

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-039-14

(UNFAIR LABOR PRACTICE)

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

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon, represented Medford School District.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Medford Education Association.

On November 19, 2015, Administrative Law Judge B. Carlton Grew 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). Neither party filed objections.

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).

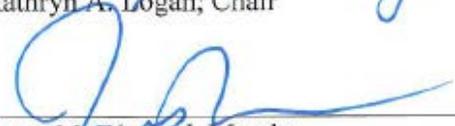
ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The complaint is dismissed.

DATED this 14 day of December 2015.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-039-14

(UNFAIR LABOR PRACTICE)

MEDFORD SCHOOL DISTRICT 549C,)	
)	
Complainant,)	RECOMMENDED RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND PROPOSED ORDER
MEDFORD EDUCATION ASSOCIATION,)	
)	
Respondent.)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 2, 2015, in Medford, Oregon. The record closed on July 27, 2015, following receipt of the parties' post-hearing briefs.

Kelly D. Noor, Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon, represented Medford School District.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Medford Education Association.

On December 1, 2014, the Medford School District (District) filed an unfair labor practice complaint against the Medford Education Association (Association or MEA). The complaint, as amended on March 13, 2015, alleges that the Association violated ORS 243.672(2)(a) and (b) by mischaracterizing a decision of the Employment Relations Board (ERB) in a communication with its members, in making a novel proposal during mediation in bad faith, and by leaving the mediation before District representatives had the opportunity to respond to the Association's last proposal. The Association filed a timely answer to the Amended Complaint.

The issues presented for hearing are:

1. Did the Association deliberately provide its members, and others, with false information about the District's conduct? If so, did the Association violate ORS 243.672(2)(a), and in so doing, injure the District?

2. Did the Association fail to bargain in good faith with the District during the November 19, 2014 mediation by submitting an offer in bad faith, misinforming members and others about District proposals and the mediation, and violating mediation confidentiality agreements? If so, did the Association violate ORS 243.672(2)(b)?

3. If the District prevails in this action, what are the appropriate remedies?

DECISION

For the reasons set forth below, we conclude that the Association did not violate ORS 243.672(2)(a) and (b).

RULINGS

During the hearing, a manager for the District testified about an interaction she had had with a bargaining unit member about information he or she had received from the Association. When asked for the name of the unit member on cross-examination, the witness refused to provide that information. The Association objected to the refusal to answer and urged that the District be sanctioned by striking the testimony of the witness in its entirety. As a sanction for the failure to answer the question, the ALJ acted within his discretion in striking the testimony of the witness regarding the interaction with the unit member, and thus declaring it not part of the evidentiary record. OAR 115-10-0060(2); *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections, Snake River Correctional Institution*, Case No. UP-9-01, 20 PECBR 1 (2002).

The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The District is a public employer within the meaning of ORS 243.650(20) and employs approximately 600 teachers and licensed specialist employees represented by the Association. The Association is a labor organization within the meaning of ORS 243.650(13). The District and Association were parties to a collective bargaining agreement that was effective from July 1, 2010 to June 30, 2013.

2. In the fall of 2011, during difficult financial times for the District, the parties negotiated a Memorandum of Understanding (MOA). The parties agreed to a wage and benefits freeze for Association bargaining unit employees and a reduction in teacher work days until the District received additional funding. The MOA included a formula for the restoration of wages, benefits, and work days based upon the amount of additional funds received by the District in future years.

3. The District received additional funds in 2012 and 2013. The parties disagreed regarding the application of the MOA to the 2013 funds. After negotiations between the parties did not resolve the issue, the Association filed an Unfair Labor Practice complaint (ULP) against

the District on August 13, 2014, *Medford Education Association v. Medford School District 549C*, Case Number UP-047-13, 26 PECBR 143 (*Medford EA-I*); *Supplemental Order*, 26 PECBR 272 (*Medford EA-II*) (2014). (MOA ULP). The Association complaint alleged that the District had violated the MOA, and, therefore, ORS 243.672(1)(g).

4. On January 16, 2014, the MOA ULP proceeded to hearing and written argument before an ERB ALJ.

5. At the time of the January 2014 hearing, the parties were engaged in negotiating a successor collective bargaining agreement. The parties disagreed on bargaining unit member compensation and work days, among other things. Unable to resolve their differences, the District unilaterally implemented its final offer and, in February 2014, the Association unit went on strike. The strike was settled by a new collective bargaining agreement in March, 2014, but the parties did not settle the Association's MOA ULP.

