

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-021-13

(UNFAIR LABOR PRACTICE)

ROSEBURG PROFESSIONAL)	
FIREFIGHTERS ASSOCIATION,)	
)	RULINGS,
Complainant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
v.)	AND ORDER
)	
CITY OF ROSEBURG,)	
)	
Respondent.)	
)	

On May 23, 2014, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Larry L. Witherell on March 21, 2014, after a hearing held on November 14 and 25, 2013, in Salem, Oregon. The record closed on January 17, 2014, following receipt of the parties' post-hearing briefs.

Barbara Diamond, Attorney at Law, Diamond Law, Portland, Oregon, represented Complainant.

Adam Collier, Attorney at Law, Bullard Law, Portland, Oregon, represented Respondent.

On April 12, 2013, the Roseburg Professional Firefighters Association (Association) filed this unfair labor practice complaint against the City of Roseburg (Department). The complaint, as amended on November 13, 2013, alleged that: (1) the Department violated ORS 243.672(1)(e) when it unilaterally decreased workload and compensation by eliminating two Emergency Medical Service (EMS) lead tech positions and contracting out work performed by bargaining unit members; and (2) the Department violated ORS 243.672(1)(e) by negotiating directly with bargaining unit employees.¹ The Department filed a timely answer.

¹On November 13, the day before the hearing, the Association filed a First Amended Complaint. The ALJ and parties agreed to treat the First Amended Complaint as a motion to withdraw paragraphs 24-27 and 33 from the original complaint, all of which concerned a headset program. The Department then did not need to file an Amended Answer.

As agreed to by the parties, the issues are:

1. Did the Department violate ORS 243.672(1)(e) by bargaining directly with the lead EMS tech unit, unilaterally making changes to their work duties and/or workload, or by unilaterally reducing the number of lead EMS techs?
2. If so, what is the appropriate remedy?

For the reasons set forth below, we conclude that the Department violated ORS 243.672(1)(e) by unilaterally contracting out work that had been performed by lead EMS techs, which resulted in the elimination of two lead EMS tech positions. We further conclude that the Department bargained directly with the lead EMS tech unit in violation of ORS 243.672(1)(e).

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT²

1. The Department is a public employer as defined by ORS 243.650(20). The Association is a labor organization as defined by ORS 243.650(13) and the exclusive representative for a bargaining unit of approximately 34 firefighters.
2. During the relevant times and events, or where otherwise specified, the following individuals held the respective positions with either the Department or Association:

Mike Lane	Fire Chief (since February 2010)
Gregg Timm	Division Chief of Operations
Josh Voynick	Shift Battalion Chief
Irik Rinnert	Association President
Lt. Ryan Martin	Association Vice President

3. The Department and Association were parties to a collective bargaining agreement covering the period from July 1, 2009 to June 30, 2012. Bargaining for a successor agreement began in November 2011, and the new agreement was signed in June 2013. Accordingly, the events in dispute in this matter occurred during negotiations for the successor agreement. The Department and Association are currently parties to an agreement for the period from July 1, 2012 to June 30, 2015.

²The Association filed numerous objections to findings of fact in the recommended order, and the Department disagreed with the Association's objections. Many of those contested findings of fact, however, were not relevant to our ultimate conclusion. Therefore, we have modified the findings of fact to focus only on those facts that are pertinent to our resolution of this matter. In doing so, we have not made any independent factual findings that are contrary to factual findings in the recommended order.

4. The Association represents, and the agreement covers, a bargaining unit consisting of three employee classifications: lieutenant, driver/engineer, and firefighter (collectively referred to as firefighters).

5. The Department operates out of three fire stations. It operates three shifts that are supervised by battalion chiefs. Employees work one 24-hour shift and then are off for 48 hours. The firefighters are quartered at the station.

6. All firefighters are required to hold an emergency medical technician (EMT) certification from the State of Oregon Department of Human Resources, Health Division. There are three levels of certifications: basic, intermediate, and advanced or paramedic. Firefighters are required to hold at least an EMT basic certification. A few firefighters hold either an EMT intermediate or an EMT advanced or paramedic certification, for which they receive a higher rate of compensation under the agreement. Firefighters are required to complete an annual number of continuing education or training hours to maintain their certification. As an example, under the Health Division rules, firefighters holding an EMT-basic certification are required to complete 25 hours in order to renew their certification. They are required to complete continuing education in several areas, including, but not limited to, trauma assessment and management, trauma case review, medical emergency assessment, pediatric patient assessment and management, medications, and use of defibrillators.³

7. The Department generally makes time available for the firefighters to take continuing education or training classes. In addition to an EMT, as will be explained below, the Department's administrative assistant, who is not in the bargaining unit, tracks the continuing education hours and reporting. In the end, however, it is the firefighter's responsibility to make sure that the continuing education requirements are satisfied and reported to the Health Division.

Development of the Lead EMS Tech

8. From at least the mid-1980s, at least one firefighter has been designated as a lead EMS tech and, as a result, has received incentive pay.⁴

9. In 1986, Jeff Farris was the lead EMS tech and received a six percent salary premium for serving in that capacity.

10. In 1994, Bryan Kollen replaced Farris as the lead EMS tech and received that same six percent pay premium.

³We take notice of OAR 333-265-0110 (Licensed EMS Provider Continuing Education Requirements for License Renewal).

