

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-06/18-09

(UNFAIR LABOR PRACTICE)

GRESHAM POLICE OFFICERS)
ASSOCIATION,)
)
Complainant,)
)
v.)
)
CITY OF GRESHAM,)
)
Respondent.)
_____)

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

The City filed, but subsequently withdrew, its objections to a Recommended Order issued on May 26, 2010, by Administrative Law Judge (ALJ) Wendy L. Greenwald following a hearing before ALJ B. Carlton Grew on September 24, 2009, in Gresham, Oregon. The record closed on November 12, 2009, upon receipt of the parties' post-hearing briefs.

Daryl Garrettson, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, Portland, Oregon, represented Complainant.

Heather A. Pauley, Senior Assistant City Attorney, Gresham City Attorney's Office, Gresham, Oregon, and Diana L. Moffat, Executive Director, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On January 20, 2009, the Gresham Police Officers Association (GPOA) filed an unfair labor practice complaint against the City of Gresham (City)(Case No. UP-06-09). As amended on April 13, 2009, the complaint alleges that the City violated ORS 243.672(1)(e), (f), and (g) by 1) unilaterally changing certain City policies without

notice and bargaining, and 2) failing or refusing to comply with GPOA's request for a copy of the City's tentative contract settlement with the International Association of Fire Fighters, Local 1062 (IAFF).

On April 10, 2009, the City filed a Motion to Dismiss the complaint on grounds that the GPOA did not timely amend its complaint. On April 13, 2009, in response to the City's motion, GPOA amended its complaint in Case No. UP-06-09 and filed a new unfair labor practice complaint (Case No. UP-18-09) which is essentially identical to the amended complaint in Case No. UP-06-09. To expedite the process, the ALJ consolidated Case Nos. UP-06-09 and UP-18-09 for hearing and decision.

The City filed a timely answer which asserted that the changes at issue were permissive subjects of bargaining.

The issues are:

1. Did the City unilaterally change certain City policies in October and November 2008 without notice or bargaining over the policies or their impact, in violation of ORS 243.672(1)(e), (f), and (g)?
2. Did the City refuse GPOA's November 2008 request for a copy of the IAFF tentative contract settlement in violation of ORS 243.672(1)(e)?
3. Should a civil penalty be assessed against GPOA?

RULINGS

1. The ALJ correctly ruled that GPOA's Exhibits C- 9, C-10, C-11, C-12, and C-13, and the testimony related to those exhibits, would not be received into evidence. ORS 40.190(1) specifically provides that evidence of settlement offers or conduct or statements made in compromise negotiations "is not admissible to prove liability for or invalidity of the claim or its amount."¹ Exhibits C-9 and C-13 are minutes and notes from the parties' February 24, 2009 meeting, the purpose of which was to attempt to resolve the issues raised by the original complaint in this matter. Exhibits C-10, C-11, and C-12 are correspondence sent after that meeting, including actual settlement

¹ORS 40.190(2)(a) and (b) provide that evidence presented during compromise negotiations will not be excluded if it is "otherwise discoverable" or if it "is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." These exclusions are not applicable to the evidence at issue here.

proposals and communications related to the discussions regarding those proposals. Therefore, Exhibits C-9, C-10, C-11, C-12, and C-13, and the testimony related to those exhibits, are inadmissible as evidence to prove that the City violated the law. For the same reason, this evidence is irrelevant to the issue of a civil penalty.

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. GPOA is the exclusive representative of a bargaining unit of employees who work for the City, a public employer.

2. GPOA and the City were parties to a collective bargaining agreement effective January 1, 2006 through December 31, 2008.

3. Article 4, the management rights clause in the parties' 2006-08 agreement, lists the management rights retained by the City, and states:

"[t]he rights of employees in the bargaining unit and of the Association are limited to those under state law and those specifically set forth in this Agreement. The City expressly retains all authority, powers, privileges, and rights not specifically limited by the terms of this Agreement, provided any bargaining obligation arising from ORS 243.650 et seq. is satisfied.

