

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-057-13

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503, OREGON PUBLIC	)	
EMPLOYEES UNION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT OF	)	AND ORDER
JUSTICE,	)	
	)	
Respondent.	)	
	)	

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On October 30, 2014, this Board heard oral argument on Respondent’s objections to a September 5, 2014, Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on April 4, 2014, in Salem, Oregon. The record closed on May 21, 2014, following receipt of the parties’ post-hearing briefs.

Christy Te and Marc Stefan, Attorneys at Law, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented Complainant.

Neil F. Taylor, Assistant Attorney General, Oregon Department of Justice, Labor and Employment Section, Salem, Oregon, represented Respondent.

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On December 12, 2013, the Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) filed this complaint alleging that the State of Oregon, Department of Justice (Department) violated ORS 243.672(1)(b) and (e) by directly dealing with an employee regarding the resolution of a pending Step 3 grievance. The Department filed a timely answer, including affirmative defenses that its conduct was authorized by the parties’ collective

bargaining agreement and that the Union had waived objections to the Department's communications and grievance resolutions with the employee.

The issues are:

1. Should this Board defer acting on the complaint, pending the conclusion of an arbitration?
2. Did the Department's November 2013 communications and actions with Kastl violate ORS 243.672(1)(b) and (e)?

For the reasons set forth below, we conclude that deferral is not appropriate and that the Department violated ORS 243.672(1)(b) and (e) by bypassing the Union and directly dealing with a Union-represented employee to resolve a contractual grievance.

### RULINGS

The rulings of the ALJ were reviewed and are correct.<sup>1</sup>

### FINDINGS OF FACT

#### Parties

1. SEIU is a labor organization within the meaning of ORS 243.650(13), representing a group of employees in the Department, a public employer within the meaning of ORS 243.650(20).
2. SEIU and the Department were parties to a 2011-13 collective bargaining agreement (CBA), effective from July 1, 2011, through June 30, 2013.

#### CBA

3. Article 90.5 §2 of the CBA provided in part:

“An employee may request in writing to work any alternate or flexible work schedule defined in this Agreement (see Article 90, Work Schedules and, for applicable Agencies, Section 15, below). No employee requests will be arbitrarily denied or rescinded. In reaching its decision, the Agency will consider whether the employee's request meets all of the following criteria:

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<sup>1</sup>The Department's request that we hold the complaint in abeyance pending an arbitration hearing and decision requires an analysis of the facts regarding that arbitration, which in turn requires an understanding of the facts leading up to that arbitration. Therefore, we discuss our ruling on the Department's request below, after setting forth our factual findings.

- “(a) That the operational needs of the Agency are met;
- “(b) That the requested work schedule will not interfere with his/her ability and availability to perform the job;
- “(c) That the needs of the public are adequately served; and
- “(d) That a forty (40) hour workweek is maintained.

“The Agency may also consider other relevant criteria, including, but not limited to, employee use of carpooling, mass transit, or demonstration of an unusual hardship.”

4. Article 21 of the CBA contains a dispute resolution (grievance and arbitration) procedure. The process applicable to this case includes Step 1, with the employee’s “management/executive service supervisor”; Step 2, with the “Agency Head” or designee; Step 3, with the Department of Administrative Services (DAS) Labor Relations Unit (LRU); and Step 4, arbitration. An individual employee or the Union may file a grievance at Step 1. Only the Union may move the grievance to additional steps.

5. The CBA Step 1 grievance procedure states in part:

“The grievant(s), with or without Union representation, shall, within thirty (30) calendar days, file the grievance except as otherwise noted to his/her management/executive service supervisor. Upon request of either Party, the Parties will meet to discuss the grievance. The supervisor shall respond in writing to the grievant(s) within fifteen (15) calendar days from the receipt of the grievance. In all cases, *the grievant and his/her management/executive service supervisor will attempt to meet within the thirty (30) calendar day filing period in an attempt to resolve the grievance at the lowest possible level of management.*<sup>2</sup> Failure to meet will not invalidate the grievance.