⁴Witnesses, exhibits, and attorneys used several terms interchangeably to identify the position in dispute (*e.g.*, EMT coordinator, EMS coordinator, and lead EMS tech). For simplification, except where stated in an exhibit, we will use lead EMS tech in discussing the disputed position.

11. The parties' 1997-99 collective bargaining agreement expressly provided language that "[e]mployees assigned to serve as [lead EMS tech] for their respective shift shall receive 2% above actual pay (including applicable incentive pay)."

12. Effective July 1, 1998, Kollen (then a driver/engineer) and Tom Edwards (then a firefighter) were the first two employees to serve as lead EMS techs under this contractual provision. In July 1999, the Department assigned Ryan Martin (firefighter) to serve as a third lead EMS tech.

13. The Department continued to have three lead EMS techs until 2006, when Martin stepped down from that position. For the next four years, only Kollen and Edwards served as lead EMS techs and each received the contractual two percent annual pay differential for that service.

14. In April 2010, Dallas Sullivan was designated as a third lead EMS tech.

15. There is no job description for the lead EMS techs and the duties performed by the lead EMS tech have varied over the years, evolving with changes in technology.

16. During his time as a lead EMS tech, Kollen taught EMS classes, ordered and stocked EMS supplies and equipment, ensured that there was proper EMS equipment on the engines, reviewed and evaluated medical reports prepared by the other firefighters to make sure that the reports met appropriate legal standards, and tracked training to make sure that the firefighters obtained the required hours for recertification.

17. As a lead EMS tech, Edwards's tasks included managing EMS supply requisitions and drugs, training probationary employees, supervising responses to fires and EMS calls, researching and ordering supplies, rotating medicines to avoid expiration, and repairing (and arranging for the repair of) medical equipment.

18. When Sullivan came on board as a lead EMS tech in 2010, the three lead EMS techs agreed to divide the various responsibilities. Sullivan would be responsible for: conducting EMS report reviews; producing "benchmarks" for EMS reports; managing protocols; assembling and maintaining PPE packs; and coordinating defibrillator maintenance. Edwards would be responsible for managing supply requisition and drugs. Kollen would be responsible for EMS certification and tracking; instruction coordination; and EMS bag maintenance.

Events Leading to the Complaint

19. The amount or level of training provided by the lead EMS techs has changed over time. At certain times, instruction was provided by a combination of instructors from three different agencies: the Department, a private ambulance company, and Douglas County Fire District 2 (District 2). The personnel from the three agencies created a pool of 12 instructors. As a result, the three lead EMS techs taught one class per year. From approximately 2002 to late 2011 or early 2012, District 2 provided most of the continuing education or training for the Department firefighters. However, in late 2011 or early 2012, the Department became dissatisfied by the

quality of classes and the limited class offerings by District 2. At that time, the lead EMS techs were charged with providing that training and education.

20. Each lead EMS tech taught two to four continuing education or training classes per year. For instance, in 2012, Sullivan taught Trauma 1, Trauma 2, Trauma Practical, and Advanced IVs/Catheters. During the same period, Kollen taught Medical Emergencies 1, 2, and 3. Edwards taught Pediatric Medicine 1 and Pediatric Medicine 2. Each class was offered to each shift, and each class could have been two to three hours in length and required two to three hours to prepare per each hour of instructional time. When lead EMS techs taught courses, they received overtime for teaching outside their own shifts.

21. However, District 2 continued to offer continuing education and training, and the Department firefighters could still attend District 2 classes. In 2012, District 2 offered courses in Post Resuscitation Care, Respiratory Distress, Pediatric Shock, Strokes, Pediatric Respiratory Distress, and Newborn/Mother Care. District 2 continued to offer courses only from January through March. The lead EMS techs, therefore, scheduled their courses from April through December.

22. By 2012, in addition to training, Edwards's responsibilities as a lead EMS tech included monitoring the status of EMS supplies, and then ordering supplies and equipment. He researched the quality and price of needed supplies and equipment, and determined whether a particular product was appropriate for use with the Department's EMS activities. He also repaired much of the EMS equipment when necessary. Edwards monitored the expiration dates of drugs and medicines held by the Department. As drugs and medicines came within six months of their expiration date, Edwards rotated the drugs to ambulance units, where they would be used much more quickly.

23. By 2012, in addition to training, Sullivan was responsible for reviewing medical reports prepared by other firefighters. He established the benchmarks and then reviewed the medical reports to ensure that they met the appropriate legal standards. This generally took one to two hours per month. Sullivan also managed protocols,⁵ oversaw defibrillator maintenance, and assembled and maintained PPE packs.⁶ Before he was assigned as a lead EMS tech, Sullivan had

⁵Managing protocols meant that a lead EMS tech telephonically contacted a battalion chief at Douglas County Fire District No. 2 to inquire whether there were any new or updated medical treatment protocols or changes in protocols that might affect the Department. Sullivan did not personally meet with the battalion chief but would instead talk to her by telephone. This occurred about once a month, and the telephone call was only a few minutes at most.