6. On April 22, 2014, the ALJ issued a Recommended Order in the MOA ULP.

7. In her Recommended Order, the ALJ reasoned that the relevant section of the MOA was ambiguous on its face. She therefore reviewed the MOA as a whole, and some extrinsic evidence (how school funding is allocated and distributed and, to correct a "misreference to a seemingly non-existent provision," a prior draft of the MOA). (Exh. C-3 at 9.) The ALJ concluded that the District had violated the MOA, and therefore ORS 243.672(1)(g), in its allocation of additional funds. In her proposed order, the ALJ required the District to: (1) "cease and desist from violating ORS 243.672(1)(g) by failing to restore teacher work days as required under the MOA," and (2) "restore four work days to the 2013-14 school year, or provide the Association's members with the financial equivalent." (Exh. C-3 at 16.) The ALJ did not require the District to increase wages or benefits to Association unit members.

8. The ALJ declined to order that a notice be posted, holding that of the list of relevant factors, the District's violation met only the condition that it affected a significant number of bargaining unit employees.¹

9. The ALJ's Recommended Order did not state that the District had violated its duty of good faith, and did not state that the District had not acted in good faith.

10. The District did not file objections to the ALJ's recommended order. The Association objected to the ALJ's failure to conclude that additional funds received by the District should be used for wage and benefit increases.

¹The factors used by this Board in determining whether to order the posting of a notice are when the violation: "(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; 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 (1983).

11. At oral argument before this Board, and a subsequent motion to re-open the record to present evidence regarding a recently ratified collective bargaining agreement, the District argued that the MOA ULP was moot because of the terms of that successor agreement.

12. On August 13, 2014, the Board issued a final order in the MOA ULP. It held that the matter was not moot. It also agreed with, and adopted, the ALJ's reasoning and conclusion, to which the District had not objected, concluding that "considering the MOA as a whole, along with the extrinsic evidence, * * * the District violated ORS 243.672(1)(g) as alleged." *Medford Education Association*, 26 PECBR 143, 152, *Medford EA-I*, (2014). The Board also agreed with the Association's objection and held that the MOA provided that additional funds were to be applied to wages and benefits, and that the District had violated ORS 243.672(1)(g) when it failed to do so. The Board's order provided in part:

"1. The District violated ORS 243.672(1)(g) by failing to restore teacher work days and failing to increase contributions to employee insurance premiums and salaries as required by the MOA. The District shall cease and desist from engaging in such conduct.

"2. The District and the Association shall bargain in good faith over an appropriate remedy consistent with the Remedy section of this Order. The parties have 60 days from the date of this Order to reach agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of the bargaining. The Board will either select one of the parties' last offers or craft its own remedy." *Medford Education Association*, 26 PECBR at 155, *Medford EA-I*, (2014).

13. The Board Order did not state that the District had violated its duty of good faith, and did not state that the District had not acted in good faith. The Board did not address the notice posting issue except to state that the parties could bargain over that issue.

14. During the second half of August 2014, the Association described the Board's decision as follows in a newsletter to its members:

"On August 13, 2014, we received [ERB's] final order regarding the Unfair Labor Practice charge we filed against the District for violating the terms of our MOA on compensation and the restoration of days. The Board found in our favor and has given the District and the Association sixty days (60) from the date of its order to bargain in good faith a remedy where *additional funds* will be applied per the old Appendix A Formula. We are excited that we won and that we have another opportunity to work together again with only something to gain and not to lose. Wish our bargaining team the best as they collaboratively work out an agreement with the district." (Exh. R-2 at 1, italics in original.)

15. During the ensuing 60 day remedy bargaining period, the parties first exchanged written proposals without meeting. On October 9, 2014, the parties met but did not reach agreement. On October 17 and 20, the parties provided their final offers in this process to the Board. The District's final offer was for approximately \$49,000 to be distributed to bargaining unit members. The Association's final offer was for approximately \$729,000 to be so distributed.

16. After receiving the parties' final offers, the ERB Board Chair urged the parties to consider a final mediation session with the State Conciliator acting as mediator. The parties agreed to that mediation session.

17. The mediation was held on November 19, 2014, at the District offices in Medford.

18. The Association bargaining team, which included experienced OEA UniServ Jane Bilodeau, appeared at the session in person, as did two District officials. District counsel participated by telephone. The mediator and the Association and District representatives were stationed in separate rooms, some distance apart.

