

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-006/016-10

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)

Complainant,)

v.)

STATE OF OREGON,)

DEPARTMENT OF CORRECTIONS,)

Respondent,)

Case No. UP-006-10;)

STATE OF OREGON, DEPARTMENT)

OF ADMINISTRATIVE SERVICES)

AND DEPARTMENT OF)

CORRECTIONS,)

Complainant,)

v.)

OREGON AFSCME COUNCIL 75,)

Respondent,)

Case No. UP-016-10.)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

On April 25, 2012, this Board heard oral arguments on Respondent's objections to a Recommended Order issued in UP-016-10 on February 9, 2012, and Complainant's

objections to a Recommended Order issued in UP-006-10 on January 26, 2012. Both Recommended Orders were issued by Administrative Law Judge (ALJ) Peter Rader.¹

John S. Bishop, Attorney at Law, McKanna Bishop Joffe & Arms, LLP, Portland, Oregon, represented Oregon AFSCME Council 75 (Union) at hearing. Jason Weyand, Attorney at Law, Salem, Oregon, represented the Union at oral argument.

Kathryn A. Logan, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Oregon Department of Corrections (Department) at hearing. Tessa Sugahara, Attorney in Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Department at oral argument.

On March 4, 2010, Oregon AFSCME Council 75 (Union) filed this unfair labor practice complaint against the State of Oregon, Department of Corrections (Department), alleging that the Department violated ORS 243.672(1)(e), (b), and (g) during negotiations for a successor collective bargaining agreement.

On March 30, 2010, the State of Oregon through its Department of Administrative Services, on behalf of the Department filed this unfair labor practice complaint against the Union alleging that the Union violated ORS 243.672(2)(b) during negotiations for a successor collective bargaining agreement in 2009. On May 5, 2010, the Department filed an amended complaint to allege that the Union also violated ORS 243.672(2)(b) due to a bargaining team member's actions during the contract ratification process. A second amended complaint was filed on January 24, 2011, to add factual allegations to support these claims. The Union timely answered.

The issues are:

UP-006-10

1. Did the Department engage in direct dealing and/or bad faith negotiations, in violation of ORS 243.672(1)(e) or (b), when Deputy Director Morrow conducted a meeting with selected, non-bargaining team members on September 9, 2009, during negotiations for a successor agreement?

¹By agreement of the parties, the two cases were heard concurrently by ALJ Rader on February 1 and 2, 2011, in Salem, Oregon. The records in both cases closed on March 7, 2011, following receipt of the parties' post-hearing briefs. Also by agreement of the parties, ALJ Rader issued two separate Recommended Orders.

After oral argument, this Board determined it was appropriate to combine the two cases for issuance of a Final Order.

2. Did the Department violate the terms of the parties' ground rules, in violation of ORS 243.672(1)(e) or (g), by opening Article 31 (Holidays) after the deadline for doing so had passed and by continuing its breach by submitting its proposal under Article 31 as part of its final offer?

UP-016-10

1. Did Oregon AFSCME Council 75 include a new proposal in its Last Best Offer that had not been discussed during bargaining or mediation in violation of ORS 243.672(2)(b)?

2. Between October 1 and 26, 2009, did Oregon AFSCME Council 75 engage in bad faith bargaining when its bargaining team members failed to support ratification of the tentative agreement and/or urged bargaining unit members to vote against ratification, in violation of ORS 243.672(2)(b)?

RULINGS

1. The rulings of the ALJ were reviewed and are correct.
2. After oral argument, this Board combined these cases for issuance of a Final Order.

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a bargaining unit of approximately 1,800 to 1,850, strike-prohibited correctional officers, corporals, and sergeants, plus a unit of transport employees, who work for the Department at eleven correctional facilities around the State.²

2. The Department of Administrative Services (DAS) is the statutory entity that bargains collectively on behalf of the Department of Corrections, a public employer.

²Those facilities include: the Snake River Correctional Institution (SRCI), Eastern Oregon Correctional Institution (EOCI), Oregon State Penitentiary (OSP), Shutter Creek Correctional Institution (SCCI), Columbia River Correctional Institution (CRCI), Powder River Correctional Facility (PRCF), Coffee Creek Correctional Facility (CCCF), Santiam Correctional Institution (SCI), Warner Creek Correctional Facility (WCCF), Deer Ridge Correctional Institution (DRCI), Two Rivers Correctional Institution (TRCI), and DOC Transport.

3. The parties were signatories to a collective bargaining agreement (Agreement) in effect from 2007 to 2009. In December 2008, the parties entered negotiations for a successor contract.

4. Tim Woolery is a staff representative for the Union and, as the spokesperson and designated representative for its bargaining team, was authorized to sign off on any tentative agreements. Members of the Union's bargaining team were chosen from each of the twelve units and included Amanda Rasmussen from Coffee Creek Correctional Facility (CCCF), Scott Campbell from Columbia River Correctional Institution³ (CRCI), Roger Ware, and Andre Dunn.

5. Craig Cowan is a Labor Relations Manager for DAS and, as the chief spokesperson and designated representative for the Department's bargaining team, was authorized to sign off on any tentative agreements.

6. During the negotiations for the successor contract, the Department's Deputy Director was Mitch Morrow, who reported directly to Department Director Max Williams. Morrow was not a member of the Department's bargaining team.

The Parties' Agreement

7. The parties' Agreement contained approximately 55 Articles and 17 Letters of Agreement (LOA).

8. Article 2, Section 2 of the parties' Agreement provided that the Union's bargaining team for successor negotiations "shall consist of one (1) member from each local covered by the terms of this Agreement." That person was often, but not always, the local's president. Section 2 also stated that the Union will notify the Department of its selected bargaining team by December 15, 2008.

Article 31 addressed holidays and allowed Corrections personnel who work on designated holidays, such as Christmas and Thanksgiving, to earn eight hours of regular pay plus holiday pay at time and one-half, resulting in compensation equaling double-time-and-one-half. This is referred to as holiday premium pay.

The Parties' Bargaining: Pre-Mediation

9. On December 16, 2008, the parties met for their first bargaining session and agreed to ground rules for the negotiations.

³Campbell transferred to the Snake River Correctional Facility during negotiations for the successor contract, but remained the bargaining team member for the CRC.

10. The ground rules set the fourth bargaining session as the deadline for opening articles for bargaining and states that proposals, offers, or counteroffers raised after that date can only be considered by mutual agreement of the parties or to conform to other articles. Paragraph 3 of the ground rules states:

“Except for Article 25 (Working Conditions) issues addressed in section 6 of this agreement, the fourth (4th) bargaining session shall be established as the last day on which any new subjects may be presented for bargaining. The December 16th [2008] bargaining session shall count as the first (1st) bargaining session. For purposes of the cutoff date, the parties agree that two (2) consecutive days of bargaining shall be defined as one (1) bargaining session. Articles of the agreement and Letters of Agreement not opened are considered closed and will be included without change into the successor agreement unless modified by mutual agreement or to conform to changes in other articles.”

Paragraph 5 of the ground rules provides that in the absence of a bargaining team member, an alternate may attend a bargaining session “so long as they obtain prior approval from their immediate supervisor and they use accrued vacation or compensatory time off to account for the time away from work.” Travel and lodging expenses to attend bargaining meetings are not ordinarily reimbursed by the Department, although it pays the Union’s team members their regular rate of pay to attend.

