

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-01-05

(PETITION TO DECLARE STRIKE UNLAWFUL)

OREGON TRAIL SCHOOL	)	
DISTRICT NO.46,	)	
	)	
Petitioner,	)	ORDER ON PETITION
	)	TO DECLARE STRIKE
v.	)	UNLAWFUL
	)	
EAST EDUCATION ASSOCIATION	)	
EAST COUNTY BARGAINING	)	
COUNCIL, OEA/NEA,	)	
	)	
Respondent.	)	
	)	
	)	

The full Board conducted an expedited evidentiary hearing on October 26, 2005 on the Petition to Declare Strike Unlawful filed by the Oregon Trail School District No. 46 ("District"). The record closed on November 1, 2005 upon receipt of closing briefs from both parties.

Bruce Zagar, Attorney at Law, Garrett, Hemann, Robertson Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-4207, represented Petitioner.

John S. Bishop, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 NW Johnson Street, Portland Oregon 97209, represented Respondent.

---

On October 14, 2005, the East County Bargaining Council, Wy'East Education Association OEA/NEA ("Council") served notice on the District and this Board that District teachers represented by the Council would commence a strike at 6:00 a.m. on October 25,

2005. On October 14, the same day as the Council's strike notice, the District filed a Petition to Declare Strike Unlawful that lead to these proceedings. In its petition, the District gave four reasons why the strike should be declared unlawful. The District did not object to the Council's strike notice.

On October 25, 2005, the Council filed its response to the District's petition. At hearing on October 26, 2005, each party had the opportunity to present evidence, examine and cross-examine witnesses, and make legal arguments in support of its position. The hearing closed on November 1, 2005 on receipt of the briefs of both parties.

### ISSUES

At hearing, the parties could not agree on the issues properly before the Board, but did agree that the issues were framed by the pleadings in this case. The parties did not agree that pending unfair labor practice proceedings should be combined for hearing with this case, and we do not do so. We formulate the issues as follows:

1. Did the Council's inclusion in its Final Offer of a proposal to amend the bargaining unit description, which the District had previously identified as permissive and over which it refused to bargain, render the strike unlawful?
2. Did the Council unlawfully condition agreement on the District's acceptance of a proposal concerning the scheduling of teacher preparation time during the student contact day, which the District previously identified as permissive and over which it refused to bargain, so as to render the strike unlawful?
3. Did the Council unlawfully condition agreement on the District's acceptance of teacher evaluation proposals containing language the District previously identified as permissive and over which it refused to bargain, so as to render the strike unlawful?
4. Does the pendency of unfair labor practice complaints, filed by both parties based on conduct during these negotiations, render the strike unlawful?<sup>1</sup>

---

<sup>1</sup>On July 12, 2005 the District filed an unfair labor practice complaint against the Council in Oregon Trail School District No. 46 v. East County Bargaining Council, OEA/NEA, ERB Case No. UP-34-05. District alleged therein that the Council violated its duty to bargain under ORS 243.672(2)(b) by including permissive language regarding the contractual recognition clause in its Final Offer and Cost Summary. On August 5, 2005 the Council filed an unfair labor practice against the District in East County Bargaining Council, Wy'east Education Association OEA/NEA, ERB Case No. UP-39-05. The Council alleged that the

We answer each of these questions in the negative, and dismiss the District's petition for reasons set forth below.

FINDINGS OF FACT<sup>2</sup>

1. The District is a public employer, and the Council is a labor organization which represents a bargaining unit of District teachers. The most recent collective bargaining agreement between the parties expired in June 2004.

2. The parties commenced negotiations on a successor to their 2001-2004 labor contract on April 27, 2004. Article 1 of that contract provided in relevant part:

“ARTICLE 1 - RECOGNITION

“\* \* \* \* \*

“B. The Board recognizes the Council as the exclusive collective bargaining representative \* \* \* of all regular licensed teachers employed one-half time and more (four [4] hours and more daily) in teaching and counseling capacities by the District, excluding all administrative, confidential, supervisory and classified personnel.”

Article 11 of that contract dealt with teacher evaluations, while Article 18(B) concerned preparation time.