"Nothing herein shall be considered a waiver of the Association's right to collectively bargain over changes in mandatory subjects of bargaining."

4. Article 21.2 of the parties' 2006-08 agreement, entitled "*EXISTING CONDITIONS*," provides that

"[u]nless otherwise provided herein, no employee shall suffer a reduction in wages or related economic benefits as a result of the signing of this Agreement. Only those existing and future benefits and work rules specifically covered by the terms of this Agreement shall be affected by execution of this Agreement."

5. In August or September 2008, GPOA and the City began negotiations for a successor collective bargaining agreement. Legal Counsel Mark Makler was the chief spokesperson for GPOA. The City's bargaining team included Director of Human Resources and Community Services Carol Murray, City Attorney Heather Pauley, Captain Timothy Gerkman, Captain Dave Gerlich, and Lieutenant Gail Cummins. The parties reached agreement on their new collective bargaining agreement sometime in the spring of 2009.

Facts Related to Policy Changes

6. Since approximately 1983, the City has established its policies through administrative rules, Gresham Administrative Rules (GARs). The City typically amends the GARs on an annual basis.

7. GAR 2.05.120, entitled "COLLECTIVE BARGAINING AGREEMENTS," provides that "[a]ll provisions of these rules will apply to all employees unless specifically addressed in a collective bargaining agreement. Specific provisions of collective bargaining agreements take precedence over the provisions of these rules."

8. Chapter 4 of the GARs is entitled "EMPLOYMENT TERMS & CONDITIONS." GAR 4.05(a) and (b) provide:

"(a) The rules of this chapter specifically apply to all City employees not in bargaining units that have negotiated collective bargaining agreements with the City.

"(b) The Manager may apply rules of this chapter to City employees in bargaining units that have negotiated collective bargaining agreements with the City to the extent provisions of this chapter are consistent with such agreements."

9. GAR 4.10 requires the City to notify employees of potential rule changes in Chapter 4 prior to adoption of the change and establishes the manner in which the employees may provide input on those proposed changes.

10. Sometime prior to October 31, 2008, the City began the process to amend the GARs. As part of this process City managers, including Human Resources Director Murray, reviewed the proposed amendments and determined that none of the proposed amendments raised an obligation to bargain with any of the unions representing City employees.

11. On October 31, 2008, Murray sent a notice to all City employees regarding the proposed GAR changes. The notice specified that all affected employees had until November 14 to submit written comments regarding the proposed changes, and that if no comments were submitted, the changes would become effective on November 17. The notice identified approximately 25 proposed changes to 10 different GARs, included an attachment showing the sections of the articles that the City proposed to change, and

referred employees to the City's intranet site to view a draft of the complete articles with the proposed changes. GPOA bargaining unit employees, including GPOA officers, received a copy of the notice in the same manner as other City employees. The City did not send a copy of the October 31 notice to GPOA officers in their role as GPOA representatives, and did not notify GPOA Legal Counsel Makler.

12. On November 5, 2008, Makler sent Murray an e-mail asking whether the City intended to raise the proposed GAR changes in their current bargaining process. Makler also notified the City that its October 31 notice to all City employees violated the City's obligation under the Public Employee Collective Bargaining Act (PECBA) to provide such a notice to the GPOA's authorized representatives. Makler objected to the manner in which the City notified all City employees of its intent to make mid-contract changes under ORS 243.698. He acknowledged that he did not know which changes the City intended to apply to GPOA bargaining unit employees, and also listed the changes that he believed involved mandatory subjects that must be bargained prior to implementation. The list included GARs 4.15.040(b), 4.14.050(b) and (c), 4.15.050(m)(1)(b) and (c), 4.15.050(r), 4.15.050(u), 4.15.050(v), 4.25.050(d)(5), 4.25.050(e)(1)(e) and (f), 4.30.040(d) and (f), 4.35.090, 4.35.100, 4.45, 4.50.030(c), and 6.20.010(c) and (d).

