

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-059-13

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS'	)	
ASSOCIATION, IAFF LOCAL 43,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
CITY OF PORTLAND,	)	AND ORDER
	)	
Respondent.	)	
	)	

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On July 30, 2015, this Board heard oral argument on the parties' objections to an April 6, 2015, recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading, after a hearing held on July 9, 10, 11, and 21, 2014, and on August 18, 19, and 27, 2014, in Portland, Oregon, and on October 9, 2014, by telephone.<sup>1</sup> The record closed on December 12, 2014, following receipt of the parties' post-hearing briefs.

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

Lory J. Kraut, Senior Deputy Attorney, Portland City Attorney's Office, Portland, Oregon, represented Respondent.

On December 26, 2013, the Portland Fire Fighters' Association, IAFF Local 43 (Union) filed an unfair labor practice complaint alleging that the City of Portland (City) violated ORS 243.672(1)(e) by failing to bargain before unilaterally: (1) making several operational changes due to a budget reduction, (2) promoting a lower-ranked candidate over a higher-ranked one to Senior Inspector from a ranked eligibility list, and (3) developing an unranked eligibility

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<sup>1</sup>Due to the voluminous record, number of issues, and complexities of this matter, a transcript was necessary for this Board to determine the matter. The transcript was received on September 28, 2015.

list to promote candidates to Battalion Chief.<sup>2</sup> In an amended complaint filed on July 9, 2014, the Union added allegations that the City violated ORS 243.672(1)(g) and ORS 243.672(1)(h) by violating, and refusing to sign, a Memorandum of Understanding (MOU) regarding the use of Rapid Response Vehicles (RRVs).

The City timely filed an answer and amended answer. The City's amended answer contained several affirmative defenses, including waiver, estoppel, timeliness and failure to exhaust available remedies.

The issues are:

1. Did the City unilaterally make several operational changes due to a budget reduction without bargaining in violation of ORS 243.672(1)(e)?
2. Did the City unilaterally change the status quo when it promoted a lower-ranked candidate to Senior Inspector over a higher-ranked one in violation of ORS 243.672(1)(e)?
3. Did the City unilaterally change the status quo when it used an unranked eligibility list to promote Battalion Chiefs in 2013, violating ORS 243.672(1)(e)?
4. Did the City refuse to sign a valid and final MOU regarding the use of RRVs in violation of ORS 243.672(1)(h)?
5. Did the City violate the terms of a valid and final MOU regarding the use of RRVs in violation of ORS 243.672(1)(g)?

For the reasons set forth below, we conclude that the City violated ORS 243.672(1)(e) by promoting a lower-ranked candidate to Senior Inspector and using an unranked eligibility list to promote candidates to Battalion Chief in 2013. The remainder of the complaint is dismissed.

## RULINGS

### City Witness List

Before the hearing, the Union moved to bar the City from presenting any witnesses because the City had not copied the Board on a witness list that was sent to the Union, pursuant to OAR 115-010-0068(3) and a prehearing order. The ALJ properly denied the motion, given that OAR 115-010-0068(3) does not contain any requirement to copy the Board on the exchanged witness list, and the Union did not assert or demonstrate any prejudice.

The other rulings of the ALJ were reviewed and are correct.

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<sup>2</sup>The complaint also contained an allegation that the City violated ORS 243.672(1)(g) in using that unranked list. Because the Union's post-hearing brief did not address the (1)(g) allegation, we limit our analysis to the (1)(e) claim.

## FINDINGS OF FACT

### Parties, Collective Bargaining Agreement, and General Background

1. The City is a public employer as defined by ORS 243.650(20). The City is comprised of several bureaus including Portland Fire and Rescue (the Bureau).
2. The Bureau is the largest fire and emergency services provider in the State of Oregon, serving Portland and the regional metropolitan area. The Bureau provides critical public safety services including fire prevention, public education, and emergency response to fire, medical, and other urgent incidents.
3. The Union is a labor organization as defined by ORS 243.650(13) and is the sole and exclusive bargaining agent for establishing wages, hours, and working conditions for all sworn bargaining unit members in the Bureau.
4. The Bureau is a paramilitary organization. Employees join the Bureau as Fire Fighters and may be promoted to the following ranks in ascending order: Lieutenant, Captain, Battalion Chief, Deputy Chief, Division Chief and Fire Chief.
5. Fire Fighters, Lieutenants, Captains, and Battalion Chiefs are in the Union's bargaining unit. The Fire Chief, Division Chiefs, Deputy Chiefs and Assistant Fire Marshals are not in the bargaining unit.
6. The Bureau has five primary divisions: the Fire Chief's office, which is headed by the Fire Chief; Emergency Operations (E-ops), which is headed by a Division Chief (Operations Division Chief); Training, Safety, and EMS (Training), which is headed by a Deputy Chief; Prevention, which is headed by a Division Chief (Fire Marshal); and Management Services, which is headed by a Senior Business Operations Manager.
7. The Bureau assigns personnel various roles, which are available based on rank. These are referred to interchangeably as assignments, specialty pay assignments, and premium pay assignments. Specialty pay assignments include, but are not limited to: Fire Investigators, Senior Inspector Specialists, Hazardous Materials Specialists, EMS Coordinators, Paramedics, and employees assigned to the Dive Team.
8. The City and the Union are parties to a collective bargaining agreement (CBA) covering the period of July 1, 2012 through June 30, 2016, the terms of which are not disputed.<sup>3</sup>

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<sup>3</sup>We will discuss the specifics and applicability of any particular provision below in the Conclusions of Law portion of the order.

9. The following Bureau employees hold, or previously held, the following roles:

<b>Name</b>	<b>Rank(s)</b>	<b>Role(s) or Assignment(s)</b>
Alan Ferschweiler	Lieutenant Since 2007	(1) Union President since January 2013 (2) Union Vice President – January 2007 to January 2013
Jim Forquer	(1) Division Chief of E-ops since June 19, 2014 (2) Deputy Chief of E-ops – March 2014 to June 2014	(1) Union President – January 2010 to January 2013 (2) Union Vice President – Before Ferschweiler
Erin Janssens	(1) Fire Chief since June 5, 2012 (2) Division Chief – 2009 to June 5, 2012	(1) Served as the Fire Marshal in rank of Division Chief – 2009 to 2012
John Klum	Fire Chief – 2008 to 2012	
John Nohr	Fire Battalion or Division Chief since October 2003	Previously served as Safety Officer, Special Operations Chief, Emergency Operations Chief, Fire Prevention (Fire Marshal) Chief, Training Chief in rank of Division Chief.
Nathan Takara	Division Chief	Fire Marshal since December 2012

RRV Program Bargaining History

10. The E-ops division is responsible for emergency medical and fire suppression activities that operate out of 30 stations strategically located throughout Portland.

