>ATU does not argue its motion for sanctions against TriMet, and we do not consider it.

<sup>3</sup>We take notice of the facts as found in *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911 (2009), *aff'd*, 250 Or App 681, \_\_\_\_ P3d \_\_\_\_ (July 27, 2012).

<sup>4</sup>The collective bargaining agreement provides, “[t]he benefits and specific coverage of these plans shall be the same as currently provided.”

arbitration. The ULP was ultimately settled through the work of ATU counsel Susan Stoner and TriMet counsel Kim Sewell, with TriMet agreeing to arbitrate the procedural arbitrability issue separate from the merits.

3. As part of the 2006 grievance and ULP, ATU obtained documents from Regence and TriMet. The documents included those received pursuant to a subpoena to Regence seeking documents regarding co-payments for drugs “approved by the FDA after January 1, 2005.” While reviewing the documents, Stoner noticed e-mail correspondence between TriMet, Regence, and TriMet’s benefit consultant, Mercer, discussing the 2005 change in prescription drug benefits. In these e-mails, the participants stated that the trigger for higher employee co-payments was whether a drug was first *marketed* after January 1, 2005. Stoner knew that the new plan’s trigger for higher employee co-payments was whether a drug was *approved by the FDA* after January 1, 2005. Therefore, a drug such as Lyrica, which was approved by the FDA before January 1, 2005, should be subject to lower employee co-payments even though it was first marketed after January 1, 2005.

4. The documents produced also included an e-mail from Mercer to Regence in May 2006 stating in part:

“TriMet has confirmed they would like Regence to use the FDA approved date to administer the custom union prescription drug benefit, since that is what was communicated to their members, and is the most accurate, consistent way for Regence to administer the benefit.”

5. One of the documents produced showed a table of drugs with their market and FDA approval date. According to that document, some employees were being charged a 20 percent co-payment for Lyrica and others were being charged \$5. Stoner determined that there were approximately ten drugs that had been approved prior to January 1, 2005, but marketed after that date.

6. On Friday, June 26, 2009, Stoner telephoned and e-mailed TriMet General Counsel Brian Playfair. Stoner informed Playfair that Regence may be incorrectly administrating the prescription drug plan, and that the plan uses the FDA-approval date, not the date the drug comes onto the market. Stoner stated that this could be a contract violation and asked Playfair to check into this issue and let her know.<sup>5</sup>

7. On Monday, June 29, 2009, Playfair sent an e-mail agreeing to check into the matter. Playfair then forwarded Stoner’s e-mail to Cynthia Kodachi in TriMet’s Human Resources Department. Kodachi was the primary TriMet Human Resources employee handling health and

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<sup>5</sup>TriMet argues that this request, and its subsequent iterations, were requests for TriMet’s legal position on the market date issue. All of the evidence, however, demonstrates that TriMet officials consistently interpreted Stoner’s queries as pertaining to whether Regence determined the amount of the employee prescription co-payment based on the market date or FDA approval date. TriMet officials never questioned Stoner’s meaning or objected to the terms of Stoner’s request until after this ULP complaint was filed.

welfare issues. Playfair asked Kodachi to “let me know the date” and tell him “how \* \* \* the benefit [is] actually administered.” Playfair told Kodachi of his (erroneous)<sup>6</sup> belief that the date used by the plan was “when the drug is released to the market.” Playfair also e-mailed Kodachi on July 1, 2009, to ask Kodachi the status of the response to Stoner’s question. Playfair did not promptly call Stoner back with the information, as Stoner had expected.

8. Between June 29 and July 6, Stoner telephoned ATU’s benefit consultant Molly Butler. Butler is retained by ATU as a benefits coordinator to assist in handling individual member’s benefit disputes. Stoner told Butler that there appeared to be ten drugs that should have been subject to a \$5 co-payment but Regence might be overcharging for them. Stoner asked Butler to check with Regence and to see what was going on.

9. Pursuant to the collective bargaining agreement, TriMet pays \$20,000 per year to the ATU Benefits Coordinator Account, which is the source of money used to pay Butler. Butler’s firm was the successor to B.W. Reed Benefits, LLC. TriMet had executed a “waiver of limitations on disclosure” regarding Reed Benefits’ access to information about benefits provided to union members. According to former ATU President Ron Heintzman, who bargained the benefit coordinator language on ATU’s behalf, the coordinator position is funded to assist members with benefit problems. The position is not a conduit for information requests for bargaining or grievance investigation. In Heintzman’s experience, these requests were always handled directly with TriMet.

10. The monies in the fund are a source of controversy between ATU and TriMet. Prior to 2007, ATU’s then Secretary/Treasury embezzled a significant sum of money from the fund, which despite insurance and restitution payments, has not been completely reimbursed for the losses. By the time of hearing, the fund contained \$129,530.84.

11. On July 6, 2009, Butler sent a letter to Melissa Lee of Regence.<sup>7</sup> Butler’s letter stated that she was retained by ATU to assist with claims and medical insurance plan issues. Butler told Lee that ATU was concerned that members were being overcharged for prescription drugs which had been approved by the FDA prior to January 1, 2005, but not marketed until after that date. Butler asked Regence to audit employee co-payments for certain prescription drugs which she listed, and to reprocess any claims for which employees had overpaid. Butler also asked for a timeline for reprocessing claims. Regence did not respond to Butler’s letter.