Paragraph 6 requires the presence of “[e]ach side’s chief spokesperson or designee at all bargaining sessions.”

11. The parties subsequently bargained on January 13 and 14, February 10 and 11, and March 9 and 10, 2009.⁴ Of the twenty-two contract articles opened by the fourth bargaining session deadline, Article 31, addressing holidays, was not one of them.

12. At the March 9 session, the Department made various proposals to address a deepening budget shortfall, including the imposition of unpaid furloughs for Corrections staff. Among the proposals was an LOA that designated 24 days, including at least 11 holidays as defined by Article 31, as unpaid furloughs. Alternatively, it proposed that employees could accept a pay reduction equivalent to the unpaid furlough obligation. The Union rejected the proposal citing the difficulty in implementing it given the 24 hours a day, 7 days a week schedules of the facilities and the increased overtime costs.

⁴Unless indicated otherwise, all remaining dates occurred in 2009.

The Parties' Bargaining: Mediation

13. Subsequent bargaining proved unsuccessful and the parties entered mediation with the State Conciliator on August 18 and 19.

14. At the August 19 mediation session, the Department submitted a package proposal to address outstanding issues, including two options regarding unpaid furloughs, a mandatory subject of bargaining. Option One would allow the Department to identify the number of variable relief assignments at each facility necessary to deploy staff; the Department would schedule the employees' furlough time (between September 2009 and June 2011) in conjunction with the employee's days off; the Agency would assign the employee's furlough; and employees would be notified through a Job Change Notice. Option Two would allow the Department to "operate institutions on a modified schedule with minimum staffing allowing staff to be furloughed on selected days without relief." During weeks with furlough day(s), an employee would not work more than 32 hours unless required by management to meet staffing needs.

15. Starting on September 3, Deputy Director Morrow initiated visits to Union leaders at some of the locals, including Owen Davis at the Eastern Oregon Correctional Institution and the local presidents at Three Rivers and Eastern Oregon Correctional Institutions. The next day, Morrow and Assistant Director of Operations, Michael Gower, met with bargaining team member Rasmussen at Coffee Creek Correctional Facility. Morrow informed them that he was not negotiating, but suggested six alternatives for addressing the furlough issue. He also informed them, incorrectly, that the Oregon State Police Officers Association (OSPOA) had agreed to a pay cut to meet the furlough obligation.

16. On September 8, Gower contacted Union bargaining team member Dunn at Powder River Correctional Facility, and asked him to come to the Department's headquarters in Salem on September 9 for a meeting with Morrow. Although Gower did not tell Dunn what the meeting was about, he told him that he would be paid for attending. Dunn lives in Baker City and left at 4:30 a.m. to attend and did not return until 11:00 p.m. that night. He was paid straight time for his regular shift and overtime for the remainder of his travel time to and from Salem.

17. Gower also contacted Charles Anderson at Shutter Creek and Jim Buhlinger at the Deer Ridge Correctional Institutions and asked them to attend the September 9 meeting. Anderson and Buhlinger were presidents of their respective locals, but were not members of the Union's bargaining team. Anderson was permitted to drive a State vehicle from Coos Bay to attend the meeting.

18. Gower did not invite bargaining team member Rasmussen but she learned about the meeting while in Salem on September 9 and arranged to attend. Two other members of the bargaining team, from Columbia River Correctional Institution and Warner Creek Correctional Facility, were not invited. Woolery, the Union's designated representative and spokesperson, was also not invited and not informed about the meeting.

19. Morrow ultimately met with six presidents of various locals on September 9, four of whom were on the Union's bargaining team. Morrow made arrangements for all of the attendees to be paid, including those not on the Union's bargaining team.

20. Morrow began the meeting by stating that he was not negotiating with them but that furloughs were inevitable and he wished to share additional options. He reiterated the six options raised a week earlier, which included a pay reduction with no furloughs; cutting holiday pay on furlough days; locking down facilities and reducing staffing during furloughs; pulling non-essential staff from posts and using relief staff for furloughs; bringing in retirees and temporary hires to create a relief pool for furloughs; and layoffs. He explained that a reduction in holiday pay would occur if a furlough day fell on a designated holiday.⁵ He also suggested that if employees agreed to a suspension of holiday premium pay, in lieu of unpaid time off, the Department would consider certain, non-financial language incentives, referred to as sweeteners, such as post-bidding procedures (bidding on specific job posts, rather than schedules or shifts) or vacation buybacks. He encouraged the attendees to consider these or other options and pursue them in bargaining.

21. Morrow also repeated his earlier misstatement that the Oregon State Police had settled their contract and accepted the option of a pay reduction with no furloughs. He added that he did not want them to discuss the meeting with membership or with Woolery, but that furloughs would be imposed unless an agreement was reached through bargaining.

22. The bargaining unit members who attended the meeting with Morrow decided to meet with Woolery and other bargaining team members prior to the start of a mediation session scheduled for September 15. By that time, Woolery was aware that Morrow had met with unit members without him being present, but Morrow would not disclose to him what he discussed. The Department agreed to pay wages, travel, and lodging expenses for both bargaining and non-bargaining team members to attend the

⁵Although Morrow could not recall specifics of that meeting, Rasmussen, Dunn, and Ware provided consistent and credible testimony that he made these representations and we credit their testimony.

meeting with Woolery prior to the start of the next mediation session. Surprised by this apparent change in reimbursement protocol, the Union's bookkeeper requested confirmation that billing the Department for both bargaining and non-bargaining team members' expenses was approved.

23. On September 14, Woolery met with Union leaders and its bargaining team to discuss furloughs, as well as contract enhancements, but they were not able to agree on a uniform proposal.

24. The parties participated in a second mediation session on September 15 and 16 in Salem.

On September 15, Morrow and Gower briefly appeared to correct Morrow's earlier misstatement about the State Police contract and to again discuss the furlough issue. Morrow reiterated the option of foregoing holiday premium pay in lieu of unpaid furloughs and suggested that non-economic sweeteners remained a possibility. Around 4:30 p.m. that day, the Union presented a suppositional package proposal that contained numerous suggestions, including an LOA titled "Furlough Unpaid Time Off Alternative-Corrections Paid Holiday," which was responsive to the discussions held with Morrow. It proposed foregoing eight hours of holiday pay on 14 upcoming holidays. Unit members who worked on one of those 14 holidays would be paid time-and-one-half, but not the extra eight hours of holiday premium pay, to satisfy the furlough requirement.

25. On September 16, the Department responded with a hard package proposal that covered a number of economic issues, including an LOA titled "Suspension of Holiday Pay" that designated 14 holidays in 2009, 2010, and 2011 for which unit members would earn time-and-one-half, in lieu of holiday premium pay. The Department's proposal included conditions and details not covered by the Union's suppositional proposal, and did not include the sweeteners Woolery and Union leaders were led to believe would be offered. The negotiations quickly deteriorated and the Department declined to pay for non-bargaining team members to attend another day.

26. The parties met again on September 23, at which time Woolery gave Cowan a letter stating that the Union objected to the package proposal offered by the Department on September 16 because Article 31 (Holidays) had not been opened by the fourth bargaining session as required by the parties' ground rules. Later that day, the Department submitted a "suppositional" proposal that included assignment or post bidding on a periodic basis but subject to qualifications, training requirements, and operational needs at most of the facilities.