11. A fire truck, also known as a ladder truck, carries ladders and equipment for forcible entry, ventilation, and extraction. It is used for a variety of rescue operations, including fires. A fire engine primarily carries hoses and water for extinguishing fires. A quint is a hybrid apparatus that carries both water and ladders, but not to the extent that a truck or engine would individually. An RRV is a van, sport utility vehicle, or pick-up that carries medical equipment and a small amount of fire suppression equipment. RRV companies respond to minor injuries and traumas, but do not respond to potentially life threatening issues such as cardiac arrest.

12. Before 2009, the Bureau used two-person response teams for lower acuity medical calls. However, they were later eliminated due to budget concerns.

13. In early 2012, the City Council became interested in the Bureau implementing the use of two-person RRVs as a pilot program, and putting the personnel assigned to the program on a 40-hour workweek schedule (eight hours per day) instead of the standard 24/48 compression schedule (meaning 24 hours on duty and 48 hours off duty).

14. The Bureau notified the Union of its intent to implement the proposed RRV program. At that time, the parties were bargaining the terms of the CBA. Although the parties initially included the RRV negotiations as part of the negotiations for the CBA, they ultimately decided to embody the negotiated RRV terms in a separate MOU. One of the Union’s primary

concerns was the City's desire to staff RRVs on a 40-hour workweek schedule, instead of a 24/48 compression schedule.

15. On July 5, 2012, the Union submitted an MOU proposal regarding RRV use. The City provided counterproposal language on July 10 and 12, 2012. On July 31, 2012, the City provided two additional counterproposals. On August 10, 2012, the City provided another counterproposal.<sup>4</sup>

16. On September 12, 2012, then-Union President Jim Forquer signed a draft version of an RRV MOU. It did not contain any City representative signatures. The basic terms provided for staffing the RRVs Monday through Thursday from 0800 hours to 1800 hours, and addressed the consequent details involved with converting employees from a 24/48 compression to a 40-hour workweek schedule. Further, the September 12, 2012, MOU provided that the "funding for the additional four (4) positions to staff the RRV pilot program is on a one time basis ending June 30, 2013. If the program is extended beyond June 30, 2013, the City will notify the Union of the proposed extension."<sup>5</sup>

17. In September 2012, the Bureau shifted the RRV employees back to a 24/48 compression schedule due to the Bureau employees' strong preference for that schedule. The Bureau did not believe that it needed to negotiate the schedule change, because the 24/48 compression schedule was reflective of the status quo in the CBA and favorable to employees.

18. On November 5, 2012, City Labor Relations Coordinator Patrick Ward sent a draft of an RRV MOU to Forquer. Forquer forwarded it to members of Union leadership. This draft version differed in language from the one that Forquer signed on September 12, 2012, but was consistent on the substantive terms.

19. The Union filed this unfair labor practice complaint on December 26, 2013. The Union alleged in its initial complaint that it had entered into an agreement permitting the City to adopt its desired RRV program on a trial basis. The Union attached an unsigned and undated draft of the RRV MOU that had been circulated by the parties via email on November 5 and 6, 2012.

20. In its answer, the City stated that the City entered into an agreement with the Union regarding the conditions for the 40 hour workweek RRV program.

21. As the hearing neared, neither party could locate a copy of an RRV MOU that both parties had signed. As a result, the City asserted that there was not a valid signed agreement.

22. Several days before the hearing, the Union made a demand on the City to sign the version of the RRV MOU attached to the complaint as Exhibit B. The City refused, stating that

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<sup>4</sup>The record does not contain the Union's counterproposals to the Bureau.

<sup>5</sup>Multiple versions of the MOU were submitted in evidence. The quoted language is from the document signed by Forquer.

the City did not receive any communications from the Union after sending it the MOU draft on November 5, 2012, and therefore there was not a final agreement.

23. As a result, the Union requested to amend its complaint to include an ORS 243.672(1)(h) claim. The ALJ granted the motion. The ALJ also provided the City with leave to amend its answer in light of the amended complaint. In its amended answer, the City stated that it did not sign the RRV MOU as demanded and it no longer believed the RRV MOU draft attached to the complaint as Exhibit B reflected an agreement between the City and the Union.

### Bureau Hiring and Promotions

24. Bureau promotions are done through the Bureau of Human Resources (Human Resources) using a standardized process. Candidates seeking promotions to Captain and Battalion Chief positions start with an “assessment center,” where high-ranked personnel from external jurisdictions administer exercises to challenge candidates in handling situations similar to what they would encounter in the position. The assessment center evaluators score the candidates’ performance. Candidates who pass the assessment center then complete an oral panel interview. The panelists score the candidates, and the Bureau then ranks candidates on an eligibility list based on their combined assessment center and oral panel interview scores. The Bureau publishes the eligibility lists to all Bureau employees and they typically remain valid for two years. When vacancies occur, the Fire Chief interviews candidates. In some cases, the Fire Chief may delegate the interview to a lower-ranking manager.

25. Before 2008, the City Charter contained a provision about how to fill a vacancy from an eligibility list. Specifically, that provision directed Human Resources to submit the names of the five highest-ranking candidates from the appropriate eligibility list to the appointing authority. For equally ranked lists, Human Resources was directed to certify all applicants. The City’s Human Resources Administrative Rules (HRARs) codified those charter provisions.

26. Sometime around 2008, the city charter was changed to eliminate language regarding what kind of eligibility lists existed or how those lists were used.

27. In 2011, the City deleted an HRAR provision that directed Human Resources to certify the names of the candidates who were highest on the eligibility list for a position.

28. In July 2008, a Union bargaining unit member with the initials GP applied for a promotion to Captain and was placed on the ranked eligibility list. The Fire Chief interviewed him, but passed over him for a lower-ranked candidate. Due to the Bureau’s failure to promote GP, he filed a grievance. The Union alleged that the Bureau improperly used the Fire Chief’s interview to eliminate GP.

29. Based on GP’s grievance, the Bureau entered into a settlement agreement with the Union, agreeing that the following would apply to all promotional recruitments for sworn personnel on an eligibility list: (1) Fire Chief interviews would be part of the selection process and would be pass or fail; (2) any member who failed a Fire Chief interview would be provided with a summary of improvement areas; (3) any member who failed a Fire Chief interview would not be

eligible for another interview for one year; and (4) a vacancy would have to be available in order for a candidate to interview.

30. After a full year, another vacancy opened. GP was not given an opportunity to interview and a lower-ranked candidate was selected. GP filed a grievance and was then given the opportunity to interview as a result. Although GP passed the interview, the eligible list expired and GP withdrew the grievance.