13. On November 12, 2008, City Attorney Pauley sent an e-mail to Makler indicating that the City did not intend to bring the GAR changes to the bargaining table. Pauley said that the City believed it had followed the appropriate process for notifying employees about the proposed amendments because the changes did not involve mandatory bargaining subjects.

Pauley stated that the proposed amendments to GARs 4.15.050(m)(1)(b) and (c), 4.15.050(v), 4.25.050(d)(5), 4.25.050(e)(1)(e) and (f), 4.30.040(d) and (f), 4.35.090, and 4.50.030(c) did not apply to GPOA bargaining unit members because these rules involved matters addressed in the parties' collective bargaining agreement. She asserted that:

- GARs 4.15.040(b) and 4.15.050(u) addressed past or current practices that were being incorporated into the GARs;

- GARs 4.14.050(b) and (c), and 4.35.100 addressed additional benefits being provided to all City employees;

- GAR 4.45 was changed pursuant to state and federal law; and

- GARs 4.45.1530 and 6.20.010(c) and (d) were permissive subjects of bargaining.

14. Also on November 12, Makler responded by e-mail to Pauley stating that, "I will just work on drafting a ULP [unfair labor practice complaint], on behalf of the GPOA, related to the responses from you and the City that I believe violate the PECBA."

15. Neither party raised the proposed GAR amendments at the bargaining table.

GAR 4.15.050(b) - Effective Date of Salary Step Advancement

16. The parties' 2006-08 collective bargaining agreement established a new employee's initial salary step placement and eligibility for salary step increases based on the employee's prior experience. The agreement did not define the date upon which the future step increases would become effective. The City has historically implemented new step increases for GPOA members based on the date an employee completes an a probationary period after hiring, or a probationary period after promotion.

17. Prior to October 31, 2008, GAR 4.15.050(b) provided that an employee was eligible for a salary increase on the first of the month in which the employee was hired or promoted. This provision had not been applied to GPOA bargaining unit members. In its October 31 notice to employees, the City proposed to modify GAR 4.15.050(b) to provide that employees would be eligible for salary step advancement "on the first or 16th day of the month, whichever date follows first after successful completion of the probationary period."

18. In his letter of November 5, Makler stated that the amendment to GAR 4.15.050(b) related to wages and must be bargained. In her November 12 response, Pauley stated that the amendment to GAR 4.15.050(b) "provides an additional benefit for employees."

19. The City adopted the proposed amendment to GAR 4.15.050(b) in January 2009.

20. In the spring of 2009, the City prepared a new seniority list to be included as an appendix in the parties' successor agreement. In reviewing the new list, GPOA President Wallace Coon determined that it included a number of incorrect dates. Coon met with Murray and Captain Gerkman to discuss the incorrect dates; they also discussed the City's move to a system of anniversary dates based on the first and sixteenth of the month. Coon explained that the anniversary dates for GPOA-represented employees should never change because they had always been based on an employee's actual anniversary date. The City subsequently revised the seniority list to reflect GPOA members' correct seniority dates.

21. Some time after the City adopted the amendment to GAR 4.15.050(b), the City realized that implementing new salary steps on the first and sixteenth of the month did not benefit GPOA members. The City decided that it would not apply GAR 4.15.050(b) to GPOA members, but did not inform GPOA.

GAR 4.15.050(r) - Jury Duty Leave

22. The parties' 2006-08 collective bargaining agreement did not address jury duty. In the past, when the Police Department was informed that an employee had jury duty on a work day, the employee was excused from reporting for work and was paid the employee's regular rate of pay while serving on jury duty. Neither Police Department management nor GPOA representatives knew about any policy or practice requiring an officer to return to work if the officer was released from jury duty prior to the end of the work day.²

Approximately eight to ten years ago, an employee who served two to three days of jury duty went home each day after he was released from jury duty, instead of returning to work. When the Department learned about the employee's actions, he was required to reimburse the City for the salary he had earned during the period of time after he had been released from jury duty but had not returned to work.