⁶PPE refers to personal protection equipment or gear contained in a vacuum-sealed bag or pack and carried on the engine. The gear, which generally included safety glasses, extra gloves, mask and shield, containers holding other masks, gowns, and gauntlets, is used to protect firefighters against blood-borne or air-borne pathogens when they respond to medical emergencies or related incidents. By organizing all the needed gear in the sealed plastic bag, contaminants are kept out, and the integrity of the gear is protected. Before Sullivan becoming a lead EMS tech, the gear was not organized or stored in a protective bag. As a result, the equipment became dirty and its protective integrity was in doubt or voided. There were about 10

been putting PPE packs together. At that time, he was not paid anything extra for assembling those packs and held no special designation or title for doing this extra duty, which he individually developed and performed. He assembled the packs for the three fire stations.⁷ After he became lead EMS tech, he continued putting together PPE packs as part of his lead EMS tech duties. He also managed the supply requisition and the current drug supplies.

24. By 2012, in addition to training, Kollen provided and coordinated the training for the other firefighters. He also made sure that the firefighters had completed the required continuing education hours necessary for recertification. Not only are the firefighters required to submit the appropriate reports demonstrating that they have completed the hours, but the Department is also required to maintain corresponding records for each firefighter's continuing education. These reports are subject to audits by the Health Division.

25. Not long after the lead EMS techs resumed offering courses, some firefighters complained about the quality of the in-house training. When the Department stepped away from the District 2 program, the lead EMS techs tried to identify an appropriate curriculum for their classes and the firefighters. As a result, they ended up using a large number of PowerPoint presentations and much of the material was merely read to the firefighters. Much of the material was too in-depth and difficult to comprehend. The firefighters lacked the necessary basic knowledge that would have made the instruction useful. Therefore, much of the training was considered boring and provoked numerous complaints and criticisms, which were conveyed to the chiefs. The Association leadership made similar complaints to management about the quality of the in-house training.

26. For several years, Edwards knew about and had experience with CentreLearn, a company that offered computer-based or online training programs. Edwards used CentreLearn as a training tool well before 2009. He had taken a few courses from CentreLearn on his own, and he used parts of their programs for the training courses that he offered in the Department. He informed the chiefs about CentreLearn, and at one of the EMS committee meetings, Edwards and the other EMS techs proposed using CentreLearn for their training classes on a one-year trial and as an adjunct to the in-house classes. He even obtained the pertinent cost information, which he provided to one of the battalion chiefs. This proposal would allow employees who were short of continuing education hours to take a CentreLearn course. Firefighters were consistently short of hours as the annual deadline approached for the submission. Edwards suggested that the Department consider CentreLearn for training within the Department. Initially, Timm was opposed; he wanted to keep the training within the Department. He thought that it was best to maintain an interaction between the Department personnel. However, in November 2012, given the level of frustration and complaints from the firefighters over the in-house training, Timm considered adopting CentreLearn.

back PPE packs at each of the three stations; there were three to four packs in the cab of each of the engines and one to two packs in the red/medical bag on the engines.

⁷Sullivan was unable to specify how much the time was required to put together a PPE pack. Several weeks would go by before he had to prepare a new pack.

27. On about December 3, 2012, Timm had a conversation or meeting with Association President Rinnert about the quality of the training. Timm said that the Department was considering and researching a number of options for training, including possibly going to computer-based and online training programs. Rinnert said that the Association would have a conflict or an issue with that. Timm said that he was just throwing out ideas, and that the Department had not decided anything yet, but was just considering and talking about possibilities.

28. A few days later, Timm had a second conversation or meeting with Rinnert. Timm acknowledged the frustration that existed over the quality of the current training classes. This time, Timm said that he had decided to go with a computer-based or online training program. He said that he could fund the computer-based or online training program with the elimination of two of the lead EMS tech positions.

December 2012 EMS Committee Meeting and Aftermath

29. The lead EMS techs and Battalion Chief Voynick held regular meetings to discuss issues pertinent to the lead EMS techs and emergency services.⁸ Timm and Voynick met with Kollen, Sullivan, and Edwards for a regular EMS committee meeting on December 20, 2012. They initially discussed old business such as stethoscope feedback, PPE triage, protocol changes, and drug shortage. At some point, Timm turned the discussion to training. He explained that the Department wanted to go with an online training program, provided by CentreLearn. He said that he wanted to get it up and running by January 2013. As a result, Timm explained, the Department needed only one lead EMS tech. He said that the Department would be dropping two lead EMS techs and retaining one position for two percent premium pay. When asked the reason for this, Timm said that this was how he was going to sell it to the city manager. Timm explained that the money savings of having only one lead EMS tech would be used to contract with CentreLearn. At some point, one of the employees said that the online training was wanted in order to supplement, not replace, the in-house, hands-on training provided by the local EMS techs.

30. Timm tried to explain the change, but he also wanted to know who of the three employees would be interested in the remaining lead EMS tech position. Timm did this through a visual demonstration. He wrote the initials of the three coordinators, BK, DS, and TE, on a white board. Under each set of initials, he wrote "training." He asked each lead EMS tech what their duties were and then he listed the duties under their respective initials. Under Kollen, he wrote "defibrillator replacement" and "clean EMS bags";⁹ under Edwards he wrote "supplies"; and under Sullivan he wrote "PPE packs" and "protocols." Timm wanted to see if they could blend together the non-training tasks into one EMS tech assignment. Timm erased training from the list because of the decision to contract out that work to CentreLearn.