*All Step 1 grievance settlements are non-precedential and shall not be cited by either Party or their agents or members in any arbitration or fact-finding proceedings now or in the future. Step 1 grievance settlements shall be reduced to writing and signed by the grievant and management/executive service supervisor. Actions taken pursuant to Step 1 settlement agreements shall not be deemed to establish or change practices under the Collective Bargaining Agreement, including but not limited to Article 5, or ORS Chapter 243, and shall not give rise to any bargaining or other consequential obligations.”* (Italics added.)

6. Article 21 also provides: “Time limits specified in this and the above-referenced Articles shall be strictly observed, unless either Party requests a specific extension of time, which if agreed to, must be stipulated in writing and shall become part of the grievance record.”

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<sup>2</sup>The reference to resolving a grievance at the lowest possible level appears only in the contractual provision regarding Step 1 of the grievance process.

7. The term “abeyance” does not appear in the dispute resolution section of the CBA.
8. Article 10, the “UNION RIGHTS” provision of the party’s CBA, provides in part:
  - “(b) Employees covered by the Agreement are at all times entitled to act through a Union representative in taking any grievance action or following any alternate procedure under this Agreement.
  - “(c) Once a bargaining unit member files a grievance, *the employee shall not be required to discuss the subject matter of the grievance without the presence of the Union representative if the employee elects to be represented by the Union.*” (Emphasis added.)
9. The CBA also provides for lunch breaks for employees:

“Consistent with the operating requirements of the Agency, an employee shall be granted a meal period of not less than thirty (30) minutes nor more than one (1) hour, unless mutually agreed otherwise. Meal periods shall normally be scheduled by the Agency at approximately mid-part of the shift.”

#### Kastl Grievance

10. Kastl is a legal secretary for the Department’s Appellate Division. Her position is included in the Union’s bargaining unit.

11. On May 30, 2013, Kastl requested an alternate work schedule under Article 90.5 of the CBA, which the Department denied on June 24, 2013. On July 19, Union steward Lori Hartman filed a grievance alleging that the Department’s denial of the alternate work schedule violated the CBA. The grievance included information regarding the various contractual criteria for granting the request, including the operational needs of the Department and noninterference with Kastl’s ability to perform her work.

12. Department officials denied the grievance at Steps 1 and 2.

13. On August 28, 2013, Steward Hartman notified the Department that the Union was advancing the grievance to Step 3 (with DAS LRU). DAS LRU assigned Labor Relations Manager Laurie Grenya to process the grievance. Grenya’s role was to advise and direct the Department in resolving the grievance; Grenya also had the authority to decide the grievance on behalf of the employer. Thus, Grenya had the authority to agree with Department managers, agree with the Union, or come up with an alternative resolution of the dispute. The parties agreed to extend the Department’s response deadline until September 30 to allow time to investigate and meet and discuss the grievance. In Hartman’s experience, DAS officials always requested such extensions, and it was her practice to grant them.

14. On September 17, 2013, the parties held the Step 3 meeting. Grievant Kastl and Steward Hartman appeared for the Union. Grenya and LRU Manager Thomas Perry represented the Department. The parties discussed various ways of resolving the grievance, but did not reach a conclusion.

15. On September 27, Grenya telephoned Hartman. Grenya stated that the Department had decided to perform an operational review of the Appellate Division to determine if it could accommodate Kastl's alternate schedule request. Grenya asked if the Union would agree to place the grievance in "abeyance," which meant, to Grenya, put the grievance "on hold," so that no Step 3 grievance response would be due while that review took place. Hartman expressed interest in the Department's possible granting of the grievance, and the parties agreed to hold the grievance in abeyance<sup>3</sup> until November 1, 2013.

16. On October 31, 2013, Grenya wrote Hartman:

"The agency has followed up with me to confirm they are continuing to work on the operational review. They have collected the needed data and still need to review and finalize the assessment of needs. I believe they are making good progress and would ask that you grant an additional month's extension to allow for completion of the review."

17. On November 4, Union Steward Joseph Ederer notified Grenya that he was replacing Hartman as the steward for the grievance because Hartman had transferred to a different section of the Department. Ederer also stated:

"Can you confirm [Kastl's] Article 90.5 grievance initially filed 6/24/13 is awaiting a step 3 response. I understand in a separate email that you've requested an additional month's response – if that's correct, then yes we agree to an additional 30 days. I think that would put the response due December 3, is that your understanding as well?"