12. Stoner heard nothing from either TriMet or Regence. Sometime between July 6 and 16, 2009, Stoner contacted the State Insurance Commission for information about what remedies existed if an insurance company was not following its official plan. Insurance Commission staff told Stoner that ATU could file a complaint with the Commission, but urged Stoner to contact TriMet and Regence to resolve the issue prior to filing such a complaint.

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<sup>6</sup>TriMet agrees that the FDA approval date is, in fact, the date required by the plan.

<sup>7</sup>Lee’s position with Regence does not appear in the record.

13. Also between July 6 and 16, 2009, Stoner called general counsel for Regence, Michael Mudrow. Mudrow stated that he knew about the general concept of using market dates or FDA approval dates as significant dates, but that he was unaware of a current issue regarding those dates. Mudrow asked Stoner to write him a letter with the details that would help him understand the issues.

14. On July 16, 2009, Stoner faxed Mudrow a letter with a chronology of events from ATU's standpoint. Stoner stated that she believed that TriMet was responsible for misuse of the market date rather than the FDA approval date to determine the employee co-payment. She included documents she had obtained by subpoena which reflected communications between TriMet and Regence on the issue.<sup>8</sup> Stoner asked Mudrow to investigate and respond to her.

15. Between July 16 and 22, 2009, Mudrow called Stoner. Mudrow told Stoner he thought that TriMet and Regence had worked out the problem, but that Mudrow did not want to discuss it with Stoner because TriMet was Regence's client. Mudrow did not say what the solution was and indicated that Stoner should get the information from TriMet. Mudrow asked Stoner to talk to TriMet attorney Kim Sewell.

16. On July 21, 2009, Sewell spoke to Mudrow.

17. On July 22, 2009, Stoner e-mailed Sewell. Stoner and Sewell were already in contact because they were representing their clients in the grievance arbitration and ULP. Stoner mentioned her conversation with Mudrow and asked that Sewell call her to discuss "how to resolve the FDA approval date vs market availability date."

18. On July 22, 2009, Sewell called Stoner; the call lasted two minutes and 17 seconds. Stoner told Sewell that the "FDA approval date" was "likely not a big deal" because not much money was involved. Sewell responded that she was "checking [with] Cynthia [Kodachi]/Brian [Playfair] who are confirming date of FDA approval." According to Stoner's notes of the conversation, Stoner did not get confirmation from Sewell that the FDA approval date was being used.<sup>9</sup> Stoner later forgot this conversation.

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<sup>8</sup>Exhibit C to the Mudrow letter is an e-mail from Regence to Playfair and others at TriMet explaining that the "market date" can differ from the "FDA approval" date. Regence told TriMet that it would wait for TriMet to confirm how to handle the drugs approved before January 1 but not marketed until after that date. Exhibit D is an internal memo between Regence staff confirming that Regence was waiting for clarification from TriMet as to whether to use the market versus FDA approval date. These documents caused Stoner to believe that TriMet was behind the effort to insert "market date" into the equation in violation of the plan. Exhibit G showed that Regence was still using the "market date" in communications sent to ATU members.

<sup>9</sup>The parties vigorously dispute the content of this telephone conversation. Sewell testified that she "confirmed" that "yes, the FDA [approval] versus market-date issue is -- is a nonissue, essentially, it's always been the market -- or, the FDA date and this -- we should be able to wrap this up; everybody's on the same  
(continued...)

19. On August 12, 2009, Stoner faxed a letter to Playfair "Re: Prescription Drug Problem – FDA Approval Date." Stoner told Playfair that she had been "holding off on initiating the grievance process to address the above problem because you indicated you were meeting with Blue Cross and that you thought it would be worked out. Do you still want the opportunity to settle this without going to a grievance?"

20. Two hours after Stoner's fax, Playfair faxed a response. Playfair informed Stoner that he had "not had much success with Regence. Probably not much chance of a settlement on this end. I think that it would be best to pursue grievance."<sup>10</sup>

21. The first step in the ATU/TriMet grievance process was a Step I pre-filing conference. On August 12, 2009, Stoner sent a request for a pre-filing conference on the prescription drug payment grievance to TriMet Labor Relations Director and Workforce Development Department head Evelyn Minor-Lawrence and Kodachi, suggesting that Kodachi be the supervisor responding to the matter.

22. Also on August 12, Stoner e-mailed Sewell regarding the 2006 grievance arbitration. Sewell responded by e-mail the next day. In her response, Sewell mentioned the letter that Stoner had sent Playfair about filing a grievance. Sewell wrote that "there should be no reason to initiate the grievance process because I believe we are all in agreement on which approval date applies." Sewell does not specifically state, however, which approval date she means.

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<sup>9</sup>(...continued)

page, so to speak." Stoner denied that this was the content of their July 22 conversation. Sewell also testified that she told Stoner that the FDA approval date was the date being used on three to five separate occasions, which Stoner also denied.

We resolve this factual dispute in Stoner's favor for the following reasons. Both Stoner and Sewell had factual errors in their recollection—Stoner did not recall a significant phone conversation with Sewell, and Sewell believed she had spoken by telephone with Stoner on dates not corroborated by telephone records. Stoner also has hearing difficulties. Stoner, however, presented contemporaneous notes of this and other conversations while Sewell had none. Stoner continued to question other individuals about the prescription drug payment issue, and never got a clear indication from Sewall or any other TriMet official that the matter was resolved. (See Finding of Fact 22.) Finally, even after ATU filed a grievance concerning prescription drug insurance payments, TriMet did not tell ATU that the FDA approval date was being used to determine the amount of employees' co-payments.

