

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-022-14

(UNFAIR LABOR PRACTICE)

911 PROFESSIONAL	)	
COMMUNICATION EMPLOYEES'	)	
ASSOCIATION,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CITY OF SALEM,	)	
	)	
Respondent.	)	
_____	)	

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Complainant.

Natasha Zimmerman, Attorney for City of Salem, Salem, Oregon, represented Respondent.

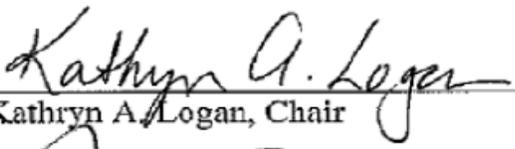
On September 9, 2015, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. See OAR 115-010-0090; OAR 115-035-0050(2). No objections were filed.

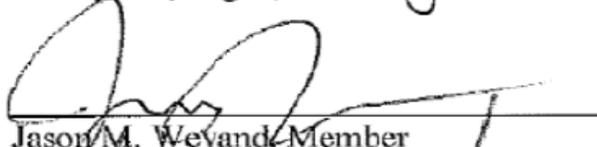
When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

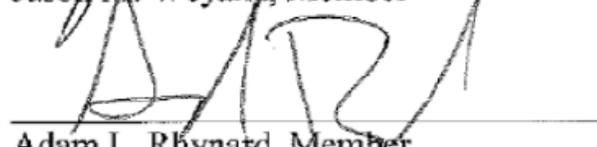
ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The City shall cease and desist from violating ORS 243.672(1)(e).
3. Within 60 days from the date of this Order, the City shall restore the *status quo* that existed before the unlawful change.

DATED this 5 day of October 2015.

  
Kathryn A. Logan, Chair

  
Jason M. Weyand, Member

  
Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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(UNFAIR LABOR PRACTICE)

911 PROFESSIONAL	)	
COMMUNICATION EMPLOYEES'	)	
ASSOCIATION,	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW, AND
	)	PROPOSED ORDER
CITY OF SALEM,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on June 3, 2015, in Salem, Oregon. The record closed at the conclusion of the hearing, as no post-hearing briefs were filed for the case.

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented the Complainant.

Natasha Zimmerman, Attorney for City of Salem, Salem, Oregon, represented the Respondent.

On June 23, 2014, the Complainant, the 911 Professional Communication Employees' Association (Union), filed an unfair labor practice complaint with the Board against the Respondent, the City of Salem (City). The complaint alleges that the City violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* by changing the overtime signup procedure from a remote electronic system to an on-site paper system. The City denies that allegation. As set forth below, we conclude that the City violated ORS 243.672(1)(e) as alleged.

## RULINGS

All rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

1. The City is and has been a “public employer” within the meaning of ORS 243.650(20). The Communications Division of the Salem Police Department manages and operates the Willamette Valley Communications Center (WVCC), which currently provides emergency and non-emergency call answering and dispatching services for a variety of public safety agencies in Lincoln County, Marion County, and Polk County. Presently, the WVCC is exclusively located in Salem, Oregon.

2. Lincoln County used to be covered by its own dispatch center in Newport, Oregon called LinCom. That arrangement changed when the WVCC and Lincoln County signed a service contract on July 1, 2012 and agreed that the WVCC would absorb LinCom and take over coverage of the region. All of LinCom’s work and employees were fully transferred to the WVCC in Salem by April 2, 2013. During the interim, a number of former LinCom employees moved to Salem.

3. The Union is and has been a “labor organization” within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit of about 57 City employees who work at the WVCC and are classified as Call Takers and Communications Specialist Is, IIs, and IIIs. At the moment, the unit includes employees who still commute from Newport to Salem for work and were once employed by LinCom.

4. The City and the Union are parties to a collective bargaining agreement (CBA). Article 2.1 of that CBA provides that the City has a management right “to schedule and assign work, including overtime.” (Exh. C-1 at 5.) Article 13.1(B) provides that basic overtime pay is 150 percent of an employee’s regular rate of pay. (Exh. C-1 at 28.) Article 8.8(B) provides that overtime hours worked during a holiday shall be compensated at two times the employee’s normal rate of pay. (Exh. C-1 at 19.)

5. The parties’ CBA does not specifically delineate when, where, or how overtime hours are offered or selected. However, according to Article 13.8(A) of the CBA, “Operational needs shall be controlling regarding overtime assignments. When possible, overtime work shall be offered equally to eligible employees.” As stated by Article 13.8(B), “Overtime work shall first be offered on a voluntary basis, except in cases of emergency operations. In cases where sufficient personnel do not accept the offered overtime on a voluntary basis, additional personnel, as deemed necessary by the City, may be required to work overtime on an equally assigned basis.” (Exh. C-1 at 31.)

6. Although the actual number can vary, presently, each bargaining unit employee is generally required to work a total of 13.5 hours of overtime each week. By design, unassigned overtime hours are made available to unit employees without warning at widely varying times. Whenever the City does make the overtime hours available, employees can voluntarily sign up for (or “star”) 13.5 of those hours on a first-come, first-served basis. If an employee fails to sign up

for a full 13.5 hours of overtime, he or she risks being served a “mandate slip” requiring the employee to work unaccounted-for overtime hours of the City’s choosing.