19. From approximately 4:30 to 5:00 p.m., the parties first met jointly with the mediator to review the process and the mediation confidentiality agreement. That agreement provided, in part:

"The undersigned parties hereby acknowledge having agreed to mediation services provided by Janet Gillman, State Conciliator. The parties further agree to the following rules for the dispute involving the Medford School District 549c and Medford Education Association, Mediation Case No. UL-IO-14L (ERB ULP Order 047-13 Remedy Bargaining) in the mediation held on November 19, 2014.

"**MEDIATION:** Mediation is a voluntary settlement negotiation and the role of the mediator is to assist the parties in reaching a mutually acceptable resolution of their dispute. The mediator is not a judge and has no authority to force a settlement on the parties. All parties acknowledge that should they reach a settlement as a result of these mediation sessions, they do so as their own free and voluntary act.

"**CONSULTING WITH ATTORNEYS:** Each party is encouraged to consult with an attorney and/or their union or management representative regarding their legal rights and obligations throughout the mediation process. The parties acknowledge that the mediator does not represent the parties, is not giving legal advice to them, nor acting as their legal counsel in any manner.

"**MEDIATOR IMMUNITY:** All parties acknowledge that the mediator is acting on behalf of the State Conciliation Service, which has been selected by the parties to provide the mediation services. The mediator shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a settlement, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

“CAUCUSES: The mediator may hold sessions with only one party. These ‘caucuses’ are designed to improve the mediator and the party’s understanding of their position. Information gained by the mediator through a caucus is confidential unless the party agrees otherwise.

“CONFIDENTIALITY: Mediation communications are confidential to the extent provided in agency rules OAR 115-040-0040 to 115-040-0044, a copy of which is available from the ERB offices. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing.” (Exh. JT-2, underlining omitted.)

20. Following the joint session, the parties adjourned to separate rooms for discussions with the mediator. The mediator first met with the District team from approximately 5:00 to 5:45 p.m., and with the Association team from approximately 5:45 to 6:30 p.m.² Through the mediator, the parties agreed that the District would present the first proposal, and the District began work on that proposal between 6:30 and 7:15 p.m. That process took longer than the Association representatives expected, and they used that time to outline Association responses to District offers they believed were most likely.

21. At approximately 8:00 p.m., the mediator brought a District proposal to the Association representatives. The District proposal contained three different scenarios. The scenario with the highest wages and benefits to Association unit members would provide them with approximately \$133,000, approximately \$84,000 more than its pre-mediation final offer.

22. The Association representatives responded relatively quickly with an offer: (1) reducing the \$729,000 figure in its pre-mediation final offer by \$49,000, and (2) requesting that the District formally apologize to the Association members through a statement to be negotiated by the parties.

23. The Association representatives believed that an apology was warranted because of District representatives’ conduct in previous negotiations and the Association’s perception that the District representatives’ conduct had necessitated the Association’s strike. The Association representatives believed that, in light of the strike and other events, the focus of the apology was obvious. The Association representatives had not discussed, or requested, such an apology in the previous bargaining. The Association representatives did not raise the apology issue in order to derail the mediation, but its inclusion reflected their anger with the District.

²Witnesses for the parties disagreed with each other about the timing of many events during the mediation, and the times above are approximate. We specifically find, however, that the District was not tasked with supplying the first proposal until after the mediator had met with both parties together and individually. We conclude that those meetings ended no earlier than 6:00 p.m., and most likely at approximately 6:30 p.m.

24. The mediator brought the Association proposal to the District representatives. They were surprised by the request for an apology, did not understand the reason for the apology, or what, exactly, they were being asked to apologize for. They questioned the seriousness of the offer because of the inclusion of what they believed was a vague and unjustified request for an apology.

25. After some additional, brief discussions with the mediator, both parties came to the understanding through those discussions that the other party had nothing to offer beyond the offer previously made, and that the other party had chosen to end its participation in the mediation. Both parties expected additional negotiations and were surprised that the other party had ended them. Both parties blamed the other party for the failure of the mediation, both at the time and at this hearing.

26. On November 20, the next day, the District bargaining team discussed the mediation with District executives the morning after the mediation, and, later, the District Board in executive session. The content of these communications is not in the record.