31. In April 2009, the Bureau opened the promotional process for Battalion Chief positions. The Bureau determined that two employees failed the oral interview panel and removed them from the ranked list, rather than ranking them at the bottom.

32. The Union filed a grievance and an unfair labor practice complaint, alleging that the Bureau had changed the process by allowing the oral panel interview to become a basis for elimination rather than a lower ranking. Subsequently, the Bureau and the Union entered into a settlement agreement that: (1) the aggrieved individuals would be added to the eligible list; (2) the Union would withdraw its ULP; (3) the Bureau could develop an equally ranked recruitment process for the next Battalion Chief examination to be used on a trial basis; (4) as part of the selection process for the next Battalion Chief promotion, the Bureau could develop a ranked eligibility list at the conclusion of the Chief's interview; and (5) the parties agreed that the terms of the settlement agreement would not establish any precedent.

33. The Bureau opened the process for promotion to Battalion Chief in 2011, using the one-time unranked list as agreed to in the settlement agreement. Otherwise, the Bureau continued to use ranked lists for other officer promotions until October 2013, when the Bureau requested and received an equally ranked list for a Battalion Chief promotion. After receiving the list, the Fire Chief interviewed all candidates on the list and then ranked them according to her preference.

34. In addition to the above instances, the Bureau has passed over (or not selected someone for a promotion in ranked order) in the following recruitments: Battalion Chief in 1995, Fire Captain in 1995 (two individuals passed over), Fire Lieutenant in 1998 (at least two individuals passed over), Battalion Chief in 2003 (at least two individuals passed over), Captain in 2007, and Lieutenant in 2010. There may have been two or three other instances of promotional candidates being selected out of ranked order.<sup>6</sup> In some cases, candidates that were initially passed over were subsequently promoted.

#### Louisa Jones

35. The Bureau hired Louisa Jones as a Fire Fighter in 2001. In 2006, she was promoted to Lieutenant through an examination process. In 2009, Jones moved into the Investigations unit after successfully testing for a promotion to Investigator.

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<sup>6</sup>Deputy Chief Nohr testified that he remembered some additional examples of times when higher-ranked promotional candidates were passed over in favor of a lower-ranked candidate. However, the City did not provide the eligibility lists for these individuals. Therefore, there are no specific details or documentary evidence about these promotions.

36. In fall 2011, Jones sought to promote to the position of Senior Inspector. She had not previously served as an Inspector. Previous work as an Inspector was not a requirement for taking the Senior Inspector exam and did not affect a candidate's score. However, in the City's class specification, the knowledge, skills and abilities desired of a Senior Inspector include knowledge of fire prevention inspection methods and knowledge of current literature, trends, and developments in the field of fire prevention inspection, including codes, laws, and legal inspections.

37. On October 27, 2011, the Bureau issued a ranked list for the Senior Inspector promotion. The list contained the first four following names in ranked order: (1) Gary Boyles, (2) Peter DeVal, (3) Louisa Jones, and (4) Kari Schimel.

38. The first Senior Inspector vacancy occurred in early 2013. The first five eligible candidates on the ranked list were interviewed in March 2013.<sup>7</sup> Jones passed the interview. Gary Boyles was selected for the first vacancy. Shortly thereafter, Fire Marshal Nathan Takara learned that a retirement may create another vacancy. Around that time, Peter DeVal told Takara in confidence that he might be leaving the Bureau soon.

39. Because of the potential vacancy and because DeVal would likely decline a promotion, Fire Chief Janssens and Fire Marshal Takara encouraged Jones to transfer to inspections work in order to gain direct experience. However, such a transfer would have meant a pay reduction for Jones as she would have lost premium pay bonuses, including 11 percent as a paramedic and 6 percent for training. As a result, she declined to do so in the absence of any guarantee of being promoted to the Senior Inspector position.

40. Although there was not a vacancy at the time, Fire Chief Janssens and Fire Marshal Takara promoted Kari Schimel, the fourth ranked candidate, to the Senior Inspector position, passing over Jones. Their decision was based on Janssens's subjective determination that Schimel was the more highly qualified candidate for promotion.

#### City Budget Process

41. The Bureau receives its funding from the City's general fund, and therefore its funding allocation is determined as part of the City's budget process. The City's fiscal year is from July 1 to June 30 of the following year. The budget process usually starts in November with the "budget kick-off." At that time, the mayor and City Council supply the City bureaus with guidance on the proposed budgets. The bureaus then work on developing a proposed budget between November and January, often through the process of a Budgetary Advisory Committee (BAC).

42. The Bureaus' budget proposals are usually due to the City Budget Office in late January or early February. After receiving the proposals, the City Budget Office spends the next five or six weeks reviewing them in light of the City's overall spending priorities. During that time, the City Budget Office primarily communicates with the bureaus through the review process.

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<sup>7</sup>Both Takara and Janssens credibly testified that the top five ranked candidates were all initially interviewed after the eligibility list was generated.

43. After completing its review, the City Budget Office then submits the budgets to the City Council, who hold budgetary sessions with the bureaus and hold forums for community input on the bureaus' budget requests. This process supports the development of the Mayor's Proposed Budget (MPB), which is the first formal step in the budget process and typically happens in early May. After the mayor develops and releases the MPB, the City hosts additional public forums.

44. When approving the budget, the City Council convenes as the City Budget Committee. The City Council members review the MPB, make any desired changes, and approve a budget, typically at the end of May. It then becomes the Approved Budget. The Approved Budget then goes to the Tax Supervising and Conservation Commission (TSCC), which reviews the budget to make sure that it is accurate and legally compliant. The TSCC has 21 days to review the budget and hold a hearing to determine compliance. Once the TSCC has determined that a budget is compliant, it sends it back to the City Council.

45. The City Council makes any recommended changes and ultimately adopts a final approved budget (FAB) in June. If the City Council votes to pass it on an emergency basis, it goes into effect immediately.

46. After the FAB, the City Council can change how it spends money throughout the year. Although changes can happen at any time, they typically occur three times a year (October, February and May) in a budget monitoring process known as a "BUMP." A BUMP is similar to the budget process, but on a smaller scale. In exceptional circumstances, such as a civil judgment against the City, the City can change the budget. However, changes are typically limited to the BUMPs.

47. In December 2012, the City was facing a \$25 million deficit for the fiscal year when the budget process began. At this time, Fire Chief Janssens began sending all Bureau personnel detailed memoranda containing information about the budgetary process. These memoranda were emailed to all Bureau employees and were often printed and distributed at the fire stations. The memoranda also contained internet hyperlinks to webpages with more detailed information.

