EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-032-15

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Complainant, v. CLACKAMAS COUNTY and CLACKAMAS COUNTY HOUSING AUTHORITY, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 10, 2016, the Board heard oral arguments on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew after a hearing was held on March 10, 2016, in Oregon City, Oregon. The record closed on April 18, 2016, following receipt of the parties' post-hearing briefs.

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Complainant.

Christina L. Thacker, Assistant Clackamas County Counsel, Oregon City, Oregon, represented Respondents.

On December 3, 2015, the Clackamas County Employees' Association (Association) filed this complaint alleging that Clackamas County and the Clackamas County Housing Authority (County)[1] had violated its duty to bargain in good faith under ORS 243.672(1)(e) by presenting a bargaining proposal for drug testing that included testing for marijuana.[2] The County filed a timely

[1]We refer to both entities as "County" for purposes of this order.

[2]In its complaint, the Association also alleged that the County failed to honor, and reduce to writing, a promise regarding health insurance premium contributions in violation of ORS 243.672(1)(e) and (h). The Association withdrew these claims before the hearing.

answer, including affirmative defenses that the Association had not been damaged, and that the claims were unripe or moot.[3]

The issue is:

> During collective bargaining, did County representatives present a marijuana testing proposal that violated state law? If so, did the County violate ORS 243.672(1)(e)?

Because the Association did not establish that the County violated ORS 243.672(1)(e), we will dismiss the complaint.

RULINGS

After the parties filed their post-hearing briefs, the Association moved to strike three portions of the County's brief. The Association argued that the portions at issue effectively raised an affirmative defense not pled in the County's answer; namely, that federal grant requirements required the proposed changes in the County's drug testing policy. The portions of the brief at issue did not raise any new affirmative defenses, but rather provided general background and context concerning the County's rationale for its drug testing proposal. The ALJ properly declined to strike these portions of the County's brief.

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

FINDINGS OF FACT

The Parties

1. The County is a public employer as defined by ORS 243.650(20); the County Housing Authority is a division of the County. The Association is a labor organization as defined by ORS 243.650(13), and the exclusive representative of three bargaining units of County employees.

2. The Association represents three County bargaining units: (1) the Employees' Association main unit (EA-Main); (2) the Housing Authority unit (EA-HA); and (3) the part-time and temporary employees unit (EA-T). Each unit has its own collective bargaining agreement with the County.

3. Beginning in September 2015, and continuing into December, the Association and the County were engaged in negotiations for successor collective bargaining agreements.

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[3]Respondent does not argue these affirmative defenses in its post-hearing brief, and we do not consider them.

4. During the 2015 bargaining, the EA-Main and EA-T agreements were negotiated together and the EA-HA agreement was negotiated separately, until a final joint bargaining session on December 18, 2015.

5. The previous collective bargaining agreements between the parties, along with the County's policies, had provided that newly hired employees were subject to drug testing (including testing for marijuana).

6. The parties held several bargaining sessions during the fall of 2015. On October 22, the County presented a drug testing proposal that sought to allow drug testing for current employees under certain circumstances. The County presented its proposal in a morning EA-HA bargaining session and in an afternoon bargaining session with the EA-Main and EA-T units.

7. The County's drug testing proposal began with the existing pre-employment drug testing policy and added some language to extend the policy to current employees moving to new positions. It stated in part:

> "This policy covers applicants for all positions which have met the standards identified in Appendix A, including applicants for temporary and seasonal positions, part-time working less than half time, limited term, and non-represented employees on employment agreements. The master list of the actual positions which are eligible for pre-employment drug testing will be kept in the Department of Employee Services.
>
> "This policy <u>applies</u> to current County employees who <u>move to other positions that meet the standards listed in Appendix A.</u>
>
> "* * * * *
>
> "Applicants for jobs which meet the standards identified in Appendix A will undergo screening for the presence of illegal drugs as a condition for employment. <u>Employees who move to a position that meets the standards identified in Appendix A will undergo screening for the presence of illegal drugs as a condition for employment.</u> Applicants and employees will be required to submit to a urinalysis test at a laboratory of Clackamas County's choice.
>
> "* * * * *
>
> "An employee who receives [a positive result] * * * on the drug test is not eligible to move to another position. An employee who is moving to another position that meet[s] the standards listed in Appendix A may be subject to disciplinary action according to the County Personnel Ordinance and the collective bargaining agreements based on the test result[.]
>
> "* * * * *