⁸Meetings had been held on June 10 and July 19, 2010; August 29 and December 22, 2011; and January 26, March 22, July 25, and December 20, 2012.

⁹Cleaning EMS bags was a project that Kollen and the Department were considering but the project never got off the ground before the December meeting. Accordingly, it was merely a prospective task within the lead EMS tech assignment.

31. Timm said that the remaining tasks were just a one-person job. He asked who was interested in taking on the remaining tasks for the two percent incentive pay. All three men turned it down. Timm was frankly surprised at the refusal because he believed that the remaining lead EMS tech assignment would have fewer duties than what was currently required of the three lead EMS techs. As a result, Timm said something to the effect that the three lead EMS techs did not know how to negotiate or that they were poor negotiators. Timm emphasized that whoever took the position would have fewer duties. Sullivan asked Timm if the one lead EMS tech position could be for six percent. Timm said that the two percent was not negotiable, but that he would discuss the duties. Edwards then went to the white board and wrote down "4.5%," and said he that would take the assignment for that amount. Timm said "no," adding that he was not there to negotiate. He erased the figure and wrote "2%" on the board and circled it. After Kollen, Sullivan, and Edwards refused the assignment, Timm responded that he was sure that any of the younger firefighters, who were "full of piss and vinegar," would be willing to take the assignment. Edwards said it was not a matter of "being full of piss and vinegar," but rather that the remaining position would have too many tasks for the two percent incentive pay.

32. The conversation then turned away from the tasks and assignments to discuss whether the firefighters would still be given adequate time to complete their EMS training hours using the CentreLearn program. Both Voynick and Timm assured the firefighters that they would. Timm told them that they "could have the whole 8 hours a day during EMS training week" if they wanted.

33. As the meeting came to a close, Timm stated that he would still like to have one of the three men agree to accept the lead EMS tech assignment. Kollen rejected the offer because he did not think that the position was defined. Timm offered Edwards the opportunity to get the pay that he then received, meaning the two percent premium, with only the responsibility for ordering EMS supplies. Timm said that he would assign the other coordinator duties to the various firefighters. Timm then wrote "1/7/13" on the board, and asked Edwards to make a decision by January 7, 2013.

34. Immediately after the December meeting, Sullivan and Edwards contacted Rinnert. They informed Rinnert that Timm had announced the elimination of two lead EMS tech positions and that the chiefs were talking about money and duties. Rinnert instructed them to write everything down that they could remember about the meeting.

35. Rinnert arranged a meeting with management for January 3, 2013, in order to discuss the change in lead EMS tech assignments. Chief Lane, Timm, Rinnert, Association Vice President Martin, and driver/engineer Smith attended the meeting. Rinnert stated that he was concerned about the chiefs bargaining with lead EMS techs about pay and job descriptions. Lane responded that that did not happen and denied that "bargaining" took place. Rinnert responded to Lane, that, if it was not bargaining, then why did Timm say that the lead EMS techs did not know how to negotiate. Lane stated that Rinnert and the lead EMS techs misinterpreted or misunderstood what happened at the meeting. Rinnert also expressed his concern about the number of lead EMS techs that the Department intended to have. Lane responded that it was management's right to make such changes. Lane said that the chiefs would handle the duties until they found someone to whom those duties could be assigned.

36. On January 9, 2013, Rinnert sent Lane an e-mail demanding that the Department bargain the decision and impacts of its decision. Rinnert also demanded that the Department maintain the *status quo* pending any negotiations. The Department refused to bargain, asserting that it had the right to unilaterally make the decision.

37. Edwards, Sullivan, and Kollen stopped performing lead EMS tech duties in December 2012, although they continued to be paid the two percent incentive pay until January 31, 2013. In January, the Department began offering online or computer-based training through CentreLearn. Before the January 7, 2013 deadline, Edwards advised the chief that he was not interested in the lead EMS tech assignment. Thereafter, no firefighter volunteered to take the assignment.

38. By the end of February 2013, none of the other firefighters had voluntarily expressed any interest in the lead EMS tech position.¹⁰ Accordingly, on February 27, 2013, Chief Lane sent an e-mail to all the firefighters informing them of the vacant lead EMS tech position, along with the two percent incentive pay that went with the position. The e-mail asked that any interested employee inform Chief Lane before March 15, 2013. The e-mail also included an attachment, which set forth the duties for the position.

39. No firefighter volunteered for the vacant lead EMS tech position. From about January 1 to August 2013, Timm and the Department's staff assistant performed EMS supply ordering that previously had been performed by Edwards. Historically, bargaining unit employees checked EMS equipment, supplies and drugs once a month and prepared a list of needed supplies. Beginning in January, Timm took that list and ordered supplies. This took about an hour per month. The tracking of continuing education and EMS certification, which was a duty that was previously performed by Kollen in his capacity as a lead EMS tech, was undertaken by CentreLearn as part of its contract with the Department.

40. On August 7, 2013, Chief Lane assigned Edwards to be the lead EMS tech with two percent incentive pay.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Department violated ORS 243.672(1)(e) by unilaterally contracting out EMS training for the Department firefighters, thereby reducing the number of lead EMS techs and changing their workload and compensation.