23. Prior to October 31, 2008, GAR 4.15.050(r) provided that "[e]mployees selected for jury duty will be paid at their standard rate of pay when participating during a workday." The rule also required employees to pay the City any compensation received for serving on jury duty, and allowed employees to retain any compensation for expenses, unless such expenses were paid by the City. Captain Gerkman did not refer to this rule in granting jury duty leave to employees and did not know whether this rule applied to GPOA-represented employees. He understood that the GARs generally applied to GPOA-represented employees on matters that were not specifically addressed in the parties' collective bargaining agreement.

24. In its October 31 notice, the City proposed to amend GAR 4.15.050(r) by adding a new sentence, which provided "[e]mployees shall report to work when less than a normal day is required by jury or witness duties if three or more hours of the work shift remain." This provision mirrored the language in the City's collective bargaining agreement with Teamsters Local 223.

²Murray testified that Department managers told her about a past practice regarding jury duty leave. Neither Murray nor any other witness could provide specific information about this past practice, however.

25. In a November 5 letter, Makler told the City that the amendment to GAR 4.15.050(r) related to "hours, wages and working conditions" and must be bargained. In her November 12 response, Pauley stated that the amendment to GAR 4.15.050(r) "is not a mandatory subject of bargaining. It is the City's position that requiring employees to return to work is a management right per the parties CBA."

26. The City adopted the change to GAR 4.15.050(r) effective January 2009. At the hearing, Murray testified that after sending the November 12 e-mail, the City came to understand through discussions with Police Department managers that the Department had "their own practice around jury duty because the nature of their operations and business is very different from the rest of the City." As a result, the City decided that GAR 4.15.050(r) would not apply to GPOA members, but did not inform GPOA.

GAR 4.35.100 - Sick Leave Incentive

27. Because of its concern about excessive sick leave usage, effective January 1, 2006, the City introduced a sick leave incentive program as part of its compensation plan for management, supervisory, and confidential employees. Under this program, employees who used no more than 16 hours of sick leave per year were credited with 16 hours of floating leave in the subsequent year. This sick leave incentive program was not incorporated into the GARs nor applied to GPOA members until October 31, 2008.

28. During 2005-06, the City also sought to address its concerns about sick leave abuse with the unions representing City employees. In bargaining with the GPOA, Captain Gerkman developed a paid time off (PTO) proposal, the purpose of which was to reward employees who did not use sick leave regularly by increasing their vacation leave banks. During bargaining, GPOA representatives recognized that the purpose of the PTO program was to help the City address sick leave abuse issues and serve as an incentive for employees to avoid using sick leave. The parties ultimately agreed to a PTO program, which was incorporated into Article 11 of the parties' 2006-08 agreement. Pursuant to Article 11.1 and 11.3 of that agreement, six days of leave was transferred from an employee's sick leave bank into their PTO bank each year, which resulted in an employee having six extra days of PTO leave and six fewer days of sick leave.

29. In its October 31, 2008 notice, the City proposed to add GAR 4.35.100, which stated:

“4.35.100 SICK LEAVE INCENTIVE. If an employee uses not more than 20 hours of sick leave per calendar year, the employee will be credited with 20 hours of additional floating leave in January of the next calendar year. That additional leave must be used within the following 12 months, and shall automatically expire if not used. This additional leave is not eligible for cash-out or for any other type of monetary payment to the employee under any circumstances.

“Employees under the PTO system will credit their sick leave as PT-S on their time and attendance record sheets (TARs).”

30. In his November 5 letter, Makler stated that the amendment to GAR 4.35.100 related to wages, hours, and working conditions and must be bargained. In her November 12 response, Pauley stated that the amendment to GAR 4.35.100 “is an additional benefit being provided to all employees.”