If, as TriMet contends, Stoner was repeatedly told that the FDA approval date was being used, and despite this kept behaving as if she had never received that information, it is difficult to understand why TriMet failed to either contact another ATU official or provide the information to Stoner in written form. The reality appears to be that TriMet officials were absorbed in the 2006 grievance arbitration issue and never squarely faced ATU's questions about the prescription drug insurance payment.

<sup>10</sup>Sewell testified that Playfair was confused and that his fax did not concern the FDA/market date grievance but rather the pending 2006 grievance arbitration being handled by Sewell. Playfair did not testify at the hearing.

23. Stoner was puzzled by Sewell's response, and was unwilling to choose Sewell's response over Playfair's. Stoner responded that Sewell should talk to Playfair, because "he sent a note saying no agreement on the approval date and told me to file." Sewell did not respond to this e-mail.

24. On August 18, 2009, ATU Vice President Sam Schwartz attended a pre-filing conference on the matter with Kodachi. Despite the lengthy process to attain this face-to-face meeting, the meeting failed to produce relevant communication or understanding between the parties. In accordance with the grievance procedure, Kodachi issued a determination letter that stated, in relevant part:

"This pre-filing was regarding a retiree who had a prescription that was not paid \* \* \* the member stated that the Rx had been covered by Regence. I told Sam that I had researched the prescription and Regence could not find where they had processed this Rx for member. I showed Sam the Regence booklet which stated Regence only covers one name brand prescription for members [*sic*] condition and the Rx was not the name brand."

On August 18, ATU moved the Grievance to Step II.

25. Between August 12 and 28, Stoner telephoned Mudrow. While Mudrow told Stoner that he thought things had been worked out, he would not tell Stoner what had been worked out. Mudrow again told Stoner that she should get the answer from TriMet.

26. On August 24, Stoner and Sewell had a two-minute conversation about how subpoenas in the 2006 grievance arbitration would be served. Neither party raised the prescription drug insurance payment issue.<sup>11</sup>

27. On August 25, Kodachi e-mailed Regence confirming that Regence would remove the "marketed-after" portion of the administration from the TriMet Union prescription plan, resolving the prescription drug insurance payment issue in the way ATU sought. TriMet did not provide this e-mail to ATU until after November 10, 2009.

28. On August 28, Stoner wrote Sewell about the prescription drug insurance payment matter and another matter. Stoner stated: "On another note, Mike Mudrow seems to think you worked things out regarding the FDA approval date problem [or the problem within the problem] regarding the prescription drugs. If that is so, I can close the grievance. Let me know!" Sewell did not respond to this e-mail.<sup>12</sup>

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<sup>11</sup>Sewell recalled that she had told Stoner during this conversation that TriMet was in agreement with ATU that employee payments for the ten drugs should be reimbursed. Stoner did not recall this, and her notes of the conversation do not reflect it. Sewell again had no notes of the conversation. For the same reasons cited above, we credit Stoner's testimony based on her contemporaneous notes.

<sup>12</sup>Sewell testified that she called Stoner on September 1, 2009, and told her "it was [the] FDA date."  
(continued...)

30. On September 8, Stoner called Mudrow to ask again which date was being used. Mudrow responded by an e-mail stating that, effective September 21, 2009, Regence would change its practice so that drugs approved by the FDA prior to January 1, 2005, would be subject to only a \$5 co-pay regardless of their marketing date, and would reimburse employees who had paid more than that.

31. Also on September 8, Stoner faxed a letter to Sewell explaining that Mudrow understood that employees would be reimbursed for prescription drugs that were charged according to the market date rather than the FDA approval date. Stoner asked Sewall if TriMet agreed with Mudrow's understanding; if so, then ATU need not pursue the grievance.

32. Sewell did not respond to Stoner's fax, nor did Minor-Lawrence send the customary letter acknowledging the resolution of the grievance.<sup>13</sup> Therefore, ATU continued to pursue the grievance.

33. On September 15, 2009, ATU requested a Step II grievance hearing along with its standard boilerplate information request for "every document the employer considered when making the decision that is being grieved." The request extended to "reports, memoranda, records, letters, e-mails and audio/video tapes."

As was its practice with a boilerplate request for information when TriMet did not know what the grievance was about, TriMet did not respond.

34. On October 12, 2009, Stoner and Schwartz filed a specific request for documents regarding the prescription drug insurance payment grievance. The written request was for all documents including e-mail, correspondence, memoranda, voice mails, and reports related to the following:

- "1. TriMet's and Mercer's discussions and agreements with Regence regarding the FDA approval date versus the go-to-market date since July 2008 to the present;
- "2. All documents provided by Regence to TriMet and Mercer related to the FDA approval date versus the go-to-market date since July 2008 to the present;

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<sup>12</sup>(...continued)

Stoner recalls no such conversation and her contemporaneous behavior is consistent with no such conversation having taken place. For the same reasons cited above, we credit Stoner's testimony based on her contemporaneous notes.