27. On September 24, the Department submitted numerous proposed LOAs, including one titled "Temporary Suspension of Corrections Paid Holiday" that listed 14 regular holidays as defined in Article 31 that members would now take without their usual holiday premium pay. Section 5 of that proposed LOA states:

"5. Employees working on a designated holiday in Section 3 shall be paid time and one-half (1 ½ X) for all hours worked but shall not receive the eight (8) hours of Corrections paid holiday. This will substitute for their obligating mandatory unpaid furlough time off."

28. Notwithstanding the Union's objections, the parties reached a tentative agreement that included the Department's proposed LOA providing for the suspension of holiday pay on designated holidays. The Union's bargaining team sent the tentative agreement to bargaining unit members with a recommendation to ratify it.

The Parties' Bargaining: Rejection of the Tentative Agreement

29. Union bargaining team member Scott Campbell, who represented the Columbia River Correctional Institution, did not approve of the tentative agreement reached on September 24.

30. On September 28, Campbell sent an e-mail to bargaining unit member Sergeant Mike Asboe stating that he did not support the tentative agreement. That same day, Campbell sent an e-mail to bargaining unit member Ethel Jackson in which Campbell stated that he had informed another bargaining unit member, Corrections Corporal Day, to vote no and to "spread the word."

31. In an October 6 e-mail exchange, Campbell told Corrections Officer Gary Hill, who works at Snake River Correctional Institution, that he was not in favor of voting for the tentative agreement.

32. On October 12, Campbell informed Corrections Officer and bargaining unit member Mark Curry via e-mail "[i]t is up to the membership now to vote down the contract." On the same day, Campbell posted a memo on the CRCI's public intranet folder which provided seven reasons to reject the tentative agreement. The intranet posting, which later included a supplemental table of information titled "Vote NO on the Contract," was accessible by other bargaining unit members. As a member of the CRCI Executive Board, Campbell's memo stated that the Board recommended a "no" vote. He sent the memo via e-mail to other bargaining unit members, including Corrections Officers Kevin Beckley and Mark Curry, as well as local institution presidents. One of the recipients, Corporal Michael Treadaway at Coffee Creek Correctional Facility, disseminated Campbell's e-mail for other bargaining unit members

at that facility to read. Bargaining team member Rasmussen, who also works at Coffee Creek Correctional Facility, believed that bargaining team members should remain neutral on the ratification vote.

33. On October 13, Woolery cautioned Campbell via e-mail of the risk in disseminating the information in his memo. Woolery wrote:

“I certainly and obviously do not care how members vote it is their contract but I do care about the unified message from the bargaining team to extend to possible inferences that can easily be made and I would like to avoid any possibility of a ULP. I respectfully request and offer a reminder that you and any member of the bargaining team should not and can not provide any assistance; messaging or facilitation of messaging that is counter to the recommendation for ratification that the majority of the bargaining team chose to do in accepting the TA settlement.” (Emphasis in original.)

34. Campbell responded that he opposed the tentative agreement and that “CRCI has their own voice and I will continue to assist them until the process is completed.” In the past, individual locals, including CRCI, had opposed certain proposals in a tentative agreement and registered that position through their Executive Boards.

35. On October 23, Woolery notified the State Conciliator and Department designated representative Cowan that 60.7 percent of the unit voted to reject the tentative agreement and suggested they return to mediation.

36. On November 9, the parties met to discuss the reasons for the failed ratification vote. Among other issues, the Union identified the Department’s proposal regarding the suspension of holiday premium pay in lieu of unpaid furloughs as being a major factor. Bargaining unit members, including Campbell, argued that while other State employees would at least have a day off on mandatory furlough days, bargaining unit members would still be required to work, but at a reduced rate of pay.

The Parties Bargaining: Impasse and Interest Arbitration

37. On November 13, the Department declared impasse, which ended further negotiations and triggered the parties’ exchange of final offers and costs summaries.

38. On November 20, the Union submitted its final offer and cost summary, which included an LOA with three options intended to address the furlough issue. The Union proposed giving the Department the options of: (1) exempting employees from

furloughs, but if it did choose to impose them, employees would be given the right to request specific furlough days; (2) if the Department found the requested furlough day could be granted, taking into consideration staffing levels and overtime, the employee would take a furlough day without pay, similar to other State employees; or (3) if the Department determined the requested day could not be granted, the employee would work as scheduled, but would still have his or her monthly compensation reduced by one day. In that instance, the Department would grant the employee a paid, personal business day to be banked and taken in the future at a mutually-agreed time. The option regarding the creation of a leave bank was the first written proposal from the Union on this issue.

39. Along with the submission of its final offer, the Union filed a Petition to Initiate Binding Interest Arbitration. The Petition contained an LOA regarding the management of mandatory unpaid furlough time off, including the creation of a furlough leave bank.

40. On November 20, the Department also filed its final offer and cost summary. Among other things, it proposed that unit employees take fourteen (14) unpaid furlough days with ten (10) being unpaid holidays. The LOA lists the holidays unit employees would take as furlough days and states that, although employees will be paid time and one-half for working on these days, they will not receive the additional eight hours of holiday premium pay they would ordinarily receive.

41. On January 13, 2010, Department bargaining representative Cowan wrote to Woolery identifying proposals that had not been subject to bargaining, including: "1) providing employees with a paid leave day if the Agency denies an employee's furlough request or if the Agency calls the employee to work on unpaid furlough day; 2) a requirement to bargain via labor/management committee the examination methods used to select employees to serve as Field Training Officers as well as to bargain which employees will be assigned the work of a Field Training Officer both of which are arguably permissive subjects of bargaining and not appropriate for interest arbitration; 3) waiving of the 300 hour vacation maximum accrual cap for the term of the 2009-11 agreement via a separate Letter of Agreement."

42. On March 18, 2010, the parties exchanged their Last Best Offers (LBO). The Union's LBO included the same proposals in an LOA relating to furloughs that were included in its final offer, including the calculation of unpaid time off and the addition "[p]ersonal business leave will be awarded in exchange for mandatory furlough days off when time off requests cannot be granted or monthly deductions are made." The State's LBO, as it pertained to furloughs, proposed that each employee give up holiday pay for ten contractually recognized holidays remaining in the biennium and take four unpaid furlough days, bringing the total number of furlough days to fourteen.

43. On May 23, 2010, the interest arbitrator issued an award ordering the adoption of the Department's Last Best Offer, which included the proposal regarding the suspension of holiday premium pay objected to by the Union.

CONCLUSIONS OF LAW

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

UP-006-10

2. The Department engaged in direct dealing, in violation of ORS 243.672(1)(e) and (b), when Deputy Director Morrow conducted a meeting with selected, non-bargaining team members on September 9, 2009, during negotiations for a successor agreement.

The Union alleges that the Department violated ORS 243.672(1)(e) when Deputy Director Morrow invited selected Union leaders, but not the entire bargaining team or its designated representative, to a meeting on September 9 to discuss bargaining issues. It also alleges the Department violated ORS 243.672(1)(b) because Morrow's actions amounted to interference with, or undermined, the Union's administration.

The Department argues that Morrow clearly stated at the outset of the September meetings that he was not negotiating or bargaining and that it was not unusual for him to meet with Union leaders with whom he had discussed labor matters in the past. Furthermore, it contends that (1) his discussions only involved two non-bargaining team members at the September 9 meeting; (2) his stated purpose was not to bargain, but to offer options regarding unpaid furloughs; and (3) he did not ask for, nor otherwise seek, a response to the options he presented regarding the furlough issue.