3. During negotiations, the Council proposed alterations to existing language in Articles 1, 11, and 18. Among other changes, the Council sought to delete from Article 1 the words “one half-time or more (four [4] hours and more daily)” from the bargaining unit description. The effect of this proposal would be to add employees to the bargaining unit who taught half time or less.

---

District had engaged in bad faith and regressive bargaining tactics in violation of its duty to bargain under ORS 243.672(1)(e). The Council seeks, among other things, an order from this Board directing the District to cease and desist from implementation of its final offer, and a return to the status quo until the parties enter into a new labor contract.

<sup>2</sup>A portion of these facts are taken from a Stipulation of Fact entered into by the parties at hearing.

The Council also proposed to retain and expand language from Article 11 of the prior agreement concerning the scheduling of student contact time during the student contact day, and to retain prior contract language regarding teacher evaluations. The parties were unable to reach agreement on a successor contract, and the Council sought mediation on December 9, 2004.

4. Initially, the District identified numerous Council proposals as permissive for bargaining, including proposals on Articles 1, 11 and 18, but agreed to bargain over them. By letter to the Council dated May 10, 2005, the District indicated that it was no longer willing to bargain concerning items it had identified as permissive subjects for bargaining. In its notice to the Council, the District indicated permissive language by bracketing it as follows:

“ARTICLE 1-RECOGNITION

“B. The Board recognizes the Council as the exclusive collective bargaining representative \* \* \* of all regular licensed teachers employed [~~one-half time or more (four [4] hours and more daily)~~] in teaching and counseling capacities by the District, excluding all administrative, confidential, supervisory and classified personnel.”

The District also objected to portions of existing language in Articles 11 and 18, and in Council proposals to amend those articles. We do not set forth those objections in detail because the parties do not dispute them. In general, the District objected to any language dealing with the standards for and substance of teacher evaluations as set forth in Article 11, and to any language limiting the District’s discretion to schedule preparation time under Article 18.

5. Thereafter, the Council engaged in “alternate proposal” negotiations. Following the District’s May 10, 2005 declaration, the Council prepared a series of complete bargaining packages of “mandatory proposals” from which the Council removed all permissive language the District had objected to. Along with the mandatory packages, the Council concurrently submitted a series of “alternate proposals” containing both mandatory and permissive language. These alternative proposals recognized that the permissive proposals had value to the teachers, and consequently asked for less from the District in mandatory areas. The Council’s “mandatory” proposals did not seek to modify the language of the recognition clause in Article 1, while its “permissive” proposals did. Similarly, its “mandatory” proposals regarding Article 11 and Article 18 did not include existing or

proposed language which the District had identified as permissive on May 10, 2005. The Council's "alternate" proposals included the offending language. "Alternate proposal" bargaining is common in negotiations involving school districts, and was used by the parties in negotiating the 2001-2004 contract. In such negotiations, as here, the labor organization is careful to couch bargaining regarding permissive language as something the employer may wish to consider as an alternate means of reaching agreement, but which the labor organization is not insisting upon as a condition or agreement. The Council made clear that it was willing to settle for the package that contained mandatory subjects only.

6. After May 10, 2005, the parties next met on June 27, 2005. The Council made "mandatory" and "alternate" package proposals through the mediator. The parties did not reach agreement. On June 28, 2005, the District declared impasse in negotiations pursuant to ORS 243 726. The mediator notified the parties of the declaration of impasse on June 29, 2005, and gave the parties until July 6, 2005 to submit their final offers and cost summaries. The District submitted its Final Offer and Cost Summary on July 1 and 5, 2005. The District's Final Offer eliminated any reference in Article 11 to the standards for or substance of teacher evaluations, and also any restrictions placed upon it by Article 18 concerning scheduling of teacher preparation time during student contact hours.