> "Marijuana is a Class I controlled substance; its use is illegal under federal law. Although Oregon law (ORS 475.300 to 475.346) exempts from criminal prosecution in state court those individuals who obtain a 'registry identification card' from the Oregon Department of Human Services, based on a statement from their attending physician that the individual has a 'debilitating medical condition', this is not an acceptable explanation for a positive drug test under this Policy. The Medical Review Officer (MRO) will automatically verify such tests as positive."[4]

8. The County's proposal defined a positive drug test result as the detection of any one or more of the following substances: amphetamines, methamphetamines, MOMA (ecstasy), cocaine, marijuana (THC), codeine/morphine, acetyl morphine, heroin, opiates, and phencyclidine (PCP). The policy identified drugs as "controlled substances" if they were listed on Schedules I through V in 21 USC § 802 and 21 CFR § 1308. Controlled substances include illegal drugs and drugs that may be authorized for use by a physician or dentist for certain medical uses, but are subject to misuse or abuse. The policy identified other drugs as prohibited drugs, namely marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines.

9. The proposal listed the following categories of positions that would appear on the drug testing list (the same positions were previously listed for new applicant drug testing):

> "To be included on the list, the <u>employee's or</u> applicant's typical daily activities must include duties such as:
>
> "1) Criminal Law Enforcement - Employees of departments who are responsible for the apprehension, prosecution, or disposition of offenders under criminal law, or for the disposition of juveniles who have committed an act which would be a crime if committed by an adult.
>
> "2) Safety Sensitive/Public Safety - Employees who are responsible for the care and safety of the public, involved in high risk safety tasks, high risk safety tasks that pose great danger to the public and those visiting *hard hat* required sites. For example, 911 Operator, Lifeguard, operating or working around equipment that can pose a danger to the public.
>
> "3) Employees covered by United States Department of Transportation regulations
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> "4) Employees who deal with vulnerable clients - Employees with responsibility for/access to vulnerable clients and/or children. For example, the mentally ill, developmentally disabled, residents of Veteran homes, and prisoners, or any employee providing direct patient care.
>
> "5) A position in a department with a demonstrated history of past work related drug use problems - this means an actual, provable, documented history of on-the-job drug problems, not one which is suspected or where there is a belief that there is a problem. If this standard is to be used, you must provide DES with evidence of such a history.
>
> "6) Positions which have access to and/or handle controlled substances

[4]The underlined text in this Finding of Fact is language that the County proposed to add to the then-current drug testing policy.

"7) Compliance with the federal Drug Free Work Place Act - Employees who work in a program that receives federal pass-through money."[5] (Boldface omitted.)

10. County officials told Association negotiators that they sought the changes based in part on generalized concerns about federal grant requirements. The Association objected to the proposal at each October 22 bargaining session, the morning EA-HA and the afternoon EA-Main/EA-T sessions. Association representatives stated that the proposal's marijuana testing provisions were a prohibited subject of bargaining as a result of the passage of the 2014 Control and Regulation of Marijuana Act (Measure 91). The Association did not object to any other provision of the proposal as involving prohibited or permissive subjects of bargaining.

11. The County presented the drug testing proposal as a stand-alone proposal, and did not condition bargaining on any other matters over this proposal. In response to Association statements that the County could not lawfully "force" the Association to negotiate over the drug testing proposal, County officials denied forcing the Association to bargain. The County's chief negotiator stated, "I'm not forcing you to bargain. If you're telling me you're not interested in bargaining over this, then we will just move forward."