<sup>13</sup>Sewell testified that she called Stoner on September 8 and told Stoner no grievance was necessary, and that, in all, Sewell provided this information to Stoner multiple times. However, the phone records in evidence do not reflect a conversation between Stoner and Sewell on September 8, 2009, and Stoner credibly testified that she has no notes of such a conversation. Sewell does not have notes documenting any instance in which she orally told Stoner that the prescription drug insurance payment matter was resolved. As before, we credit Stoner's testimony over Sewell's for the reasons stated above and Stoner's contemporaneous notes.

- “3. Any documents sent to union members by either Regence or TriMet or Mercer related to FDA approval date versus the go-to-market date since July 2008 to the present.”

As was customary with formal grievance information requests, Stoner sent the request to Labor Relations Director Minor-Lawrence.

35. On October 19, 2009, Minor-Lawrence responded to the request in a letter to ATU President Jonathan Hunt. Minor-Lawrence stated that she had received the request for documents and that she was referring the request to the TriMet Legal and Human Resources Departments for review and response. Minor-Lawrence stated that TriMet would then “respond to your request and provide relevant documents as applicable.”

36. Sewell saw the information request a few days after it was made and told Minor-Lawrence that the grievance was resolved. However, TriMet neither communicated this information to ATU nor issued its standard grievance closing form.

37. On November 10, 2009, ATU filed this unfair labor practice complaint.

38. The 2006 grievance arbitration hearing was held on December 7 and 8, 2009. During the unilateral change arbitration hearing, some witnesses mentioned the prescription drug insurance payment issue. Kodachi stated that TriMet was “adamant” that the proper date was the FDA approval date, but that Regence may have been using the market date.

39. On January 19, 2010, Tina Lowe of the TriMet Legal Department mailed Stoner a disk containing electronic copies of various documents. The cover letter stated that the documents were provided in response to ATU’s “Request for Inspection of Public Records dated October 12, 2009,” and that “[i]nformation exempt from disclosure has been withheld pursuant to ORS 40.225, 192.502(1) and 192.502(2).”

40. On January 25, 2010, Stoner wrote to TriMet Counsel Jana Toran in response to Lowe's letter. Stoner stated that ATU’s request for documents was made under the Public Employee Collective Bargaining Act (PECBA), not the Public Records Law, and that the documents provided did not include anything related to actions of Regence and TriMet correcting the prescription drug insurance payment problem. Stoner asked Toran to provide any withheld documents. TriMet did not respond to this letter.

41. On an unknown date, ATU subpoenaed documents from Regence in connection with this unfair labor practice proceeding. Regence produced a small number of documents showing that members were reimbursed for the overpayments on co-payments for the ten drugs in late October. TriMet had never asked Regence for this information.

42. Some time after November 10, 2009, pursuant to a subpoena in this unfair labor practice proceeding, ATU first received a copy of the August 25, 2009 Kodachi e-mail to Regence confirming that Regence would use the FDA approval date in administering the TriMet/Regence prescription plan.

43. The arbitrator issued his award in the 2006 grievance arbitration on February 19, 2010, ruling in favor of TriMet's defense that the grievance was untimely.

#### History of Labor Relations

44. The ATU/TriMet relationship is mixed. On the one hand, the parties have successfully processed hundreds of grievances and information requests over the last several years. On the other hand, there are matters where the relationship has broken down.

45. There are two general categories of information requests by ATU: (a) formal, written information requests made to the TriMet Workforce Development Department; and (b) informal oral or written requests made by ATU stewards or officials to TriMet managers, from lower level staff to the highest level executives.

46. Formal, written information requests through the Workforce Development Department are processed as follows:

a. ATU sends requests to the TriMet Workforce Development Department, which are dealt with by Labor Relations Director Minor-Lawrence and her subordinate Christine Stevens. ATU generally files a written standard-form boilerplate information request that is very broad and general in scope along with its grievance filings, which TriMet routinely ignores.

b. ATU apparently ignores the fact that TriMet ignores those requests, but generally follows the boilerplate requests with more relevant and specific requests.

c. The Workforce Development Department acknowledges, in writing, the information request within 10-11 days. If the request is simple, the Department generally responds in two or three days. The Department may take months to complete its responses to voluminous or complex requests. In those cases, the Department tells ATU how long it expects the production to take. If TriMet fails to respond to a request, ATU generally sends a follow-up letter after about a month. If necessary, Stevens will follow up with the manager responsible for obtaining the documents.

d. Although ATU generally files a second information request or a reminder if TriMet has failed to respond in a timely manner to the original request, there is no agreement between the parties that ATU must do so. ATU usually does not have to file multiple requests to obtain a specific piece of information, but sometimes has to do so. It was unusual for ATU to file an unfair labor practice complaint prior to sending another request or reminder to Stevens.

47. At all times relevant to this complaint, then-ATU President Jon Hunt would contact TriMet to attempt to resolve discovery problems regarding particular grievances. The process was often, although not always, successful. When the parties had disputes over information, Stoner would send a copy of the 1997 agreement in Case Number UP-52-96 to a TriMet representative to assist in resolving the problem.

48. Formal information requests to the Workforce Development Department are in letter form and bear a phrase such as “Re: Document Request for Grievance #7329.” The letter requests also contain the following statement:

“Any request for clarification or refusal to provide the documents should be sent to the Union immediately. Please be aware that, under PECBA, the employer must provide the requested documents within a reasonable time. Generally, that reasonable time is less than 30 days.”

49. While ATU usually advises TriMet that it plans to file a ULP, or threatens to file a ULP if the matter is not resolved, there is no agreement between the parties that ATU must do so, and no established practice between the parties on the issue.