48. On December 13, 2012, the City issued its 2013-2014 Current Appropriation Level (CAL) target budgets to the City's bureaus. Instead of providing bureaus with a specific reduction target, the City Council asked bureaus to use a modified zero-based budget development process. Under this system, bureaus were allowed to request up to 90 percent of the CAL target, while cutting 10 percent, and submitting prioritized add-back packages for the cut items. The CAL targets were developed based on the 2012-2013 budget, with a variety of adjustments for inflation and other factors.

49. In early December, the Bureau convened its first BAC meeting. The BAC's purpose was to determine budget priorities and areas that could provide savings. The Bureau's BAC was comprised of 16 members, including six citizens, the Multnomah County Medical Director, a management employee, Union President Alan Ferschweiler and the Bureau's core leadership team.

50. The BAC met twice in January. On January 23, 2013, it issued a 64 page report, detailing the proposed budget, which reflected 10 percent in reductions (approximately \$9.25

million) and prioritizing add-back packages. The BAC's budget-saving measures included closing seven stations, transferring the Safety Officer and Chief Inspector assignments out of the bargaining unit, eliminating two Training Academy Specialist positions, discontinuing the Dive Team, eliminating the Hazmat Coordinator position, reducing overtime, closing the Safety Learning Center (thereby eliminating an Inspector position), and eliminating 3.8 FTE support positions.

51. On February 4, 2013, the Bureau submitted its requested budget to the City Budget Office. The City Budget Office worked with the Bureau, and then provided the proposed budget to the City Council and mayor.

52. On April 30, 2013, the mayor released the MPB (discussed below). His office formally submitted the MPB to the City Council on May 15, 2013. The MPB reflected a projection of a \$21.8 million City budget shortfall and a \$4.4 million (4.7 percent) budget reduction from the Bureau's CAL. Therefore, the budget cuts for the City or the Bureau were not as significant as originally projected.

53. Around this time, the City, the Bureau, and Union staff were aware of an existing federal grant that could provide the Bureau with significant additional funds. This grant, named the Staffing for Adequate Fire and Emergency Response (SAFER) grant, was available through the Federal Emergency Management Agency (FEMA). Chief Janssens began to explore the possibility of applying for the SAFER grant and obtaining bridge funding from the City until grant monies could be received in order to avoid Bureau lay-offs.

54. Between May 9 and approximately May 25, Ferschweiler met with Noah Siegel, the mayor's Budget Liaison, on several occasions to discuss the budget, the pending operational reductions, and the SAFER grant. Chief Janssens was present during one of these meetings.<sup>8</sup>

55. The purpose of the meetings, from the City's perspective, was to see if the City and the Union could come to some sort of accord regarding how the Bureau would implement the directive to cut 4.4 million dollars from its budget.

56. At the outset, the mayor's proposed budget directed the Bureau to replace four companies with four RRVs, which would have resulted in laying off 26 firefighters. That budget also directed the Bureau to eliminate: (1) the Safety Battalion Chief position (shifting all functions to the Deputy Chiefs Office); (2) two Firefighter Specialists assigned during the Training Academy; (3) one Inspector position; (4) two carpenters; (5) the Hazardous Materials Coordinator (shifting those duties to the Training Division); (6) the Dive Rescue Team; and (7) three Investigators positions.<sup>9</sup>

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<sup>8</sup>The parties presented conflicting testimony on whether there ultimately was an agreement that resulted from these meetings. Where the testimony conflicts, we rely on the corroborated testimony of Siegel and Janssens, which was more specific and detailed than the testimony of Ferschweiler.

<sup>9</sup>The MPB reflected some additional areas of operational budget cuts not relevant to this complaint.

57. When Siegel and Ferschweiler first met (May 9, 2013), the two discussed the proposed budget and identified key concerns. The City (via Siegel) communicated that savings needed to be achieved, and that replacing the companies with RRVs was the identified method to accomplish that. For the City, the highest priority was “achieving the innovations,” meaning expanding the use of RRVs and reducing the number of companies. The Union’s (via Ferschweiler) highest priority was preserving the firefighter positions. Siegel asked Ferschweiler to think about whether the parties could agree to a compromise, wherein the City would achieve the RRV innovations without a reduction in the firefighter positions, and the Union would agree to not oppose or grieve those innovations. The two also discussed the possibility of the City applying for a SAFER grant.

58. After the meeting, Siegel discussed the SAFER grant option with the mayor, who was quite resistant to that option because he believed that option to be a “band-aid” for larger financial and structural problems at the Bureau.

59. Siegel and Ferschweiler met again on May 16, this time accompanied by Janssens. At the meeting, the three agreed to a common course of action—namely, that they would try to reach the following compromise. The City would not close four companies or eliminate 26 firefighter positions, but would instead introduce quints and consolidate double-engine companies by adding RRVs to stations that already had an engine. The City would also apply for a SAFER grant, although Siegel explained that the SAFER component would be a difficult sell to the mayor, who had made clear that such an option “was not his first choice.” Thus, if Siegel were to pursue this option with the mayor, he needed the assurance that the Union would not object to or grieve the “innovation” changes outlined above.

60. On May 21, 2013, *The Oregonian* published a story asserting that Janssens had successfully convinced the mayor and City commissioners to keep four-person staffing at each station and to use RRVs *in addition to* engines, rather than *replacing* engines. The article also stated that Stations 2 and 8 would lose engine and ladder trucks to be replaced by quints. The article quoted Ferschweiler as stating that he had concerns about the quint-truck replacements in those two stations.

61. Also on May 21, 2013, the Union wrote to its members to discuss the Union’s “work to mitigate the budget cuts proposed by [the mayor].” The Union referenced the *Oregonian* article of the same day and asserted that the Union had been “successful in moving the [m]ayor away from his original proposal.” The Union asserted that the agreement outlined in the article, however, was reached by Janssens and the mayor. The Union also stated that it had met with the mayor earlier that day “to discuss our two primary concerns” and to offer “several solutions to avoid cutting positions.” According to the document, the Union: (1) requested to delay any changes until October 1, 2013, but the mayor made no such commitment; (2) asked the mayor to consider releasing contingency funds, with the mayor indicating that he had already released what he was comfortable with; and (3) requested that the City apply for the SAFER grant, with the mayor responding that he would not commit to that because it was one-time funding that could not be relied on in the future.

62. The mayor did meet with the Union (among others) on May 21 to discuss the budget cuts and his proposed options. In preparation for that meeting, Siegel prepared a briefing book that outlined talking points for the mayor. That briefing book was an internal document intended only for the mayor and his staff. The book included endorsing the proposal laid out in *The Oregonian* article. The briefing book also noted that, at that point, 26 positions would still be lost, but that those positions could be saved “through a combination of internal bureau savings and a COLA reduction by [the Union].” Lastly, the briefing book asserted that Ferschweiler “want[ed] to do it, but his people still think that they can hold out, apply for the SAFER grant, and wait for better times.”