12. On November 2, 2015, the Association negotiators emailed County negotiators to state that the drug testing proposal "needs to be withdrawn" because it "constitutes a prohibited subject of bargaining," and that "[c]ontinued insistence on this proposal could constitute an unfair labor practice."

13. On November 19, 2015, the parties discussed the County's drug testing proposal by identifying it as one of the "poison pills" awaiting disposition in bargaining. This discussion took place in a bargaining session for the EA-Main and EA-T units only.

14. The County withdrew the drug testing proposal on December 18, 2015, at the session covering, and resolving, collective bargaining for the successor agreements for all three units.

CONCLUSIONS OF LAW

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

2. The County did not violate ORS 243.672(1)(e).

The Association brings this action under ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative" of its employees. Specifically, the Association asserts that the County violated its duty to bargain in good faith by proposing, and then refusing to withdraw, a policy allowing it to test certain current employees for marijuana use. According to the Association, this

[5]As in Finding of Fact 7, underlined text indicates where the County proposed adding language to the then-current policy on drug testing.

action was unlawful because the County's drug testing proposal involved a prohibited subject of bargaining. For the reasons set forth below, we disagree.

Under the Public Employee Collective Bargaining Act (PECBA), mandatory subjects must be bargained. Permissive subjects may be bargained if both parties agree to do so. Parties cannot bargain about a contractual term that is "specifically contrary to statute or would require a party to act contrary to statute," otherwise referred to as a prohibited "subject."[6] *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 17 PECBR 299, 304 (1997), *aff'd*, 157 Or App 341, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999); *see also Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347, 350 (1975), *order on remand*, 3 PECBR 1950 (1978), *aff'd as modified*, 290 Or 217, 621 P2d 547 (1980) (A prohibited subject is one that "would require either party to do an illegal act or perform an act [that] is contrary to any other statutory or constitutional provision.") Provisions of a collective bargaining agreement (or other written agreement) that involve prohibited subjects are unenforceable, even if agreed to by the parties. *See Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No. UP-36-05, 22 PECBR 302, 316, *recons*, 22 PECBR 503 (2008), *aff'd*, 352 Or 697, 291 P3d 658 (2012).

At oral argument, the Association conceded that, if the subject of the County's proposal was not prohibited (*i.e.*, was either mandatory or permissive), the County did not violate ORS 243.672(1)(e). Consequently, because that question is dispositive, we first address whether the County's proposal constituted a prohibited subject of bargaining.

At the outset, we note that the Board has previously held that drug testing proposals may contain permissive subjects of bargaining, such as the decision to impose a testing policy on public safety workers, as well as mandatory subjects of bargaining, such as the privacy afforded during the test, the privacy of the results, and the reliability of the test. *Federation of Oregon Parole and Probation Officers, v. State Of Oregon, Department Of Corrections*, Case No. UP-117-89, 14 PECBR 693, 703-4 (1993) (order on remand). The Association does not dispute these prior holdings, but rather argues that the passage of Measure 91 rendered drug testing for marijuana a prohibited subject, so long as that testing included potential off-duty or off-premises marijuana use.[7]

In determining whether the Association is correct that Measure 91 rendered the County's proposal a prohibited subject of bargaining, we must review and interpret the provisions of that statute. When interpreting a statute enacted by legislative referral, our task is to discern the intent of the voters. *Burke v. DLCD*, 352 Or 428, 433, 290 P3d 790 (2012). To do so, we apply the same

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[6]ORS 243.650(4) recognizes that there are two specific categories of subjects for bargaining (mandatory and permissive) and that parties cannot agree to something that is "prohibited by law." Practically speaking, any subject or proposal that is prohibited by law is considered a prohibited subject of bargaining, regardless of whether it might otherwise be described as "mandatory" or "permissive." *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 598, 54 P3d 1043 (2002).