31. In January 2009, the City adopted GAR 4.35.100. The City did not apply GAR 4.35.100 to GPOA bargaining unit employees, but did not inform GPOA of this fact.

GAR 4.45 - FMLA/OFLA Leave

32. The parties’ 2006-08 collective bargaining agreement did not address family medical leave, parental leave, or leave requirements under the Family Medical Leave Act (FMLA) or the Oregon Family Leave Act (OFLA).

33. Prior to January 2009, GAR 4.45 included a section outlining employees’ rights to Parental Leave. This language was adopted prior to the existence of OFLA and FMLA.

34. Sometime after the adoption of OFLA and FMLA, the City established Family and Medical Leave Guidelines to inform City employees about their FMLA and OFLA rights. The Guidelines outline employee rights to family and medical leave, including eligibility requirements for leave, the parameters of leave, the requirement that City employees use paid leave time while on leave, and the process for requesting leave. Sometime prior to January 2008 the City incorporated an employee’s parental leave rights from GAR 4.45 into the Guidelines. The City provides family and medical leave, including parental leave, to all City employees under these Guidelines. The Guidelines are posted on the City’s intranet site.

35. Prior to January 1, 2008, the Guidelines provided that employees were entitled to up to 12 weeks of leave during a 12-month period. Effective January 1, 2008, the City changed the Guidelines to provide that employees were entitled to 12 weeks of leave during a calendar year. The City also added grandparent and grandchild as additional members of the immediate family. At the time this change was made, the City notified all employees and the three unions of the change in the method of calculating the 12 weeks of leave, and the Guidelines were updated on the City's intranet site.

36. Effective January 14, 2008, the Guidelines were again updated to reflect a change in the law related to leave to care for family members who were injured in military service or preparing to leave for active duty. The City did not notify the unions of this change.

37. In its October 31, 2008 notice, the City proposed to replace the GAR 4.45 parental leave provision with the following:

“[i]t is the policy of the City of Gresham, and in accordance with federal and state law, to grant family medical leave to eligible employees. Generally, eligible employees are entitled to up to 12 weeks of unpaid leave of absence in a calendar year, except in certain circumstances involving pregnancy. While the federal and state family leave laws designate this type of employee absence as unpaid, the City will require employees to use their available leave bank accruals before an employee is on unpaid family medical leave. Federal and state laws also protect an employee against loss of employment for reasons related to the protected leave and, in some cases, against loss of insurance coverage in the event an employee must be absent from the workplace due to his or her own serious health condition or the serious health condition of a family member. Administration of family leave will be in accordance with this policy and the applicable federal and state laws.”

38. In his November 5 letter, Makler notified the City that the amendment to GAR 4.45 related to wages, hours, and working conditions and must be bargained. In her November 12 response, Pauley stated that the amendment to GAR 4.45 was “made pursuant to federal and state law.”

39. Effective January 2009, the City adopted the amendment to GAR 4.45, with minor grammatical changes. The amended GAR 4.45 applies to all City employees, including GPOA members.

Facts Related to the Information Request

40. The IAFF represents a bargaining unit of City employees. On February 26, 2008, the IAFF and the City executed a ground rules agreement for their successor collective bargaining negotiations. Ground Rule 8 provides that

“[t]he parties agree that these negotiations, documents and materials are not open to public inspection, involvement or participation. Neither party shall release information about the subjects under discussion in negotiations to the media except: a) in a written press release signed by the Chief Negotiators for both parties; b) until the contract is ratified by both parties; or c) until impasse is reached and the State Conciliator has published outstanding issues.”

41. Ground Rule 9 provides that “[t]he parties agree that all sessions be considered executive sessions and, as such, are not open to the public.”

42. On October 23, 2008, the IAFF and the City entered into a tentative contract agreement. The tentative agreement established the terms of the City and the IAFF settlement in principle and included the agreed upon salary increases, but did not include the final contract language in all areas. The ground rules required that tentative agreements were subject to ratification.