7. The Council submitted its Final Offer and Cost Summary on July 5 and 6, 2005. The Council proposed to change the existing language of Article 1(B) by deleting language which limited membership in the bargaining unit to teachers who taught more than half time (as set forth above in Finding No. 4). The District had previously identified this change in the recognition clause as permissive and refused to bargain about it. The Council's representative testified that she made a mistake in deleting the language from Article 1 of its Final Offer.<sup>3</sup> The District objected to the Council's Final Offer and on July 12, 2005, it filed an unfair labor practice complaint against the Council based on the Article 1 proposal in the Council's Final Offer. ( See footnote 2 above). The District did not object to any other aspect of the Union's Final Offer.

8. On July 26, 2005, the Council submitted an Amended Final Offer, which restored the original language to its proposed Article 1(B) as the District had demanded. Thereafter, the parties had mediator-assisted bargaining sessions on August 4, 2005, September 1, 2005 and October 24-25, 2005. At each of these sessions, the Council made mandatory and alternate package proposals regarding Articles 11 and 18 which were considered by the District in making its proposals and counter proposals. None of the Council's mandatory proposals in these sessions attempted to modify the bargaining unit

---

<sup>3</sup>We do not need to determine whether the deletion of this language was intentional or resulted from an honest mistake, for reasons set forth below in our Conclusions of Law.

description. The parties did not reach agreement.

9. On August 26, 2005, the District implemented its Final Offer, with minor exceptions, pursuant to ORS 243.712(2)(d). The parties' next negotiation session occurred on September 1, 2005. A mediator was again present, and again no agreement was reached.

10. On October 14, 2005, pursuant to ORS 243.726, the Council served formal notice on the District and the Employment Relations Board of its intent to commence a strike on October 25, 2005 at 6:00 a.m. The parties did not meet formally to discuss their disagreements over a new contract between September 1, 2005 and October 21, 2005.

11. On October 21, 2005, and again on October 24, the parties met for bargaining through a mediator. They were unable to settle their contract.

12. At each of the bargaining sessions referred to above, the Council submitted package proposals which eliminated the language in Articles 11 and 18 which the District had identified as permissive. The Council simultaneously continued to submit alternate packages which included proposals to continue "current language"—that is, the language of the expired contract—in Articles 11 and 18. At the October 24 bargaining session, the Council initially submitted both a mandatory proposal and an alternative proposal. In formulating its response, the District referred not to the Council's mandatory proposal, but to the alternative. During pre-strike negotiations, the Council did not condition agreement on the adoption by the District of permissive language which the Council sought to include in Articles 11 and 18, among others; nor did the District refuse to discuss permissive proposals advanced by the Council in its alternate proposals.

13. In support of its contentions, the District introduced into evidence a number of newspaper articles referring to ongoing labor negotiations, as well as communications from the Council to its membership and the general public. All contained references to preparation time and teacher evaluation, among other things. Some indicated that evaluation criteria and preparation time were important to teachers. None identified particular aspects of these subjects as permissive subjects for bargaining.

We turn to one illustrative example. The District refers us to an article in the September issue of the Mountain Times, which made comparisons between the provision of the previous contract, the District's implemented contract, and the Council's Final Offer in several areas: salaries, length of contract, insurance premiums, layoff policies, and teacher preparation time. The article noted that the 1997 strike still "roused strong feelings among teachers and administrators." Mike Cosper, President of the West Education Association, was quoted as saying "Whatever we put on the table, they rejected. Why they want to put us

through this, I don't know. We'll now go through the process of a strike vote." Cosper also stated that "Of course, our goal is to get the district to come to the table and bargain with us." If anything, this article indicates that the District and the Council disagreed on many issues, not just evaluations and preparation time. In addition, Cosper's statements can be summarized as follows: the 1997 negotiations were difficult and resulted in a strike, current negotiations were also difficult, the Council was going to take a strike vote; and that the Council still wanted to get the District to the bargaining table. We read nothing more into it.<sup>4</sup>

14. We find that, during negotiations, Council representatives continued to make comments emphasizing the issues of teacher evaluation and preparation time as being of great concern to the teachers, and as important matters which were in dispute between the parties. We further find that both District and Council representatives issued statements to their constituencies and the public via newsletters, e-mails, websites, and publications in and to the media. The District wrote letters to parents and to bargaining unit members. The Council issued bargaining updates to its members. All became widely distributed. Both sides issued statements characterizing their own proposals and those made by the other side. Neither side's characterizations were accurate in every detail. Except as set forth below, we do not make detailed findings regarding the parties' public pronouncements, for reasons discussed in our Conclusions of Law.