27. Also on November 20, the Association bargaining team met to prepare an email update for their members. This was the procedure they had followed throughout bargaining. The team agreed upon a general outline, one member agreed to draft the document, and OEA UniServ Bilodeau was assigned to, and did, review the text before its distribution.³

28. The emailed update was sent out at 10:18 p.m. on November 20. It was provided only to bargaining unit members, former unit members affected by the dispute, and Association staff. It stated:

“Medford Education Association
Update to members regarding November 19, 2014 Mediation
NO AGREEMENT REACHED IN ULP MEDIATION!

Review of what led to mediation:

- Your Association and the District agreed to a Memorandum of Agreement (MOA) during the 2011-2013 contract that provided for restoration of days and additional salary if the District received additional monies. Additional funds were received and the District refused to restore days or give salary per the MOA.
- Your Association filed an Unfair Labor Practice (ULP) and the Employment Relations Board (ERB) ruled against the District and found them guilty of violating the rules of good faith.
- ERB asked the Parties (Association and District) to have Janet Gilman, State Mediator, help reach an acceptable resolution to the violation.

Your bargaining team met the District’s team yesterday afternoon/evening in an attempt to reach a resolution on the Unfair Labor Practice.

The rules of this mediation does not [sic] allow us to share specific proposals but we can provide an overview of what happened:

³The Association witnesses disagree about who actually wrote which portion of the email. They agree, however, that Bilodeau wrote or reviewed the final draft and provided it to another team member who sent it out.

- First, Mediator Gilman gave the rules of this particular mediation process and the Parties signed an agreement to the rules.
- Then, the mediator met separately with each group to get an understanding of each party's rationale for its respective position.
- The mediator asked the District to give an offer first. It took over three hours for them to construct its offer.
- Your team reviewed it and determined it was not something that you deserved.
- We immediately provided an offer back to the District.
- Within a few minutes, the mediator returned and said that the District was done and had nothing further to offer.

Now what? ERB will now finalize on its own what the resolution will be. There is no specific timetable for the final decision but we are hoping it is soon. We will announce that decision when we receive it.

Your bargaining team appreciates all your continued support and remains hopeful that ERB will provide appropriate justice.” (Exh. C-19, underlining in original.)

29. Because the Association bargaining team had provided more detailed information about the MOA ULP in prior emails, the November 20 email's description of prior events (“[R]eview of what led to mediation”) was intended to be a quick summary.

30. Approximately 53 percent of the recipients opened the email, but it is unknown who did so or whether anyone forwarded the email. No unit members approached members of the Association bargaining team with questions, concerns, or complaints about the email.

31. No District representatives contacted the Association with any concerns about the email. The Association learned of the District's concerns through a copy of this Complaint.

32. The record contains one instance of a bargaining unit member expressing concerns about the November 20 email to District representatives. In that instance, a bargaining unit member provided a copy of the email to his spouse, a District executive. Nevertheless, District managers were concerned about the content of the email.

33. One District executive believed that Association unit members acted differently after the mediation, by engaging in increased water-cooler conversations and an increase in members wearing Association t-shirts on the day following the mediation. There is no evidence that this Association unit member conduct was because of the specific content of the Association email as opposed to the failure of the mediation generally.

34. On December 1, 2014, the ERB Board issued a Supplemental Order in the MOA ULP. *Medford Education Association*, 26 PECBR 272, *Medford EA-II*, (2014). Because of the events between the signing of the MOA and the Supplemental Order, this Board held that it was, as a practical matter, impossible to restore the parties to the position they would have been in had the District not violated the MOA. Therefore, this Board held that an equitable remedy was appropriate.

35. The Board's remedy began with the Association's final offer of approximately \$729,000 and then subtracted the retroactive pay increase of approximately \$384,000 implemented by the District to yield a total of approximately \$345,000 (plus interest at nine percent per annum from June 10, 2013 to August 13, 2014) to be provided to Association unit members. The date range for the interest calculation was based on the date the District "approved the school calendar without the restored work days (thereby violating the MOA)" and the date the Board issued its order on the merits of the case. *Medford Education Association*, 26 PECBR, at 274, n 3, *Medford EA-II*, (2014).

36. This Board declined to require the District to post a notice. It noted that only one posting criteria, that the conduct affected a large number of bargaining unit employees, had been met. It also noted that the disputed language "was far from clear." *Medford Education Association*, 26 PECBR at 274, *Medford EA-II*, (2014). This Board declined to impose a civil penalty, stating that the District's conduct was neither repetitive nor egregious.