63. The briefing book was inadvertently left out after the meeting and was obtained by a newspaper, the *Portland Mercury*, which published the contents of the book on May 22, 2013. The article that published the briefing book characterized Ferschweiler as personally supporting that his members forego some COLA amount, but doubtful that his members would “go along.”

64. The May 22 *Portland Mercury* publication made things difficult for Ferschweiler with the Union members, as it indicated that he was willing to consider COLA reductions. Siegel called Ferschweiler to apologize about the inadvertent disclosure and to ask to meet again, which they did a few days later.

65. At this meeting, both Siegel and Ferschweiler expressed their respective positions on the outstanding issues. Specifically, Siegel stated that getting the mayor to sign off on the SAFER grant would be difficult, and Ferschweiler indicated similar difficulty getting his members to sign off on a COLA reduction. Siegel indicated, however, that he believed that he could get the mayor on board with the SAFER grant, so long as the Union would not oppose the “innovations” (*i.e.*, RRVs, company consolidation, and quints discussed above). Siegel explained that he could not get the mayor to agree to apply for the SAFER grant, though, if the Union was then going to “grieve” those “innovation” changes. At the end of the meeting, Siegel committed to getting the mayor to agree to apply for the SAFER grant with the *quid pro quo* that the Union would not grieve the changes of consolidating the two companies and expanding the use of RRVs and quints, as discussed above.

66. Siegel then returned to the mayor’s office and delivered on his end of the bargain—*i.e.*, the mayor agreed to pursue the SAFER grant so that the Union would not lose the 26 positions. The City ultimately received the SAFER grant, which was used as contemplated by the parties’ agreement—namely, to pay for the 26 represented positions that otherwise would have been lost.

67. In sum, after the back-and-forth of multiple negotiations with the Union’s president, the City agreed to move off of its original position and cede to the Union’s primary objective—namely, that no bargaining unit positions would be lost, in exchange for the “innovations.” Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station’s truck and engine being replaced with a quint; (2) two additional RRVs would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant,

with the understanding that receiving the grant would prevent 26 bargaining unit members from being laid off.

After the agreement was reached, Siegel briefed the City commissioners on the deal that had been bargained with the Union, and the City Council approved a budget that reflected the deal. Specifically, on June 20, 2013, the City Council approved the following Final Approved Budget (FAB): (1) eliminating the Dive Team; (2) transferring Safety Chief and Chief Investigator assignments to management; (3) replacing some trucks and engines with quints; (4) permanently implementing an RRV program; (5) eliminating three Fire Investigator positions; and (6) eliminating standby pay in the Investigations unit.<sup>10</sup>

68. On June 20, 2013, Chief Janssens sent a budget memorandum to all employees explaining that the FAB had passed and had provided bridge funding to maintain employment of 26 Fire Fighters through the fall and that the City would apply for the SAFER grant to fund the continued employment of those Fire Fighters.

69. On July 14, 2013, the Union filed a grievance by email, challenging the implementation of the RRV program and associated consolidation of companies, the loss of standby pay in the Investigations unit and an increase in health care premiums. The Union filed the same grievance by letterhead hard copy on July 30, 2013. The grievance advanced through the steps to arbitration. Before the arbitration, the City informed the Union that it intended to assert that the Union had not timely filed the grievance. The Union responded that, if the City would not waive the timeliness defense, it would pursue an unfair labor practice complaint.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The City did not violate ORS 243.672(1)(e) with respect to the operational changes made in 2013 due to a budget reduction.

The Union alleges that in 2013, the City made the following operational changes to accommodate a budget reduction: (1) eliminated the Dive Team; (2) transferred the duties of the Safety Chief and Chief Investigator to management; (3) consolidated companies by replacing trucks with quints and permanently implementing RRVs; (4) eliminated three Fire Investigator positions; and (5) eliminated standby pay in the Investigations unit. According to the Union, these changes concern mandatory subjects of bargaining and were made unilaterally—*i.e.*, without bargaining with the Union. The City counters that it made these changes only after coming to an agreement with the Union *via* its president (Ferschweiler), and that the Union waived its right to contest the changes. For the following reasons, we agree with the City.

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Under most circumstances, a public employer commits a *per se* violation of its

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<sup>10</sup>There were also additional budget reductions that are not relevant to this complaint.

duty to bargain in good faith if it makes a unilateral (*i.e.*, unbargained) change in the status quo concerning a subject that is mandatory for bargaining. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, 534, *recons*, 25 PECBR 764 (2013).

Our methodology for analyzing unilateral change allegations involves considering: (1) whether an employer changed the status quo; (2) whether the change concerned a mandatory subject of bargaining; (3) whether the employer exhausted its duty to bargain; and (4) any affirmative defenses raised by the employer. *Id.* We need not apply this analysis in a mechanical manner and may proceed to a particular step if that step will be dispositive of the issue. *Id.*

Here, the record establishes that the City exhausted its duty to bargain over the changes regarding consolidating companies by replacing trucks with quints and permanently implementing RRV. Specifically, the City met multiple times with the Union’s president over these changes, and the Union’s president ultimately agreed not to contest the changes as part of the package agreement that saved 26 jobs for the Union’s members. Relying on Ferschweiler’s testimony, the Union argues that such an agreement was not reached. We, however, are more persuaded by the corroborated testimony of Siegel and Janssens. Accordingly, because the employer and the Union bargained the contested changes, the City did not violate ORS 243.672(1)(e).

In reaching this conclusion, we disagree that the meetings between the City and Ferschweiler were not “collective bargaining” or that such a legal determination be resolved by way of witness testimony. “Collective bargaining” is a statutory term that means meeting and “confer[ring] in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining.” ORS 243.650(4). Here, the City (via the mayor’s liaison and the Department’s chief) and the Union (via its president) met and conferred on multiple occasions on matters that included wages, workload, and job security, among others. Moreover, the parties exchanged different proposals and concepts on those subjects, and both ultimately yielded in their initial positions resulting in a bargained compromise. That course of conduct qualifies as collective bargaining, regardless of whether either party might attach a different label to those actions.<sup>11</sup>

Even if, however, we were to look at the facts in a light more favorable to the Union and through the lens of the Union’s legal theory, we would still dismiss the claim because we would conclude that the Union waived its right to dispute those changes. “A union may waive its right to bargain over a unilateral change in working conditions, either expressly or by inaction.” *Washington County Police Officers’ Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 481 (2009). Here, there was no express waiver of the Union’s right to bargain over the budget-related changes, but rather a waiver by inaction, which may be implied under certain limited circumstances. *See Washington County*, 23 PECBR at 481 (“[w]hen a union does not expressly waive its right to negotiate, we examine the circumstances to determine if a waiver

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<sup>11</sup>To be clear, the City has maintained throughout this proceeding that it bargained a deal with the Union, and that such a deal should be viewed through the legal lens of “waiver” or “estoppel.” Although those other legal theories might also lead us to the same conclusion (dismissal of the claim), we believe that our analysis is the most fitting.

may be implied.”).<sup>12</sup> For example, when a union has sufficient notice about a proposed change in employment relations, it must timely request to bargain over the proposed change and “diligently pursue[] bargaining over” that change. *Id.*; see also *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 362 n 8 (2008) (“[i]n a unilateral change situation, the employer’s obligation to bargain usually does not attach unless the union first demands to bargain”). Here, there is no dispute that the Union had actual notice of the proposed changes in this case. The Union was actively involved in multiple meetings where the specific potential changes were discussed throughout May and the following months. The Union discussed its concerns over the possible changes with City representatives, its own members, and representatives of the media on several occasions.