43. During an October 28, 2008 negotiation session between the City and GPOA, Makler requested a copy of the IAFF tentative agreement so GPOA could determine if the IAFF wage settlement was relevant to the parties’ negotiation. Murray told Makler that the IAFF tentative agreement was confidential and that the City and IAFF had not yet ratified the agreement. Makler did not respond to Murray’s reply.

44. Murray, who was on the City bargaining team during the IAFF negotiations, believed that Ground Rule 8 applied to anyone who did not participate in the City/IAFF negotiations, not just the media. As a result, Murray understood that she could not give the tentative agreement to anyone not involved in the negotiations until that agreement was ratified and the contract language finalized. Murray did not ask the IAFF whether they believed the settlement agreement could not be provided to GPOA under the ground rules.

45. IAFF Vice President Jeff Hamilton, who participated in the bargaining for the IAFF tentative agreement, did not believe that Ground Rule 8 prevented the City or IAFF from providing information to persons other than the media. Hamilton believed

that, based on the language of Ground Rule 8 and legislation passed in 1998 which made labor negotiations more transparent, negotiations with the City were no longer confidential.³

46. In her November 12 e-mail to Makler, Pauley responded to the GPOA's request for the IAFF tentative agreement:

"[i]n response to your request that the City provide you with a copy of the IAFF's contract settlement.[sic] The agreement has not been finalized and it is the City's position that it is confidential. As a result, it will not be provided to you until there is a final agreement. Please let me know if you have any questions or would like to discuss further."

47. In his November 12 response to Pauley's e-mail, Makler did not directly reply to Pauley's statement that the IAFF contract settlement would not be provided until there was a final agreement.

48. Makler did not request a copy of the tentative agreement directly from the IAFF.

49. On or about December 3, 2008, the IAFF ratified the October 23 tentative agreement. The City Council ratified the IAFF tentative agreement on December 16 and posted the agreement on the City's intranet site, which is available to GPOA. The IAFF and the City executed the agreement on December 18, 2008.

50. On January 20, 2009, GPOA filed its original complaint in Case No. UP-06-09. After receiving a copy of this complaint, Murray realized that she had never given GPOA the IAFF settlement information. On January 20, 2009, Murray notified Makler that the IAFF contract "became available as of December 16 as it was approved by council" and could be found on the City intranet website. The City never gave the GPOA a copy of the IAFF tentative agreement. Makler never notified the City that the information it provided did not meet his request.

³We assume that the witness is referring to the legislature's 1995 revision of ORS 192.660(2) (now ORS 192.660(3)), which provides that all "[l]abor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session." The statute prior to the revision provided that labor negotiations would be conducted in executive session if either party requested that the meeting be closed.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City violated ORS 243.672(1)(e) by refusing to bargain over the changes to GAR 4.15.050(b) (effective date of a salary advancement) and GAR 4.35.100 (sick leave).
3. The City did not violate ORS 243.672(1)(e), (f), or (g) by refusing to bargain over the changes to GAR 4.15.050(r) (jury duty leave) or GAR 4.45 (OFLA and FMLA leave).
4. The City did not violate ORS 243.672(1)(e) by refusing to bargain over the changes to GARs 4.15.040(b), 4.15.050(c), 4.15.050(m)(1)(b) and (c), 4.15.050(u), 4.15.050(v), 4.25.050(d)(5), 4.25.050(e)(1)(e) and (f), 4.30.040(d) and (f), 4.35.090, 4.50.030(c), and 6.020.010(c) and (d).⁴
5. The City violated ORS 243.672(1)(e) when it failed to timely provide GPOA with a copy of the IAFF tentative agreement.
6. A civil penalty is not warranted.

DISCUSSION

The allegations in this complaint arise from two separate situations: the City's decision to unilaterally change its administrative rules, and the City's refusal to provide GPOA with a copy of the IAFF tentative agreement.