50. The amount of time it takes the Workforce Development Department to respond to ATU’s information requests varies; there is no uniform past practice. On average, it takes the Workforce Development Department 25 days to respond to ATU’s information requests.

51. The vast majority of ATU’s information requests are informal oral or written requests made by ATU stewards or officials to TriMet managers. The amount of time TriMet takes to respond to these informal requests varies; some are quickly dealt with while others take longer and require multiple requests by ATU.

52. Most of the litigation between the parties over information requests appears to concern the more formal requests.

53. ATU’s formal information requests to the Workforce Development Department have generated several pieces of litigation before this Board, and are tracked by the Workforce Development Department. The informal requests are not tracked by the Workforce Development Department. ATU has not identified any litigation specifically involving those types of requests.

54. In 1993, ATU filed an unfair labor practice complaint against TriMet for failing to provide information related to the termination of two employees for alleged theft. The matter was resolved via a consent order in which TriMet admitted violating ORS 243.672(1)(e). *Amalgamated Transit Union, Division 757 (AFL-CIO) v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-12-93, 14 PECBR 468 (1993).

55. The parties resolved a 1996 ULP regarding TriMet’s production of documents, Case No. UP-52-96, by a written settlement agreement. Under the agreement, parties agreed that disputes about documents could be handled by then-ATU President Heintzman and then-TriMet Director of Labor Relations Mike Savage.<sup>14</sup>

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<sup>14</sup>The settlement agreement, offered as Exhibit C-2, was not entered into evidence.

56. In 1997, ATU filed a ULP against TriMet for failing to provide information. The matter was resolved via a consent order in which TriMet admitted violating ORS 243.672(1)(e). The consent order also stated that:

“For future cases, Tri-Met’s counsel, Richard N. Van Cleave, shall provide a written response to any discovery response directed to him by any representative of the ATU within fourteen (14) days of receipt of the request. The response shall (1) provide any documents then available; (2) advise as to the status of any remaining requests; and (3) provide a projected delivery date.” *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-48-97, 17 PECBR 780 (1998).

57. In 2004, TriMet filed a ULP complaint against ATU for requesting documents relevant to a settled grievance. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-46-04. That case was resolved prior to a hearing.

#### TriMet’s Subpoena to ATU Secretary/Treasurer

58. On August 9, 2010, TriMet issued a subpoena *duces tecum* to then-ATU Secretary/Treasurer Evette Farra.<sup>15</sup> ATU brought a motion to quash the subpoena, which the ALJ denied, but entered a protective order for the documents at issue. ATU provided the subpoenaed documents on February 7, 2011, the penultimate day of hearing.

59. On the last day of hearing, TriMet called Farra as a witness and inquired about her efforts to comply with the subpoena:

“Q. In preparing to locate those documents, the documents that are responsive to number one, two, and three, what did you do?

“A. Nothing.” (Farra Testimony at 516.)

Eventually, Farra testified that she delegated virtually all responsibility regarding the response to ATU counsel Stoner and other staff, and was for the most part unaware of what efforts were made to comply with the subpoena.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. Trimet failed to respond in a timely or adequate manner to ATU’s June 26, August 28, September 8, and October 12, 2009 requests for information concerning prescription drug insurance payments in violation of ORS 243.672(1)(e).

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<sup>15</sup>Farra had held that position since September 2007.

This unfair labor practice complaint arose out of ATU's efforts to obtain information about a possible violation of the collective bargaining agreement. ATU learned that Regence, a medical insurance carrier that provides health insurance benefits to bargaining unit members, may have incorrectly computed the amount of bargaining unit members' copayments for prescription drugs. On a number of occasions, ATU asked TriMet for information about this issue. ATU asserts that TriMet either failed to respond to these requests or failed to respond to the requests in a timely or adequate manner in violation of ORS 243.672(1)(e).

Under ORS 243.672(1)(e), a public employer's duty to bargain in good faith includes the obligation to provide a union with information of probable or potential relevance to bargaining or contract administration. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982). Our analysis of a party's obligation to provide requested information begins with the premise of full disclosure. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999). To determine whether a party violated its duty to produce the requested information, we consider four factors: (1) the reason given for the request; (2) the ease or difficulty of producing the information; (3) the kind of information requested; and (4) the parties' labor-management history. *Colton School District 53*, 6 PECBR 5031-32.

An employer's duty to provide information also includes the obligation to respond to a union's request in a timely manner. Whether a response is timely depends on the totality of circumstances, such as the accessibility and amount of data sought, the clerical time needed to obtain the information, and the employer's workload priorities. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 416, 429 (2006); *Colton School District 53*, 6 PECBR at 5032. Further, the reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether where the parties' history includes a pattern of numerous requests or apparent "fish-and-grieve" expeditions. *Id.*

We apply these standards to determine if TriMet's responses to ATU's information requests violated subsection (1)(e).

#### TriMet's Responses to ATU's June 26, August 28, and September 8, 2009 information requests

On June 26, 2009, Stoner questioned TriMet attorney Playfair about the date Regence used to determine the amount of a bargaining unit member's co-payment for a prescription drug, explaining that failure to use the FDA approval date to determine co-payments could violate the contract. Playfair replied that he would check into the matter. This oral request for the date utilized to determine prescription drug benefits constituted ATU's first request for information from TriMet.