15. Many statements by Council representatives spoke directly to the District's implementation of proposals to eliminate "current language" in Articles 11 and 18, among others. For example, in its newsletter of August 4, 2005, the Council stated:

"The District continues to propose removing the following rights that are currently guaranteed in your contract:

- "• Delete language that guarantees employees prep time during the student day
- "• Delete all language regarding employee evaluation

"\* \* \*"

At the Council's August 31, 2005 membership meeting, and again in its September 5, 2005 analysis of the District's Final Offer, Council representatives identified rollbacks in the District's Final Offer, including evaluation language, and preparation time

---

<sup>4</sup>The Council also introduced into evidence a number of District communications to its members, parents, and the general public

during the student contact day.

16. At no time did Council representatives state that the Council was conditioning agreement on the District's failure to accept current language in Articles 11 and 18, nor that the Council intended to strike over permissive aspects of evaluation or preparation time.

17. On more than one occasion, the District invited discussion by the Council and those in the bargaining unit of issues "of greatest importance" to teachers. These issues included, but were not limited to, rollbacks in contractual restrictions on the scheduling of student preparation time, and standards relating to teacher evaluations. On September 12, 2005, in a press release concerning negotiations with the Council, the District stated:

"At the September 12 School Board meeting, teachers shared their concerns over seniority rights and competency requirements, the time of day that preparation is scheduled, and the lump sum pay increase for 2004/2005. Consequently, the Board would like to meet with the ECBC, with the assistance of a mediator, if they will bring forward a new proposal for consideration that narrows down the issues to those that have been voiced as most important to teachers."

Again, on October 11, 2005 the District wrote parents a letter in which it stated:

"Since implementation of our final offer, we have heard concerns from our teachers regarding four major contract issues: 1) evaluation procedures, 2) preparation time, 3) the definition of teacher competence, and 4) the salary increase for 2004/5. The school board is interested in discussing alternative resolutions to these important issues and has requested an additional mediation session to occur on October 24."

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Council's inclusion of permissive recognition clause language in its Final Offer does not render its strike unlawful.

The District petitions this Board under ORS 243.726(4)(a) and OAR 115-40-020 for a declaration that the Council's strike is unlawful. Such a petition initiates an expedited process designed to provide prompt resolution of a claim that a strike is in violation of ORS 243.726.

The petition process presents us with a narrow question. By statute, the only issue before us is whether a strike is or would be "in violation of this section." ORS 243.726(4)(a). "This section" refers to ORS 243.726. To determine the nature of the question before us, we turn first to the provisions of that statute.

Under ORS 243.726, public employees may lawfully engage in a strike only when they meet specified conditions. The employees must be in a properly certified or recognized bargaining unit that is involved in a labor dispute, ORS 243.726(1) and (2), and they may not be in safety or emergency positions that are expressly prohibited from striking by ORS 243.736<sup>5</sup> or any other statute. In addition, the employees must comply with the conditions of ORS 243.726(2):

"(2) It shall be lawful for a public employee who is not prohibited from striking under subsection (1) of this section and who is in the appropriate bargaining unit involved in a labor dispute to participate in a strike over mandatory subjects of bargaining provided:

"(a) The requirements of ORS 243.712 and 243.722 relating to the resolution of labor disputes have been complied with in good faith;

"(b) Thirty days have elapsed since the board has made public the fact finder's findings of fact and

---

<sup>5</sup>ORS 243.736(1) states:

"It shall be unlawful for any emergency telephone worker, parole and probation officer who supervises adult offenders, police officer, firefighter or guard at a correctional institution or mental hospital to strike or recognize a picket line of a labor organization while in the performance of official duties."

