

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-77-11

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES)	
ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
MEDFORD SCHOOL DISTRICT #549C,)	AND ORDER
)	
Respondent.)	
_____)	

On April 18, 2013, the Board heard oral argument on Respondent’s objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on January 24, 2013, after a hearing held on May 14, 2012, in Salem, Oregon. The record closed on July 3, 2012, following receipt of the parties’ post-hearing briefs.

Sarah K. Drescher, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Lisa M. Freiley, Designated Representative, Oregon School Boards Association, Salem, Oregon, represented Respondent Medford School District #549C at oral argument. Jessica N. Knieling, Designated Representative, Oregon School Boards Association, Salem, Oregon, represented Respondent at hearing.

On November 21, 2011, the Oregon School Employees Association (OSEA) filed this unfair labor practice complaint alleging that the Medford School District #549C (District) violated ORS 243.672(1)(b) and (e) during bargaining for a funding reopener in 2011. On March 19, 2012, OSEA filed an amended complaint and the District timely answered.

The issues are:

1. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the District *per se* violate its duty to bargain in good faith pursuant to ORS 243.672(1)(e)?
2. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the totality of the District's conduct amount to "surface bargaining" in violation of ORS 243.672(1)(e)?
3. During bargaining for a funding reopener provision pursuant to ORS 243.698 and the parties' collective bargaining agreement, did the District violate ORS 243.672(1)(b) or (e) when it sent an e-mail directly to OSEA bargaining unit members on or about October 26, 2011, regarding bargaining issues and employment relations?
4. If the District violated ORS 243.672(1)(b) and/or (1)(e), what is the appropriate remedy?

For the reasons set forth below, we conclude that the District did not violate ORS 243.672(1)(b) or (e), as alleged by OSEA.

RULINGS

OSEA filed a motion to strike certain portions of the District's Memorandum in Aid of Oral Argument, asserting that the memorandum included "objections" to the Recommended Order that were not included in the District's initial objections. Thereafter, the District filed its own motion to strike, contending that OSEA's Memorandum in Aid of Oral Argument had effectively "objected" to portions of the Recommended Order, even though no official "objections" had been timely filed in accordance with OAR 115-010-0090. At oral argument, OSEA represented that it was not objecting to any portion of the Recommended Order.

We declined to strike any portion of either party's memorandum, but also explained that we would only hear arguments on the objections set forth in the District's timely-filed objections.

Additionally, on April 16, 2013, the District submitted a document that was not introduced during the hearing. At oral argument, we explained that this document was not properly admitted as evidence in the hearing and that we would not consider it.

We incorporate these oral argument rulings into this order. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. OSEA is a labor organization and the exclusive representative of a unit of approximately 460 classified employees who work for the District, a public employer.

2. The District is overseen by a board of directors. The District's Superintendent is Dr. Philip Long and its Human Resources (HR) Director is Dr. Todd Bloomquist, both of whom were designated representatives for the District.

3. OSEA's local president is Lyndy Overacker, and the OSEA's field representative and chief negotiator is Cindy Drought. Drought is a former president and union steward for the local.

4. The District's classified employees hold job classifications in 21 categories, which fall into one of six areas: clerical, operations, technical, instructional, safety, or facilities. Based on their positions, classified employees work between 169 and 261 days per year. Some classified employees work only when students are in school, while others work year-round. The District maintains between 40 and 50 calendars to track each position's work schedule.

The Parties' Agreement

5. The District and OSEA are parties to a collective bargaining agreement (Agreement), effective July 1, 2009 through June 30, 2012.

6. Article I, 1.3 b. of the Agreement contains a funding reopener provision, which states:

"In the event of a budget deficit from the prior year, legislative action, or initiative affecting any portion of this agreement, the wage and related economic items agreed to herein shall not be reduced without negotiations between the Association and the District. A budget deficit shall be defined as the inability of the District to finance staffing and programs through the general fund operating budget at the previous year's level. The District or Association shall give notice of its need to renegotiate the contract during the term of the agreement and the parties shall utilize the provisions of ORS 243.698 except that the period of negotiations shall be 150 calendar days."

7. Article IV, 4.3 provides that the District will participate in PERS and contribute six percent of each employee's wage for the duration of the Agreement.

The Parties' Bargaining

8. On or about May 31, 2011, HR Director Bloomquist notified local OSEA President Overacker in writing that reduced State revenues would result in a budget shortfall for the District of approximately \$11 million, and that the District was reopening the Agreement to discuss ways to deal with the deficit.¹ The District had already negotiated concessions from teachers and administration personnel, and was seeking \$1.7 million in further cuts from its classified employees, which represented a potential wage cut to those classified employees of eight percent.

¹Unless noted otherwise, all events occurred in 2011.

9. On June 1, the parties met for the first of eight meetings that extended into October. At the outset, Bloomquist told OSEA's representatives that he was open to their suggestions for cost-saving ideas, as long as they totaled the targeted amount. The goal was to avoid layoffs or school closures.

10. OSEA favored furloughs, which are unpaid days in the school calendar, as a way to fill the deficit. The teachers had agreed to furloughs on non-student contact days, when students are not in school. The District did not immediately reject the idea of furloughs and agreed to continue talking.