Alleged Violation of ORS 243.672(1)(e)

ORS 243.672(1)(e) makes it an unfair labor practice for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." An employer violates its bargaining duty when it attempts to negotiate directly with employees. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 575 (1996). This Board considers a number of factors when determining whether an employer engages in unlawful direct dealing. In *Rogue Valley*, we stated:

"The employer's obligation under the PECBA is to bargain in good faith with the employees' *exclusive representative*. Bypassing the exclusive

representative, meeting directly with employees to discuss its contract proposal, revising its proposal in response to address issues raised in the meeting, and then submitting new proposals directly to bargaining unit members, as the District did, violates its obligation to bargain with the Union, the employees' exclusive representative, and is a *per se* violation of subsection (1)(e)." *Id.* at 576 (emphasis in original).

In *Lane Unified Bargaining Council v. McKenzie School District, #68*, Case No. UP-14-85, 8 PECBR 8160, 8194-96 (1985), the employer violated subsection (1)(e) when it presented an offer directly to bargaining unit members that contained multiple proposals not previously submitted to the bargaining team. In that case, the School Board sent a letter to members stating:

"The attachment reflects all of the Board's proposals, including some modifications that have been suggested by the Board subsequent to the factfinding hearing and post-factfinding session. These modifications will be found in: [list of nine areas]." *Id.* at 8167.

We described the employer's submission of a list with new issues directly to bargaining unit members as dealing "with the Union through the employees, rather than the employees through the Union." *Id.* at 8196 (quoting *NLRB v. General Electric Co.* 418 F2d 736, 759 (2d Cir. 1969), *cert den*, 397 US 965 (1970)).

Similarly, in *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673 (2007), the College engaged in direct dealing when a member of its Board of Directors sent a letter to all College faculty summarizing the College's bargaining proposal and directing them to an intranet website where they could find "the complete proposed contract." Both the intranet posting and the summary contained proposals that had not previously been raised in bargaining, including the calculation of pay and sabbatical leave, grandfathering pay for current part-time instructors, and mandatory training for advisors. *Id.* at 770-71.

While the facts here are not identical to those in *Rogue Valley, McKenzie School District*, and *Blue Mountain*, they are sufficiently similar to conclude that Morrow engaged in direct dealing. Morrow invited a select group of Union leaders to Salem to discuss furloughs, a mandatory subject of bargaining under ORS 243.650(7)(a). Morrow was not a member of, nor did he bring, the Department's bargaining team to the meeting, and he intentionally excluded certain members of the Union's bargaining team, including Woolery, its designated representative. Union bargaining team member Rasmussen only attended because she heard about the meeting while in Salem on September 9. Although Morrow stated at the outset that he was not bargaining, he

informed them that furloughs would be imposed if they could not reach a negotiated agreement.⁶ He proceeded to offer six options to satisfy the furlough obligation, including the possibility of giving up holiday premium pay, an option not previously raised in bargaining. He then offered the possibility of non-economic sweeteners as an inducement. A dialogue ensued that ended with Morrow encouraging the attendees to pursue these or other options in bargaining. He also advised them not to discuss these issues with membership or with Woolery.

Coming from the Department's Deputy Director, the clear implication, if not the express representation, was that the Department was attempting to influence Union leaders to forego holiday premium pay as a way to accept unpaid furloughs and offering non-economic sweeteners as a way to get there. Morrow's somewhat coercive statement that furloughs would be imposed if an agreement was not reached in bargaining supports that conclusion. The importance placed on these discussions was underscored when the Department took the unusual step of authorizing payment for both bargaining and non-bargaining team members to attend the September 9 meeting with Morrow, and again by authorizing payment, including lodging and travel expenses, for these same bargaining unit members to return to Salem on September 14, before the start of the next mediation session. By these actions, Morrow was inserting himself into the bargaining process even though he was not a member of the Department's bargaining team and lacked authority to do so.

Morrow's subsequent appearance at the start of the September 15 mediation session lends credence to this conclusion. After correcting his earlier misstatements about the State Police contract, he again took the opportunity to discuss the possibility of foregoing holiday premium pay as a way to satisfy the furlough requirement.⁷ Morrow was no doubt motivated to find a way to resolve the difficult furlough issue as quickly as possible, but in the cases cited above, this Board has looked at actual conduct rather than an employer's motivation for evidence of a violation. Here, the conduct shows an intent to bargain about a contract issue without the Union's bargaining representative being present or even aware of the discussions.

The fact that Morrow did not offer a firm proposal in these discussions does not avoid a finding that a violation occurred. As this Board stated in *Blue Mountain*, "[t]he

⁶Morrow's statement was correct in that he had no legal authority to bargain or sign a tentative agreement on behalf of the Department but, as the Deputy Director, he certainly was in a position to discuss, respond to, and influence issues raised in bargaining.

⁷Morrow did not recall discussing furlough options at this meeting, but Woolery, Dunn, and Ware credibly testified that he did. In addition, the Union's meeting notes refer to an off-the-record discussion with Morrow in which holiday premium pay in lieu of furloughs was discussed.

issue is not whether the College made a formal proposal at the bargaining table concerning these issues. The violation is the discussion itself because the discussion was with bargaining unit members rather than their exclusive representative.” *Id.* at 772.

We conclude that the Department violated ORS 243.672(1)(e) when it bypassed the Union’s designated representative to discuss bargaining issues with selected unit members.

Alleged Violation of ORS 243.672(1)(b)

The Union alleges the Department violated ORS 243.672(1)(b), which makes it an unfair labor practice for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” The Union contends that Morrow’s conduct—bypassing Woolery to meet with non-bargaining team members, and seeking to conceal these discussions from him—interfered with its administration by undermining its ability to effectively represent unit members. The Department denies any impact on the Union and points out that the parties continued to bargain over this issue and eventually reached a tentative agreement. It also cites as speculative the Union’s contention that the membership’s rejection of the tentative Agreement, due in part to the suspension of holiday premium pay, is proof of any interference with the Union’s administration.

To establish a (1)(b) violation, the Union must prove “‘actual’ domination, interference, or assistance that has a ‘direct effect’ on a labor organization.” *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 608 (2004). As we have explained, “[u]nlawful employer interference ‘goes beyond merely interfering with [protected] rights of individual employees; it is aimed instead at the labor organization as an entity.’ Morris, *The Developing Labor Law*, (BNA 2d ed. 1983) at 282 (footnote deleted).” *AFSCME Council 75, AFL-CIO and Haphey and Bondietti v. Linn County, Linn County Sheriff’s Office and Martinak*, Case No. UP-115-87, 11 PECBR 631, 656 (1989) (emphasis in original). The union bears the burden of proving actual interference which has a direct effect on it. *AFSCME Council No. 75 and Local Union No. 3669 v. Mid-Willamette Valley Senior Services Agency*, Case No. UP-12-91, 13 PECBR 180, 185-86 (1991).

This Board has found a (1)(b) violation where it determines that the employer sought to undermine the designated representative’s role in the bargaining process. In *Blue Mountain* we described the violation in this way:

“* * * When a labor organization is chosen by the employees as their exclusive representative, it has the statutory right to represent those employees in dealing with the employer. By bypassing the exclusive

representative and dealing directly with the employees on contractual matters, a public employer undermines the exclusive representative's status and impairs the representative's ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *Blue Mountain* at 773 (citing *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999)).