Teachers are not prohibited from striking under this provision.

recommendations or the mediator has made public the parties' final offers;

“(c) The exclusive representative has given 10 days' notice by certified mail of its intent to strike and stating the reasons for its intent to strike to the board and the public employer;

“(d) The collective bargaining agreement has expired, or the labor dispute arises pursuant to a reopener provision in a collective bargaining agreement or renegotiation under ORS 243.702(1) or renegotiation under ORS 243.698; and

“(e) The union's strike does not include unconventional strike activity not protected under the National Labor Relations Act on June 6, 1995, and does not constitute an unfair labor practice under ORS 243.672(2)(f).”

The District first asserts that the Council's strike is unlawful under subsection (2)(a) because the Council failed to comply in good faith with the requirements of ORS 243.712. ORS 243.712 establishes the statutory bargaining process. It begins with 150 days of table bargaining. If the parties do not reach agreement after 150 days, either party may request the assistance of a mediator. After at least 15 days of mediation, either party may declare impasse. Within seven days of that declaration, the parties must submit their Final Offers along with a summary of the cost of their offer. The mediator makes these submissions public and the parties begin a 30-day cooling off period. If there is no agreement after the cooling-off period, the parties may resort to self help: the employer may implement all or part of its Final Offer, and the employees may go on strike.

The District alleges that the Council acted in bad faith at the Final Offer stage by including a permissive subject for bargaining<sup>6</sup> in its offer over the District's objection. “[A] party violates the duty to bargain in good faith by including a permissive item in its final offer, as required by ORS 243.712(2)(b), over the other party's objection.” *Amalgamated Transit*

---

<sup>6</sup>Bargaining subjects are considered either mandatory, permissive or prohibited for bargaining. If either party insists, the parties *must* negotiate over a proposal concerning a mandatory subject. The parties *may* negotiate a proposal concerning a permissive subject, but neither party can insist on it. A prohibited subject is one that would require a party to violate the law or public policy.

*Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 581-582 (1996).

The Council proposed to change the recognition clause of the parties' expired agreement by removing the language that excluded employees who worked half-time or less from the bargaining unit. In other words, the Council proposed to add employees to the bargaining unit who worked half time or less. A recognition proposal is mandatory for bargaining only to the extent it reflects the existing bargaining unit description. *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97, 17 PECBR 892, 899 (1999); *Oregon AFSCME, Council 75 v. Clackamas County*, Case No. UP-80-86, 9 PECBR 9298, 9300-9301(1987). The Council's proposal to change the composition of the bargaining unit concerned a permissive subject for bargaining, and the District properly objected to bargaining over it.

The District argues that the Council bargained in bad faith by including its permissive recognition clause proposal in its Final Offer, thereby committing an unfair labor practice. It further argues that the Council's later submission of an amended Final Offer that omitted the offending proposal does not cure the violation. The District states: "Once an unfair labor practice, always an unfair labor practice." (District's Closing Arguments at 3).

The District may be correct, but its argument misses the point. This is not an unfair labor practice proceeding. The District has filed a separate unfair labor practice complaint on this same issue. That is the proper forum for deciding whether the Council's conduct constitutes an unfair labor practice.<sup>7</sup> A strike unlawfulness petition is not an alternative to an unfair labor practice proceeding. *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9485 (1987). The lone issue before us is whether the strike violates ORS 243.726. We conclude it does not.

Our decision in *Eugene School District No. 4J* is instructive. The employer there alleged that the union's strike was unlawful under ORS 243.726(2)(a) because the union failed to timely submit a list of issues to the factfinder and did not submit language on all issues.<sup>8</sup> This Board rejected the claim:

---

<sup>7</sup>The parties did not agree to consolidate the unfair labor practice proceedings filed by both parties with this one.

<sup>8</sup>In SB 750, the 1995 legislature eliminated the factfinding requirement from the bargaining process and replaced it with the requirement to submit final offers. For this reason, we have held that the same requirements that existed for submitting a proposal to factfinding now apply to final offers. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707, 709 (1996) (Order on Reconsideration). Our discussion of the factfinding submission in the *Eugene School*

“We hold that such technical deficiencies, without evidence that they had some significantly deleterious effect on the factfinding process or that they were the product of a bad motive, are not sufficient—even if proven—to constitute a failure to participate in factfinding in good faith, as such compliance is required by ORS 243.726(2)(a).” 9 PECBR at 9486-9487.