"Please feel free to contact me directly if you have any questions."

18. On November 5, Grenya replied to Ederer, stating, "[t]hank you for the update. Yes, December 3rd was the intention for response. Thank you for the extension. *I will keep you informed of any updates I receive along the way.*" (Emphasis added). Grenya also e-mailed Donna Bennett, Department Human Resources Director, stating "[t]he union has agreed to an additional month extension. My response is due December 3rd. I will follow up the week prior for status and determination of next steps with the response."

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<sup>3</sup>The Department states that "[r]espondent understood that the parties agreed to deactivate the grievance process while the issue was sent back to the DOJ management level for possible resolution at the lowest possible level." The parties' agreement, however, was only to grant the Department time to conduct a review of the circumstances to determine whether it would grant the grievance. The record does not establish that the parties agreed to remand the grievance to "the lowest possible level," Step 1, or, in fact, to address the grievance at any other level besides Step 3.

## Completion of Operational Review and Meeting with Kastl

19. In November 2013, the Department completed the operational review and concluded that it could accommodate Kastl's alternate schedule request. Management Assistant Mistie Slauson, Kastl's supervisor, discussed the matter with the Department's Human Resources Director Bennett. On November 19, Slauson sent Bennett a draft of the terms of the alternate schedule. Slauson stated, in part, "[h]ere is the proposed language we talked about this morning *that should be communicated to Laurie Grenya, [Kastl], and Lori Hartman*<sup>4</sup> as a condition to us approving her 4/10 schedule." (Emphasis added.)

20. The draft letter stated in part:

*"An agreement was reached between the Department of Justice, [ ] Kastl, and her union representative that the step 3 grievance would be held in abeyance while management within the Agency conducted an internal review of operations. First, we want to thank you for allowing us that time. That review has since been concluded, and we are prepared to respond to Ms. Kastl's request. During our review, problems were identified that have impacted the operational needs of the Agency. Management within the Appellate Division has been working to implement solutions geared toward improving operations, as well as improving staff job satisfaction.*

*"\* \* \**

*"Due to the noted improvements [in Department absenteeism and other production-related issues], we are prepared to approve Ms. Kastl's 4/10 work schedule request on a three (3) month, trial basis. At the end of the three month period a reassessment will be conducted to ensure the approval of Ms. Kastl's 4/10 schedule has not interfered with any of the criteria outlined in Article 90.5. For added clarification, the following expectations will be considered when deciding whether to extend approval of the modified schedule.*

*"1. A 4/10 work shift will have no negative impact on Ms. Kastl's ability to conform to the DOJ Basic Expectations or the Department's policy on maintaining a professional workplace.*

*"2. A 4/10 work shift will not require additional work or impose additional obligations on attorneys, management, or other staff members beyond what is currently experienced.*

*"For example, support staff are employed to minimize the administrative obligations of attorneys and managers. To be successful, this change in schedule must not impose burdens on division team members beyond those that would otherwise be present if Ms. Kastl were to work a 5/8 work shift. If, for instance, a*

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<sup>4</sup>As noted above, by this time Ederer had replaced Hartman as the Union representative responsible for the grievance.

brief is due on a Friday, Ms. Kastl would be responsible for ensuring that her unavailability on that day does not create a disruption that requires additional work by the assigned attorney. As reassignments are necessary, the volume and frequency in those reassignments will be consistent with that of others due to periodic leave.

“3. From time to time an employee’s absence requires management to assign that employee’s tasks to other employees to meet the operational needs of the division. This need might arise if an employee is ill or takes a vacation. This change in work shift must not negatively impact Ms. Kastl’s availability to complete another employee’s tasks in the event that [it] is necessary for her to do so to meet the operational needs of the division.

“4. \* \* \* The allowance of Ms. Kastl’s schedule change may be rescinded if there is an increase in staff absences and a normal 5/8 work shift is necessary to meet the operational needs of the division.