11. On July 7, OSEA proposed that full-time employees who worked 261 days per year would take ten furlough days, and employees who worked 181 days per year would take seven furlough days. For employees who worked less than 181 days, OSEA proposed no furloughs because those employees had recently incurred wage cuts of 12 to 24 percent due to District restructuring.

12. The District was initially sympathetic to the idea of exempting employees who had recently undergone wage reductions from further cuts, but opposed the furlough option. It countered with the idea of employees contributing six percent of their salaries to PERS, called a "pickup," which Bloomquist suggested could be presented as a wage reduction to make it more acceptable to the employees.

13. On August 2, Bloomquist e-mailed Drought and Overacker stating that he had received numbers from the District's business office indicating that even with the six-percent PERS pickup, the shortfall would be in the \$500,000 to \$600,000 range. He requested a meeting with them to discuss the situation.²

14. On August 9, the parties reached a tentative agreement (TA), which included the six-percent PERS pickup and no furlough days. The pickup period would be in effect for the 2011-12 fiscal year, ending on June 30, 2012. The TA exempted from the pickup any employees who did not earn enough to participate in PERS and who had recently undergone wage reductions. The TA also included changes to the employee insurance plan.³ The District further agreed to cover "any amount remaining of the classified portion of the deficit" from its reserve funds. After taking into account the tentatively-agreed-on PERS pickup and insurance changes, that remaining deficit was estimated to be \$500,000. The estimated savings to the District would be around the eight percent target amount, but the net cost to employees would be around six and one-half percent, due to tax savings from their PERS contributions.

²The District applied an additional \$425,000 to the shortfall arising from savings associated with retirements, unfilled vacancies, reductions, or eliminations of classified hours or positions.

³The District is one of a handful of school districts that is self-insured, giving it some flexibility to make cost-saving changes.

15. Before submitting the TA to a membership ratification vote, OSEA asked the District to consider adding more employees who would be exempt from the PERS pickup—namely, employees who had experienced a loss in pay as a result of being “bumped” into a lower classification due to a reduction in force (RIF). The District informed OSEA that it did not agree to the additional exemptions.

16. OSEA drafted a Memorandum of Agreement (MOA) reflecting the TA, and submitted it to the membership for ratification. On August 29, OSEA’s ratification vote failed by a narrow margin.

17. On August 31, the parties met to discuss the failed ratification vote. OSEA proposed separating the health insurance portion of the TA and submitting that issue to the membership for ratification. The District indicated agreement with that approach.

18. On September 7, Drought sent two MOAs to Bloomquist. The first one included the health insurance package, which would save the District \$312,500 and expire with the Agreement on June 30, 2012. This amounted to approximately two percent of the targeted eight percent in reductions. The District agreed to the health insurance MOA, and on September 13, OSEA’s members ratified that MOA.

19. The second MOA proposed furloughs based on the number of days per year an employee worked. Exempted from furloughs were those employees who had undergone a wage reduction through restructuring or a RIF. The second MOA did not include any PERS pickup by the employees.

20. At a September 8 meeting, OSEA modified their furlough proposal so that full-time employees working 261 days per year would take ten furlough days, those working between 203 to 224 days would take eight furlough days, those working between 193 to 199 days would take seven furlough days, and employees working less than 181 days would have no furlough days. The District indicated an opposition to furlough days, and further stated that its reserve-funds contribution was contingent on an employee PERS pickup. The District also estimated that exempting so many employees from furloughs would not achieve the necessary deficit reduction.

21. In a telephone conversation with Overacker, Superintendent Long stated that the District might still be willing to contribute to the deficit from its reserves.

22. At a September 28 meeting, OSEA again proposed furloughs for certain employees on non-student contact days, but Bloomquist responded that this would not spread the cuts equally and suggested that if the PERS pickup was not on the table, the District would not contribute any money from its reserve funds. The District also informed OSEA that its Board of Directors (Board) was opposed to furlough days.

23. On October 11, the District notified OSEA's representatives that the Board had rejected its latest proposal because it exempted approximately 45 percent of OSEA's members from any cuts. Under that proposal, the District estimated that it would have to contribute \$751,000 to make up the deficit amount. Bloomquist reiterated that the Board would not contribute from reserve funds unless the six-percent PERS pickup was on the table. He suggested some wage reduction ideas, including prorating insurance contributions or reducing wages by eight-percent for one year, but expressly stated those suggestions were not "proposals." OSEA offered a new proposal that included five furlough days on non-student contact days and a six-percent PERS pickup from January 1, 2012 through June 30, 2012. OSEA's proposal maintained the same exemptions for employees who had recently experienced a wage reduction due to restructuring or a RIF.

24. On October 17, the District rejected these ideas and stated that it would not accept exemptions, on equitable grounds, even for employees who had suffered wage cuts in 2011. The District's position was that wage cuts, in whatever form, needed to be applied equally to all employees, and that tracking furloughs for 40 to 50 work schedules would be problematic.

25. On October 18, 11 days before the end of the 150-day bargaining period, the parties met for another bargaining session, at which the District submitted a proposal that called for an employee-paid six-percent PERS pickup to start on January 1, 2012, and continue until a successor agreement was reached. There were no exemptions for OSEA members who had recently undergone wage cuts. The proposal also included a three-percent wage reduction to all employees, effective July 1, 2011 through June 30, 2012, to make up for the loss of six months in PERS contributions. The District also agreed to cover any remaining deficit amount, which was estimated to be in excess of \$500,000, from its reserve funds.