The violation here may be a bit more than a mere technicality, but *Eugene School District* establishes that not every violation is sufficient to render a strike unlawful. In the *Eugene School District* case, we also held that the more substantive claim that the union repudiated tentative agreements,<sup>9</sup> even if proven, would not support a conclusion that the strike was unlawful. 9 PECBR at 9487-9488.

To determine whether the Council’s conduct violated ORS 243.726(2)(a), we examine the totality of the circumstances.

The Council submitted its Final Offer on July 5 and 6, 2005.<sup>10</sup> The District filed an unfair labor practice on July 12, 2005, alleging that the Council bargained in bad faith by including a proposed change to the recognition clause in its Final Offer. The Council then amended its Final Offer on July 26, 2005. The only amendment was to remove the proposed change to the recognition clause. There is no dispute that the recognition clause proposal that the Council included in its amended Final Offer concerned a mandatory subject for bargaining. The parties thereafter bargained over the amended proposal. The Council went on strike on October 25, 2005. The District did not offer evidence that the bargaining process suffered any significant ill effects from the Council’s submission of the non-mandatory recognition clause proposal in its Final Offer, and that proposal is not a basis for the Council’s strike. We find that the Council promptly and effectively rectified any difficulty with its original Final Offer.

In deciding whether the Council’s conduct should render its strike unlawful, we consider whether it prevented the Final Offer process from accomplishing its intended

---

*District* case is thus directly pertinent to the issue here regarding the submission of a final offer.

<sup>9</sup>In *Lane Unified Bargaining Council v. McKenzie School District, No. 68, Case No. UP-14-85, 8 PECBR 8160 (1985)*, we held that a party’s repudiation of tentative agreements was an indication of bad-faith bargaining. In *Eugene School District No. 4J*, we held that such indicia of bad faith do not make a strike unlawful.

<sup>10</sup>The reason the permissive recognition clause proposal was included in the final offer is irrelevant, and we do not consider it

purpose. "The purpose of the Final Offer and cost summary is to provide a basis for a reasoned debate on the merits of the proposal." *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 589-590 (1996). It gives the public an opportunity to pressure the parties into altering their positions and reaching agreement. *Sandy Union High School District UH2 v. East County Bargaining Council*, Case Nos. UP-8-97 and DR-1-97, 17 PECBR 151 (1997).<sup>11</sup> The law requires this opportunity for debate and public pressure to last for at least 30 days. ORS 243.712(2)(d).

The statute's purposes were met. The Council submitted its amended Final Offer on July 26. It did not commence its strike until October 25, more than 30 days after it submitted the amended Final Offer. During this time, there was opportunity for debate and public pressure on the issues in the Council's Final Offer. The District presented no evidence that the initial Final Offer, which the Council promptly withdrew, caused any significantly deleterious effects to the bargaining process. The recognition clause issue is not a reason for the strike, and we cannot discern a way in which it made the strike more likely to occur. The Council's actions satisfied the basic purposes of the statute regarding Final Offers. We therefore conclude that "[t]he requirements of ORS 243.712 \* \* \* have been complied with in good faith." We will dismiss this claim.

To hold otherwise would upset the delicate balance of bargaining power that the legislature created. The legislature expressly recognized that one of the important public policies underlying the PECBA is "establishing greater equality of bargaining power between public employers and public employees." ORS 243.656(3). The District's position would undermine that policy. It would have us hold that once a party makes a mistake in the Final Offer process, no matter how minor or how promptly rectified, that party forever loses the right to engage in self help. The threat of self help is an incentive for the parties to resolve their differences. If a party could proceed secure in the knowledge that it does not face the prospect of self help by the other side, it would have less incentive to settle. We should not lightly upset the balance reached by the legislature. There are undoubtedly circumstances where a party engages in conduct that removes its right to engage in self help, such as committing violations that are pervasive, not rectified, and tied closely to the reasons for a strike. This case does not present such circumstances.