37. Also on December 1, the District filed the Complaint in this action.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The District was not injured by the information that the Association provided its members, and therefore the District has failed to state a claim against the Association for a violation of ORS 243.672(2)(a).

The District contends that it was injured when Association officials made the following statements to Association unit members and staff: (1) "The District refused to restore days or give salary per the MOA" and (2) "The Employment Relations Board (ERB) ruled against the District and found them guilty of violating the rules of good faith."

Legal Standards: ORS 243.672(2)(a)

ORS 243.672(2)(a) provides that it is an unfair labor practice for a public employee or labor organization to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." This section is the labor organization analog to ORS 243.672(1)(a), which prohibits like conduct by public employers. We analyze (2)(a) claims using a similar standard to that applied in (1)(a) claims. *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285, 290 (1999).

ORS 243.672(4) provides that an unfair labor practice complaint be brought by an "injured party." In *Jefferson County, supra*, this Board relied on an Oregon Court of Appeals addressing the meaning of this term, *Oregon City Fed. of Teachers v. OCEA*, 36 Or App 27, 584 P2d 303 (1978). The Court reviewed what a party must plead and prove to be an "injured party" for purposes of an unfair labor practice complaint:

“An unfair labor practice complaint may be brought by an injured party.” ORS 243.672(3). The type of injury which must be pleaded and proved in order to establish standing to bring such a complaint is essentially the same as is required of litigants in other contests. The petitioner must show that he has suffered or will suffer a substantial injury as a consequence of the alleged unfair labor practice.

“Citing ORS 243.672(4), ERB ruled that the Federation did not have standing, as a minority union, to challenge the Association's conduct with respect to fair share payments. This ruling was correct because the Federation neither pleaded nor proved that it had suffered any direct injury from the conduct complained of. Thus, the Federation's sole capacity in this proceeding is as representative of the named individual petitioners. ORS 243.782.” 36 Or App at 32-33. (Emphasis added, footnotes omitted.)

Applying those standards in *Jefferson County*, this Board held that the employer had “neither alleged nor proved that it had suffered any direct and substantial injury” from the union’s conduct, and thus did not have standing to file the (2)(a) complaint.” *Jefferson County*, 18 PECBR at 291.⁴

Accordingly, we must determine whether the District suffered a direct and substantial injury from the emailed statements it cites. The District argues that the Association’s communications to its members injured it in the following ways:

“In this case, the Association sent a communication to its member[s] that contained a number of false statements. This communication falsely stated that the ERB ‘ruled against the District and found them guilty of violating the rules of good faith.’ The published statement has interfered with, restrained or coerced individual members published statements [*sic*] which injure the District, because the nature of the statements cause reputational damage and have a negative impact on the District's ability to engage in collective bargaining with respect to employee relationships. The District thus has standing [as an injured party] to file a ULP against the Association. This has injured the District and establishes standing to file a ULP.

“The breakdown of trust caused by the Association could damage every aspect of labor relations, from investigations and grievances to negotiations. It also damages the day-to-day relationships between individual employees and their supervisors, as is demonstrated by the actions of employees in bringing the publication to their supervisors.” (District Post-Hearing Brief at 3.)

We conclude that the District has failed to establish any injury. It presented admissible evidence that one bargaining unit employee brought the Association email to the attention of his spouse, a District executive. The District presented no other admissible evidence of any other

⁴In another case arising out of the same overall Jefferson County labor dispute, the Court of Appeals concluded that secondary picketing (at the private retail business of a County Commissioner) constituted a substantial injury under ORS 243.672(2)(g). *Jefferson County v. OPEU*, 174 Or App 12, 25-26, 23 P3d 401 (2001).

effects of the information except for the speculative concerns of District managers. The relationship between District and Association was a difficult one, and the fact that the parties had participated in unsuccessful bargaining followed by a strike appears to have had a far greater impact on the relationship between the parties.

The District argues that this Board should apply the same standards to a labor organization's direct communication with bargaining unit members as we do to an employer's direct communications with bargaining unit members, and hold that inaccurate or false communications between a labor organization and its bargaining unit members should be subject to per se liability, and not require the employer to present direct proof of injury. *See Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correction Institution*, Case No. UP-51-05, 22 PECBR 372, 398 (2008). We decline to do so. An employer and labor organization act in very different roles in collective bargaining regarding bargaining unit employees. The labor organization is the representative of unit members in a labor dispute and unfair labor practice litigation, while the employer is not their representative and is often their adversary. A labor organization has a duty of fair representation to its members, which the employer does not share, and has no standing to enforce. Nor would it be appropriate to impose complementary per se liability on an employer for the accuracy of its bargaining team reports to the employer's executives.