*“If agreed upon by Ms. Kastl, this trial phase will begin effective Monday, December 2, 2013. The review will be conducted no later than March 2, 2014. The Agency retains the right to, upon proper notice, assign other work hours, either temporarily or permanently, if required to assure that all conditions are met. In addition, Ms. Kastl’s work schedule request will need to be resubmitted to ensure the requested meal period conforms to standards set out by the Bureau of Labor and [Industries] (BOLI). (Please double-check this! In the BOLI Q and A available online, it appears as though lunch must be taken and completed between the third and sixth hour worked. In this case 9:30-12:30 since Kim is asking to work from 6:30-5:30.)”* (Emphasis added.)

21. After at least one other Department manager commented on the draft (urging additional emphasis on the importance of attorney work deadlines), Bennett replied to Slauson, stating “I’ve sent all you [sic] and Michael’s communications to Laurie [Grenya] at LRU for her consideration and inclusion in the Step 3 response.”

22. Grenya responded to Bennett as follows:

“After reading the attached, it seems best to have Mistie [Slauson] meet with [Kastl], approve the 4/10 on re-check at 3 months, make her expectations clear, then notify me of completion. I can then respond to the grievance with [an] understanding of the change in the agency decision. This allows the agency to maintain (or forge) a relationship without giving the appearance that DAS had to get involved.”

23. Bennett recommended that Slauson meet with Kastl regarding the Department’s decision.

24. On November 20, 2013, Slauson approached Kastl and called her into a meeting. The purpose of the meeting was to discuss Kastl's request for an alternate schedule. Neither Slauson, Grenya, nor Bennett notified the Union about the meeting.<sup>5</sup> Kastl asked if she would need a steward for the meeting. Slauson said no, because the meeting was not disciplinary. Slauson did not, however, disclose the purpose of the meeting to Kastl in advance. Slauson chose to have another manager, William Beaty, at the meeting with Kastl so that there would be, as Slauson told Bennett, "two sets of ears on the management side."

25. Kastl relied on Slauson's assurance in not requesting a Union representative to attend the meeting. Had Kastl requested that a Union representative be present, it was Slauson's intention to postpone the meeting and ask "Human Resources," presumably Bennett and Grenya, for instructions.

26. During the meeting, Slauson offered Kastl an alternate work schedule in accordance with the November 14 draft letter and presented Kastl with her original May 30 "Work Schedule Request" form. That form contained information about Kastl's employee identity and proposed schedule, including her lunch time and weekday off, but it did not contain the other information in the November 14 letter, such as the three month trial period.

27. The Work Schedule Request form stated, in part, "I voluntarily request a change of my work hours schedule to the hours shown below." The managers told Kastl that her requested lunch hour would have to be changed to comply with BOLI requirements. The lunch times on the form were then lined out and replaced, with Kastl signing the document next to those changes. The parties also agreed that Kastl's schedule could be changed back to the conventional 5/8 schedule if the Department needed the change. Neither the form, nor the participants in the meeting, mentioned the contractual lunch scheduling requirements<sup>6</sup> or whether this agreement would set a precedent under the CBA. The form stated that the schedule change "Effective Date" was December 2, 2013. Beaty and Slauson also signed the form. The meeting lasted 30 to 45 minutes.<sup>7</sup>

28. Once the meeting was over, Kastl believed that the grievance process was no longer necessary because the issue had been resolved to her satisfaction.

29. Later on November 20, 2013, Slauson e-mailed Kastl regarding the meeting, with a copy to Beaty.

"I just wanted to send you a quick recap of our discussion surrounding your 4/10 work schedule request.

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<sup>5</sup>There is no evidence of any communications between the Department and the Union about Kastl's grievance between November 5 and January 21, despite Grenya's assurance that she would keep Ederer informed of any "updates" received "along the way."

<sup>6</sup>The CBA provided that an employee's lunch should generally take place in the mid-part of the shift for between 30 and 60 minutes.

<sup>7</sup>There is no evidence that the meeting participants discussed anything besides the schedule change and its implementation.