3. The Council did not unlawfully pursue permissive bargaining proposals concerning preparation time or teacher evaluations.

The District's second and third claims are similar and we consider them

---

<sup>11</sup> That case arose out of the 1997 strike in the Sandy Elementary and High School Districts. Those Districts later merged with others to form the Oregon Trail School District No 46.

together. The second claim alleges that the Council pursued, over the District's objections, a permissive proposal to include teacher preparation time during the student contact day. The third claim alleges that the Council pursued, over the District's objection, a proposal concerning teacher evaluations that contained permissive elements.

At the outset, we note a significant problem with the District's petition regarding these two claims. The statute permitting the District to file this petition requires a good-faith allegation that the strike "is or would be in violation of this section." ORS 243.726(4)(a). "This section" refers to ORS 243.726. The District's allegations do not meet this standard because they fail to identify any portion of ORS 243.726 which the Council allegedly violated.

The District asserts that the Council acted in bad faith. This may be sufficient to allege an unfair labor practice, but it is not sufficient in this petition to declare a strike unlawful. This alone is a sufficient basis for dismissing the District's claims. In the future, this Board will dismiss without hearing any petition to declare a strike unlawful that fails to identify a specific provision of ORS 243.726 that the strike allegedly violates. Because of the importance of the issues presented here, and because we have not previously announced this rule, we will nevertheless proceed to a decision on the merits.

The difficulty with the District's petition becomes clear when we attempt to analyze its claims. We normally begin with the words of the statute to determine the legal requirements; we then determine whether the evidence proves that those requirements were met. Here, however, we are left to guess which provision of the statute the District is relying on.

The District may be relying on ORS 243.726(2)(a) which requires the Council to comply in good faith with the bargaining process spelled out in ORS 243.712.<sup>12</sup> It may also be relying on ORS 243.726(2)(c) which requires the strike notice to state the reasons for the intended strike. Both allegations lack merit.

The District's general contention is that the Council unlawfully pursued permissive items. There is a crucial distinction between (1) simply making a permissive proposal, and (2) insisting on the permissive proposal as a condition of agreement. It is not

---

<sup>12</sup>The procedures in ORS 243.712 begin with 150 days of table bargaining, followed by 15 days of mediation, the submission of final offers, and 30 days of cooling off. Nearly all of the evidence the District relies on to prove these two allegations occurred after the cooling off period ended. Even if we assume for the sake of argument that the Council's conduct amounted to bad faith, it was not bad faith in regards to the procedures specified in ORS 243.712, and thus would not violate ORS 243.726(2)(a).

unlawful to make a permissive proposal. This Board encourages parties to explore every possibility that may resolve their differences. In some instances, that may involve proposals on permissive issues. A problem arises only when a party *insists* on a permissive proposal *as a condition of agreement*. “Whether a party is merely proposing and urging negotiations on permissive subjects or is unlawfully pursuing a permissive subject is an issue of fact.” *Oregon City School District, No. 62 v. Oregon City Education Association*, Case No. C-179-79, 5 PECBR 4246, 4255 (1981). On these facts, we find that the Council did not unlawfully pursue permissive proposals concerning evaluation criteria or preparation time during the student contact day.

The District concedes that the Council’s Final Offers and its strike notice do not mention permissive aspects of either evaluation or preparation time. Neither does the District allege that the Council insisted on those items at the bargaining table. It nevertheless asserts that the Council has unlawfully pursued these issues in bargaining by making them a condition of agreement.

In support of its contention, the District presents a series of newspaper articles and newsletters from the Council to its members. They all make reference in some fashion to preparation time and teacher evaluation. Some include accurate factual statements that the District exercised its self-help option by implementing parts of its Final Offer that rolled back evaluation protections and eliminated preparation time during the student contact day. Some were newspaper articles that did not attribute any statements to the Council. Some generally mentioned evaluation or preparation time without identifying any particular aspects that are considered permissive.<sup>13</sup> Some indicate that evaluation criteria and preparation time during the student contact day are important issues to teachers. Many of the documents contain unreliable evidence. None of these documents says that the Council is conditioning agreement on, or intending to strike over, permissive aspects of evaluation or preparation time. These facts do not indicate that the Council unlawfully conditioned settlement on the District’s agreement to a permissive subject.