Because the District has not established any injury, we will dismiss its ORS 243.672(2)(a) claim.

3. The Association did not fail to bargain in good faith with the District during the November 19, 2014 mediation and did not violate ORS 243.672(2)(b).

The District argues that the Association violated its duty to bargain in good faith under ORS 243.672(2)(b) by submitting an offer in bad faith, misinforming members and others about District proposals and the mediation, and violating mediation confidentiality agreements.

Legal Standards: ORS 243.672(2)(b)

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization to refuse to "collectively bargain in good faith" with a public employer. The statute mirrors ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to refuse to collectively bargain in good faith with a labor organization. This Board recently addressed the standards under ORS 243.672(2)(b) in *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757 and Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-001-13, 26 PECBR 322 (2014), and we track that decision here.

In assessing whether a party has refused to collectively bargain in good faith, we generally examine the totality of the bargaining conduct to determine whether the party demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11,

25 PECBR 506, 516-17 (2013).⁵ The totality of a party's bargaining conduct typically includes: (1) whether dilatory tactics were used; (2) contents of the proposals; (3) behavior of the party's negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Id.* at 517; *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584, *recons.*, 16 PECBR 707 (1996). We also consider other factors that might be relevant in any given case. *Medford School District #549C*, 25 PECBR at 517; *Rogue Valley Transportation District*, 16 PECBR at 587.

The District argues that the Association violated its duty to bargain in good faith by: (1) submitting an offer raising the new issue of an apology and then leaving the mediation; (2) misinforming unit members and affected former unit members about the history of District proposals and the events of the mediation; and (3) violating mediation confidentiality agreements. We address each allegation in turn, and then look to the totality of the Association's bargaining conduct, to determine whether its conduct demonstrated that the Association had no intention of reaching an agreement. *See TriMet*, 26 PECBR at 343; *Medford School District #549C*, 25 PECBR at 516. As we proceed, it is important to note that that this dispute arose during a supplemental mediation, at the request of this Board, in a final attempt to resolve the dispute between the parties through negotiation. Accordingly, cases predicated on the normal PECBA bargaining and mediation process are not directly applicable. *See, e.g., Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 n 7 (2009) (submitting a new proposal in the statutory final offer and mediation stages is a per se violation of the duty to bargain in good faith.)

Apology and hasty exit

The District argues that the fact that the Association raised a new, unexplained apology issue and then promptly left the mediation demonstrates its bad faith. We have determined, however, that both parties left the mediation because they understood, through communications with the mediator, that the mediation had ended. Accordingly, the remaining issue is whether raising the new issue of an apology indicates bad faith by the Association.

It is undisputed that the Association counteroffer contained a new demand for an apology, but there is no evidence that the Association intended the apology to be confusing or unexplained (insulting, perhaps, but not confusing). Rather, from the Association perspective, the apology was justified by, and sought for, the District's previous conduct in the course of the overall labor dispute. While new, the apology had no financial impact, was combined with a significant reduction in the Association's monetary demands, and was made in the course of a special

⁵This Board has recognized that certain types of actions are so destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions *per se* violate (2)(b) or (1)(e), regardless of whether subjective bad faith is proven. *TriMet*, 26 PECBR at 343, n 16; *Medford School District #549C*, 25 PECBR at 515. The District urges that we hold communications between officials and members of a labor organization to the same standard under subsection 2(b). We decline to do so, for the same reasons that we did not impose such liability under subsection 2(a). In addition, we believe that our longstanding totality-of-conduct approach is the better tool to assess whether the Association violated ORS 243.672(2)(b).

mediation at the request of this Board. While this request for an apology could be viewed as self-righteous posturing, such conduct is not unusual in serious labor disputes such as the one between these parties. There is no evidence that Association representatives refused to answer, or would have refused to answer, District questions seeking clarification of what the Association intended by the proposal. In addition, the Association bargaining team expected the mediation to continue after the proposal. We conclude that the request for an apology was not a sham proposal or, on its own, an offer made in bad faith.