By excluding the Union's designated representative from discussions with selected Union leaders about a bargaining issue, the Department placed Woolery in the difficult position of reacting to proposals he learned about from bargaining unit members rather than the Department's designated bargaining team. This is not how the parties agreed to conduct their bargaining. When the Department rejected the Union's suppositional proposal to forego holiday premium pay in exchange for some of the sweeteners suggested by Morrow, the impact on negotiations was immediate and negative. The resulting confusion and frustration are precisely the effects that can undermine a union's ability to represent its members. Whether the subsequent rejection of the tentative agreement was a direct result of the Department's conduct or not, as we stated in *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999):

"Bypassing the Union and dealing directly with the lead workers about contractual matters impacts the Union's ability to fulfill its obligations because it undermines unit members' willingness to rely on and trust the Union to protect their interests. We hold that such direct dealing amounts to unlawful interference with the Union."

Based on the foregoing, we conclude that the Department violated ORS 243.672(1)(b).

3. The Department violated the terms of the parties' ground rules during negotiations for a successor agreement, in violation of ORS 243.672(1)(e) and (g), by opening Article 31 (Holidays) of the collective bargaining agreement after the deadline for doing so had passed, and by continuing its breach by submitting its proposal under Article 31 as part of its final offer.

The Union argues that the Department opened Article 31 (Holidays) after the deadline agreed to in the parties' ground rules, a violation of ORS 243.672(1)(e) and (g). ORS 243.672(1)(g) makes it an unfair labor practice to "[v]iolate the provisions of any written contract with respect to employment relations * * *." The Union contends that by proposing that members forego holiday premium pay as a way to satisfy the furlough

requirement, first in mediation and again in its final offer, the Department violated both the ground rules and the requirement to bargain in good faith.

The Department argues that it did not open Article 31, but met the deadline requirements in the ground rules when it submitted an LOA on March 9, 2009, that listed 24 days as possible furlough days, 11 of which were holidays as designated by Article 31. It also points out the Union was the first party to submit a proposal that addressed the suspension of holiday premium pay in its September 15 suppositional mediation proposal.

Written and executed ground rule agreements are enforceable contracts. *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80, 5 PECBR 4237, 4242 (1980). We apply well-established rules of contract interpretation to determine the meaning of a ground rule. We begin analyzing the text of the language at issue in the context of the entire contract; if the provision is unambiguous, our analysis ends and we enforce the contract language according to its terms. *Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-38/41-08, 23 PECBR 972, 996-97 (2010) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). If the language at issue is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent, such as past practice and bargaining history. If the language remains unclear after this second step, we apply appropriate maxims of contract construction. *Id.*

Here, the parties' ground rule regarding the deadline for opening new articles of the Agreement for bargaining is unambiguous. The ground rules state, in relevant part, that the deadline for presenting new subjects for bargaining will be the fourth bargaining session, and that "[a]rticles of the agreement and Letters of Agreement not opened are considered closed and will be included without change into the successor agreement unless modified by mutual agreement or to conform to changes in other articles." (Finding of Fact 10.) On this record, we cannot conclude that the Union agreed to extend the deadline for opening new articles and the Department did not argue that it was merely conforming Article 31 to other opened articles. Accordingly, we need not proceed to the second step of contract analysis.

Although the Department's LOA of March 9 proposes that furloughs would be imposed on holidays, there is no evidence that it proposed the suspension of holiday premium pay, at least as subsequently presented by Morrow and the Department after mediation had begun, nor is there evidence that the parties bargained the issue with that understanding.

The Union proposed the suspension of holiday premium pay in exchange for sweeteners in its mediation proposal of September 15, but this was a suppositional proposal that had no force or effect if the Department rejected it, which it did the

following day in its package proposal. Furthermore, the Union's proposal was in direct response to the discussions with Morrow and incorporated his suggested inducements in the form of non-economic sweeteners.

While the concept of using holidays to satisfy the furlough requirement was discussed by the parties, the specific proposal to suspend holiday premium pay to achieve that goal was not—at least until Morrow raised the possibility after the deadline for opening new articles. “An important consideration in determining whether a proposal presents new issues is notice. A proposal made late in bargaining is new if a party could not reasonably have anticipated the terms of the proposal, based on positions previously taken in negotiations.” *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-16-11, 24 PECBR 412, 440 (2011) *recons*, 24 PECBR 488 (2011). The impact of reducing holiday premium pay is a mandatory subject of bargaining that necessarily entails negotiating the financial impact on members and the Department with specificity.

When the parties submitted their final offers and cost summaries, the Department proposed suspending holiday premium pay in exchange for non-economic sweeteners, but the Union's final offer addressed furloughs through a furlough bank that makes no reference to the suspension of holiday premium pay. Accordingly, we cannot conclude that the parties seriously discussed this issue or had an adequate opportunity to bargain over it.

Based on the foregoing, we conclude that the Department opened Article 31 (Holidays) after the deadline for doing so in the parties' ground rules in violation of ORS 243.672(1)(g).

The Union also contends that by including the suspension of holiday premium pay in the Department's mediation proposal and again in its final offer of November 29, it engaged in bad faith bargaining in violation of ORS 243.672(1)(e). A party violates its good faith bargaining duty if it includes a proposal in its final offer that was never before presented to the other party in negotiations. *Rogue Valley*, 16 PECBR at 581-82. Although the *concept* of using holidays to satisfy the furlough requirement had appeared during mediation, we cannot conclude on this record that the Department's final offer (*proposal*) on this issue was ever properly bargained with the Union. *Id.* at 582. Accordingly, we conclude that the Department violated ORS 243.672(1)(e) when it included a proposal in its final offer that was not opened by the parties' agreed deadline for doing so.

UP-016-10

4. The Union violated ORS 243.672(2)(b) by including a proposal in its last best offer that was first presented to the Department in the Union's final offer.

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization representing a group of employees to “[r]efuse to bargain collectively in good faith with the public employer * * *.” Under the PECBA, parties that reach impasse in negotiations must submit their final offers to the mediator within seven days of declaring impasse. ORS 243.712(2)(b). Parties that resolve their negotiation disputes through interest arbitration must submit their last best offers “on all unresolved mandatory subjects” to the interest arbitrator not less than 14 days before the date of the hearing. ORS 243.746(3). The Department alleges that the Union violated its good faith bargaining duty under subsection (2)(b) by including a proposal “which was not subjected to the PECBA bargaining process” in its last best offer. The Union proposal at issue specified that if the Department was unable to grant an employee’s request for a specific furlough day, the employee would work the day as scheduled, have one day’s pay deducted from the employee’s monthly salary, and receive a personal leave day that could be used in the future. We begin our analysis of the Union’s claim by reviewing the nature of a party’s good faith bargaining obligation in submitting final and last best offers.

A public employer violates its good faith bargaining duty under ORS 243.672(1)(e) if it presents proposals on new issues in its final offer. *Tri-County*, 24 PECBR at 432. A bargaining proposal presents a new issue if the proposal did not logically evolve from or was not reasonably comprehended within an earlier proposal. *Id.* We have explained our reasons for refusing to allow a party to present proposals that raise new issues late in the bargaining process as follows:

“The PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. * * * The goal is a negotiated agreement. A new issue injected late in the bargaining process frustrates the statutory purpose. It skips one or more of the statutory steps on the new issue, and it expands rather than narrows the scope of the parties’ bargaining dispute, thereby making agreement less likely.” *Blue Mountain* at 754.

