

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-1-08

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON	)	
CORRECTIONS EMPLOYEES,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT	)	AND ORDER
OF CORRECTIONS,	)	
	)	
Respondent.	)	
_____	)	

On August 27, 2008, the Board heard oral argument on both parties' objections to a Recommended Order issued on July 7, 2008 by Administrative Law Judge (ALJ) Larry L. Witherell following a hearing on March 25 and 26, 2008, in Salem, Oregon. The record closed with the submission of post-hearing briefs on May 9, 2008.

Becky Gallagher, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, P.C., 423 Lincoln Street, Eugene, Oregon 97401, represented Complainant.

Stephen D. Krohn, Assistant Attorney General, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On January 11, 2008, the Association of Oregon Corrections Employees (AOCE or Association) filed this unfair labor practice complaint. On February 25, 2008, AOCE filed an amended complaint. The complaint, as amended, alleges that the Department of Corrections (DOC or Department) violated ORS 243.672(1)(e) by unilaterally changing the December 14, 2007 work schedule for employees Henry

DeHaan and Robert Boudreau. DOC filed a timely answer denying the allegations and asserting several affirmative defenses.

The issue in this case is: Did the Department unilaterally change the December 14, 2007 work schedule of employees DeHaan and Boudreau in violation of ORS 243.672(1)(e)?<sup>1</sup>

### RULINGS

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

### FINDINGS OF FACT

#### Introduction

1. DOC is an agency of the State of Oregon and a public employer within the meaning of ORS 243.650(20).

2. AOCE is a labor organization within the meaning of ORS 243.650(13). AOCE is the exclusive representative for a bargaining unit described in the parties' collective bargaining agreement as "all classified positions (except temporary positions and those positions excludable [*sic*] by ORS 243.650) within the bargaining unit within the [DOC] which are at the Oregon State Penitentiary [OSP], the Mill Creek Correctional Facility, and the South Fork Forest Camp, and the Correctional Officers, Correctional Corporals and Correctional Sergeants at Oregon State Correctional Institution [OSCI]."

3. During the relevant times, the following individuals held supervisory or managerial positions with OSP:

Lou Allen - Assistant Superintendent for General Services

Dave Andrews - Manager

Greg Atkins - Safety Manager

Brian Belleque - Superintendent

Brandon Kelly - Manager

Steve Mitchell - Maintenance and Operations Supervisor, Physical Plant

Don Neal - Maintenance Supervisor

David Versteeg - Physical Plant Manager

Tom Watson - Manager

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<sup>1</sup>The transcript is corrected to read "DeHaan" and not "beyond" at Tr 2:17

4. Mitchell began working at OSP as a corrections officer in 1986. He transferred to the physical plant in 1996 and became a maintenance and operations supervisor in 1998 or 1999. During the relevant time period, Mitchell was responsible for supervising electricians, carpenters, groundskeepers, locksmiths, and a painter. He reported to Versteeg, the physical plant manager. Neal also reported directly to Versteeg and was responsible for supervising boiler operators, general and preventative maintenance employees, HVAC employees, installation employees, and plumbers.

5. AOCE and DOC were parties to a collective bargaining agreement which expired on June 30, 2007, although the parties agreed it would remain in effect until they negotiated a successor agreement. Eventually, the parties negotiated a successor collective bargaining agreement for 2007-2009

6. Among the classified employees, AOCE represents the physical plant staff at OSP, including the following classifications: painter; carpenter; plumber; electrician 1, 2, and 3; facility maintenance specialist; facility energy technician 1, 2, and 3; and physical/electronics security technician.

7. The duties of the painter include, but are not limited to, preparing and applying coating materials such as paint and varnish to metal, wood, glass, plaster, and masonry surfaces of buildings and other structures, equipment, furniture, and woodwork. The duties of the carpenter include, but are not limited to, carpentry work to maintain and repair buildings, structures, fixtures, furniture, and equipment.

8. Henry DeHaan has been a corrections painter at OSP since April 2000. Aside from the exceptions described below, DeHaan has worked a regular shift of 6:45 a.m. to 3:15 p.m. since he began working at OSP.

9. Robert Boudreau has been a corrections carpenter at OSP since February 2002. Aside from the exceptions described below, Boudreau has worked a regular shift of 6:45 a.m. to 3:15 p.m. since he began working at OSP.