26. OSEA was concerned about the open-ended PERS pickup, and felt that it put pressure on the successor bargaining team. OSEA was also concerned about the straight wage reduction without any exemptions. The "most glaring thing that [OSEA] was concerned about" was the lack of exemptions.

27. OSEA responded by asking whether the District would be willing to consider "cut hours" as opposed to "cut days" (furloughs). After a caucus, the District reiterated that there would not be exemptions, but indicated that "cut hours" might work, and would take that suggestion to the Board.

28. On October 26, the parties met for a final time. OSEA proposed an MOA that included a PERS pickup, effective January 1, 2012 through June 30, 2012 for some employees, and effective February 1, 2012 through June 30, 2012 for other employees, and a three-percent wage cut effective July 1, 2011 through June 30, 2012, which could be converted into furlough hours for employees who worked on non-student contact days. OSEA's proposal also anticipated a contribution from the District in excess of \$500,000. OSEA's proposal maintained the same employee exemptions from both the PERS pickup and the three-percent wage reduction. The District told OSEA that it would take this proposal to the Board.

29. On October 26, at around 2:17 p.m., Bloomquist sent an e-mail to all District employees, which summarized the bargaining for all employee groups up to that time. The District regularly sent e-mails to all employees updating them on events, policies, or other relevant information. Bloomquist's communication addressed a number of topics, but as it pertained to the classified employees, it stated:

“Working Together with Medford’s Employees During the Budget Crisis

“As of October 26, 2011, the only employee group that has yet to agree to compensation adjustments to meet the overall reduction is the Oregon School Employees Association (OSEA) classified group. Even so, the district and OSEA leadership continue to work on solutions.

“Working with OSEA

“The total amount that was OSEA’s portion of the deficit was approximately \$1.5 million. After cost saving measures and staff reductions in the spring of 2011, the remaining \$1.25 million was the target amount to resolve through negotiations.

“The Medford School Board made it clear that any solutions with employee groups needed to be equitable amongst the employees with as little negative impact of service to students. The initial classified talks centered on employees contributing toward their retirement through the Public Employee Retirement System (PERS). This is what is known as a PERS pickup and is six percent of an employee’s salary. Because the OSEA bargaining team supported the PERS pickup, the school board agreed to cover nearly \$500,000 of OSEA’s remaining portion of the deficit. With the insurance program change and the PERS pickup, the total savings to the district would be about eight percent; however, the actual impact to a typical OSEA employee may only be about 6.5% because of tax breaks when employees pay their own PERS pickup. Despite the August 9 tentative agreement, the OSEA members voted to reject the agreement on August 29.

“Further OSEA Problem-Solving

“Other than a massive layoff of classified staff, there is no other way to achieve such large employee cost reductions. After analyzing the impact of such a layoff, the school district determined that further layoffs were a last resort option and that to do so would have a significantly negative impact on classrooms.

“OSEA’s counter offers since the August rejection have been centered on a cut-day approach and exemptions for certain employees. This concept is problematic since there are so many varying days and hours that classified employees work. Cutting days means that each employee group loses different amounts. That translates into inequitable reductions to staff. Additionally, many of the employees only work when students are in school; to reduce those services would be inappropriate. OSEA insisted that if employees are to lose wages due to a state budget deficit that the employee should not have to come to work. However, a cut-day approach does not provide an equitable solution and clearly disadvantages some employees.

“On September 8, OSEA submitted a new proposal for the district. The district analysis of the offer found that only 55% of all classified staff would be impacted by the agreement, leaving 45% not having to contribute to the reductions. This proposal constituted about \$158,000 in savings, leaving the district to cover the remaining \$1.09 million.

“On October 3, the school board bargaining team rejected MOA #2 because it did not adequately address the budget deficit and because it was not equitable to employees. OSEA drafted a new proposal after a bargaining session on October 11, when the district shared out what it would take to make up the budget deficit. Based on that discussion, OSEA’s proposal included 45% of OSEA employees exempted from any cuts; five non-instructional cut days; a six percent PERS pickup beginning January 1, 2012 and ending June 30, 2012; and the district filling in the remaining \$781,000 of the deficit. This proposal was again rejected by the school board bargaining team since it exempted certain employees and did not address enough of the deficit.

“On October 18, the district presented a proposal that eliminated the exemptions OSEA had previously proposed for certain employees so that wage reductions were equitable. The proposal included a six percent PERS pickup beginning January 1, 2012, a three percent across the board wage reduction effective July 1, 2011 to make up for the loss of six months of PERS pickup, and the district covering \$500,000 of the OSEA portion of the deficit. The impact to OSEA staff would be an effective 7.25% since half of the year’s PERS pickup would yield a smaller tax break for OSEA employees.

“The school board made it very clear that it would not be able to provide \$500,000 of reserves to help the OSEA deficit if OSEA did not agree to a PERS pickup. Without a PERS pickup, the agreement could be an 8% (or higher) wage reduction. That, along with the insurance program changes, would get OSEA closer to the needed amount. This, of course, would have a more significant impact to each employee’s take-home pay, especially when the district’s original proposal only impacted employee earnings by about 6.5%. Talks between the association and the district continue as the end of the 150-day bargaining period comes to a close. You can click [here](#) to see a timeline of the expedited bargaining process.”