*“Your agreement to give us time to review the operational needs of the division was very helpful. Through the one-on-ones, I was able to identify assignments that have hindered the operational effectiveness of the Appellate Division. Also, when I started here, you and others expressed concerns surrounding the reliability of some staff within the Division. Since the rollout of the Department’s basic expectations, and as a result of addressing some of the concerns, I’ve seen improvement. Due to the noted improvements and plans for the Division, I am inclined at this time to approve your 4/10 schedule request on a 3-month, trial basis. At the end of that period, we will conduct another review to ensure that the operational needs of the division have not been impacted and that other issues have not come up that make the 4/10 schedule no longer practical.*

*“In order to ensure your request aligns with standards set by BOLI, you modified your original request so that your lunch happens ½ hour sooner than originally requested. I’ve attached a copy for your records.*

“You and Bill also talked about some appointments you currently have on the calendar. The two of you can work together to adjust future appointments, if needed; like the appointment at your suggestion that could be moved from a Wednesday to a Friday since you will now have that day off. I’ll leave the decision up to you as to whether a change is necessary.

“Your 4/10 schedule will start effective December 2, 2013. The 3-month review will take place on or before March 2, 2014.

*“You agreed that pursuing this 4/10 schedule is something you are still interested in pursuing and agreed to the 3-month trial basis. We also talked about you being responsible for ensuring the 4/10 schedule doesn’t impact the operational needs of the Division. You let us know that you are willing to revert back to 5/8s in the event something needs to be covered. We appreciate that.*

“Let me know if you have any questions.” (Emphasis added.)

30. On November 21, Grenya e-mailed Ederer, stating in part:

“As per my voice mail, I understand the agency has completed its organizational review and has granted the 4/10 schedule requested by Kim. The step 3 response had been in abeyance until the review was complete.

“As the 4/10 schedule was the requested remedy it seems carrying forward with the grievance may not be needed. Please let me know if you are withdrawing the grievance.”

31. On December 13, 2013 Steward Ederer responded to Grenya, stating “[a]s per the reason best articulated in the attached, the Union does not withdraw its grievance.” The attachment

to the e-mail was the unfair labor practice complaint filed in this proceeding. Department officials were surprised and disappointed by the Union's failure to withdraw the grievance. One of Ederer's objections to the Department's actions was that it deprived the Union of a victory on the grievance.

32. On December 12, 2013, the Union filed a grievance alleging that Slauson's November 20, 2013 meeting with Kastl on the work-schedule grievance violated Article 10(c) of the parties' CBA. In February 2014, the Union advanced that grievance to arbitration and an arbitrator was subsequently assigned to hear the grievance. The arbitration is pending.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. This Board declines the Department's request to hold the complaint in abeyance pending the outcome of an arbitration hearing and decision.

### Pre-Arbitration and Post-Arbitration Deferral

Before the hearing in this matter, the Department asked the ALJ to "defer" the processing of this case until an arbitrator issued a decision and award regarding the grievance filed by SEIU under Article 10 of the parties' CBA. The ALJ denied this request, and the Department reasserted its request at oral arguments before the Board. Before responding to that request, we begin by providing an overview of the two distinct types of arbitration-related "deferrals" that this Board generally receives and how this Board has historically analyzed such requests.

The first, and more common type of deferral issue presented to this Board, concerns post-arbitration deferral. In that situation, an arbitrator has already rendered an award that is arguably related to a pending unfair labor practice, and a party asks this Board to defer to that award rather than conducting our own independent assessment of the facts and conclusions reached by the arbitrator. Whether we give deference to such an award depends on a number of factors, including the nature of the claim filed with this Board and the nature of the matter grieved before the arbitrator. Broadly speaking, this Board has promulgated two categories of post-arbitration deferral: *Greater Albany Education Association v. Greater Albany School District No. 8J (Greater Albany)*, Case No. C-6-80, 5 PECBR 4158, 4160-61(1980) and *Willamina Education Association 30J and Lucanio v. Willamina School District No. 30-44-63J (Willamina)*, Case No. C-253-79, 5 PECBR 4086 (1980). *See also Portland Police Association v. City of Portland*, Case Nos. UP-25/26/27-11, 25 PECBR 481 (2013) (explaining the difference between the *Greater Albany* and *Willamina* deferral standards). In short, the Board applies its *Willamina* deferral analysis for contract claims filed under ORS 243.672(1)(g) and (2)(d), and its *Greater Albany* deferral analysis for all other claims. *See id.*

The instant matter, however, concerns a *pre*-arbitration deferral request, in which a party asks that we hold a matter in abeyance pending the outcome of a particular arbitration dispute.<sup>8</sup> This Board has, in limited situations, held (1)(e) and (g) unfair labor practice claims in abeyance