#### December 14, 2007 Shift Change

10. Some time prior to November 2007, Boudreau built new cabinets for the control center, a highly controlled and secured area at OSP. OSP needed to arrange a time to install the cabinets that would not compromise security. The security authorities at OSP decided it would not be safe to install the new control center cabinets during the day shift. As a result, Boudreau would need to work outside his normal workday to remove the old cabinets and install the new ones.

11. In late November 2007, supervisor Mitchell told Boudreau and DeHaan that they would work overtime to install the control center cabinets. This meant that Boudreau and DeHaan would work their regular 6:45 a.m. to 3:15 p.m. shift and return later in the evening to remove the old cabinets and install the new ones.

12. In late November 2007, assistant superintendent Lou Allen told Mitchell that for budget reasons, OSP could not pay overtime to install the new control center cabinets. Supervisor Mitchell then told Boudreau and DeHaan that they would not do the control center project on an overtime basis but that OSP would change their work schedule for the cabinet installation. Mitchell also explained they would do the project on December 14.

13. On November 27, 2007, Mitchell sent Boudreau and DeHaan an e-mail on the subject of "Control Center Remodel" which stated:

"Based on the operational and budgetary needs on the institution. [*sic*] In accordance with the Collective Bargain Agreement, Article 28 WORKING CONDITIONS, Section 3 working schedule . . . the employer will provide seven (7) days notice of a change in working schedules.

"On December 14, 2007, your work schedule will be changed from your normally [*sic*] work schedule of 6:45 am - 3:15 pm to 3:30 pm until 12:00 pm. This change is to complete the installation of the new cabinets and the spot painting in the control center.

"Please feel free to contact me if you have any questions "  
(Underlining in original.)

DeHaan and Boudreau were unhappy about the change in work hours and the loss of overtime. They questioned Mitchell about whether OSP had the right to make the change, and they specifically discussed the contract language and their differing interpretations.

15. Boudreau and DeHaan did not consent to the schedule change but nevertheless reported to work as assigned on December 14, 2007. They worked from 3:30 p.m. to 12:00 midnight and were not paid an overtime rate.

## Demand to Bargain

16. Bryan Goodman was the Association president from January 2006 to January 2008. In late November 2007, an employee from the OSP physical plant told him about the schedule change for Boudreau and DeHaan (as set out in Versteeg's memorandum). In late November 2007, Goodman sent a letter to David Versteeg demanding to bargain the "change in working conditions." Versteeg forwarded a copy to Superintendent Belleque, who received it on November 29, 2007. Goodman's letter stated:

"Pursuant to ORS 243 672(1)(e) and DOC's obligation to bargain in good faith and provide information, please consider this the Association of Oregon Corrections Employees' (AOCE) written demand-to-bargain. Recently, Mr. Mitchell stated to an employee that he will be changing his start and stop times from day shift to swing shift. This is not standard practice and if work is needed after hours, by practice, you hire overtime. Any changes involving hours of work and wages, are both mandatory subjects of bargaining, and is therefore an unlawful unilateral change."

17. On about November 30, 2007, Jan Weeks at the Department of Administrative Services (DAS) confirmed receipt of the demand to bargain. However, DOC did not agree to bargain.

## Other Schedule Changes

18. Schedule changes for the physical plant employees are uncommon.

19. In 1996, DOC changed the work schedule for Mitchell, who was then a bargaining unit employee in the physical plant. DOC assigned him to a "swing shift" for five to eight days in order to accommodate outside contractors who needed to re-install wiring at OSP. He was not paid overtime.

20. As a supervisor, Mitchell has changed the schedules for physical plant employees to accommodate training sessions. For a week in April 2003, he adjusted the physical plant employees' schedules by 15 minutes (changing the shift to 7:00 a.m. to 3:30 p.m.) so they could attend asbestos training.

21. In the spring of 2005, OSP needed to complete a culinary project involving carpentry work in the dining and kitchen areas of OSP. As a result of the high use of the kitchen and dining areas, the project had to be done during evening hours. OSP temporarily altered the work schedules of four physical plant employees, including Boudreau and Dehaan.