We first address the Association's allegation that the Department unilaterally contracted out work to an online training company at a time when the parties were negotiating a successor

¹⁰There was testimony by Timm that a firefighter volunteered for the lead EMS tech assignment, but after apparently being given a hard time by his colleagues, he withdrew his interest and did not accept the assignment.

collective bargaining agreement.¹¹ In contracting out that work, the Department eliminated two lead EMS tech positions, decreased bargaining-unit compensation, and changed the workload of bargaining unit employees. When an employer contracts out work being performed by bargaining unit members, “all circumstances surrounding the change generally must be considered in determining whether, in any particular case, bargaining will be required under the [Public Employee Collective Bargaining Act (PECBA)].” *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5655, *recons*, 7 PECBR 5664 (1983) (*FOPPO*).¹²

Under this “all-things-considered” approach, we “balance the employer’s right to manage its enterprise against the effects of the decision on the bargaining unit in light of all relevant circumstances.” *Id.* (emphasis omitted); *accord Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437 (2008). Common considerations under the test include: (1) the motive or reason for the decision; (2) the nature of the work affected; (3) the parties’ collective bargaining history; and (4) the past practices of the employer. *FOPPO*, 7 PECBR at 5655. One “important consideration is the impact of the work transfer on bargaining unit members’ working conditions.” *American Federation of State, County and Municipal Employees Local 189 v. City of Portland (Portland Police Bureau)*, Case No. UP-049-08, 24 PECBR 612, 641 (2012). “If the employer’s transfer of work traditionally performed by bargaining unit members has the potential to significantly and adversely affect bargaining unit members’ working conditions, we will require the employer to bargain its transfer decision and the impacts of that decision.” *Id.* (quoting *Washington County Police Officers’ Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 478 (2009)); *see also*

¹¹The dissent questions whether the “contracting out matter is properly before us.” As set forth above (and in the recommended order), the Association’s complaint specifically alleged that the Department violated ORS 243.672(1)(e) in numerous ways, including contracting out bargaining unit work. Further, the issue statement agreed to by the parties included the issue of whether the Department violated subsection (1)(e) by: (1) making a unilateral change to employee workload (which in this case we understand to mean the contracting out of the training work); and (2) eliminating the lead EMS tech positions, which the Department did in conjunction with contracting out the training work. Consistent with the complaint and the agreed-to issues, the contracting out of the training work was expressly raised in the Association’s opening arguments, with no objection by the Department that the contracting out was somehow not at issue. Moreover, both parties expressly briefed the contracting-out issue in their post-hearing briefs and memoranda in aid of oral argument. Finally, at no point has the Department intimated that the contracting-out issue is not before us. Under these circumstances, we have no cause to question that the Department’s unilateral change of contracting out of the training work is squarely before us.

¹²To the extent that the Department argues that it did not contract out the training work, we reject that argument. It is undisputed that the lead EMS techs performed the training work as a required duty for their two percent incentive pay. It is further undisputed that the work did not just stop—*i.e.*, that there was no longer a need for the training work. Rather, the training work continued with the Department opting to contract that work to an outside entity. This is a paradigmatic example of contracting out bargaining unit work.

Multnomah County, 22 PECBR at 437. In contrast, if the contracting out has only a slight or remote effect on the bargaining unit, then the employer need not bargain that change. *FOPPO*, 7 PECBR at 5656-58.

Here, the record establishes that the Department decided to contract out the training work performed by the lead EMS techs primarily because it had received complaints about that training. The Department also believed that contracting out the work would allow them to eliminate two lead EMS tech positions. Although a transfer-of-work decision motivated *solely* by economic reasons factors in favor of the employer being permitted to lawfully bypass bargaining (*see City of Portland*, 24 PECBR at 641), the record in this case does not establish that the Department was motivated solely (or even primarily) by economic reasons.

The nature of the work, as set forth above, involved training for bargaining unit members and was an extra duty performed by three lead EMS techs for extra pay (a two percent salary differential). Although the duties performed by lead EMS techs have changed over the years, there is no dispute that the lead EMS techs performed the contracted-out training for at least one year as part of their lead EMS tech duties. When the Department decided to transfer that work to an outside entity, the lead EMS techs suffered a loss of extra-duty pay, as well as overtime. In previous cases, we have concluded that the loss of extra-duty pay and potential overtime have a significant effect on bargaining unit members. *See Washington County*, 23 PECBR at 478-79; *Multnomah County*, 22 PECBR at 438; *FOPPO*, 7 PECBR at 5657-58. Here, given the small size of the bargaining unit (approximately 34 people), eliminating extra-duty pay for two members amplifies that effect. Likewise, the loss of a two percent pay differential for two employees is significant. Finally, the change in workload also amounts to a substantial effect on unit employees.

The parties have a longstanding collective-bargaining relationship, as well as a longstanding contractual provision that provides for a lead EMS tech position with a two percent salary differential. The parties were also in the process of negotiating a successor agreement when the Department unilaterally contracted out the training services then performed by the lead EMS techs. Under these circumstances, we conclude that the parties' collective bargaining relationship weighs in favor of requiring the Department to bargain over the decision to contract out the training work.

Finally, the past practices of the Department are mixed with respect to the contracting out of training work. Although lead EMS techs had not always performed this work, they had done so as part of their core responsibilities for the past year.