Stoner heard nothing further from Playfair until August 12, 2009. On that date, Stoner sent Playfair a letter asking if she should file a grievance regarding payments for prescription drugs, or whether Playfair needed more time to check into the issue. Playfair responded by telling Stoner (incorrectly) that efforts to resolve the matter with Regence had been unsuccessful and that ATU should file a grievance.

After Playfair's comment, ATU initiated a grievance alleging that TriMet violated the collective bargaining agreement by using the date a drug was marketed, and not the date the FDA approved the drug, to determine the amount of a bargaining unit member's co-payment. Stoner then learned (from Regence, not TriMet) that Regence had agreed to use the FDA approval date. Twice—on August 28 and September 8, 2009—Stoner asked TriMet attorney Sewall to confirm Regence's agreement to use the FDA approval date. Sewall never responded to Stoner.

TriMet's failure to reply to ATU's June 26, August 28, and September 8, 2009 requests for information violated its good faith bargaining duty to supply information under subsection (1)(e). TriMet's actions cannot be excused by any of the factors we apply to analyze the adequacy of an employer's response to a union's information request.

In regard to the kind of information requested, ATU asked for information concerning the administration of prescription drug benefits by TriMet's insurer, Regence. The information Stoner sought on June 26 was needed to help ATU decide if the contract was being violated; the information Stoner sought on August 28 and September 8, 2009, was relevant to a grievance ATU initiated with a Step I pre-filing conference on August 18. Thus, all the information Stoner sought was relevant to a possible grievance, or one that had already been filed. Under the PECBA, a union is entitled to obtain information from an employer that is necessary to administer a collective bargaining agreement. This entitlement includes the right to information relevant to a pending grievance, as well as a probable or potential grievance. *Union-Baker ESD Association v. Union-Baker Education Service District*, Case No. UP-2-05, 21 PECBR 286, 295 (2006).

TriMet, however, argues that Stoner had no right to receive the kind of information she sought under the PECBA. According to TriMet, Stoner's requests constituted demands for a statement of TriMet's legal position on a particular issue, information that TriMet had no obligation under the PECBA to disclose. (TriMet Closing Argument, p. 24.) In support of its position, TriMet cites *Local One-L, Amalgamated Lithographers of America and the Metropolitan Lithographers Association, Inc.*, 352 NLRB 906 (2008), *enforcement granted* 344 Fed Appx 663 (2d Cir 2009). In that case, the National Labor Relations Board (NLRB) held that although the employer had a duty under the National Labor Relations Act (NLRA) to provide a union with "information in its possession which relates to the enforcement of the Agreement," it had no "corresponding duty to provide a statement of position, explicate its legal theories or to create them on demand." 352 NLRB at 916.

TriMet's argument is misplaced. The information Stoner asked for on June 26 was needed so that ATU could evaluate a potential grievance; the information Stoner sought on August 28 and September 8, 2009, was necessary to determine if a grievance ATU had initiated was resolved. In addition, what ATU wanted to know was the date Regence had used to determine the co-payment for bargaining unit members' prescription drug benefits. This was a request for factual information, not a request for a statement of TriMet's legal position. Because the information ATU sought was relevant to a potential or pending grievance, TriMet had an obligation under the PECBA to provide it.

ATU's requests were neither burdensome nor difficult to fulfill. Sewell contended that she had actually resolved the matter several times simply by very brief oral and written statements. Sewell needed only to communicate this resolution to Stoner or another ATU representative to adequately respond to ATU's information requests.

Finally, the history of the parties' labor relations does not excuse TriMet's failure to respond to Stoner's requests. An employer's failure or delay in providing information to a union may not violate subsection (1)(e) if the union has a history of abusing the process:

"Where there has been a pattern of numerous requests or of apparent 'fish-and-grieve' expeditions, the reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether." *Colton School District 53*, 6 PECBR at 5032.

TriMet argues that ATU has engaged in multiple "fish-and-grieve" expeditions, and that any failure to respond to the union's request should be excused for this reason. The record does not establish, however, that ATU had a history of filing numerous information requests of questionable relevance or that ATU had otherwise abused the process. We agree with ATU that the record of the parties' litigation indicates a lack of responsiveness by TriMet rather than a pattern of numerous ATU information requests that lack merit.

In sum, we conclude that TriMet's failure to respond to ATU's June 26, August 28, and September 8, 2009 information requests, violated TriMet's duty to provide information under subsection (1)(e). We now consider ATU's September 15 and October 12, 2009, information requests.

#### TriMet's Responses to ATU's September 15 and October 12, 2009 information requests

On September 15, 2009, ATU filed its grievance concerning prescription drug co-payments at Step II of the grievance procedure. With the grievance, ATU included a request that TriMet provide it with "[e]very document the employer considered when making the decision that is being grieved." (Finding of Fact 33.) On October 12, 2009, ATU asked for the following specific materials related to its grievance: all communications between Regence and TriMet concerning "the FDA approval date versus the go-to-market date." (Finding of Fact 34.) On January 19, 2010—four months after ATU's first request—TriMet provided ATU with documents that it claimed were responsive to ATU's October 12 request.

In regard to ATU's September 15, 2009 request, we conclude the request is overly broad and fails to adequately describe what the union wanted. *See Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999) (an employer is obligated to provide a union with relevant information that the union specifically requests; the employer is not required to assume that the union is seeking other documentation that is not specifically requested). Accordingly, we hold that TriMet had no duty to respond to this request, and was entitled to wait until the union more clearly specified what it wanted.