Boudreau did not object to his assignment on the culinary project. Mitchell denies that he needed Boudreau's or DeHaan's permission to change their schedules for the culinary project but that he was merely discussing the project with them "trying to get consensus" on when and how to undertake the culinary project.

Boudreau, DeHaan, and two other physical plant employees completed the culinary project in the spring of 2005. During the project, Boudreau and DeHaan worked the evening shift instead of their regular day shift, so they did not receive overtime pay for the evening work. However, two other physical plant employees did not change their shifts but instead worked additional hours in the evening. They were paid an overtime rate for their work on the culinary project. There is no evidence in the record to explain the different treatment of these employees.

22. In December 2006, the physical plant needed to complete work in the master control area (which is different from the control center). On December 1, 2006, Versteeg issued a memorandum to Boudreau regarding a "schedule change," which stated:

"Please note that in order to complete the Control Center project, your schedule will fluctuate between day and night shift. This fluctuation is scheduled for the week of December 11<sup>th</sup> thru 15<sup>th</sup>. On Monday, December 11<sup>th</sup> through Wednesday, December 15<sup>th</sup> your schedule will remain 6:45am-3:45pm. On Thursday, December 14<sup>th</sup> and Friday, December 15<sup>th</sup>, your schedule will change to 4:00pm-12:00am."

23. Boudreau's daughter was scheduled to visit him in December 2006. As a result, Boudreau asked his supervisor whether the work could be scheduled at another time. In response to Boudreau's request, OSP made other accommodations for the project.

Collective Bargaining Agreement Provisions

24. Article 3 of the parties' collective bargaining agreement, "Management Rights," states:

"The Association agrees that the Employer retains all inherent rights of management and hereby recognizes the sole and exclusive right of the State of Oregon, as the Employer, to operate and manage its affairs in accordance with its responsibilities to maintain efficient governmental operations. The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. The retention of these rights does not preclude any employee from filing a grievance, pursuant to Article 44, Grievance and Arbitration Procedure, or seeking a review of the exercise of these rights, when it is alleged such exercise violates provisions of this agreement."

25. Article 12 of the collective bargaining agreement provides for "Overtime."

Article 12, section 2(A) states in part:

"Overtime for employees working a regular work week is time worked in excess of eight (8) hours per day or forty (40) hours per week \* \* \*"

Article 12, section 2(B) states:

"Except for shift changes requested by the employee, weeks in which training occurs, or for trial service employees, if a shift change requires that an employee work more than five

(5) consecutive days, he/she will be compensated at the rate of time and one-half (1-1/2) for all hours worked in excess of forty (40) hours within his/her prior workweek.”

Article 12, section 3 states:

“Overtime shall be paid at the rate of time and one-half (1-1/2). The form of compensation of overtime shall be pay or compensatory time off, at the option of the Employer.”

26. Article 28 of the collective bargaining agreement provides for “Working Conditions.”

Article 28, section 1, “Work Week,” states:

“The workweek shall begin at 12:01 a.m. Sunday and end at 12:00 midnight the following Saturday. All permanent full-time employees in the unit shall be scheduled for five (5) shifts of eight (8) hours with two (2) consecutive days off within each workweek or four (4) shifts of ten (10) hours with three (3) consecutive days off within each workweek, or a twelve (12)-hour workday with a schedule in which the employee works three (3) twelve (12)-hour days followed by four (4) days off, three (3) twelve (12)-hour days followed by four (4) days off and then four (4) twelve (12)-hour days followed by three (3) days off. For the twelve (12)-hour schedule, the Employer adopts a twenty-one (21)-day 7-K FLSA exemption starting the first day the twelve (12)-hour shift begins. Saturday and Sunday will be considered as consecutive days off within the workweek.

“If a variance from this paragraph is required in order to accomplish the mission of the Institution, the Employer shall notify the Association of the reasons for the change prior to its effective date, and the Association shall be afforded an opportunity to comment and offer alternative suggestions. If the Association feels the change is unreasonable, the matter may be processed as a grievance.”

Article 28, section 3, "Work Schedule" provides:

"Schedules showing each employee's shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, the Employer will provide seven (7) days notice of changes in work schedules."

Article 28, section 7, "Shift and Time Off Bidding" provides:

"A. Regular status employees in the Correctional Officer series may bid for shifts and days off on a schedule posted by the Employer at their institution on the basis of their classification seniority \* \* \*"

"B. Shift and time off schedule bidding shall apply to all bargaining unit work sections, except Education Services.