Misinformation about mediation proposals

The Association reported the following about the mediation proposals of the parties:

“The rules of this mediation does not [sic] allow us to share specific proposals but we can provide an overview of what happened:

First, Mediator Gilman gave the rules of this particular mediation process and the Parties signed an agreement to the rules.

Then, the mediator met separately with each group to get an understanding of each Party’s rationale for its respective position.

The mediator asked the District to give an offer first. It took over three hours for them to construct its offer.

Your team reviewed it and determined it was not something that you deserved.

We immediately provided an offer back to the District.

Within a few minutes, the mediator returned and said that the District was done and had nothing further to offer.” (Finding of Fact 28.)

The District disputes that it ended the mediation after receiving the Association offer. We have determined that both parties understood the other to have ended the process. The Association statement was therefore inaccurate, but not intentionally so.

The District disputes that it took three hours to provide its first offer in mediation. The evidence at hearing supports that the District took less than two hours for that process, as the Association’s own chronology suggests, and that Association representatives knew or should have known the timing. We conclude that the three hour time frame stated in the email was incorrect.

Breach of mediation confidentiality

The District argues that the following statements in the email violated the mediation confidentiality agreement:

“[1] The mediator asked the District to give an offer first. * * * [2] [after the Association’s counter offer,] the mediator returned and said that the District was done and had nothing further to offer.” (Finding of Fact 28.)

The District argues,

“[Item 1] * * * is concerning because the Association quotes the mediator in an apparent breach of the confidentiality provisions * * *. The Association violated the confidentiality agreements regarding mediation when it published this statement to its membership which had statements that quoted or attributed a comment to the mediator that were related to the offer. As set forth above, the parties were prohibited from sharing ‘mediation communications’ by written agreement in Exhibit JT-2, and the parties further agreed verbally that details of proposals were confidential. In general, attributing comments or quoting the mediator gives the impression that the Association is, indeed, releasing confidential mediation statements by the mediator. It is especially concerning when the ‘quotes’ or statements from the mediator are inaccurate, and when the statements were not heard first hand by the Association members. The evidence indicates that the District took about 30 minutes to develop its offer once there was a determination that it would provide the initial offer. [Item 2] * * * has the same concerns * * *. It is another quote from the mediator, and it is inaccurate. Quoting the mediator in this manner is a clear breach of the confidentiality agreement. The District was not privy to the conversation between the mediator and the Association team; however, the statement that was attributed to the mediator was not what the District provided to the mediator. This highlights the inherent dangers of quoting the mediator regarding the statements of others.” (District Post-Hearing Brief at 22.)

The mediation agreement itself has only one paragraph regarding confidentiality. It states:

“CONFIDENTIALITY: Mediation communications are confidential to the extent provided in agency rules OAR 115-040-0040 to 115-040-0044, a copy of which is available from the ERB offices. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing.” (Finding of Fact 19.)

The text of the agreement refers only to disclosures by the mediator. The District does not explain how the Association violated that agreement. In addition, as the Association argues, the statements were process-oriented and did not describe District or mediator proposals. Finally, the information was communicated by Association representatives to the members of the bargaining unit and past affected members. It was not a communication to the public, and there is no evidence that, prior to this proceeding, that the communication was publicly available. We conclude that the Association did not violate the mediation agreement.

Application of Standards

We turn to the standards for bad faith bargaining set out above, reviewing the totality of the bargaining conduct to determine whether the party demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. Applying the specific criteria above, we

conclude that: (1) dilatory tactics were not used; (2) the contents of the proposal, specifically the request for an apology, was a genuine offer combined with a monetary offer and not intended to end the supplemental mediation; (3) the behavior of the party's negotiator is not at issue; (4) the Association made a significant financial concession of \$49,000; (5) even if the Association proposal for an apology required explanation, the District never asked for one; and (6) the course of negotiations reflects that the Association promptly provided a counter offer to the District offer, and only left the mediation after the mediator communicated that the mediation had ended. Finally, while the Association bargaining team email to Association bargaining unit members and affected former members contained inaccuracies, those inaccuracies were not sufficient to support a determination that the Association bargained in bad faith. We conclude that the District has not established that the Association violated ORS 243.672(2)(b), and we will dismiss this claim, and therefore the Amended Complaint.

PROPOSED ORDER

1. The Complaint is dismissed.

SIGNED AND ISSUED on November 19, 2015.



B. Carlton Grew
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. The objections must be mailed, faxed or hand-delivered to this Board – not sent electronically. 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. This Board does not accept electronic filing of objections (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)