30. Later that day, Bloomquist sent a letter via e-mail to Drought and Overacker rejecting OSEA’s proposal. In rejecting the proposal, the District cited the limited number of PERS pickup months, the exemptions for certain employees, and the use of furloughs in lieu of wage reductions. The District reiterated its position that “including exemptions for some employees creates an inequitable condition for OSEA members, placing additional burdens on some employees who have to compensate for others.” The District offered to meet with the OSEA representatives and welcomed any other proposals that more closely aligned with the Board’s direction and met OSEA’s portion of the deficit. The District also informed OSEA that it would implement its October 18 offer, unless the parties reached agreement before October 29. The District further stated that its bargaining team was available through the evening of October 29 to meet with OSEA.

31. On October 28, Drought sent a letter to Bloomquist responding to the District's rejection of OSEA's October 26 proposal. In that letter, OSEA "acknowledge[d] the Board's generosity in [its] willingness to contribute dollars from the District's reserves to assist in covering classified's portion of the deficit." However, OSEA also felt that it was not appropriate to tie successor bargaining issues into discussions regarding the deficit, which OSEA believed the District had done with its last offer involving the PERS pickup. OSEA also felt that its most recent proposal "addressed the issue of equity to the greatest extent possible," considering the complexity of the bargaining unit. OSEA acknowledged the District's willingness to meet through October 29, but stated that continued discussions were unlikely to result in a TA that would be ratified by both parties. Finally, OSEA took exception to the District's October 26 e-mail, which OSEA felt contained erroneous and misleading information and undermined the bargaining process. The letter concluded by stating that OSEA would file an unfair labor practice complaint against the District.

32. OSEA sent a memorandum to its members disputing a number of statements in Bloomquist's October 26 e-mail. OSEA told the members that the e-mail misrepresented the negotiations by omitting any mention of the cost savings measures that had been agreed to, including the health insurance adjustments worth \$312,500 and reductions in the classified workforce worth \$450,000. According to OSEA, rather than the \$781,000 amount cited by Bloomquist needed to make up the deficit, the accurate number was approximately \$500,000. The memorandum also pointed out that Bloomquist's e-mail failed to mention that the District initially represented that OSEA could design cost-saving measures anyway it wished, which led to OSEA spending a great deal of bargaining time crafting proposals around non-student-contact-day furloughs, all of which were rejected. The memorandum also stated that the August TA exempted from furloughs those members who had recently incurred wage cuts, but that the District later rescinded that position by calling the exemption inequitable. The memorandum further told members that the District did not unequivocally reject the furlough option until September 7, which was late in the process. Finally, OSEA pointed out that the TA reached in August ended the PERS pickup on June 30, 2012, but that the District's October 18 proposal potentially extended the pickup period beyond that date if no new agreement was reached.

33. On November 1, the District implemented its October 18 proposal.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. During 2011 bargaining of a funding reopener provision, the District did not *per se* violate its duty to bargain in good faith in violation of ORS 243.672(1)(e).
3. During 2011 bargaining of a funding reopener provision, the totality of the District's conduct did not constitute bad-faith bargaining in violation of ORS 243.672(1)(e).

4. During 2011 bargaining of a funding reopener provision, the District did not violate ORS 243.672(1)(b) and/or (e) as a result of an e-mail sent directly to OSEA members on or about October 26, 2011, regarding bargaining issues and employment relations.⁴

DISCUSSION

After reaching agreements with teachers and administration personnel to reduce an \$11 million budget shortfall in 2011, the District sought \$1.7 million in concessions from its classified employees. OSEA alleges that the District's conduct during mid-term bargaining to address the shortfall amounted to both a *per se* violation of its duty to bargain in good faith under ORS 243.672(1)(e) and a violation based on the totality of the District's bargaining conduct. OSEA also alleges that the District violated ORS 243.672(1)(b) and/or (e) when its HR director sent an e-mail regarding bargaining to all employees. OSEA contends that this e-mail was an attempt to directly deal with employees by bypassing the union, and that as a result, the District interfered with its administration. We disagree with each of OSEA's allegations, reasoning as follows.

Bad-Faith-Bargaining Claim

It is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). Here, OSEA alleges that: (1) the District's implementation of an offer that was "worse for" OSEA's members than the TA that those members previously rejected constitutes a *per se* violation of ORS 243.672(1)(e); and (2) that the totality of the District's conduct amounted to "surface bargaining." We address each allegation, in turn.⁵

We first address the alleged *per se* violation. 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. *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206-07 (2007). 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; and (3) submitting a new proposal in a final offer, which had not been subjected to bargaining. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009). OSEA does not contend that the District's conduct falls within one of those previously recognized categories, but rather asserts that if a labor organization's

⁴OSEA alleged a "direct-dealing" violation under ORS 243.672(1)(e), but did not argue or otherwise address that argument in its post-hearing brief. Accordingly, we will dismiss that claim. *Gresham Police Officers Association v. City of Gresham*, Case Nos. UP-06/18-09, 24 PECBR 55 (2010).