"\* \* \* \* \*

"H. Employees will bid for a six (6) to twelve (12) month cycle to commence on or about August and February of each year. The Employer shall post notice of proposed six (6) to twelve (12) month rotation of shift and time off schedules and a seniority roster at the work unit thirty (30) days in advance of the bid "

27. The position descriptions for correctional officer, correctional corporal, and correctional sergeant include the following provision: "Rotating shifts/positions of a seven-day, 24-hour operations including holidays and mandatory overtime." Under the collective bargaining agreement, corrections officers (officer, corporal, and sergeant classifications) bid twice a year for specific work, job locations, and shift schedules based on their seniority.

One of the schedules available for bid is a variable relief schedule which allows DOC to routinely to change the employee's work schedule.<sup>2</sup> With seven days

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<sup>2</sup>DOC uses variable relief schedules at OSP, OSCI, and the South Fork Forest Camp, but not at Mill Creek Correctional Facility.

advance notice, DOC can change the start and stop times and the days off of employees on the variable relief schedule. This gives DOC some flexibility to meet various staffing needs. In return, variable relief employees receive five percent premium pay.

All physical plant employees, including Boudreau and DeHaan, work the day shift, Monday through Friday. Because they all work the same shift, the schedule bidding process has not applied to the physical plant employees.

28. DOC had difficulty covering some shifts with nurses and approached AOCE about negotiating a separate understanding. In March 2006, DAS, on behalf of DOC, negotiated and executed a letter of agreement with AOCE that provided a schedule for the nurses as follows:

“The OSP Nurse Schedule shall become an eight (8) hour shift with the exception of two (2) night shifts of ten (10) hours.

“In addition two (2) positions shall be assigned as variable relief positions to absorb overtime concerns. The relief positions shall receive 5% pay differential.

“To allow for the change of shifts, the bid for these positions shall be delayed. For this reason AOCE shall waive the posting requirements in the Collective Bargaining Agreement, but the bid shall be posted as soon as possible.”

29. The American Federation of State, County, and Municipal Employees (AFSCME) represented OSP classified employees from the mid 1970s until the late 1990s, when the Association replaced AFSCME as the bargaining representative.<sup>3</sup> SEIU represented employees at OSCI until the 1993-1995 period, when the Association replaced SEIU. As a result, by the late 1990s, the Association was the exclusive bargaining representative for all of the employees identified in Finding of Fact 2.

30. The last collective bargaining agreement between AFSCME and DOC covered 1994 to 1999. Article 25, section 8 of that agreement provided: “[s]chedules showing each security employee’s shift, work days, and hours shall be

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<sup>3</sup>AFSCME continues to represent some DOC employees who are not in the AOCE bargaining unit.

posted in the appropriate department at all times. Except for emergency situations or as mutually agreed, the Agency will provide seven (7) days' notice of changes in work schedule." The seven-day notice requirement was first included in the 1975-1978 collective bargaining agreement between AFSCME and DOC.

31. The agreements between DOC and AOCE in 1993-1995, 1995-1997, 1997-1999, and 1999-2001 all included language in Article 28, Section 3 that stated: "[s]chedules showing each employee's shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations or as mutually agreed, the Employer will provide seven (7) days notice of changes in work schedules."

32. In the 1999 negotiations, both DOC and AOCE proposed changes to Article 28, Section 3.

DOC proposed to change Article 28, Section 3, to read: "[s]chedules showing each employee's shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, **critical production time frame**, external contract work, fire crew response or as mutually agreed, the Employer will provide seven (7) days notice of changes in work schedules." (Boldface and underscoring in original to indicate proposed new language.)

AOCE first proposed to change Article 28, Section 3, to read: "[s]chedules showing each employee's shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, the Employer will not change schedules after employees have bid for them. If an employee doesn't bid, but is a floater, the Employer will provide fourteen (14) days notice of a change in work schedule." (Underscoring in original to indicate proposed new language.)

AOCE proposed a second change to Article 28, Section 3, to read: "[s]chedules showing each employee's shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, the Employer will not change schedules after employees have bid for them." (Underscoring in original to indicate proposed new language.)