7. Since as early as 1998, bargaining unit employees selected their overtime hours by hand using an on-site “pen and paper” overtime book. In October of 2012, the City switched to using an electronic scheduling system called ScheduleExpress. For the first time, unit employees could sign up for overtime and see what overtime hours were available whenever and wherever they could connect to the Internet, no matter how many employees were logged in at a time. The Union did not demand that the City bargain that change.

8. On November 15, 2012, the Union’s local vice president, Jennifer Hagan, sent the City an email claiming that, while ScheduleExpress had some great features, it was “causing more problems than good.” The email also detailed several problems the Union was having with the system and suggested that, if those problems could not be fixed, the overtime book should be reinstated “until at the very least the system allows for automatic (real time) approval when you volunteer for the OT selected.” (Exh. R-1.) The City did not reply to the email.

9. On December 19 and 20, 2014, the City presented every bargaining unit employee with a poll sheet that allowed each employee to select from two options: (1) keep ScheduleExpress or (2) return to paper. It also contained a small space for each employee to share his or her comments. Ultimately, a clear majority of the employees polled voted to return to paper. However, many of the employees who voted for that option nevertheless commented that they liked having an online signup system that could be accessed from home. (Exh. R-2.) As a result of the poll, the director of the Communications Division, Mark Buchholz, made a preliminary decision to get rid of ScheduleExpress.

10. On May 13, 2014, a shift supervisor named Brenda Faxon sent an email to every bargaining unit employee. Her email stated that, “[e]ffective immediately,” the WVCC would no longer be using ScheduleExpress and would instead be using an overtime book again. In addition, the email noted that, “[i]n order to be as fair as possible in the distribution of the overtime book,” the book would be made available during a different shift each week. (Exh. C-2.) The Union was not warned of the change in advance of the May 13, 2014 email and was not given an opportunity to discuss the matter or bargain the impacts of the change or possible alternatives.

11. On May 16, 2014, Buchholz sent a letter to all WVCC staff. He explained that the City had abandoned ScheduleExpress because the WVCC could no longer sustain the time, energy, and mistakes involved in maintaining ScheduleExpress and a manual system, and ScheduleExpress “was insufficient and/or unable to handle [the City’s] policies and procedures without some sort of manual system.” (Exh. R-3.)

12. On May 22, 2014, the Union’s attorney, Becky Gallagher, sent Buchholz written objections to the May 13, 2014 change. Therein, the Union claimed that the new method was a substantial change to the past practice and concerned mandatory subjects of bargaining, and demanded the City bargain the change and the impact of the change.

13. Since the May 13, 2014 change, bargaining unit employees must physically be in the WVCC whenever the overtime book is made available in order to select overtime hours or see what hours are available, and only one employee can use the book at a time. Employees cannot call in to schedule overtime. Off-duty employees can and sometimes do come into or remain at the office at their own expense and wait for the book released. However, employees are never told in advance when the book will be made available, and even when it is released, off-duty employees must wait until all of the on-duty employees who are interested in using the book have had a chance to do so first. That wait can possibly last for hours. Alternatively, employees can seek out another employee and try to negotiate a trade.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The City violated ORS 243.672(1)(e) when it made a unilateral change to a mandatory bargaining subject.

### Legal Standards

The complaint alleges that the City violated ORS 243.672(1)(e), the provision of the Public Employee Collective Bargaining Act (PECBA) that prohibits a public employer from refusing to bargain collectively in good faith with the bargaining representative of its employees. Under the PECBA, the public employer's duty to bargain is limited to changes to employment conditions that are deemed "mandatory subjects of bargaining." For other, "permissive" subjects, the public employer is free to bargain or not to bargain. However, if a change to a permissive subject has an impact on a mandatory subject, the public employer may also be required to bargain regarding that impact. *Three Rivers Ed. Assoc. v. Three Rivers Sch. Dist.*, 254 Or App 570, 574, 294 P3d 547 (2013) (citations omitted).

If the subject in dispute is specifically included in the definition of "employment relations" under ORS 243.650(7)(a), then the subject is mandatory for bargaining. According to that subsection, employment relations "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." Subjects defined in ORS 243.650(7)(b), (d), (e), (f), and (g) are permissive. Of those subsections, ORS 243.650(7)(d) provides that "[e]mployment relations' does not include subjects that have an insubstantial or *de minimis* effect on public employee wages, hours, and other terms and conditions of employment." To determine the status of subjects the PECBA does not designate as mandatory or permissive, we use the balancing test set forth in ORS 243.650(7)(c). Under that test, a subject is permissive if the impact of the subject on management's prerogatives is greater than the impact on employees' wages, hours, or other conditions of employment. *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 282-85, 751 P2d 770 (1988); *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89-92 (2001).

