

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-047-13

(UNFAIR LABOR PRACTICE)

MEDFORD EDUCATION ASSOCIATION,)
)
 Complainant,)
)
 v.)
)
 MEDFORD SCHOOL DISTRICT 549C,)
)
 Respondent.)
 _____)

SUPPLEMENTAL ORDER

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris and Kaplan, Portland, Oregon, represented Complainant.

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson, Salem, Oregon, represented Respondent.

On August 13, 2014, this Board issued a final order holding that the Medford School District 549C (District) violated ORS 243.672(1)(g) by failing to restore teacher work days and increase contributions to employee insurance premiums and salaries as required by a Memorandum of Agreement (MOA) reached with the Medford Education Association (Association). 26 PECBR 143 (2014). As a remedy, we ordered the District to cease and desist from that conduct. We also ordered the parties to bargain in good faith over an appropriate “make-whole” remedy. In the event that the parties were unable to reach an agreement after bargaining in good faith for 60 days, we ordered the parties to submit their final remedy proposals to this Board so that we could determine an appropriate make-whole remedy. Although the parties bargained in good faith for an appropriate make-whole remedy, they were unable to come to an agreement. Consistent with our prior order, both parties submitted their most recent proposals to this Board.

The only issue before us in this order is what constitutes an appropriate make-whole remedy. We begin with each party’s proposed remedy. The District proposes that it remit \$49,295.43 to the Association to be distributed to the Association-represented employees. The District did not make the source of this number clear and, from the District’s perspective, is a gratuity because the District believes that it owes nothing for its violation of the MOA. Although

the District acknowledges that a minimum of \$132,871 is owed under our final order (even using the District's calculations), the District asserts that its payment of retroactive salary increases of \$383,926 under the parties' most recent collective bargaining agreement (CBA) means that nothing is owed for the MOA violation.

The Association sees the remedy issue differently. The Association's final proposal would require the District to remit \$728,993. According to the Association, we should take into account the significant passage of time since the District breached the MOA and apply the Appendix A formula (per the terms of the MOA) to result in a payment of \$728,993.¹ Although the Appendix A formula is triggered only after the four cut days had been restored, the Association argues that it had to subsequently bargain for those days to be restored as part of a CBA that was reached after the District's unilateral implementation and an Association strike. According to the Association, crediting the District with the monetary value of those restored days ignores that the Association had to bargain for those days in its successor agreement, even though those days were already bargained and should have been awarded as required by the MOA.² Thus, according to the Association, crediting the District with the monetary value of the restored days effectively rewards the District for breaching the MOA.

In ordering a remedy for an unfair labor practice violation, this Board has "broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of the Public Employee Collective Bargaining Act (PECBA)." *Oregon School Employees Association v. Parkrose School District*, Case No. UP-030-12, *recons.*, 25 PECBR 845, 846 (2013). *See also Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); ORS 243.676(2)(c). The goal of a make-whole remedy is to restore an injured party to the status that existed before the violation occurred. *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 17 PECBR 93, 94 (1997), *aff'd*, 155 Or App 92, 962 P2d 763 (1998). Here, however, attempting to restore the Association to the status that existed before the District violated the PECBA is particularly complicated. As set forth above and in our prior order, the District's unlawful conduct occurred in the midst of negotiations for a successor CBA that resulted in a strike. The parties ultimately reached an agreement that included terms and conditions of employment (*e.g.*, number of work days, insurance contributions, and wages) that were also central to the MOA breached by the District. Moreover, a substantial amount of time has passed since the District breached the MOA. As a practical matter, it is impossible to completely rewind back to the time of the District's violation and accurately assess what would have happened had the District not breached the MOA. Rather than engaging in such speculation, we find it more appropriate to provide an equitable remedy that advances the purposes of the PECBA, but that also recognizes the subsequent events that occurred, including the signing of a new CBA.

¹Under the MOA and Appendix A formula, the first step is to determine the difference in the yearly General Purpose Grant Estimates. Making that determination for the 2012-13 and 2013-14 years equals \$8,599,191 (\$98,761,488-\$90,162,297), which is then converted to a percentage change of 9.54 percent. Next, the insurance change for 2012-13 and 2013-14 is calculated, which is 1.06 percent, and that amount is subtracted from the funding increase (9.54 percent), yielding 8.48 percent. That percent is multiplied by the aforementioned dollar increase (\$8,599,191), which equals \$728,993.

²We made this determination in our prior order.

With that in mind, we are not convinced that either party's proposal achieves that goal. The District's proposal of remitting \$49,295.43 falls short of even the minimum amount that it would have had to contribute at the time of the breach under its own calculations had it not violated the PECBA. The Association's proposal does not take into account the retroactive wage increase that was included in the parties' recently-signed agreement. Consequently, we order our own remedy, which shall require the District to remit \$345,067 (plus interest at nine percent per annum from June 10, 2013 to August 13, 2014)³ to Association-represented employees.⁴ This amount recognizes the \$728,993 that the District should have contributed under the Appendix A formula.⁵ However, the amount also recognizes (and subtracts) the retroactive pay increase of \$383,926. Finally, we believe that this remedy most accurately fulfills our charge to make the aggrieved party whole and to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

The Association also requests that we order the District to post a notice of its violation and that we award a civil penalty, along with the reimbursement of the Association's filing fee. We decline to order those additional remedies in this case. We generally order a posting if the violation 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. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 891 (2013). Not all of these criteria need to be satisfied to warrant the posting of a notice. *Id.* Here, the District's conduct did affect a significant number of bargaining unit employees. The Association has not established that any of the other factors warrant a posting. Moreover, as described in detail in our prior order, the disputed contract language was far from clear. Under these circumstances, we do not believe that a posting is necessary to effectuate the purposes of the PECBA. *See* ORS 243.676(2)(c).

We turn to the request for a civil penalty. This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice if (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). Here, the record does not establish that either criterion has been satisfied, and we will deny the request.

³These dates reflect the date that the District approved the school calendar without the restored work days (thereby violating the MOA) and the date that our order issued. We decline to award interest for the period after our award issued, during which the parties bargained (as required by our order) and mediated over a potential remedy.

⁴This amount shall be distributed on a full-time-equivalent basis. In other words, after calculating the interest, the District shall divide that number by the number of full-time-equivalents in the Association bargaining unit. A full-time employee would then receive that amount, while a .5 employee would receive half of that amount.

⁵We agree that the Association's methodology and calculation best reflects the intent of the MOA and Appendix A formula and should be used as the starting point in our determination of an appropriate remedy.

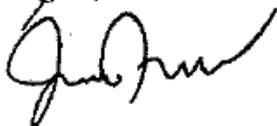
Lastly, the Association requests that we order filing fee reimbursement, which we may do if the District's answer was "frivolous or filed in bad faith." OAR 115-035-0075. Although we have concluded that the District violated ORS 243.672(1)(g), the record does not establish that its answer was frivolous or filed in bad faith. Therefore, we will deny the Association's request.

ORDER

1. Within 60 days of the date of this order, the District shall remit \$345,067, plus nine percent interest per annum from June 10, 2013 to August 13, 2014, to Association-represented employees. That amount shall be divided among the Association-represented employees on a full-time-equivalent basis, as described in this order. If the District has not satisfied the payment required by this order within 60 days, interest will begin to run again 61 days after the date that this order issues, until such time that such payment is made.

DATED this 1 day of December, 2014.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.