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<sup>8</sup>The Department's reliance on several unpublished opinions concerning *post*-arbitration deferral, therefore, is misplaced.

pending an arbitration decision in the context of an employer's unilateral change of a subject also covered by a collective bargaining agreement. *See, e.g., Oregon Public Employes Union, SEIU, Local 503, AFL-CIO, CLC v. State of Oregon, Executive Department, Labor Relations Division (OPEU)*, Case No. C-64-84, 8 PECBR 7863 (1985); *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners, and Vanelsberg, Roadmaster*, Case No. C-183-82, 8 PECBR 6559(a), *recons*, 8 PECBR 6767 (1985). The standards that we apply in pre-arbitration abeyance requests are significantly different from the standards that we apply in post-arbitration deferral situations. Distilled to its essence, this Board has placed such unilateral change (1)(e) and (g) complaints in abeyance if: "(1) there is a pending grievance, and (2) the arbitrator and the Board 'may be requested to consider separate cases [that] have the same facts and congruent decisional standards.'" *International Union of Operating Engineers, Local 701 v. City of Portland*, Case No. UP-50-96, 17 PECBR 385, 396 (1997) (citing *OPEU*, 8 PECBR at 7868).

This Board has not previously determined whether, and under what standard, we might hold a (1)(b) or (1)(e) "direct dealing" claim in abeyance. For purposes of this case, we will assume without deciding that abeyance may be appropriate in such "direct dealing" claims and that the *City of Portland* standards apply to those claims. Nevertheless, even applying those standards, we decline to hold SEIU's claims in abeyance.

Under *City of Portland*, the two dispositive questions in this case are: (1) is there a pending grievance; and (2) if so, do the matters before this Board and the arbitrator assigned to that grievance have the same facts and congruent decisional standards? It is undisputed that there is a pending grievance under Article 10 of the parties' CBA and that an arbitrator was selected to hear the dispute. Additionally, both the Article 10 grievance and the (1)(b) and (1)(e) claims have the same basic facts. Specifically, both concern the November 20, 2013 meeting between Slauson and Kastl, which involved the Department attempting to settle the Union's grievance over Kastl's work schedule.

The more difficult question is whether this Board's decision and a potential arbitration decision would apply "congruent decisional standards." *See id.* To answer that question, we first set forth this Board's decisional standards regarding the (1)(b) and (1)(e) claims.

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." *Roseburg Professional Firefighters Association v. City of Roseburg*, Case No. UP-021-13, 26 PECBR 111, 122 (2014) (quoting *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)); *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").

Likewise, a public employer violates ORS 243.672(1)(b) when it bypasses the exclusive representative and deals directly with bargaining unit members regarding contractual matters. *See, e.g., City of Roseburg*, 26 PECBR at 122 n 13 (citing *Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 888-89 (2002); *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 38-39 (1999)). That is so because the exclusive representative “has the statutory *right* to represent those employees in dealing with the employer.” *City of Albany*, 18 PECBR at 39 (emphasis in original). When a public employer bypasses the exclusive representative and directly deals with employees on contractual matters, the employer “impairs the representative’s ability to discharge its statutory obligations,” and the employees “will inevitably lose confidence in the exclusive representative’s capability to represent their interests in dealing with the employer.” *Id.*<sup>9</sup>

Thus, under both of SEIU’s (1)(b) and (1)(e) claims, this Board would essentially determine whether the Department, in the November 20 meeting with Kastl, attempted to bypass SEIU and deal directly with Kastl regarding SEIU’s contractual grievance.