The parties did not agree to change Article 28, Section 3, and instead retained the language from their prior agreements.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. DOC did not violate ORS 243.672(1)(e) when it changed the work schedules of employees DeHaan and Boudreau for December 14, 2007.

## DISCUSSION

Robert Boudreau is an OSP carpenter and Henry DeHaan is an OSP painter. Like all physical plant employees, Boudreau and DeHaan work the day shift, 6:45 a.m. to 3:15 p.m., Monday through Friday. DOC assigned Boudreau to build new cabinets for the OSP control center, a highly controlled and secured area within the facility. For security reasons, removing the old cabinets and installing the new ones needed to occur in the evening. DOC gave Boudreau and DeHaan more than two weeks advance notice that they were assigned to conduct the operation on the evening of December 14, 2007. It directed Boudreau and DeHaan to work 3:30 p.m. until midnight that day rather than their regular work hours. AOCE asserts that DOC violated ORS 243.672(1)(e) when it unilaterally changed Boudreau's and DeHaan's December 14 work schedules (start-stop times) without first bargaining with AOCE.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to refuse to bargain collectively in good faith with the employees' exclusive bargaining representative. The obligation to bargain in good faith requires an employer to negotiate to completion with the labor organization before it changes an existing employment condition (the *status quo*) regarding a mandatory subject of bargaining. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007); and *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89, *supplemental order*, 19 PECBR 317 (2001).

In *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360-67 (2008), we reviewed the analytical framework we apply to unilateral change cases. We explained:

“In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it

does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies).” *Id.* at 360.

One defense to a unilateral change allegation is that the parties’ contract permits the employer to act as it did. When an employer raises such a defense, we must interpret the contract language to decide whether the contract does, in fact, authorize the employer’s action. *Lebanon Education Association*, 22 PECBR at 366. If it does, the employer’s change is not unlawful under subsection (1)(e). DOC has raised this defense, and we find it dispositive. For the reasons described below, we conclude that the parties’ contract permits DOC to assign Boudreau and DeHaan to a different schedule for one day for security reasons, so long as it gives them at least seven days advance notice.

At its core, DOC’s defense poses a question of contract interpretation. In *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005), we described the analytical template we use to interpret a collective bargaining agreement:

“We interpret labor agreements in the same manner and using the same rules of construction as do courts. *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991); *Marion Cty. Law Enforcement Assn. v. Marion Cty.*, 130 Or App 569, 575, 883 P2d 222 (1994). We first examine the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we proceed to the second step which is to examine extrinsic evidence of the contracting parties’ intent. Finally, if the provision remains ambiguous after applying the second step, we resort to the use of appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997).”

We follow that method here and begin by examining the pertinent contract language. Article 28, section 3 provides:

“Schedules showing each employee’s shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, *the Employer will provide seven (7) days notice of changes in work schedules.*” (Emphasis added )<sup>4</sup>

As applied to the facts here, the contract language is clear and unambiguous. It permits DOC to temporarily change an employee’s work schedule if it gives seven days advance notice of the change.<sup>5</sup> That is what occurred here. DOC needed to install new cabinets in a highly controlled and secure area and could do it only at night for security reasons. It notified Boudreau and DeHaan more than two weeks in advance that they would need to work later hours for one day to complete the installation. DOC acted within the contract in making the one-day reassignment of hours.

Article 12, section 2(B) supports this interpretation of the contract. It provides that “[e]xcept for shift changes requested by the employee, \* \* \* if a shift change requires that an employee work more than five (5) consecutive days, he/she will be compensated at the rate of time and one-half (1-1/2) for all hours worked in excess of forty (40) hours within his/her prior workweek.” This provision makes sense only if the contract permits DOC in some circumstances to change an employee’s shift even

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<sup>4</sup>Article 28, section 7 of the agreement provides that all bargaining unit members (except those in Education Services) are entitled to bid on their shift and time off. As a practical matter, however, employees in the physical plant, including Boudreau and DeHaan, do not bid because they have no choice of shifts or days off—they are all assigned to the day shift with weekends off

<sup>5</sup>A contract is ambiguous if it can reasonably be given more than one plausible interpretation. *Portland Fire Fighters’ Association, Local 43 v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). AOCE has not offered another plausible interpretation of Article 28, section 3. It argues that the provision applies only to employees on a variable relief schedule, but not to other bargaining unit members such as Boudreau and DeHaan. Nothing in the contract language, its context, bargaining history, or past practice supports such an interpretation. The Association’s interpretation is not plausible.

though the employee did not request the change.<sup>6</sup> Reading this provision together with Article 28, section 3, we conclude that the contract permits DOC to make temporary and short-term schedule changes, like the one-day change in hours for Boudreau and DeHaan on December 14, if it gives at least seven days advance notice.