⁴GPOA alleged that the City violated ORS 243.672(1)(f) by interfering with GPOA's ORS 243.662 right to participate in the activities of labor organizations for the purpose of representation, and refusing to bargain with the GPOA in accordance with ORS 243.698 *et seq.* GPOA further alleged that the City's refusal to bargain over policy changes, violated the parties' collective bargaining agreement, in violation of 243.672(1)(g). However, GPOA addressed neither of these allegations in its post-hearing brief. Nor did GPOA address its ORS 243.672(1)(e) allegations regarding the remaining GARs at hearing or in its post-hearing brief. Therefore, we will dismiss these allegations without discussion.

Alleged Unilateral Changes

GPOA alleges that the City violated ORS 243.672(1)(e) by: 1) failing to notify GPOA of proposed policy changes involving employment conditions which were related to mandatory subjects of bargaining; 2) failing to bargain over those policy changes; and 3) unilaterally implementing those policy changes without bargaining.⁵

Under ORS 243.672(1)(e), good faith bargaining requires an employer to bargain prior to changing existing employment conditions related to mandatory subjects during the term of a contract. *American Federation of State, County and Municipal Employees, Local No. 2752 v. Wasco County*, Case No. C-176-75, 4 PECBR 2397 (1979), *aff'd*, 46 Or App 859, 613 P2d 1067 (1980). In determining whether the employer violated ORS 243.672(1)(e), we apply the analysis established in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008):

“[i]n 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).”

Generally, the *status quo* is established by an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). The party alleging a past practice has the burden of proving its existence. *Oregon AFSCME Council 75, Local 2831 v. Lane County*

⁵GPOA also argues that “[t]he City’s actions in unilaterally amending the GARs involved self-dealing and/or direct contact by the City with employees represented by the Association.” An employer’s direct communications with bargaining unit members regarding contract proposals may constitute direct dealing in violation of ORS 243.672(1)(e). *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, *adh’d to on recons*, 16 PECBR 707 (1996). However, GPOA failed to clearly allege this type of a subsection (1)(e) violation in its complaint. Therefore, we do not address this argument.

Human Resources Division, Case No. UP-22-04, 20 PECBR 987, 993 (2005). A legitimate past practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. *Id.* Once the *status quo* is established, the complainant has the burden of proving that the employer changed the *status quo*. *McKenzie Education Association/Lane Unified Bargaining Council/OEA v. McKenzie School District 68*, Case No. UP-81-94, 16 PECBR 156, 164 (1995). We apply this analytical framework to each of the changes the City made in its policies.

GAR 4.15.050(b) - Effective Date of Salary Step Advancement

GPOA established the *status quo* for determining the effective date for salary step advancement for GPOA bargaining unit members. The past practice was to advance employees on the date they completed their probationary periods. There is no dispute that this practice was clear and consistent, had historically been used by the City for determining the date of step advancement for GPOA members, and was acceptable to both parties.

The City changed the *status quo* when it amended GAR 4.15.050(b) so that salary-schedule increases occurred on the first and sixteenth of the month. The amended rule initially applied to GPOA members. The change involves the date on which an employee will receive a salary-schedule increase, which has a direct impact on the amount of an employee's wages. Under ORS 243.650(7)(a), wages are one of the specifically enumerated mandatory bargaining topics which the City is obligated to bargain. We move to the next step in our analysis to determine whether the City completed its bargaining obligation.

When the subject of the change is a mandatory subject of bargaining, ORS 243.672(1)(e) requires the parties to bargain over both the decision and the mandatory impacts of that decision. When the subject of the change concerns a mandatory subject of bargaining, the employer must bargain before it decides to make the change. *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5654, *ruling on reconsideration*, 7 PECBR 5664 (1983). When the subject of the change is permissive for bargaining but impacts a mandatory subject of bargaining, the employer must bargain before implementing the change. *Id.* Here, the City decided to change GAR 4.15.050(b) when it officially adopted the decision without first bargaining to completion either the decision or the potential impacts of that decision on GPOA members.