We turn to the decisional standards under SEIU’s (10)(c) grievance. Under Article 10(c) of the CBA, “[o]nce a bargaining unit member files a grievance, the employee shall not be required to discuss the subject matter of the grievance without the presence of the Union representative if the employee elects to be represented by the Union.” Thus, as applied to this case, Article (10)(c) prohibits the Department from *requiring* Kastl to discuss the subject matter of the work-schedule grievance without the presence of an SEIU representative, so long as Kastl elected SEIU representation. The contract article does not, on its face, necessarily prohibit the Department from bypassing SEIU and directly dealing with Kastl. Although an arbitrator could ultimately read the contract provision as such, an arbitrator could also read Article 10(c) as requiring Kastl to have affirmatively requested SEIU representation before the “direct-dealing” prohibition applied, a requirement not mandated by ORS 243.672(1)(b) or (e). Moreover, the gravamen of the contract provision concerns whether or not the Department *required* Kastl to discuss the subject matter of the grievance. In contrast, ORS 243.672(1)(b) or (e) concerns whether the Department attempted to deal directly with Kastl regarding the grievance, irrespective of whether or not the Department *required* Kastl to discuss the grievance. Alternately stated, Kastl’s voluntary agreement to meet with the Department and consent to the grievance adjustment may be a defense to the Union’s (10)(c) grievance, but it would not be a defense to the Union’s complaint before this Board. Thus, on this record, we are not convinced that our decision and an arbitrator’s decision would necessarily apply “congruent decisional standards.” *See City of Portland*, 17 PECBR at 396. Consequently, we decline to hold this matter in abeyance pending the outcome of the (10)(c) arbitration.

3. The Department violated ORS 243.672(1)(b) and (e) by bypassing SEIU and directly attempting to resolve the grievance with Kastl regarding her work schedule in the November 20, 2013, meeting.

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<sup>9</sup>Therefore, we reject the Department’s assertion that SEIU was required to specifically show how and to what extent the Department’s direct dealing interfered with the formation, existence, or administration of SEIU.

In this case, the parties were engaged in the grievance process when Grenya of DAS, who represented the Department, proposed that the grievance be put on hold while the Department reviewed facts regarding the contractual criteria for granting an alternate schedule. The Union agreed to that request. Following consultation between the Department Human Resources Director, the DAS Labor Relations Manager, and Kastl's supervisor, the Department chose to resolve the merits of the dispute by way of a meeting with Kastl and her supervisor.

As set forth above, both ORS 243.672(1)(b) and (e) prohibit a public employer from bypassing the exclusive representative and directly dealing with a represented employee on a contractual matter. Here, SEIU's grievance regarding Kastl's work schedule constitutes a contractual matter. Moreover, although the Department initially (and properly) attempted to resolve the grievance with SEIU after the matter advanced beyond the first step, the Department then elected to bypass SEIU and attempted to directly resolve the matter with Kastl. We find that action proscribed by ORS 243.672(1)(b) and (e).

The Department argues, however, that it did not "deal" with Kastl, but merely "notified" her that it was granting her request for an alternate schedule.<sup>10</sup> Although such a distinction may or may not be legally significant, that is not what occurred here.<sup>11</sup> To the contrary, the Department worked with Kastl to amend her initial request to include certain conditions that were not part of her initial request, but that were important to the Department, even to the point of having Kastl initial and change the requested lunch breaks. Kastl and Department representatives then signed the document. In short, rather than merely announcing that it was granting Kastl's initial alternate schedule request, the Department representatives memorialized an agreement about an employee's contractually identified working conditions in the face of a pending grievance regarding those same working conditions. That memorialized agreement was substantively different from Kastl's initial request. It is undisputed that the meeting and its resolution were not identified or discussed between the Union and the Department. The connection between the Department officials' meeting with the grievant and the grievance itself is underlined by the fact that the Department officials were surprised and disappointed that the Union did not abandon the grievance after the Department's meeting with Kastl. Therefore, we conclude that the Department bypassed the Union and directly dealt with Kastl regarding SEIU's grievance, which violates ORS 243.672(1)(b) and (e).<sup>12</sup>

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<sup>10</sup>The Department also contends that, by agreeing to place the grievance in abeyance at Step 3, the Union agreed that the matter would be referred back to "the lowest possible level" for resolution. The evidence does not establish, however, that Union representatives Hartman or Ederer understood or agreed to this condition.

<sup>11</sup>Thus, our decision should not be read to prohibit all communications between an employer and an employee while a grievance is pending that affects the employee.

<sup>12</sup>The Department's actions are not insignificant. First, the Department's proposed resolution of the grievance may have deprived the Union of precedential value in handling future disputes. Second, the "private" resolution negotiated with Kastl could have included terms that would be unpalatable for the Union and potentially damaging in future grievances or contract negotiations. In any event, the grievance constituted a subject for negotiation between the Department and *the Union*, not the Department and Kastl.