Even if we found the contract ambiguous, the result would be the same. When contract language is ambiguous, we must then examine “extrinsic evidence of the contracting parties’ intent.” *Yogman*, 325 Or at 363. The parties’ bargaining history provides such evidence. In the 1999 negotiations, AOCE proposed to change Article 28, section 3 by removing the language that allows DOC to change an employee’s schedule with seven days advance notice and replacing it with language that would prohibit involuntary schedule changes except in narrow circumstances that do not apply here. The parties did not agree to this change. We will not interpret the contract to provide the protection AOCE failed to obtain in negotiations.

The manner in which the parties conducted themselves under the contract provides further extrinsic evidence of their intent. *Tarlow v. Arnston*, 264 Or 294, 300, 505 P2d 338 (1973). Here, minor changes to established work schedules were infrequent, but when they occurred, the parties did not bargain over the changes. This is further evidence that the parties intended the contract to allow occasional temporary schedule changes upon proper notice.

AOCE argues that our decision here is controlled by *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890 (2005). Although that case involved some of the same contract language between these same parties, the Association ignores the fact that the case involved a different issue, and it fails to acknowledge that the Court of Appeals remanded the case to us for further consideration. 209 Or App 761, 149 P3d 319 (2006).

In *Association of Oregon Corrections Employees*, DOC decided to *permanently* change the start-stop times and days off for a large number of security personnel. 20 PECBR at 895. The union alleged an unlawful change in the *status quo*, and DOC asserted as a defense that the parties’ contract allowed the change. We rejected this defense on grounds that the contract language was ambiguous and therefore did not constitute a “clear and unmistakable waiver” of the union’s right to bargain. The Court

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<sup>6</sup>The Association argues that DOC could change Boudreau’s and DeHaan’s schedules if it paid them overtime. The change did not cause them to work more than five consecutive days. Under Article 12, section 2(B), they were not entitled to overtime because of the schedule change.

of Appeals reversed on this issue. It held that in these circumstances, we erroneously applied the “clear and unmistakable waiver” standard.<sup>7</sup> It remanded the case to us with instructions to interpret the contract and decide whether the contract did, in fact, permit DOC to make the change. 209 Or App at 770.<sup>8</sup>

The Association relies in particular on our earlier holding in *AOCE* that the parties’ contract language is ambiguous. That holding applied to circumstances quite different from those currently before us. Contract language can be ambiguous when applied to a specific set of circumstances and issues, but unambiguous when applied to a different set of facts and issues. The prior case involved a permanent, across-the-board change in start-stop times and days off for a large number of personnel. Here, the change was for a single day and involved two employees. For the reasons described above, we conclude that the contract unambiguously permits the type of temporary change at issue here.

Because the collective bargaining agreement permitted DOC’s temporary schedule changes for Boudreau and DeHaan, those changes did not violate ORS 243.672(1)(e). Accordingly, we will dismiss the complaint.

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<sup>7</sup>We continue to apply the “clear and unmistakable” standard when an employer alleges that the union waived its right to bargain. *Lebanon Education Association*, 22 PECBR at 366. But when, as here, the employer asserts that the contract permits its action, we follow the Court of Appeals decision in *AOCE* and interpret the contract to determine if the employer is correct.

<sup>8</sup>Remand proceedings are pending. We allowed the parties to reopen the record to present further evidence to address the new standard established by the court.

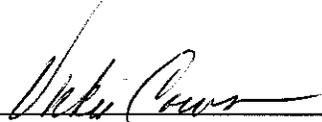
ORDER

The complaint is dismissed.

Dated this 18<sup>TH</sup> day of November 2008.



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Paul B. Gamson, Chair



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Vickie Cowan, Board Member



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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.