[7]We recognize that the Association is not asserting that *all* marijuana testing is prohibited for bargaining.

method of statutory analysis that we apply when interpreting a statute enacted by the legislature. *Id.* at 432-33. Accordingly, we look first to the text and context of the statute, taking into account any legislative history that illuminates the voters' intent. *Id.*; *see State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009) (prescribing method of statutory construction).

The text and context of a statute are the "best evidence" of the voters' intent. *Hoekstre v. DLCD*, 249 Or App 626, 634, 278 P3d 123, *rev den*, 352 Or 377, 290 P3d 813 (2012); *Gaines*, 346 Or at 171 (text and context "must be given primary weight in the analysis"). When interpreting the text of a statute, we consider rules of statutory construction that bear directly on how to read the text, including the statutory enjoinder not to insert what has been omitted or to omit what has been inserted. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

Here, in pertinent parts, Measure 91 provides:

> "(1) The People of the State of Oregon declare that the purposes of ORS 475B.010 to 475B.395 are:
> (a) To eliminate the problems caused by the prohibition and uncontrolled manufacture, delivery and possession of marijuana within this state;
> (b) To protect the safety, welfare, health and peace of the people of this state by prioritizing this state's limited law enforcement resources in the most effective, consistent and rational way;
> (c) To permit persons licensed, controlled and regulated by this state to legally manufacture and sell marijuana to persons 21 years of age and older, subject to the provisions of ORS 475B.010 to 475B.395; and
> (d) To establish a comprehensive regulatory framework concerning marijuana under existing state law.
>
> "(2) The People of the State of Oregon intend that the provisions of ORS 475B.010 to 475B.395, together with other provisions of state law, will:
> (a) Prevent the distribution of marijuana to persons under 21 years of age;
> (b) Prevent revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
> (c) Prevent the diversion of marijuana from this state to other states;
> (d) Prevent marijuana activity that is legal under state law from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
> (e) Prevent violence and the use of firearms in association with the cultivation and distribution of marijuana;
> (f) Prevent drugged driving and the exacerbation of other adverse public health consequences associated with the use of marijuana;
> (g) Prevent the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
> (h) Prevent the possession and use of marijuana on federal property." ORS 475B.005.

Additionally, Measure 91 provides that it "may not be construed * * * [t]o amend or affect state or federal law pertaining to employment matters." ORS 475B.020(1).

We see nothing in the text or context of Measure 91 that would establish that the County's proposal constitutes a prohibited subject of bargaining. Nor has the Association identified any specific provision of Measure 91 that prohibits a public employer from testing employees for marijuana. To the contrary, Measure 91 is silent on the testing of employees or potential employees for marijuana use. Rather, the provisions of Measure 91 decriminalized the recreational use of marijuana (at the state level) and established a regulatory framework for the growth, sale, taxation, and use of marijuana. Nonetheless, the Association would have us hold that, because Measure 91 decriminalized the recreational use of marijuana, that act implicitly made it unlawful for a public employer to test for marijuana use. However, it does not necessarily follow that it is unlawful for a public employer to bargain with a labor organization just because a formerly illegal action is now legal under Oregon law. Thus, at a minimum, the Association has not established that the text of Measure 91 forbids such testing or prohibits collective bargaining over that testing.

Moreover, as noted above, Measure 91 states that the measure "may not be construed * * * [t]o amend or affect state or federal law pertaining to employment matters." ORS 475B.020(1). The Association's argument, however, is premised on Measure 91 affecting the PECBA (*i.e.*, a state law that pertains to employment matters). Accepting the Association's logic would effectively omit this specific provision from Measure 91, while inserting an implied term that was not included in the law itself. To do so would be contrary to the rules of statutory construction, and we will not construe Measure 91 in that way.

In sum, we conclude that the subject of the County's proposal is not prohibited for bargaining.[8] Accordingly, we will dismiss the Association's complaint.

ORDER

1. The Association's complaint is dismissed.

Dated September 15, 2016.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

[8]Therefore, we do not reach the additional question of whether the County unlawfully pursued the subject.