ATU provided this necessary specificity in its October 12, 2009 request, however, and TriMet was obligated to respond to it. Accordingly, we next determine whether TriMet's response was timely and adequate. We conclude it was not.

TriMet offered no reason for the four-month delay in responding to ATU's request. TriMet did not assert that numerous documents were sought, that the documents were difficult to access, or that a great deal of clerical time was needed to collect the documents. The materials ATU sought were clearly relevant to a pending grievance. As discussed above, the record contains no proof that ATU engaged in numerous "fish-and-grieve" expeditions. Accordingly, we find the length of time TriMet took to respond to ATU was unreasonable. *See Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220 (1992) (an employer established no legitimate reason for taking 30 days to respond to a union's information request); and *Deschutes County 911 Service District*, 21 PECBR at 429-30 (although information the union sought required a search of the employer's records, there was no evidence that the material was difficult to locate; the employer's failure to respond within 35 days violated subsection (1)(e)).

In addition, TriMet's response was inadequate; the documents that TriMet eventually provided to ATU in January 2010 did not contain the materials ATU sought. Accordingly, we conclude that TriMet's response to ATU's October 12, 2009 information request was both untimely and inadequate in violation of subsection (1)(e).

#### TriMet's Affirmative Defenses of Waiver and Estoppel

TriMet argues that ATU's claim is foreclosed by waiver or estoppel because ATU's requests for information were "wholly inconsistent with the way in which the parties had been dealing with respect to requests for documents and information." (TriMet post-hearing brief at 32.) Whatever practice the parties may have developed does not (and cannot) affect TriMet's obligations to comply with the PECBA. The law, and not the parties, dictates what is a reasonable amount of time needed to respond to an information request and whether a response is adequate. ATU cannot waive or be estopped from asserting its right to a timely and adequate response to a request for information under the PECBA.<sup>16</sup>

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<sup>16</sup>*See, e.g., Oregon Public Employees Union, Local 503, SEIU v. Judicial Department*, Case No. RC-13-95, 16 PECBR 17, 22 n 5 (1995). In that case, the union held "ballot parties" to collect ballots in a representation election; union representatives then hand-delivered the ballots to the offices of this Board. The union defended this practice on the grounds that it had hand-delivered ballots in four prior representation elections. It contended that it reasonably relied on the election coordinator's knowledge of and acquiescence in this practice. We concluded:

"Even if we were to agree that such reliance was reasonable under the circumstances, this Board is not "estopped" from enforcing its rules and applying its case law even where a Board employee has given a party incorrect advice." *Id.*

We set aside the election because the union's conduct significantly interfered with the secret ballot process necessary for a valid representation election under the PECBA.

TriMet contends, however, that the parties had a well-established practice of considering 30 days a reasonable amount of time to respond to an ATU information request. Even if this were the case, TriMet did not meet with this standard. TriMet never responded to ATU's June 26, August 12, and September 8, 2009 information requests, and TriMet took three months to provide an inadequate response to ATU's October 12 request.

4. TriMet's failure to provide information in response to ATU's requests concerning prescription drug insurance payments did not violate prior settlement agreements and consent decrees between the parties and ORS 243.672(1)(g).

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer or its designated representative to violate the provisions of any written contract with respect to employment relations. ATU argues that TriMet's failure to respond to its information requests violated written contracts with TriMet.<sup>17</sup> Those alleged contracts are three consent orders, from 1993, 1996, and 1998. The 1993 consent order simply provides that TriMet has violated ORS 243.672(1)(e) in connection with an ATU request for documents regarding two employees terminated for theft. It does not impose future obligations on TriMet or ATU.

Under the 1996 consent agreement, the text of which does not appear in the record, the parties agreed that disputes about documents could be handled by then-ATU President Ron Heintzman and then-TriMet Director of Labor Relations Mike Savage. Since that time, this procedure has been generally followed by ATU, with then-ATU President Hunt contacting TriMet executives to attempt to resolve discovery disputes.

The third consent order was entered in February 1998. It provides in part:

"For future cases, Tri-Met's counsel, Richard N. Van Cleave, shall provide a written response to any discovery response directed to him by any representative of the ATU within fourteen (14) days of receipt of the request. The response shall (1) provide any documents then available; (2) advise as to the status of any remaining requests; and (3) provide a projected delivery date." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-48-97, 17 PECBR 780 (1998) (Finding of Fact 56.).

We interpret this consent order as we do any other written contract, and apply a three part test to determine the parties' intent. *Portland Fire Fighters' Assn., Local 43 v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2002) (en banc), *rev den*, 334 Or 491, 52 P3d 1056 (2002); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We first examine the text and context of the disputed language. If the provision is clear, our analysis ends and we enforce the contract terms. If we conclude the provision

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<sup>17</sup>ATU alleges that it has five written contracts with TriMet governing requests for information. Those alleged contracts are consent orders and Exhibits C-1 through C-5. Exhibits C-2, C-4, and C-5 were never made part of the evidentiary record in this case, although there is some testimony about Exhibit C-2.

is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009). If an analysis of extrinsic evidence does not resolve the ambiguity, we apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Here, the procedure in the 1998 consent order require that TriMet's counsel will respond within 14 days to any "discovery request" made by an ATU representative. This language is ambiguous, because it is capable of at least two plausible interpretations. *Portland Fire Fighters' Assn.*, 181 Or App at 91. Discovery could refer to compulsory disclosure of information relevant to litigation such as one made under Oregon Rules of Civil Procedure 36. Or, discovery could have its more common dictionary meaning: "the act, process or an instance of gaining knowledge of something previously unknown or unrecognized." *Webster's Third New Int'l Dictionary* 647 (unabridged ed 2002). Under this definition, discovery could refer to ATU's formal and informal requests for information relevant to contract administration matters, even when no litigation is involved.