After considering all of the relevant circumstances, we conclude that the Department's decision to contract out training services previously performed by lead EMS techs has a greater effect on bargaining unit work conditions than on the Department's right to manage its enterprise. We particularly give great weight to the substantial effect of the subcontracting decision on the two percent pay differential and loss of overtime. Consequently, the Department was required to bargain in good faith with the Association over that decision, and its failure to do so violated ORS 243.672(1)(e).

3. The Department violated ORS 243.672(1)(e) on or about December 20, 2013, when it met with lead EMS techs and bargained with them over changes in lead EMS tech workload.

We next address the Association's contention that the Department additionally violated ORS 243.672(1)(e) during a December 20, 2012, meeting. It is an unfair labor practice for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). "An employer violates its bargaining duty when it attempts to negotiate directly with its employees." *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 769 (2007) (citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8195 (1985)); *see also 911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 890 (2002) ("the good faith bargaining obligation imposed by (1)(e) encompasses a prohibition on direct dealing by an employer with members of the bargaining unit").¹³

Here, at the December 2012 meeting, the Department (*via* Timm) informed the three lead EMS techs of its decision to contract out the training work and eliminate two of the three lead EMS tech positions (and the accompanying incentive pay). This announcement alone does not constitute "bargaining" or "direct dealing" with the lead EMS techs, as it merely informed the employees of a decision that had already been made. However, Timm then began negotiating with the three lead EMS techs over the appropriate workload to be performed by the potential lone lead EMS tech in exchange for the collectively-bargained two percent incentive pay. Specifically, Timm wrote a list of various work duties currently performed by the three lead EMS techs. He then invited the techs to construct a workload that they believed would represent fair compensation for the two percent incentive pay. In doing so, he crossed the line that prohibits a public employer from negotiating directly with employees.

Although Timm did not budge on the Department's position to only pay a two percent salary differential in exchange for the extra work, he did express a willingness to negotiate over the amount of work that would be required of a lead EMS tech to receive that incentive pay. When faced with resistance from the lead EMS techs, who believed that the proposed workload was too much for a lone employee to provide for a two percent salary increase, Timm emphasized that he was offering them less work for the same pay. He further told the lead EMS techs that they were poor negotiators and that if they refused to accept some variation of the workload-for-incentive pay that was being proposed, he would find a younger firefighter "full of piss and vinegar" who would be willing to perform the work. Under these circumstances, we conclude that the Department negotiated directly with the lead EMS tech employees over the workload required to receive the collectively-bargained incentive pay. In doing so, the Department violated ORS 243.672(1)(e).

¹³ The Board has also concluded that a public employer violates ORS 243.672(1)(b) when it bypasses the exclusive representative and deals directly with bargaining unit members. *See City of Salem*, 19 PECBR at 888-89; *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 38-39 (1999). In this case, the Association alleged only that the Department's conduct at the December 2012 meeting violated subsection (1)(e), not (1)(b). Therefore, we do not address any potential (1)(b) violation.

In arguing to the contrary, the Department contends that no “bargaining” took place at the December 2012 meeting because Timm never made a formal proposal to the three lead EMS techs that would be included in a collective bargaining agreement. We disagree with the Department’s contention that the subsection (1)(e) prohibition on direct dealing or negotiating is limited to a public employer making a formal proposal to be included in a collective bargaining agreement. Under that theory, an employer could bypass the exclusive bargaining representative and directly negotiate side deals on wages and other benefits, so long as those side deals were not formal proposals to be included in a collective bargaining agreement. Such conduct, however, would nevertheless constitute direct negotiations with employees that undermine the union’s role as the exclusive bargaining representative of the employees that they represent. *See McKenzie School District #68*, 8 PECBR at 8195 (quoting *NLRB v. General Electric Co.*, 418 F2d 736 (2d Cir. 1969), *cert den.*, 397 US 975 (1970)).

The dissent also concludes that the Department’s conduct at the December 2012 meeting did not violate ORS 243.672(1)(e), but for a different reason. The dissent would find that Timm only negotiated with the employees over the permissive subject of “assignment of duties” (*see* ORS 243.650(7)(g)), rather than the mandatory subject of “workload” (*see Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 547 (2013)). According to the dissent, a public employer does not violate ORS 243.672(1)(e) when it bypasses the exclusive representative and negotiates directly with represented employees regarding permissive subjects of bargaining. Such direct dealing, according to the dissent, is not proscribed by ORS 243.672(1)(e). Although we are skeptical of that distinction, we need not address it here because we have concluded, as set forth above, that Timm directly negotiated with the lead EMS techs over workload.

The dissent maintains that Timm only broached the “assignment of duties” to be performed by the to-be-determined lead EMS tech and did not cross the line into negotiating over the “workload” of that position. Admittedly, the distinction between “workload” and “assignment of duties” can be somewhat nebulous. Yet, as explained above, in pushing for one of the lead EMS techs to take the new “solo” lead EMS tech position, Timm expressed his dismay at the lack of willingness by one of three employees to take that position. In doing so, Timm explained that he was proposing *less work* for the *same amount of pay*. The three employees disagreed, asserting that Timm was proposing *too much work* for the *same amount of pay*. Moreover, in that context, Timm told the three employees that, although the amount of pay was not negotiable, the work to be done by the lead EMS tech for that pay was negotiable. Although it is conceivable that Timm was referring to a particular assignment (or group of assignments) that the employees found undesirable, we find it more probable that Timm was referring to the overall workload to be performed for the incentive pay. Thus, under these circumstances, we disagree with the dissent that Timm only bargained over “assignment of duties,” rather than “workload.” Therefore, we conclude that the Department violated ORS 243.672(1)(e) when it bargained directly with the three lead EMS techs over workload at the December 2012 meeting.