We addressed a similar contention in *Eugene School District No 4J, supra*. There, the union took out a newspaper advertisement that listed the reasons the employees were on strike. The list included a permissive proposal. This Board found no violation. We stated:

---

<sup>13</sup>The general subjects of preparation time and evaluation are neither mandatory nor permissive for bargaining. Some aspects of each are mandatory for bargaining and some aspects are permissive. As a result, a statement that preparation time or evaluation are issues in bargaining does not necessarily imply that any permissive aspects are involved.

“We do not lend the same credence to statements made in advertisements or flyers intended for general distribution as we do to sworn testimony. Hyperbole, over-simplification and just plain distortion are more the rule than the exception in such material.

“\* \* \* This kind of ‘puff of wind’ activity is often associated with protracted collective negotiations when the parties attempt to voice their positions and appeals to the general public through the media. \* \* \* *Redmond School District v. Redmond Education Association*, Case No. C-154-77, 3 PECBR 1564, 1573 (1977).” *Eugene School District No. 4J*, 9 PECBR at 9484.

In *Eugene School District No. 4J*, the union put a statement in the newspaper which said it was on strike over a permissive item. If that statement does not constitute a violation, then the statements here, which do not go nearly so far, cannot be a violation.

We also note that on a number of occasions, in both face-to-face discussions and in writing, the District invited the Council to discuss preparation time during the student contact day as well as permissive aspects of evaluation. These discussions occurred in the same general time frame as the articles and newsletters the District relies on. We hold that the District may not invite discussions of a topic and then successfully allege that the Council unlawfully discussed the topic. Any such discussions were not over the District’s objection. We will dismiss the second and third claims in the petition.

4. It was not unlawful for the Council to go on strike while it had a pending unfair labor practice complaint against the District.

The District’s fourth claim is that the strike is unlawful because the Council has a pending unfair labor practice complaint against the District. According to the District, the Council should not be allowed to strike until the complaint is resolved.

The District cites ORS 243.726(5) which states in pertinent part: “An unfair labor practice by a public employer shall not be a defense to a prohibited strike.” On its face, this provision concerns a defense, and it applies only when a strike is otherwise prohibited by law. It does not provide an independent basis for declaring a strike unlawful. ORS 243.726(5) does not provide a statutory basis for the District’s claim.

The legislative history of the PECBA further undermines the District's claim. Until 1989, ORS 243.726(2) contained the following requirement for a lawful strike: "The proceedings for the prevention of any prohibited practice have been exhausted." ORS 243.726(2)(b) (1987). In *Redmond Education Association v. Redmond School District No. 2J*, Case No. C-164-77, 3 PECBR 1611, 1615 (1977), this Board found an unfair labor practice to be a proceeding that must be exhausted before a strike is lawful.

In 1989, the legislature repealed this exhaustion requirement. Oregon Laws 1989, Chapter 1088. The District would have us read the exhaustion requirement back into the statute. We decline. We may not insert words in a statute that the legislature has omitted. ORS 174.010; *Simpson Timber Co. v. Department of Revenue*, 326 Or 370, 374, 953 P2d 366 (1998).

We will dismiss the District's fourth claim.

The District has failed to carry its burden of proving that the Council's strike violates ORS 243.726. We will accordingly dismiss the petition.

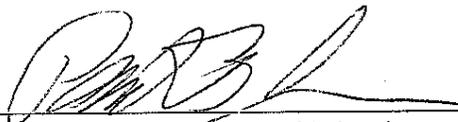
ORDER

The petition is dismissed.

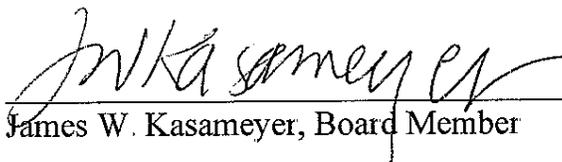
SIGNED and ISSUED this 7<sup>th</sup> day of November 2005.



Donna S. Bennett, Chair



Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