To decide if a proposal is new, we look at the substance, and not just the wording, of the proposal. *Id.* at 762. In *Blue Mountain*, this Board compared a final offer proposal to prohibit part-time employees from acquiring regular status to the college’s earlier proposal to prohibit part-time employees from acquiring regular status for layoff purposes. The two proposals were identical except for three words. We looked to the substance of the final offer proposal rather than its form and held that the final offer proposal raised an issue—part-time employees’ entitlement to all contract rights—that was not reasonably comprehended within and did not logically evolve from the prior proposal. *Id.* at 761-62.

Here, however, the Union's proposal concerning a personal leave bank did not concern a new issue. During table bargaining and mediation, both parties discussed and made proposals regarding furloughs. The Union proposal concerning a personal leave bank in the Union's final offer, which was also included in its last best offer in which employees accumulated personal leave days in exchange for furloughs, was reasonably comprehended within and logically evolved from prior proposals concerning furloughs. As a result, this proposal did not concern a new issue.

As discussed above, a party violates its good faith bargaining duty if it includes a proposal in its final offer that was never before presented to the other party in negotiations. In *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08, 23 PECBR 583, 605 (2010), the bargaining unit rejected a tentative agreement reached by union negotiators. After the failed ratification vote, the union submitted a final offer to the mediator that included a proposal that had not previously been presented to the employer. We noted that under our cases, parties were required to resume good faith bargaining after rejection of a tentative agreement and concluded:

“Requiring a party to negotiate over a proposal before submitting it as part of the final offer furthers the PECBA policy of promoting meaningful bargaining. A failed ratification vote does not excuse a party from meeting this obligation.” *Id.* at 606.

We concluded that the union's submission of the new proposal constituted a *per se* violation of ORS 243.672(2)(b).

The Union's written proposal to provide an employee who was denied a requested furlough day and required to work with a paid, personal day that could be used at a later date surfaced for the first time in the Union's final offer. The record contains evidence of informal discussions concerning this issue at the parties' November 9, 2009 meeting after the Union bargaining unit rejected the tentative agreement. There is no evidence, however, that the Union made an oral or written proposal that the Department could evaluate and meaningfully respond to. We conclude, as we did in *Hood River County*, that the Union committed a *per se* violation of ORS 243.672(2)(b) by including a proposal in the last best offer that was presented to the Department for the first time in the Union's final offer.

5. The Union violated ORS 243.672(2)(b) when its bargaining team members failed to support ratification of the tentative agreement. It is an unfair labor practice for a labor organization to refuse to bargain in good faith with the public employer of employees for whom the labor organization is the exclusive representative. ORS 243.672(2)(b). The obligation to bargain in good faith does not require either party to agree to particular contract terms. ORS 243.650(4); *Baker Education Association*

v. Baker School District 5J, Case No. UP-5-00, 19 PECBR 712, 726 (2002). Once the negotiators agree on contract terms, subject only to ratification, however, the obligation to bargain in good faith requires the negotiators “to present the agreement to their ratifying entities and to support its approval.” *School District 549C of Jackson County v. Oregon School Employees Association and Foster*, Case No. UP-102-86, 10 PECBR 304, 313 (1987). The negotiators must recommend ratification to their ratifying entities, *City of Central Point v. International Association of Firefighters, Local 1817*, Case Nos. UP-44/53-95, 16 PECBR 458, 469 (1996), and they may not act in a way that undermines the agreement or discourages ratification. *Baker School District 5J* at 727.

Union bargaining team member Campbell actively encouraged bargaining unit members to vote against the tentative agreement Union bargainers had reached. The Union seeks to minimize Campbell’s opposition to the tentative agreement, and his efforts to urge bargaining unit members to do the same, by arguing that his advocacy was limited to people he had known for years and that, in the past, local units had gone on record as opposing all or part of tentative agreements up for ratification. Campbell’s advocacy to defeat the tentative agreement, however, was both widespread and inappropriate for a member of the Union’s bargaining team. Both before and after the tentative agreement was presented to bargaining unit members for a vote, Campbell e-mailed numerous Corrections personnel, including those at other Corrections facilities, telling them that he opposed the agreement and urging them to vote against it. Campbell also asked some bargaining unit members “to spread the word,” *i.e.*, tell other bargaining unit members to vote against the tentative agreement. He posted a seven-point memorandum listing his reasons for opposing ratification, which was supplemented with a table of information titled “Vote NO on the Contract,” on an intranet site intended for bargaining unit members to exchange information. He sent the memorandum to other facilities where he knew, or should have known, that it would be disseminated further. As an experienced member of the Union’s bargaining team, his obligation to support the tentative agreement was clear, and his widespread efforts to defeat ratification undermined the integrity of the bargaining process and violated the good faith bargaining requirements of ORS 243.672(2)(b). *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08, 23 PECBR 583, 602-04 (2010).

In addition to Campbell, other members of the bargaining team did not fulfill their affirmative duty to convince or persuade its constituency to vote for the agreement. Bargaining team members Rasmussen and Woolery both expressed no opinion as to whether the membership should approve or reject the tentative agreement. “The duty to bargain in good faith requires the bargaining team to make some affirmative effort to convince or persuade its constituency to vote for the [tentative] agreement.” *Hood River County* at 604.

Remedy for the Department's Violations of ORS 243.672(1)(b), (e), and (g)

We have determined that the Department violated ORS 243.672(1)(e) and (b) by dealing directly with bargaining unit members and by interfering with the administration of the Union, and violated ORS 243.672(1)(e) and (g) by opening a new article after the deadline for doing so in violation of the parties' ground rules. We will order the Department to cease and desist from (1) bypassing the Union's designated representative and dealing directly with bargaining unit members; (2) interfering with the Union's administration; and (3) violating the parties' ground rules and engaging in bad faith bargaining by opening an article in the agreement after the deadline for doing so has passed. ORS 243.672(2)(b).

When there is evidence of bad faith bargaining, this Board often orders the parties to return to bargaining at the step where the earliest violation occurred. *Blue Mountain*, 21 PECBR at 781. Here, the earliest violation occurred when Morrow excluded the Union's bargaining representative from the September 2009 meetings intended to present and discuss bargaining issues. There is nothing to be gained by returning the parties to the bargaining table to discuss issues that may have no further relevance or can no longer be implemented. The interest arbitration has been completed and the Department's final offer was awarded by the arbitrator, which is final and binding on the parties pursuant to ORS 243.752. More importantly, the contract at issue has expired and the parties are in the process of negotiating a successor contract. Under these circumstances, a return to bargaining is not warranted and would not be helpful to the parties.

The Union asks that rather than ordering the parties to return to bargaining, we require the Department to compensate bargaining unit member for "any financial losses related to the forced forfeiture of holiday pay that would have been suffered by AFSCME members under the 2009-2011 contract." (AFSCME's Memorandum in Aid of Oral Argument, p. 8-9.) According to the Union, such an order would provide an "equitable and meaningful remedy" for bargaining unit members.