In general, unilaterally changing an employment condition that is a mandatory subject of bargaining is an unfair labor practice. Whenever an unlawful unilateral change is alleged, we must first identify the *status quo* and determine whether the employer changed it. If the employer did change the *status quo*, we then decide whether the change concerns a mandatory bargaining subject. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). To determine the *status quo*, we often look to a variety of sources including the terms of a CBA or other memorialized policies or work rules. In other cases, the *status quo* can simply be the product of an employer's pattern of behavior. See *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-95 (2005); *Coos Bay Police Officers' Association v. City of Coos Bay and Coos Bay Police Department*, UP-61-92, 14 PECBR 229, 233 (1993), citing *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9192 n 11 (1986).

### DISCUSSION

There is little doubt in the instant case that swiftly abandoning ScheduleExpress without a prior discussion with the Union was in fact a unilateral change in the *status quo*. Granted, the record provides no written policies or work rules that are directly applicable to the disputed change. However, it is clear that the WVCC's Salem office used ScheduleExpress without interruption from October of 2012 until it suddenly returned to using an overtime book on May 13, 2014. In our view, that is a sufficiently longstanding and consistent enough practice to establish a legitimate *status quo*. Logically, the fact that the WVCC has previously used the current "pen and paper method" for an even longer period of time does not change that. Moreover, it is evident that the two sign-up methods are meaningfully distinct from each other, and that, while it was available, ScheduleExpress was understood and accepted by all as the customary and exclusive means for overtime sign-up. See *Lane County Human Resources Division*, 20 PECBR at 993-94 (a past practice is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality).

Regarding the central question of whether the change concerns a mandatory bargaining subject, we note once again that ORS 243.650(7)(a), which provides a list of mandatory subjects, includes "direct or indirect monetary benefits." As outlined above, bargaining unit employees' income is directly tied to the particular overtime hours they work. By contract, holiday overtime always pays double. When individuals could use ScheduleExpress, they inevitably had a much better chance of being able to choose to work those higher paying timeslots, or even getting overtime at all. In addition, they never had to go to work while off duty at their own expense in order to avoid the very real risk of unwanted or mandated hours. To that extent, the change at issue involves more than merely substituting one selection tool for another; it affects monetary benefits, a subject that is *per se* mandatory for negotiations. See *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437-38, *recons*, 22 PECBR 571 (2008) (wherein a loss of unspecified overtime wages necessitated bargaining); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 867 (1993) (a subject is mandatory for bargaining if it "directly concerns" a subject listed in ORS 243.650(7)(a)); *Goya Foods of Florida*, 351 NLRB 94, 96 (2007).

We must also reiterate that ORS 243.650(7)(a) specifically lists “hours” as a mandatory bargaining subject. As this Board has observed in the past, the legislature intended the term “hours” to have a broad meaning given to it. Accordingly, we have concluded that the particular hours of the day and the particular hours of the week during which employees shall be required to work (i.e., the scheduling of employees’ work) are subjects well within the realm of what public employers and unions must bargain. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533, 547 (2001); *Oregon Public Employees Union v. State of Oregon, Executive Department*, Case No. UP-71-93, 14 PECBR 746, 771-73 (1993); see *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). The City’s new restrictions on the unit’s freedom to schedule overtime plainly have real bearing on those subjects, and therefore should have been bargained. See *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 71-74 (1987) (the order in which employees will be offered the opportunity to work overtime and the method by which employees will be scheduled to work certain hours are mandatory subjects); *Blue Circle Cement Company, Inc.*, 319 NLRB 954, 960 (1995) (wherein a new restriction on employees’ freedom to schedule vacations was a substantial change affecting a condition of employment); *J.L.M. Inc.*, 312 NLRB 304, 307 (1993) (policies concerning how employees must go about securing a day off or switching days off are terms and conditions of employment).

To be sure, we are cognizant of the fact that the overall workload and number of overtime hours available to the bargaining unit as a whole were not impacted by the City’s unilateral change. We also recognize that, despite the change, bargaining unit employees still have some relatively equitable ability to voluntarily sign up for available overtime. However, given the circumstances before us, we must nevertheless conclude that the effects of the change on the unit’s working conditions were not *de minimis*, and that the City’s unilateral action violated ORS 243.672(1)(e) as alleged.

Broadly speaking, a subject cannot be characterized as mandatory and *de minimis* at the same time, and as explained, the change at issue is inextricably intertwined with subjects that ORS 243.650(7)(a) states are *per se* mandatory. See *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 898 (2005). Furthermore, having the ability to sign up for overtime from anywhere and at any time clearly provided bargaining unit employees a number of material and significant benefits, especially for those employees who must commute from Newport, frequently travel abroad, or have to make childcare arrangements. According to un rebutted testimony, the loss of those benefits has caused morale issues and infighting in the unit and has caused unit employees to change their behavior and spend off-duty time at work. It also follows that, for any individual employee, the cumulative effect of routinely missing out on extra income rapidly builds up when measured by months and years.

#### PROPOSED ORDER

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

2. Within 60 days from the date of this Order, the City shall restore the *status quo* that existed before the unlawful change.

SIGNED AND ISSUED on September 9, 2015.



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Martin Kehoe  
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)