⁵Because the Recommended Order found a violation of subsection (1)(e) under a totality-of-conduct analysis, the order did not reach the issue of the *per se* violation. As set forth below, we find that the totality of the District's conduct did not violate subsection (1)(e). Therefore, we also address OSEA's assertion of a *per se* violation.

membership rejects a tentative agreement, an employer may not ultimately implement a “worse” offer than that rejected by the membership without violating ORS 243.672(1)(e).⁶

We decline to conclude that a final offer implemented by an employer must always be equal to or better than a tentative agreement rejected by a union’s membership. Simply put, such an implementation is not so inimical to the bargaining process that it necessarily amounts to *per se* bad-faith bargaining. Moreover, such an implementation does not rise to the level of the limited categories of *per se* violations that this Board has previously recognized.

Specifically, an employer’s unilateral change in a mandatory subject of bargaining fundamentally undermines and destabilizes the relationship between an employer and the exclusive bargaining representative. Additionally, submitting new proposals (either in a final offer or in mediation) that have not been subjected to bargaining effectively bypasses the entire collective bargaining process, a core element of the Public Employee Collective Bargaining Act (PECBA).

The same cannot necessarily be said for an employer’s implementation of a final offer, which has components that are less favorable to some or all bargaining unit members than a proposal that the parties tentatively agreed to but that the union membership rejected. This is particularly true where, as here, the parties engaged in bargaining for some two months after the union membership rejected the TA. In such circumstances, an employer’s implementation of a “worse” offer does not *per se* fundamentally undermine the exclusive bargaining representative, nor does it completely bypass the bargaining process. In fact, here, as set forth in more detail above and below, after the OSEA membership rejected the TA, the parties met numerous times over the next two months about how to reach an agreement to address the District’s deficit. Although those bargaining sessions did not ultimately yield a collectively-bargained agreement, it does not follow that the employer *per se* bargained in bad faith by implementing a final offer that was less favorable to some bargaining unit members than the rejected TA.

Therefore, we conclude that the employer’s implementation of its October 18, 2011 proposal does not constitute a *per se* violation of ORS 243.672(1)(e). Consequently, we will dismiss this claim.

We now turn to OSEA’s allegation that the District engaged in “surface bargaining,” meaning that the District merely went through the motions of bargaining without any intention of reaching agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 (1985). In surface bargaining cases, there is no direct evidence

⁶In addition to the reasons set forth below, OSEA’s proposition is problematic in at least one other respect—namely, the difficulty in determining whether one offer might be objectively “worse” than another. For example, some proposals may include an increased monetary benefit to employees but a decreased non-monetary benefit, or vice-versa. Additionally, proposals may affect certain bargaining unit members differently. Here, for example, a member of OSEA’s negotiating team testified as to her subjective belief that the proposal implemented by the District was “worse” than the TA. Yet, a chart submitted by OSEA to compare the effects of the TA and the implemented proposals on three different employees was more equivocal. To be sure, according to the chart, two employees fared worse under the implemented proposal; however, one employee fared the same. Thus, on this record, whether the District’s final offer was objectively “worse” for *all* bargaining unit members is not clear.

that an employer is unwilling to negotiate in good faith. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 777 (2007). Instead, we examine the totality of the bargaining conduct to determine whether the employer demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-52, *compliance order*, 16 PECBR 696 (1996), *AWOP*, 146 Or App 777, 932 P2d 1216 (1997).

In applying the totality-of-conduct standard to allegations of surface bargaining, we examine multiple factors, including: (1) whether dilatory tactics were used; (2) contents of the proposals; (3) behavior of the party’s negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *City of Dallas*, 23 PECBR at 378; *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584, *recons*, 16 PECBR 707 (1996). We also consider other factors that might be relevant in any given case. *See, e.g., Rogue Valley Transportation District*, 16 PECBR at 587.⁷ After considering the totality of the District’s bargaining conduct regarding the funding reopener, we do not conclude that the District “merely went through the motions of bargaining without any intention of reaching an agreement.” *See McKenzie School District #68*, 8 PECBR at 8196. We reason as follows.

1. *Dilatory Tactics.* Dilatory tactics that tend to unreasonably delay or impede negotiations indicate bad-faith bargaining. *Id.* at 8197. OSEA argues that by waiting until the end of the school year to reopen the contract, by which time most of the classified employees were about to start summer break, the District made communications and feedback problematic for the bargaining team. OSEA, however, was on notice well before May 31 that there was a funding shortfall and that layoffs were possible. OSEA was also aware that the District wished to complete negotiations with its teachers and administration personnel before bargaining with classified employees. OSEA did not object to this arrangement or demand that mid-term bargaining begin sooner, and we do not find that the District’s formal notification to OSEA in May was dilatory.

OSEA also argues that the District unreasonably delayed submitting its proposal to extend the PERS pickup period, such that OSEA had inadequate time to respond to that proposal. According to OSEA, the District had previously signaled that the pickup period would end on June 30, 2012, as was agreed to in the TA, rather than extend until a successor agreement was reached.

⁷For example, we have considered whether a party: (1) committed other unfair labor practices during negotiations; (2) gave inaccurate reasons for a claim asserted in negotiations; and (3) engaged in conditional bargaining. *Rogue River Valley Transportation District*, 16 PECBR at 587. As noted, however, each case presents its own set of circumstances, and we may consider any factor that contributes to the totality of a party’s bargaining conduct.