We turn to the Department's affirmative defense that its actions were authorized by the parties' CBA, such that the Union waived its right to act as the exclusive representative of employees in grievance matters. We have followed federal precedent under the National Labor Relations Act, which requires the waiver of a statutory right to be clear and unmistakable, and not something that will be satisfied by a general contract provision. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 179, 295 P3d 38 (2013); *see also Laborers' International Union of North America, Local 483, v. City Of Portland, Bureau Of Human Resources*, Case No. UP-027-12, 25 PECBR 810, 825, *recons*, 25 PECBR 892, 895 (2013). Here, the Department relies on the language of Article 10(c) discussed above, which simply states that an employee is not required to discuss the subject matter of the grievance without the presence of a Union representative. That provision does not clearly and unmistakably state that the Union waives its right to act as the exclusive bargaining representative of employees for purposes of processing grievances. Therefore, we reject the Department's waiver argument.

In sum, we conclude that the Department violated ORS 243.672(1)(b) and (e) when it bypassed SEIU and directly dealt with Kastl regarding SEIU's contractual grievance. *See City of Roseburg*, 26 PECBR at 122; *City of Salem*, 19 PECBR at 888-89.

### Remedy

We turn to the remedy. Because we have determined that the Department committed an unfair labor practice, we will order that it cease and desist from that conduct. ORS 243.676(2)(b). The Union requests that we 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. *Service Employees International Union Local 503, Oregon Public Employees Union v. City Of Tigard*, Case No. UP-040-13, 26 PECBR 131, 141-42 (2014). Not all of these criteria need to be satisfied to warrant posting a notice. *Id.* at 142.

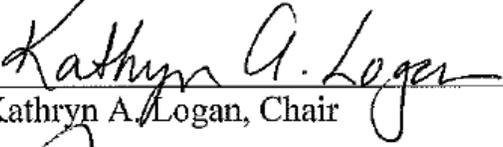
The Department's actions regarding Kastl's grievance did not involve a strike, lockout, or discharge; was not committed by a significant number of the Department's personnel; and was not part of a continuing course of illegal conduct. However, as set forth above, when a public employer bypasses the exclusive representative and directly deals with a represented employee on contractual matters, the represented employees inevitably lose confidence in the capability of the exclusive representative to represent the employees' interests in dealing with the employer. Moreover, such conduct inherently has a significant impact on the designated bargaining representative's functioning. Under such circumstances, we conclude that a posting is warranted.

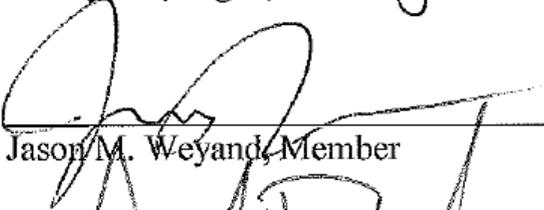
ORDER

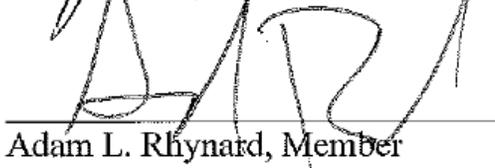
1. The Department shall cease and desist from violating ORS 243.672(1)(b) and (e) as described above.

2. Within 15 days of the date of this Order, the Department shall post the attached notice of its violations in prominent places at the Department where SEIU-represented employees are likely to view it.

Dated this 12 day of December, 2014.

  
\_\_\_\_\_  
Kathryn A. Logan, Chair

  
\_\_\_\_\_  
Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.



**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-057-13, Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Justice, 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 found that the State of Oregon, Department of Justice (Department) violated ORS 243.672(1)(b) and (e) of the PECBA by bypassing the Union and directly dealing with a Union-represented employee regarding a contractual grievance. To remedy this violation, the Employment Relations Board ordered the Department to:

1. Cease and desist from violating ORS 243.672(1)(b) and (e).
2. Post this notice in prominent places at the Department for at least 30 days.

EMPLOYER

Dated \_\_\_\_\_, 2014

By: \_\_\_\_\_

Title: \_\_\_\_\_

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

*This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are employed. This notice 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.*