Because the relevant language in the consent agreement is ambiguous, we turn to extrinsic evidence to interpret its meaning. The parties' actions or practice are an important aid to interpreting ambiguous contract language. *Lane County*, 23 PECBR at 425. Here, the parties' practice has been clear and consistent for a number of years. ATU never directed its information responses to VanCleave or any other TriMet lawyer. Instead, ATU submits formal written information requests to the TriMet Workforce Development Department and Labor Relations Director Minor-Lawrence and her staff respond to them. Thus, the parties' practice demonstrates that the 1998 agreement does not apply to the type of information request at issue here—one that concerns a pending or potential grievance. Accordingly, TriMet's failure to respond to ATU's information requests did not violate this agreement and subsection (1)(g).

5. ATU's failure to comply with TriMet's subpoena does not warrant an inference that any evidence produced would have been unfavorable to ATU.

On August 9, 2010, TriMet issued a subpoena *duces tecum* to ATU Secretary/Treasurer Evette Farra. ATU made a motion to quash the subpoena, which the ALJ properly denied, but entered a protective order for the documents at issue. On February 7, 2011, the penultimate day of the hearing, ATU provided the subpoenaed documents to TriMet.

TriMet asserts that ATU improperly withheld these documents, and asks that we sanction ATU by inferring that the improperly withheld documents contained evidence favorable to TriMet. The inference TriMet asks us to make is that the withheld documents demonstrate that ATU sought information about prescription drug benefits from TriMet to avoid spending funds in the ATU Benefits Coordinator Account.

In *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 916, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, \_\_\_ P3d \_\_\_ (June 27, 2012), ATU alleged that TriMet improperly withheld

documents by failing to produce them prior to the hearing and offering them as exhibits at the hearing. We refused to infer that the allegedly withheld documents contained evidence favorable to ATU, because ATU failed to demonstrate that any such inference was relevant to the allegations in the unfair labor practice complaint.

Here, the inference TriMet asks us to make—that ATU wanted to save funds in the Benefits Coordinator account—has no relevance to the issue in this complaint—TriMet’s duty to provide information under ORS 243.672(1)(e). Accordingly, we will not draw any adverse inference from the documents that ATU withheld from TriMet until the hearing.<sup>18</sup>

### Remedy

We will order that TriMet cease and desist from failing to respond to requests for information from ATU. ORS 243.676(2)(b).

ATU also asks that we award a civil penalty. This Board may award a civil penalty if the party who committed the unfair labor practice “did so repetitively, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was egregious.” OAR 115-035-0075; ORS 243.676(4)(a). To show that a violation of the PECBA was repetitive, a complainant typically must prove “the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful.” *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). “Egregious” means “conspicuously bad or flagrant.” *TriMet*, 22 PECBR at 956. We have found an employer’s actions to be egregious when the employer displays a “flagrant and knowing disregard” of its good faith bargaining obligation under the PECBA. *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986).

We conclude that TriMet knowingly disregarded the law by failing to respond in a timely or complete manner to ATU’s information requests. From the beginning, it appeared that TriMet officials understood the problem Stoner identified, and its relationship to a potential or pending grievance filed under the collective bargaining agreement. No TriMet official ever objected to the relevance of the information requests. Sewell acknowledged that determining the appropriate approval date for prescription drug benefits would resolve a grievance. The Workforce Development Department never objected to the October 12, 2009 information request that was submitted after the Step II grievance filing. Instead, it referred the request to TriMet’s Legal Department for a response, which was not forthcoming. TriMet appears to have challenged the appropriateness of ATU’s information requests only in this litigation. Accordingly, the record demonstrates that TriMet officials understood their duty under the PECBA to provide information regarding the prescription drug benefit to ATU. For whatever reason, however, these officials chose to disregard this obligation. Under these circumstances, we will award a \$750 civil penalty.

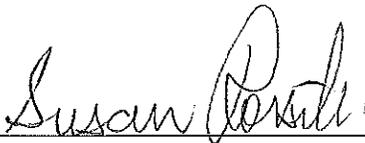
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<sup>18</sup>We do not condone ATU’s actions in withholding the subpoenaed documents. ATU’s behavior was counterproductive, and may well have unduly prolonged the hearing. Our refusal to make the adverse inference TriMet asks us to make is based solely on the subpoenaed documents’ lack of relevance to the issues in this case.

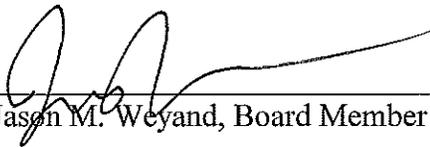
ORDER

1. TriMet will cease and desist from failing to respond to requests for information from ATU.
2. TriMet shall pay a civil penalty of \$750 to ATU within 30 days of the date of this Order.

DATED this 10 day of October, 2012.

  
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Susan Rossiter, Chair

  
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Kathryn A. Logan, Board Member

  
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Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.