Because the Union had notice of the proposed changes, a failure to demand bargaining may constitute a waiver of the right to bargain. Of course, there are exceptions to this rule, including that a bargaining demand need not be made when the notice of a change amounts to nothing more than a *fait accompli*. See *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93, 16 PECBR 267, 274 (1995) (citing *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988)). In this situation, however, the City’s announcement of the budget-related changes was not a *fait accompli*, as even in the absence of a demand to bargain, the City on numerous dates actively solicited and considered the Union’s input on how best to respond to the budget shortfall. The City even significantly modified its original approach in response to the Union’s input. Thus, there was no excuse for the Union’s failure to file a demand to bargain in a reasonable time after it had notice of the potential changes.

According to the Union, it had no right to demand bargaining until after the “budget process” was completed. Even assuming that assertion is correct, the Union still never demanded to bargain over the changes even after the council voted to approve the budget that consolidated the companies and expanded the use of RRVs and quints. Moreover, it cannot be said that the Union diligently pursued bargaining over these changes. Consequently, even if we agreed with the premise of the Union’s theory, we would conclude that the City has established its affirmative defense of waiver because at no point did the Union demand to bargain or diligently pursue bargaining over these changes.

We also conclude that the City established its affirmative defense of waiver with respect to the other unilateral changes arising out of the budget reduction: (1) moving Safety Chief and Chief Investigator assignments to management; (2) eliminating the Training Academy Specialist positions; (3) eliminating one Inspector position; (4) eliminating the Hazardous Materials Coordinator position; (5) eliminating the Dive Team; and (6) eliminating three Investigator positions, including standby and overtime wages.

This panoply of changes was announced hand-in-step with the consolidation and RRV/quints expansions and were approved by the council at the same time. Again, the record does

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<sup>12</sup>The more clear-cut waiver by inaction occurs when an employer provides a labor organization with written notice of proposed changes under the provisions of ORS 243.698, and the labor organization does not demand to bargain those changes within 14 days. By operation of the statute, the labor organization’s inaction constitutes a waiver of the right to bargain those changes and the employer may proceed. ORS 243.698(3).

not establish that the Union made a demand to bargain the decision or the impact of these other changes. Consequently, we hold that the City proved its affirmative defense of waiver with respect to these other six enumerated changes.

3. The City violated ORS 243.672(1)(e) when it promoted a lower-ranked candidate to Senior Inspector over a higher-ranked one.

We next address the Union's allegation that the City made a unilateral change in its internal promotional process in violation ORS 243.672(1)(e). Specifically, the Union asserts that the Bureau made a unilateral change without bargaining when it chose employee Schimel over Jones for the Senior Inspector position. According to the Union, the established practice is to select candidates from eligibility lists in ranked order; therefore, the Bureau made a unilateral change when it promoted Schimel (a lower-ranked candidate) instead of Jones (a higher-ranked candidate).

The City responds that this issue concerns a permissive subject of bargaining. Further, the City argues that the Bureau has previously passed over next-ranked candidates in favor of lower-ranked ones, thereby defeating any claim that the City's past practice was to always promote by ranked order.

For the following reasons, we agree with the Union.

We begin with whether the promotion of a lower-ranked candidate concerns "promotion," a mandatory subject of bargaining. See *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, 26 PECBR 225, 251 (2014) (citing *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 178 (2007) *AWOP*, 229 Or App 96, 211 P3d 381 (2009)). We conclude that it does, as the change concerns "a raise in position or rank." See *City of Milwaukie*, 22 PECBR at 178 (defining "promotion" as "a raise in position or rank and holding that "promotion" constitutes a mandatory subject of bargaining).

In arguing to the contrary, the City cites *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 868-69 (1993) (*AOCE*). That case, however, is inapt because it used the Board's pre-1995 approach of determining whether a *proposal*, rather than a *subject*, was mandatory for bargaining. That approach has long since been disavowed.<sup>13</sup> See, e.g., *Tri-Met*, 26 PECBR at 250; *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 718-21 (1996). Under our subject-based approach, we have consistently held that the subject of promotion is mandatory for bargaining and that it is distinct from the permissive subject of minimum qualifications for a position—*i.e.*, the knowledge, skills, and abilities necessary to perform the work. See *Tri-Met*, 26 PECBR at 251. Here, Jones possessed the minimum qualifications for the position; otherwise, she would not have been allowed to test or be placed on the eligibility list. Rather, Jones was qualified

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<sup>13</sup>Moreover, the *proposal* found permissive in *AOCE* was more akin to a proposal concerning the minimum qualifications for a position, rather than a *proposal* concerning how bargaining unit members might take advantage of a promotional opportunity.

in her attempt to promote to Senior Inspector, a higher position or rank. Accordingly, the City's unilateral change in how a bargaining unit member (here, Jones) might take advantage of this raise in position or rank concerns a mandatory subject of bargaining.

We turn to whether the City changed the past practice by promoting Schimel over Jones for the Senior Inspector position. The record establishes that, since 2008, the chief's interview has been "pass or fail."<sup>14</sup> In other words, once a promotional candidate qualifies for a position such as Senior Inspector by way of passing the civil service exam and being ranked on the promotional list, the chief's interview is limited to "passing or failing" that candidate for promotion. This post-2008 practice stems, in part, from an August 2008 grievance resolution that so cabined the chief's authority. Specifically, that resolution applied "to all promotional recruitments for sworn personnel that take place after the establishment of an eligible list and before appointment to the higher classification \* \* \*." Under that resolution, the chief's interview is "Pass or Fail."