Although the District's October 18 proposal included a change to the end date of the PERS pickup, that proposal also pushed back the start date for that pickup. Specifically, rather than starting the PERS pickup period at the beginning of the 2011-12 fiscal year as proposed in the TA, the District's October 18 proposal started the pickup period on January 1, 2012. Moreover, in an attempt to try different ways of filling the classified employees' portion of the deficit, the parties engaged in numerous bargaining sessions after the OSEA membership rejected the TA. In other words, this is not a situation where there was no bargaining after OSEA members rejected the TA, with the District springing a last-second proposal that radically departed from the framework of the rejected TA.

Additionally, the record shows that the primary sticking point between the parties was not the end date of the PERS pickup, which would in any event ultimately be determined by a successor agreement. Rather, the more significant disagreement concerned whether there would be any exemptions for certain employees and whether cut days/hours could be used instead of a straight wage reduction.

Finally, when the District made its proposal, the parties still had some time (11 days) before the 150-day period expired, and the record shows that OSEA made a meaningful counterproposal several days before that period expired. After the District rejected that counterproposal, it informed OSEA that it was still willing to bargain up to the deadline.

Consequently, on these facts, we do not find that the District's October 18 proposal to extend the PERS pickup until a successor agreement was reached unreasonably delayed or impeded the overall negotiations on how to fill the classified employees' portion of the budget shortfall.

2. *Content of the District's Proposals.* OSEA argues the District acted in bad faith by: (1) allegedly conditioning bargaining on acceptance of the PERS pickup; (2) conditioning a reserve-funds contribution on the PERS pickup; (3) not exempting certain employees from wage cuts and the PERS pickup in the District's only written proposal; and (4) extending the PERS pickup period beyond the Agreement's expiration. OSEA further contends that because its membership had already rejected the six-percent PERS pickup in the TA, OSEA's bargaining team could not bring that same proposal back to them a second time.

A party may not condition its participation in bargaining on the other party making concessions. See *Clackamas County Peace Officer's Association v. Clackamas County and Clackamas County Sheriff's Department*, Case No. UP-41-86, 9 PECBR 9174, 9177-78 (1986). Here, however, although the PERS pickup was a signature piece of the District's proposal on filling the budget shortfall, the District did not condition its participation in bargaining on OSEA agreeing to the pickup. To the contrary, the parties regularly met and exchanged varying ideas about ways to cover the deficit. Although the District held to its position that the PERS pickup was the most desirable way to achieve that goal, it did not condition bargaining on OSEA's acceptance of that proposal.

We also disagree that the District violated its duty to bargain in good faith by merely conditioning its contribution from reserves on OSEA's acceptance of the PERS pickup. Throughout the negotiations, and even after it appeared that those negotiations would not result in an agreement, OSEA acknowledged the District's "generosity" to contribute approximately \$500,000 from its reserves, a contribution that was not made to other bargaining units. We do not agree that conditioning that contribution on the PERS pickup indicates that the District was unwilling to reach a negotiated agreement.

We next address the District's proposal that no employees be exempted from the PERS pickup and wage reduction. The District explained why it believed that OSEA's proposal exempting so many employees from those "cuts" was "inequitable." The District further explained that those proposals fell short of filling the deficit. The District also told OSEA that a PERS pickup and a straight wage reduction were the most practical and efficient means of filling that deficit, and that those "cuts" should be applied across-the-board to all employees.

OSEA countered that the District's definition of "equitable" failed to consider that the proposed exempted employees had recently endured significant wage cuts. Thus, asking those employees to take additional cuts was, from OSEA's perspective, "inequitable."

The question concerning the most equitable way to fill the budget shortfall was subjected to considerable disagreement and debate. The question is also one of significant complexity. Indeed, as OSEA informed its members at the conclusion of bargaining, "'equity' is a difficult thing to achieve for a classified bargaining unit" with such a diverse group of employees. Although the parties had different ideas about what would be most "equitable" and practical, that difference in perspective does not mean that the District was unwilling to reach an agreement.

Finally, we consider the District's proposal extending the PERS pickup period indefinitely until a successor agreement was reached. OSEA contends that this proposal indicates bad faith because it was regressive, and made 139 days after bargaining had begun. OSEA further contends that because the proposal was made just 11 days before the 150-day bargaining period expired, it had little time to adequately respond to or bargain over the issue.

We agree with OSEA that the timing and content of the District's proposal extending the time period of the PERS pickup was not good bargaining practice. *See McKenzie School District #68*, 8 PECBA at 8198 n 18 (observing that certain employer actions were not necessarily "good bargaining practice," but also were not indicative of "bad faith"). We further note that a new proposal made in the late stages of bargaining may indicate bad-faith bargaining, particularly when that proposal is regressive. However, the District's proposal, along with its timing, does not amount to a *per se* violation of the duty to bargain in good faith. Moreover, although made in the later stages of negotiating, the parties still had time to conduct meaningful negotiations before the bargaining period expired. Nevertheless, we agree with OSEA that it would have been preferable if the District had proposed (and explained) the PERS pickup extension earlier in the process. Therefore, we consider the timing and content of the District's October 18 proposal as one factor in our analysis of the totality of the District's conduct, and conclude that, together, the timing and content of the proposal are suggestive of bad-faith bargaining.