In *Rogue Valley*, 16 PECBR 559, we considered the union's conduct in fashioning a remedy for the employer's bad faith bargaining. The union asked that we order the employer to rescind an imposed final offer only to the extent requested by the union. We refused to do so; and ordered restoration of the entire *status quo*. We explained our reasoning as follows:

"The Union's bargaining conduct, while not the subject of an unfair labor practice complaint, was less than exemplary. Allowing the Union to pick and choose what portions of the imposed offer to retain would in effect

reward it for its own intransigence at the table. The purposes of the PECBA are best served by restoring the status quo.” *Id.* at 591.

Here, the Union’s conduct during negotiations was not only intransigent but unlawful—the Union engaged in bad faith bargaining when its bargaining team members failed to support ratification of a tentative agreement and when it included a new proposal concerning furloughs in its last best offer. To order the Union the remedy it requests—essentially allowing it to choose one of its furlough proposals for implementation—would effectively reward the Union for its unlawful behavior. As we did in *Rogue Valley*, we will not permit the Union to benefit from its unlawful conduct.

As an additional remedy, we will order that the Department post a notice of its violations. We order such a posting if we determine a party’s violation of the PECBA was: “(1) ‘calculated or flagrant’; (2) part of a ‘continuing course of illegal conduct’; (3) committed by a significant number of the [violating party’s] personnel; (4) affected a significant number of bargaining unit members; (5) significantly (or potentially) impacted the designated bargaining representative’s functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).” *Tri-County*, 24 PECBR at 452. Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). Here, there is no question that a significant number of bargaining unit members were affected because the ratification vote failed, in part, because the Department did not include the sweeteners in its package proposal that Morrow had led them to believe would be offered. This in turn undermined the Union’s designated bargaining representative because he was left scrambling to respond to a proposal on the eve of a mediation session that he learned about from his members rather than the Department’s bargaining team.

Remedy for the Union’s Violations of ORS 243.672(2)(b)

We have determined that the Union violated ORS 243.672(2)(b) when it included a new proposal in its last best offer and when its bargaining team failed to support ratification of a tentative agreement. We will order the Union to cease and desist this unlawful conduct.

For the reasons discussed above, we will not order the parties to return to bargaining at the step in the process where the violation occurred.

We will order the Union to post a notice of its wrongdoing.

Here, the Union's conduct satisfies some of the criteria we require for posting a notice. There is no evidence that the Union's violation was part of a continuing course of illegal conduct, committed by a significant number of members, or involved a strike, lockout, or discharge. Nevertheless, a significant number of the Union's bargaining unit members were affected by the failed ratification vote because it left them without a new contract for an extended period. More importantly, evidence that Woolery and Rasmussen appeared to remain neutral about the ratification vote, even after learning of Campbell's efforts to defeat it, was a flagrant violation of their obligation as bargaining team members. When combined with the submission of a new proposal in its last best offer, after being put on notice of that fact by the Department, we conclude that it is appropriate for the Union to post a notice of these violations.

ORDER

1. The Department shall cease and desist from violating ORS 243.672(1)(e) by bypassing the Union's designated representative and dealing directly with non-bargaining unit employees concerning employment relations matters.

2. The Department shall cease and desist from violating ORS 243.672(1)(b) by interfering with the Union's administration by presenting proposals to bargaining unit members other than the Union's designated representative.

3. The Department shall cease and desist from violating ORS 243.672(1)(g) by disregarding the parties' ground rules regarding the opening of new articles after the deadline for doing so has lapsed.

4. The Department shall cease and desist from violating ORS 243.672(1)(e) by introducing new proposals in its final offer that were not subject to bargaining during contract negotiations.

5. The Department shall sign and prominently post one copy of the attached notice in each building or facility where bargaining unit members work. The notice shall be posted within 14 days of the date of this Order and may not be removed for 30 consecutive days.

6. The Union shall cease and desist from submitting new proposals in its final offer or Last Best Offer that were not subject to bargaining during contract negotiations.

7. The Union's bargaining team members shall cease and desist from failing to support ratification of a tentative agreement or by advocating that bargaining unit members reject the tentative agreement.

8. The Union shall sign and prominently post one copy of the attached notice in each building or facility where bargaining unit members work. The notice shall be posted within 14 days of the date of this Order and may not be removed for 30 consecutive days.

DATED this 19 day of June 2012.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member

**Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

**Member Logan did not participate in the deliberations and decision in this case.

*Member Gamson Concurring

I generally concur in the result but offer several observations and comments about my colleague's analysis and reasoning.

I.

I begin with the Union's claim that the Department engaged in unlawful direct dealing with bargaining unit members. First for some brief background. Public employees have the right to bargain collectively with their employer through their chosen representative. ORS 243.656(5) and 243.662.⁸ A public employer violates its duty to

⁸Direct dealing violates the statutory rights of not only the employees but also of the union itself. A union has "the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." ORS 243.650(8). An employer that bypasses the union and instead deals directly with the employees denies the union its statutory right to act as the bargaining agent for its members. Such interference with the rights of the union constitutes an unfair labor practice under ORS 243.672(1)(b).

bargain in good faith when it attempts to negotiate directly with its represented employees. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 769 (2007); *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8195(1985). In *McKenzie*, we described the employer's misconduct as dealing "with the Union through the employees, rather than the employees through the Union." *Id.* at 8196 (quoting *NLRB v. General Electric Co.*, 418 F2d 736, 759 (2d Cir 1969), *cert. denied* 397 US 965 (1970)).

In my view, the analysis in such cases is straight forward: did the employer bypass the union and instead attempt to bargain directly with the employees? Here, the Department's Deputy Director called a meeting with a number of bargaining unit members to discuss bargaining issues. He purposely excluded the Union's bargaining spokesperson. At the meeting, the Deputy Director discussed furloughs and offered options not previously raised with the Union. He also offered non-economic "sweeteners" as inducement, and he urged those in attendance to pursue his suggestions in bargaining. These are all bargaining activities that should have occurred with the employees' representative rather than with the employees. On these facts, I conclude without difficulty that the Deputy Director unlawfully bypassed the Union and negotiated directly with bargaining unit members.

A.

My colleague takes a different analytical approach, one that has led to inconsistent results in our prior cases and therefore needs to be reexamined. She seizes on a quote from *Rogue Valley*, 16 PECBR 559, *adh to on recons*, 16 PECBR 707 (1996). There, we held that an employer engaged in unlawful direct dealing by

"[b]ypassing the exclusive representative, meeting directly with employees to discuss its contract proposal, revising its proposal in response to address issues raised in the meeting, and then submitting new proposals directly to bargaining unit members * * *." *Id.* at 576.

My colleague characterizes this quote as a list of the "factors" we consider to determine whether an employer engaged in direct dealing. It is not. The quote merely recites the facts the Board relied on to find a violation in that particular case. In other words, these facts constitute *sufficient* conditions for finding a violation; but characterizing them as "factors," as my colleague has, turns them into *necessary* conditions for a violation.