Here, Jones passed both portions of the exam for the Senior Inspector position and was placed on the eligible list. She was then given a pre-hire or chief's interview for the position and *passed*. At the time of the promotion decision, Jones was at the top of the eligible list. Yet, the City passed her over in favor of Schimel, who was ranked lower on the eligible list. According to the chief, that decision was made based on the chief's subjective determination that Schimel was the better candidate, notwithstanding the ranked list based on objective performance in the exam process.

That action, however, is inconsistent with the past practice for promotional decisions since at least 2008. We disagree with the City's position that the past practice was one of "variability" that permitted the chief to essentially re-rank the list based on whatever subjective factors the chief might elect to use after the candidate passed the chief's interview. Such an assertion not only goes against the "pass or fail" limitation of the 2008 agreement, but the promotional practices regarding sworn personnel since that time. Indeed, the record establishes that after 2008, only two candidates, at most, had been passed over for a promotional opportunity. The record does not establish, however, whether those two individuals passed or failed the chief's interview. In other words, it is just as likely, if not more likely, that those individuals were passed over because they failed the chief's interview. Indeed, the record supports that off-duty incidents formed the basis for determination that put fitness for promotion into question. The record does not establish, as the City asserts, that the past practice (before the Jones decision) for promotions was that the chief could select any individual on the eligible list regardless of where that individual was ranked, or that the chief could make such a selection based on a subjective assessment that someone lower-ranked was "better" or "more qualified" than an individual ranked higher on the eligibility list.

In sum, we conclude that, since at least 2008, the relevant past practice consisted of promoting the highest-ranking candidate on the eligibility list, so long as that individual "passed" the chief's (or prehire) interview. Here, Jones was the highest-ranked individual remaining on the eligible list and passed the chief's interview. Consequently, when the City changed course and promoted a lower-ranked candidate, it changed the past practice in violation of ORS 243.672(1)(e).

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<sup>14</sup>Although the practice before 2008 was less consistent, it was still quite rare for an employee to be passed over in favor of an employee who ranked lower on the promotional eligibility list.

4. The City violated ORS 243.672(1)(e) by unilaterally using an unranked eligibility list to promote candidates to Battalion Chief in 2013.

We turn to the Union's allegation that the City made a unilateral change to the promotional process by using an unranked (or equally ranked) list for Battalion Chief recruitments in 2013. We explained above that the subject of the alleged change, promotion, is mandatory for bargaining. Moreover, the established practice for promoting to a Battalion Chief is for the Bureau to take promotional candidates' combined score from the assessment center and oral panel interview and rank candidates according to that score. The ranking is maintained on a published eligibility list that remains valid for approximately two years. As promotional vacancies occur during a list's effective period, the Fire Chief typically interviews top candidates and promotes in ranked order. The longstanding past practice, therefore, is to use a ranked list.

The City avers, however, that it changed this past practice in 2011 via amending its HRAR 3.02.<sup>15</sup> According to the City, that amendment authorized the Bureau to use either a ranked or equally ranked (where all passing candidates receive the same rank) when making a decision as to who should next be promoted to Battalion Chief.

We disagree with the City's argument. The 2011 amendments to HRAR 3.02 do not expressly state whether the Bureau may or may not use a ranked list or an equally ranked list. Rather, the rule identifies two types of lists: ranked and equally ranked. By its terms, the amended rule merely deleted a provision that required Human Resources to certify to the appointing authority the names of candidates standing highest on the eligible list. The amendment does not authorize or require the Bureau to disregard its longstanding practice of using a ranked list for Battalion Chief promotions. Indeed, after the passage of the 2011 amendment, the Bureau has continued (until this dispute) to use a ranked list for Battalion Chief promotions. In sum, we conclude that the 2011 HRAR amendment did not abolish the longstanding past practice of using a ranked list for Battalion Chief promotions or set a new *status quo* for such promotions. Consequently, because the City unilaterally changed that past practice in 2013, it violated ORS 243.672(1)(e).

5. The City did not violate ORS 243.672(1)(g) or (h) regarding the RRV MOU.

The Union has alleged two separate violations with respect to the draft MOUs adopting an RRV program – one under 243.672(1)(g) and another under ORS 243.672(1)(h).

We first address the allegation that the City violated ORS 243.672(1)(g) by breaching the terms of a 2012 RRV MOU. ORS 243.672(1)(g) makes it an unfair labor practice for a public employer or its designated representative to “[v]iolate the provisions of any written contract with respect to employment relations.” Here, the Union asserts that the parties signed a 2012 MOU that defined the working conditions of bargaining unit employees assigned to a pilot RRV program. Putting aside the City's assertion that the agreement was never signed by both parties, the MOU was limited to the duration of the RRV pilot program, and terminated with the funding of that

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<sup>15</sup>As set forth above, the Union also permitted the City to use an unranked list for a 2011 Battalion Chief promotion on a one-time trial basis. That one-time allowance did not establish a new past practice.

program in June 2013. The Union’s allegation, however, is rooted in the City’s conduct *after the agreement expired*. As noted, however, the MOU was no longer in effect at the time that the Union alleges that the breach occurred. Accordingly, any decision by this Board will not “have a practical effect on or concerning the rights of the parties.” *Medford Education Association v. Medford School District 549C*, Case No. UP-047-13, 26 PECBR 143, 152 (2014). In such circumstances, we deem the matter moot and dismiss the allegation, which we do here with respect to the (1)(g) claim.<sup>16</sup>

The Union also alleges that the City violated ORS 243.672(1)(h) when the City, in 2014, refused to sign the expired agreement. The Union’s demand that the City sign the expired MOU arose when the City asserted, in conjunction with this proceeding, that it had never signed the MOU (as a defense to the above-discussed (1)(g) claim). Again, any decision by this Board that directed the City to sign an expired agreement would not “have a practical effect on or concerning the rights of the parties.” *Id.* Accordingly, we also conclude that this claim is moot.

### Remedy

Because we have determined that the Department violated ORS 243.672(1)(e) we will issue a cease and desist order. ORS 243.676(2)(b). We also order the following affirmative relief to effectuate the Public Employee Collective Bargaining Act (PECBA). ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the past practice that existed before the unlawful change. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, 25 PECBR 871, 890 (2013). We see no reason not to order our “usual remedy” in this case. Accordingly, the City is directed to return to using the past promotional practices described above with respect to Senior Inspector and Battalion Chief positions.<sup>17</sup> The City is also directed to make Louisa Jones whole for any harm resulting from the City’s unlawful conduct. This traditional make-whole remedy includes any back pay and benefits, plus interest at the rate of 9 percent per annum, which Jones would have received if not for the City’s unlawful conduct.