3. *Behavior of the District's Negotiator.* In examining the conduct of the party's negotiator, we focus on the effect that the negotiator's conduct had on the bargaining process. Where, for instance, a representative makes no proposals, offers no counterproposals, has no apparent authority to negotiate, is non-responsive to inquiries from the other party, and tinkers with contract language away from the bargaining table, such conduct indicates an intention not to bargain or reach agreement. *Hood River County*, 16 PECBR at 454.

OSEA argues that neither Bloomquist nor Superintendent Long had any real authority to reach a tentative agreement, and contends that they misled OSEA's bargaining team into believing certain reductions were acceptable when they were not. The evidence does not show an intent to mislead.

It is correct that Bloomquist had limited authority to enter into a tentative agreement without ultimate board approval, but there is no persuasive evidence that he lacked authority to advance proposals or accept others. Neither side had unrestricted authority to enter into a binding agreement without the approval of its constituency. This does not mean the representatives acted in bad faith. Accordingly, we do not find that Bloomquist or Long lacked meaningful authority to bargain.

We also do not conclude that Bloomquist's or Long's behavior negatively affected the bargaining process. Bloomquist and Long were cordial throughout the negotiations; they promptly exchanged telephone calls and e-mails from OSEA's representatives; Bloomquist attended the bargaining sessions, responded to proposals and offered cost-saving ideas, and explained the District's position, even when OSEA's representatives did not accept it.

Therefore, we do not find Bloomquist's or Long's behavior indicative of bad-faith bargaining.

4. *Nature and Number of Concessions Made.* The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. ORS 243.650(4). Thus, this Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position * * *." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08, 23 PECBR 895, 916 (2010). However, "the employer is obliged to make some reasonable effort in some direction to compose [its] differences with the union * * *." *Id.* at 916-17, quoting *McKenzie School District*, 8 PECBR at 8198 (emphasis in original).

OSEA contends that the District engaged in surface bargaining because it made no concessions and only one counterproposal shortly before the bargaining period ended. We disagree. The negotiations show that the District was willing to apply savings from retirements and unfilled vacancies to the classified employees' deficit; it agreed to additional savings from the health insurance package; it offered a financial contribution from its reserves; and it reached a TA in August. Although, as noted above, the District made a later-stage bargaining proposal that extended the end date of the PERS pickup, we do not find that the District was unwilling to consider or propose other cost-saving measures. Overall, we find that this factor does not indicate that the District was merely going through the motions without any intention of reaching an agreement on the budget shortfall. See *McKenzie School District #68*, 8 PECBR at 8196.

5. *Failure to Explain Bargaining Position.* Good-faith bargaining requires that a party explain its proposals so that the other side may respond in an intelligent manner. *Id.* at 8199. OSEA argues that the District had no reasonable explanation for making a proposal in October that was worse than what was tentatively agreed to in August. OSEA further contends that the District also failed to explain why it insisted on certain conditions and failed to pursue other solutions.

We conclude that the District adequately and repeatedly conveyed its objections to furloughs and to exempting certain employees from the PERS pickup. OSEA did not accept the District's explanation about the most "equitable" way to implement wage cuts, but that does not make the District's explanation false or misleading.

We are less persuaded, however, that the District adequately explained why it changed its position regarding the end date of the PERS pickup period. Although the District may have done so in light of its proposal to start the pickup date six months later, it did not sufficiently identify that as the reason. Additionally, the District's explanation that the PERS pickup period would extend as the "*status quo*" until a new successor agreement was reached did not adequately convey how that proposition related to the budget shortfall. Thus, we find the District's explanation on this particular proposal to be inadequate and a factor weighing in favor of OSEA's complaint.

6. *Course of Negotiations.* Evidence that a party never intended to reach a settlement but had planned to implement its proposals from the beginning indicates bad-faith bargaining. *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 433 (2003). Likewise, an employer who rushes through the negotiation process may demonstrate a lack of serious intention to reach agreement. *Id.*

Here, the parties met approximately eight times over a five-month period and their representatives maintained regular communications and exchanged ideas, information, and options. Moreover, the parties agreed to a TA relatively early in the bargaining process. Although OSEA's membership narrowly rejected the TA, the parties established a serious intention to reach an agreement.

After the TA was rejected, the parties continued to bargain, and indeed reached a separate agreement on health insurance. Although the parties disagreed on the best way to fill the balance of the budget shortfall, particularly in a way that would be ratified by both parties, they discussed and exchanged proposals on that issue. The District also continued to offer \$500,000 from its reserves. Although that contribution was contingent on the PERS pickup, it was nonetheless a good-faith offer to reduce the classified bargaining group's contribution amount, and was not an offer that had been extended to other bargaining groups. Therefore, we find that the course of negotiations indicates that the District was willing to reach a negotiated agreement.

7. *Other Factors.* In addition to the foregoing, we give weight to the parties' ability to reach a TA on the entire budget shortfall. We also give weight to the parties' ability to reach an agreement on health insurance, even after the OSEA membership rejected the overall TA. Moreover, even after the District rejected OSEA's final proposal, the District indicated a willingness to continue bargaining until the end of the bargaining period; OSEA, however, declined to continue bargaining. Collectively, these factors significantly weigh against concluding

that the District “merely went through the motions of bargaining without any intention of reaching an agreement.” See *McKenzie School District #68*, 8 PECBR at 8196.