Elevating the *Rogue Valley* facts to "factors," as my colleague does, has led to inconsistent results in our cases. Compare, for example, the results in four of our cases that raised the same issue: does an employer act unlawfully when it makes bargaining

proposals directly to employees without first proposing them to the union? In two of those cases, the Board found no violation because the *Rogue Valley* “factors” were absent. *AFSCME Council 75, Local 328 v. Oregon Health Sciences University*, Case No. UP-37-96, 17 PECBR 343, 362 (1997); and *Coos Bay Firefighters Association v. City of Coos Bay and Coos Bay Fire Department*, UP-41-98, 18 PECBR 515, 525 (2000), *AWOP*, 171 Or App 523, 19 P3d 387 (2000). But in two other cases with the same pertinent facts, the Board found violations. *Blue Mountain*, 21 PECBR at 769-71; and *McKenzie School District*, 8 PECBR at 8196. These cases did not apply the *Rogue Valley* “factors.” Instead, the Board in both cases concluded that making bargaining proposals directly to employees without first proposing them to the union constituted unlawful direct dealing.

Here, the Department probably committed a violation under either standard. But my colleague fails to recognize the inconsistency in our cases, and in fact perpetuates the problem by continuing—incorrectly in my view—to portray the *Rogue Valley* case as the source of analytical factors.⁹ At its first opportunity, this Board should eliminate inconsistent results by clarifying the analytical framework it will use in direct dealing cases.

B.

My colleague also attempts to decide the direct dealing claim by fact matching. That is, she recites the facts of prior Board cases and follows the result of the case with facts that seem to most closely resemble the facts here. She concedes that the facts here are not identical to those in any other case.

In my view, fact matching is an unreliable and imprecise basis for deciding cases. The Court of Appeals has observed that fact matching “can be a fool’s errand.” *State v. Zubrum*, 221 Or App 362, 367, 189 P3d 1235 (2008). Our Supreme Court has recognized that “[f]act matching can be a misleading enterprise.” *State v. Sierra*, 349 Or 506, 515 n 5, 254 P3d 149 (2010). This seems especially true in fact-intensive cases such as this one. Each case should be decided on its own facts, applying applicable legal principles rather than fact matching.

II.

⁹In my view, the analysis in *McKenzie* is correct. It discusses policy considerations and follows the pre-1973 law under the NLRA. *See Elvin v. OPEU*, 313 Or 165, 175 n 7, 177-79, 832 P2d 36 (1992) (the PECBA is modeled after the National Labor Relations Act (NLRA); as a consequence, we should interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year the PECBA was enacted); *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 260 P3d 619 (2011) (same).

I turn now to the Department's claim that the Union unlawfully included something "new" in its final offer. In *Tri-County Metropolitan Transportation District of Oregon*, 24 PECBR 602, 608-09 (2012) (Compliance Order) (Member Gamson, concurring), I warned of the confusion that can arise from imprecise language in our cases about what can be included in a final offer. This Board has developed two separate and distinct theories that prevent something "new" in a final offer. One prohibits a "new issue" in a final offer; the other prohibits an unbargained "new proposal" on an issue that has previously been raised. Each theory has a different factual predicate, different analysis, and different remedy. My colleague has conflated and confused these two theories here.

I begin by briefly describing the prohibition on "new issues" in a final offer. The PECBA bargaining process is comprised of a series of steps to be conducted in a specified order and designed to help the parties resolve their disputes. *Blue Mountain*, 21 PECBR at 756. A party cannot pursue an issue in bargaining unless it has raised that issue in the prior statutory steps. A new issue raised for the first time in a final offer constitutes bad-faith bargaining. *Id.* at 755 (citing *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 581-83 (1996)). An issue is "new" unless it is "reasonably comprehended within" or "logically evolve[s] from the prior discussions or bargaining positions * * *." *Id.* at 757.

In a separate line of cases, this Board also prohibits "new proposals" in a final offer. *E.g.*, *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707, 709-10 (1996) (Order on Reconsideration). This differs from the prohibition on "new issues." Even if an *issue* is not new (*i.e.*, it has gone through all the prior statutory bargaining steps), a specific *proposal* on that issue can be included in a final offer only if it has first been presented to the opposing party with an opportunity to bargain over it. The difference is largely one of timing. An *issue* must be raised in table bargaining if a proposal concerning that issue is to be pursued in a final offer; but if the issue has been pursued throughout bargaining, a specific *proposal* on that issue can be raised at almost any time, so long as it is proposed far enough in advance of the final offer to give the parties time to bargain over it.¹⁰

¹⁰An example may help. If the issue of holiday pay *has not* been raised in the prior steps of bargaining, no proposal concerning the issue can be included in the final offer. But if the holiday pay issue *has* been raised in all the earlier steps, any proposal concerning holiday pay can be included in the final offer so long as the parties had the opportunity to bargain that specific proposal first.

My colleague confuses these two analytically distinct questions. She states that the issue in the case is whether the Union included a “*new proposal*” in its final offer.¹¹ She nevertheless then proceeds to decide two questions, *viz.*, whether the Union included a *new proposal* in its final offer, and also whether it included a *new issue* in its final offer. I concur because I agree with the result she reached on the only question included in the issue statement, *i.e.*, the Union unlawfully included a new proposal in its final offer. I believe she erred in deciding the “new issue” question because it was not presented in the issue statement. The error, however, is harmless, because we each reach the same result, albeit through a different analysis. My colleague dismissed the claim on its merits (*i.e.*, she concluded the Union did not include a new issue in its final offer); I would never have considered the merits in the first place. I write separately because I think it is a bad practice—and perhaps a violation of Due Process—to decide an issue not presented for decision.



*Paul B. Gamson, Board Member

¹¹I note that my colleague adopted the issue statement from the ALJ’s Recommended Order which specified that the question before the Board is whether the Union presented a “new proposal.” Neither party objected to the issue statement. I understand the lack of objection to be a binding admission that only the “new proposal” issue is properly before the Board.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-16-10, State of Oregon, Department of Administrative Services, Department of Corrections v. Oregon AFSCME Council 75, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify the bargaining unit members of Oregon AFSCME Council 75:

The Employment Relations Board has found that the following actions by Oregon AFSCME Council 75 violated the Public Employee Collective Bargaining Act (PECBA), and ordered Oregon AFSCME Council 75 to cease and desist from engaging in the activities described below in the future and to post this notice:

1. During negotiations for a successor collective bargaining contract in 2009, Oregon AFSCME Council 75 submitted a new proposal in its Last Best Offer that was not subject to bargaining during contract negotiations in violation of ORS 243.672(2)(b).
2. During negotiations for a successor collective bargaining contract in 2009, Oregon AFSCME Council 75's bargaining team member(s) failed to support ratification of the tentative agreement in violation of ORS 243.672(2)(b).

UNION

Dated _____

By _____
Representative
Oregon AFSCME Council 75

Title _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted in each employer facility in which Oregon AFSCME Council 75 bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-06-10, Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections (Department), and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board has found that the following actions by the Department violated the Public Employee Collective Bargaining Act (PECBA), and ordered the Department to cease and desist from engaging in the activities described below in the future and to post this notice:

1. During negotiations for a successor collective bargaining contract in 2009, the Department dealt directly with non-bargaining team members regarding employment relations matters in violation of ORS 243.672(1)(e).

2. The Department interfered with the Union's administration by bypassing the Union's designated representative to present proposals to bargaining unit members in violation of ORS 243.672(1)(b).

3. The Department disregarded the parties' ground rules by opening an article for negotiation after the deadline for doing so had passed, in violation of ORS 243.672(1)(g).

4. The Department included a proposal in its final offer that was not subject to bargaining during contract negotiations in violation of ORS 243.672(1)(e).

EMPLOYER

Dated _____

By _____
Employer Representative

Title _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted in each employer facility in which bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.