Remedy

We turn to the remedy for the Department’s unlawful transfer of the training work previously performed by the three lead EMS techs and for the Department’s unlawful direct negotiations with Association-represented employees regarding workload. We will order the

Department to cease and desist from refusing to bargain about its decision to transfer out the training work. ORS 243.676(2)(b). We will also order the Department to cease and desist from bypassing the Association and directly negotiating with represented employees regarding workload. *Id.*

We will also order affirmative relief “necessary to effectuate the purposes of [the PECBA].” ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, 25 PECBR 783, 792, (2013); *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80 (2005). We see no compelling reason not to order the “usual remedy” in this case. Accordingly, the Department is ordered to return Sullivan and Kollen to their lead EMS tech positions and to restore all wages (including the two percent salary differential) and benefits lost by Sullivan, Kollen, and Edwards due to the Department’s unlawful conduct, until the Department has fulfilled its bargaining obligations.¹⁴ The Department is also ordered to return the contracted-out training work to the bargaining unit until it has completed its bargaining obligations.

We will also order the Department to post a notice of its wrongdoing. We generally order such a posting if we determine that a party’s violation of the PECBA was: (1) calculated or flagrant; (2) part of a continuing course of illegal conduct; (3) committed by a significant number of the respondent’s personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative’s functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). Here, the Department’s conduct, particularly its direct negotiations with Association-represented employees, undermined the role of the Association as the exclusive representative of those employees, thereby negatively affecting the Association’s functioning as that exclusive representative. That violation occurred directly after the Department had unlawfully refused to bargain with the Association regarding its decision to contract out work previously performed by lead EMS techs. Both of these violations occurred during a time at which the parties were negotiating a successor agreement. Under these circumstances, we conclude that a posting is warranted.

¹⁴As set forth above, the Department paid all three employees the lead salary differential through January 31, 2013, meaning that the back pay obligation commenced on February 1, 2013. Additionally, Edwards was returned to a lead EMS tech position with the two percent salary differential as of August 7, 2013, and that date ends the Department’s back pay obligation with respect to his two percent incentive pay.

ORDER

1. The Department violated ORS 243.672(1)(e) when it contracted out training work previously performed by lead EMS techs without first bargaining with the Association and when it directly negotiated with Association-represented employees regarding lead EMS tech workload.

2. The Department shall cease and desist from: (1) refusing to bargain in good faith with the Association about the Department's decision to contract out the training work (and any mandatory impacts of that decision); and (2) directly negotiating with Association-represented employees regarding workload.

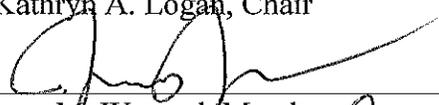
3. The Department is ordered to return Sullivan and Kollen to their lead EMS tech positions and to restore all wages and benefits lost by Sullivan, Kollen, and Edwards due to the Department's unlawful conduct, consistent with this opinion, until the Department has fulfilled its bargaining obligations.

4. The Department is ordered to return the contracted-out training work to the bargaining unit until it has completed its bargaining obligations.

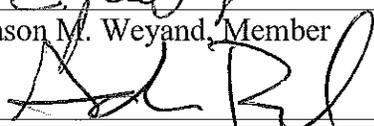
5. Within 15 days of the date of this Order, the Department shall post a notice of its violations in each of its fire stations in a prominent location where Association-represented employees are likely to view it. The notice shall remain posted for 30 days. The Fire Chief shall sign the notice.

DATED this 23 day of July 2014.

*Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This order may be appealed pursuant to ORS 183.482.

*Chair Logan, dissenting.

My colleagues have determined that the Department violated ORS 243.672(1)(e) by contracting out the EMS training and by bargaining directly with the lead EMS techs over "workload." I disagree with both determinations, and therefore respectfully dissent.

First, I question whether the contracting out matter is properly before us. The Association's demand to bargain, which Association President Rinnert sent by e-mail to Chief Lane, states that

the Association “demands to bargain the decision and impact of eliminating two Lead EMT positions.” This demand appears to incorporate only the District’s decision to reduce the number of lead EMS techs – not any action by the District about sending the training work to CentreLearn. Additionally, the parties agreed that the issues before the ALJ, and consequently the Board, were whether the Department bargained directly with the techs, made changes to work duties or workloads, or unilaterally reduced the number of lead EMS techs. This list of issues does not include the issue of “contracting out.” Because the Association did not demand to bargain about the contract with CentreLearn, and because the parties limited their issues to direct dealing and elimination of two lead EMS tech “positions,” it does not appear that the contracting out of the training is even properly before us.