After weighing the totality of the District’s conduct, we do not find that the District engaged in surface bargaining, as alleged by OSEA. Although, as set forth above, we agree that certain conduct concerning the District’s late-stage proposal on the end date of the PERS pickup could indicate bad-faith bargaining, the totality of the District’s conduct does not establish that the District lacked serious intention to reach a negotiated agreement. Accordingly, we find that the District did not violate its duty to bargain in good faith under subsection (1)(e), and we will dismiss this complaint.

The District Did Not Violate ORS 243.672(1)(b)

OSEA alleges the District violated ORS 243.672(1)(b) when Bloomquist sent an e-mail to all employees on October 26, which it contends materially misrepresented the bargaining that had occurred, undermined the designated representatives by portraying them in a negative light, and attempted to bypass the designated representatives and deal directly with bargaining unit members. Specifically, OSEA contends that the timing of Bloomquist’s communication, coming just before the District rejected OSEA’s latest proposal, made OSEA’s bargaining team appear unreasonable because it was the only employee group not to reach agreement. OSEA also argues that this was a subtle attempt to bargain directly with OSEA members.

A public employer violates ORS 243.672(1)(b) when it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 385 (2006). In order to prevail on a subsection (1)(b) claim, a complainant must show interference that directly affects the labor organization. We have explained that

“[t]o establish a subsection (1)(b) violation, ‘a complainant must prove that an employer took actions [that] impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation[,] a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer’s actions.’” *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008) (emphasis in original) (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 780, 789 (1989)).

Additionally, an employer dealing directly with employees on contract issues can violate subsection (1)(b) because “[b]argaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative’s capability to represent their interests in dealing with the employer.” *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999). See also *911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871 (2002).

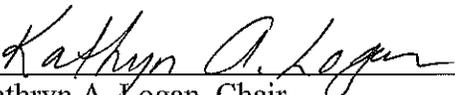
Here, Bloomquist's e-mail correctly pointed out that OSEA was the only employee group that had not reached agreement with the District, but the e-mail did not: (1) criticize OSEA's bargaining team or its proposals; (2) contain a proposal that differed significantly from proposals previously made to OSEA; (3) invite a response from, or propose to meet with, bargaining unit members; (4) allege that the OSEA bargaining team had failed to convey a proposal; (5) state anything that was not already known to OSEA's bargaining team; or (6) indicate that the District would change its positions based on member feedback. The e-mail omitted references to the cost-saving measures already agreed to, and to the District's initial offer to consider OSEA's cost-saving measures (including furloughs and exemptions), but these omissions did not misrepresent the negotiations.

The only material omission was any reference to the District's proposal to extend the PERS pickup period beyond the Agreement's expiration. Although significant, there is no persuasive evidence that bargaining unit members had lost confidence in, or called for the removal of, their bargaining representatives as a result of the omission. Accordingly, OSEA did not establish that Bloomquist's e-mail interfered with or undermined its administration, and we will dismiss this subsection (1)(b) claim.

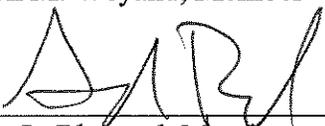
ORDER

The complaint is dismissed.

DATED this 23 day of May, 2013.



Kathryn A. Logan, Chair

*Jason M. Weyand, Member


Adam L. Rhynard, Member

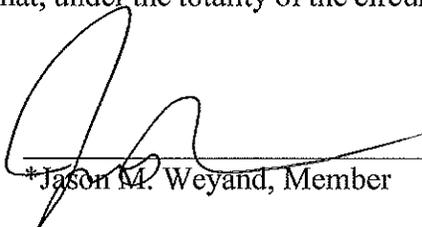
This Order may be appealed pursuant to ORS 183.482.

*Member Weyand, Concurring In Part, Dissenting In Part:

I concur with my colleagues in holding that the District did not engage in a *per se* violation of ORS 243.672(1)(e), and that the District did not violate ORS 243.672(1)(b). However, I respectfully disagree with their conclusion that the District did not engage in bad faith bargaining under the totality of the circumstances.

The District's conduct before the failure of the ratification vote on the original TA was certainly consistent with the standards of good faith bargaining, but its conduct after the Association members voted the TA down was not. The District's bargaining position became increasingly hard line, culminating in its proposing and implementing a regressive proposal regarding the elimination of the employees' PERS pickup. While a regressive proposal in and of itself may not establish bad faith bargaining, there are situations where it can under the appropriate surrounding circumstances. This is one of those cases.

The parties were engaged in interim bargaining as a result of a contractually mandated re-opener provision solely on economic issues to address a budget shortfall for fiscal year 2011-12. The PERS pickup became a central focus of the negotiations, as demonstrated by the failure of the ratification vote and the subsequent decision by the District to condition its contribution of reserve funds on employees accepting the elimination of the PERS pickup. A regressive proposal on a key financial issue so late in the bargaining process (especially one that extended beyond the period of time in which budget savings were intended to be realized), coupled with the surrounding facts and the marked change in the District's bargaining approach, is in my opinion sufficient to establish a violation. I agree with the ALJ that, under the totality of the circumstances, the District violated ORS 243.672(1)(e).



*Jason M. Weyand, Member