With respect to the Battalion Chief positions, we order the parties to promptly confer to determine if any employee was affected by the unilateral change. If so, the parties are directed to bargain in good faith for a period of 60 days to determine an appropriate remedy regarding any affected employee. If the parties are unable to reach an agreement after 60 days of good-faith bargaining, each party shall submit to the Board the last offer made to the other party and shall do so within seven days of the conclusion of bargaining. At that point, the Board will consider both final offers and choose one, or craft an alternative remedy that best effectuates the PECBA.

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<sup>16</sup>We also note that one of the Union’s initial concerns with the RRV program was that the City initially staffed the RRVs on a 40-hour workweek schedule. Most of the terms in the draft RRV MOUs concerned the details associated with converting employees from a 24/48 compression schedule; however, in September 2012, the City changed RRV personnel back to a 24/48 compressed schedule.

<sup>17</sup>The parties can, of course, collectively bargain a different practice in the future.

ORDER

1. The City violated ORS 243.672(1)(e) by unilaterally changing the promotional past practice regarding the Senior Inspector and Battalion Chief positions.
2. The City is to cease and desist from violating ORS 243.672(1)(e). The City is also ordered to return to the past practices that existed before the unilateral change.
3. With respect to the Senior Inspector violation, the City shall promote Louisa Jones to the position and make her whole for not being promoted in October 2013, including back pay and benefits, plus interest at the rate of 9 percent per annum.
4. With respect to the Battalion Chief position, the parties are to promptly confer to determine if any employee was affected by the unilateral change. If so, the parties are directed to bargain in good faith for a period of 60 days to determine an appropriate remedy regarding any affected employee. If the parties are unable to reach an agreement after 60 days of good-faith bargaining, each party shall submit its final offer to the Board and shall do so within seven days of the conclusion of bargaining. The Board will select one of the offers or craft its own remedy.
5. The Union's other claims are dismissed.

DATED this 2 day of December, 2015.



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Kathryn A. Logan, Chair

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\*Jason M. Weyand, Member



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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482

\*Member Weyand, Specially Concurring:

I join with my colleagues in the order above with one exception—I strongly disagree with my colleagues' conclusion that the City fulfilled its obligation to bargain over the budget-related changes because the Union and the City agreed to a "deal" on those changes. Therefore, I do not

agree with my colleagues' factual findings or legal conclusion related to the alleged deal between the parties. I do, however, agree with their alternative conclusion that the Union waived its right to bargain over these changes through its inaction. Thus, I would reach the same result, but for different reasons.

As a preliminary matter, I disagree with my colleagues' conclusion that the City and Union were engaged in collective bargaining when they had informal discussions regarding the Mayor's proposed budget cuts. To the contrary, I agree with Chief Janssens, Mr. Siegel, and Mr. Ferschweiler, who all unequivocally testified that they were not engaged in collective bargaining on behalf of the City or the Union. Further, Ferschweiler and Siegel testified that they had no authority to bargain over these issues independently even if they desired to do so. Based on the circumstances surrounding these discussions, including among other things the shared understanding of the parties and the manner in which the parties conducted themselves, I would find that no collective bargaining occurred. This position is also consistent with the manner in which the City litigated this case, as the City never once asserted that it had engaged in collective bargaining with the Union, let alone completed its bargaining obligation.

Even assuming for the sake of argument that the City and the Union had engaged in collective bargaining, I would still conclude that any such bargaining had not yielded an agreement between the parties. Distilled to its essence, the City is alleging that an enforceable oral agreement was made during the budget-related conversations. When one party alleges that an oral agreement was reached, we apply the objective theory of contracts to determine whether such a deal was in fact agreed to by the parties. *See North Clackamas Education Association v. North Clackamas School District*, Case No. UP-51-04, 21 PECBR 629, 655-57 (2007) (applying the objective theory of contracts to a claim that an employer violated ORS 243.672(1)(h)). To be bound by a putative oral agreement, we must find that a party's acceptance of the terms be "positive, unconditional, unequivocal, and unambiguous, and must not change, add to, or qualify the terms of the offer." *Id.* at 657, citing *Wagner v. Rainier Mfg. Co.*, 230 Or 531, 538, 371 P2d 274 (1962).

Viewed under these standards, there is insufficient evidence to support my colleagues' conclusion that a deal was reached. I do not doubt that the City representatives earnestly believed that the Union had agreed to generally support the Mayor's modified approach to the budget cuts. But to conclude that an oral agreement was reached, we need more than the City's subjective belief. Rather, we need tangible, persuasive evidence of facts that make it objectively reasonable to conclude that such a deal agreed to by both parties. This evidence must also be detailed enough to identify with clarity what terms the parties agreed to. I do not see such evidence in this case. To the contrary, based on the evidence before us, what I find to be more likely is that the Union agreed generally that the modified approach—including the application for the SAFER Grant and some of the "innovations" sought by the Mayor—was preferable to the closing of stations and cutting of positions, and the Union agreed to work with the City to help obtain the SAFER Grant and would be willing to explore the innovations sought by the Mayor. But I do not see persuasive evidence that demonstrates that the Union entered into a final, enforceable agreement with the City that was sufficient to satisfy the City's bargaining obligation or to otherwise waive the Union's right to bargain over the specific aspects of the budget-related changes.

In reaching the opposite conclusion, my colleagues relied on the testimony of Siegel and Janssens, finding it more specific and detailed than Mr. Ferschweiler's testimony. Siegel and Janssens' testimony may have been slightly more detailed in some respects, but their testimony also was at times inconsistent on key points. For example, Janssens testified that the deal was reached on May 16, at a meeting she was present for. Siegel disagreed, testifying that the agreement was reached at least a week later during a one-on-one meeting with Ferschweiler. Further, the testimony provided by Siegel and Janssens was also fairly vague on key issues and lacked enough meaningful details to establish that both parties had come to a sufficiently well-defined agreement to support the conclusion that a deal had been reached.

Conversely, Mr. Ferschweiler testified consistently that no agreement was reached, other than an agreement to work together to try and find a solution to avoid the most painful impacts of the budget cuts. Mr. Ferschweiler's testimony that no deal was reached was consistent with the public actions of the Union during the relevant time period, which included the filing of a grievance over the budget cuts under the Existing Conditions provisions of Article 13 of the CBA, as well as statements to the press that were critical of the innovations included in the Mayor's budget cuts. On the other hand, the City never once asserted that a "deal" had been reached in response to the grievance or the Union's criticisms that were published in media articles. This argument did not appear until after the complaint in this case had been filed, seven months after the alleged deal was entered into. It is difficult to believe that, if the City truly believed at the time that an enforceable deal had been reached through collective bargaining, it would not have said so.

For these reasons, I do not agree that any "deal" was reached, or that the City fulfilled its obligation to bargain over the budget related changes at issue in this case. Accordingly, I do not join in the factual findings or legal conclusion related to the alleged deal between the parties.



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Jason M. Weyand, Member