That said, assuming *arguendo* that the contracting out matter is before the Board, I agree with my colleagues that the “all things considered” approach is what we should use in analyzing this matter. I also agree that when using this approach, we engage in a balancing of the employer’s right to manage against the effects of the decision on the bargaining unit. Where we diverge is in the results when “all things considered” is applied to the case before us. In sum, the transfer of this training work did not have the “potential to significantly and adversely affect bargaining unit members’ working conditions.” *City of Portland*, 24 PECBR at 641.

When applying the “common considerations” outlined in our case law, this matter represents an extremely close case. The City’s reason for contracting out the training is that the training provided by the lead EMS techs was not suitable – in sum, the City wanted better training. Further, the nature of the work provided, which was training, was tangential to the core work actually performed by bargaining unit employees. Training was a duty required of only three lead EMS techs. And only two techs, out of a unit of approximately 34 firefighters, were affected by this reduction in work. These elements are aligned on the employer’s side of the scale.

However, the parties’ collective bargaining history is aligned with the bargaining unit, as the lead work differential has been in place in one form or another since the mid-1980s. Although the amount of time that these lead EMS techs exclusively conducted the training was limited to approximately one year, they had performed some type of training for the bargaining unit for a number of years.

I understand that this Board’s case law, cited by the majority, stands for the proposition that loss of pay and overtime opportunities for bargaining unit members triggers the determination that the City must bargain its decision to contract out. My difficulty is that these cases never evaluate how much loss of pay or potential/actual loss of overtime is the catalyst, and whether such loss needs to affect most, some, or a very few members of the bargaining unit. I am not closing my eyes to the effect on these two bargaining unit members, but a two percent cut and loss of overtime for two out of 34 bargaining unit members has a fairly limited effect on the bargaining *unit*. I also note that no employee wanted the third lead EMS tech position for a two percent pay increase, causing me to wonder how much of a difference a pay increase or decrease made on the bargaining unit members.

Next, I disagree with the majority decision that the Department bargained with the three lead EMS techs about workload on December 20, 2012. In order for the Association to prevail, it must prove that the Department bargained directly with the bargaining unit employees, rather than the Association, regarding a mandatory subject of bargaining. *See* ORS 243.650(4). The Association has failed to meet its burden of proof.

This allegation rests on whether Timm and the three lead EMS techs were discussing assignment of duties or workload.¹⁵ Assignment of duties, as well as workload “when the effect on duties is insubstantial,” are permissive subjects of bargaining. ORS 243.650(7)(g). Workload may be a mandatory subject for bargaining when the effect on duties is more than insubstantial.

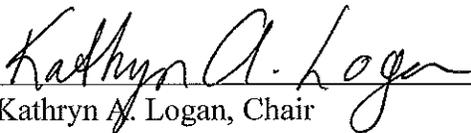
While I agree that the lone tech’s *duties* would change and increase, the evidence does not establish that the *workload* of the lone EMS tech would actually increase or decrease. One cannot equate an increase in duties with an increase in workload. There are situations, and this appears to be such a case, where the removal of the most time-intensive duty (training) appears to offset the addition of other duties. The effect on the duties is unknown. Without more, I am unable to conclude that the preponderance of evidence establishes that workload as a mandatory subject was what was being discussed.

My assessment is that Timm and the lead EMS techs were discussing the assignment of duties, although this is yet another very close case. An equally justified reading of the established facts is that Timm, not knowing who would step forward to take the single position, was trying to figure out which duties that unknown person was interested in doing. Timm was willing, and we so found, that he would assign any non-desired duties to others. Consequently, what occurred more closely reflects a conversation about the assignment of duties.

The Department was not particularly artful in the way it chose to discuss the duty assignments. Informing the lead EMS techs that they were poor negotiators clearly muddied the waters. But an employer can lawfully discuss the assignment of duties with employees without involving the exclusive representative.

So, while I lean to this being an assignment of duties discussion between Timm and the techs, which is not bargaining, I would decide this matter by holding that the Association failed to meet its burden of proof that the subject of the discussion was mandatory.

In sum, I would dismiss the complaint.



*Kathryn A. Logan, Chair

¹⁵ I agree with the majority decision that informing the lead EMS techs about the elimination of training did not constitute bargaining.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-021-13, *Roseburg Professional Firefighters Association v. City of Roseburg*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

The Employment Relations Board has held that the City of Roseburg (Department) violated ORS 243.672(1)(e) by: (1) unilaterally contracting out work that had been performed by lead EMS techs, without first fulfilling its obligation to bargain with the Roseburg Professional Firefighters Association (Association); and (2) directly negotiating with Association-represented employees over lead-EMS-tech workload.

To remedy this violation, the Employment Relations Board ordered the Department to:

1. Cease and desist from refusing to bargain in good faith with the Association regarding the contracting out of training work previously performed by lead EMS techs and cease and desist from directly negotiating with Association-represented employees regarding lead-EMS-tech workload;
2. Return employees Dallas Sullivan and Bryan Kollen to their lead EMS tech positions and to restore all wages and benefits lost by Sullivan, Kollen, and Tom Edwards due to the Department's unlawful conduct, until the Department has fulfilled its bargaining obligations;
3. Return the contracted-out training work to the bargaining unit, until the Department has completed its bargaining obligations; and
4. Post this notice for 30 days in each of its fire stations where Association-represented employees are likely to view it.

City of Roseburg

Dated _____, 2014

By:

Employer Representative

Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted in each employer facility in which bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.