The City argues it was not obligated to bargain the change because the change benefitted employees. We disagree. When a subject is mandatory for bargaining, an employer may not make an unbargained change regardless of whether it helps or hurts the employees. An employer cannot unilaterally increase an employee's wages, any more than the employer can unilaterally decrease an employee's wages, without first exhausting the applicable statutory dispute resolution procedures. It is the *change*, not whether the change is positive or negative, which gives rise to the duty to bargain. See *AFSCME v. Wasco County*, 4 PECBR 2397; and *Rogue Community College Classified Employees Association/Chapter 152, Oregon School Employees Association v. Rogue Community College*, Case No. C-159-83, 7 PECBR 6351 (1984).

The City further argues that it did not violate ORS 243.672(1)(e) because it subsequently decided not to apply GAR 4.15.050(b) to GPOA employees. We disagree. The fact that the City never implemented the change in salary-schedule advancement for GPOA bargaining unit members does not relieve the City of the need to bargain its decision to make the change. The subsection (1)(e) violation occurred when the City decided to change GAR 4.15.050(b). The City had an obligation to bargain before it made the decision, and that obligation is not somehow retroactively dissolved because the City later decided not to implement the change. The lack of implementation may affect the remedy, but it does not change the fact that the City acted in bad faith.

GAR 4.35.100 - Sick Leave Incentive

At the time the City proposed adoption of GAR 4.35.100, the *status quo* was that the City did not apply the manager's sick leave incentive program to GPOA members. The only sick leave incentive provided to GPOA members was established by the parties' collective bargaining agreement, which required that the City place a portion of an employee's sick leave accrual into the employee's PTO bank. The evidence shows that the PTO bank in the collective bargaining agreement language was negotiated as an alternative to the sick leave incentive program provided to other City employees.

The City decided to change the *status quo* for GPOA bargaining unit members when it adopted GAR 4.35.100. Murray's October 31 letter and Pauley's November 12 e-mail clearly reflect the City's intent to apply GAR 4.35.100 to GPOA members, and its refusal to bargain over this decision. Sick leave is a specifically enumerated mandatory bargaining subject under ORS 243.650(7)(a); accordingly, the City was obligated to bargain before it made this decision. We again reject the City's argument that it was not required to bargain because it was providing an additional benefit to these employees. The City's unilateral decision to adopt GAR 4.35.100 in January 2009 violated ORS 243.672(1)(e).

The City argues that we should not find a violation because it did not apply GAR 4.35.100 to GPOA employees. As discussed above, the City's later choice not to apply the new policy to bargaining unit members does not exonerate it of its earlier bad faith.

GAR 4.15.050(r) - Jury Duty Leave

GPOA failed to prove that the City changed the *status quo* regarding jury duty leave because it failed to establish the existence of a binding past practice. As stated previously, the *status quo* is established by an expired collective bargaining agreement, past practice, work rule, or policy. Here, the parties' collective bargaining agreement does not address jury duty leave. GAR.4.15.050(r) concerns jury leave but does not specify an employee's obligation to return to work after being released from jury duty. Although the GARs generally apply to matters not addressed in a collective bargaining agreement, the evidence was insufficient to determine whether the Department granted jury duty leave pursuant to GAR 4.15.050(r).⁶

The only evidence presented at hearing involved one specific incident that occurred several years earlier when a Police Department employee was required to reimburse the City for the salary he received when he failed to return to work after being released from jury duty. To be legitimate, a past practice must be clear, consistent, occur repetitively over a long period of time and be acceptable to both parties. This single incident is insufficient to establish a legitimate past practice. GPOA failed to establish the existence of a binding past practice which the City changed. Accordingly, the City had no obligation to negotiate changes in pay for jury leave the City made pursuant to GAR 4.25.050(r). *AFSCME v. Lane County*, 20 PECBR at 995. Therefore, the City did not violate ORS 243.672(1)(e).

GAR 4.45 - FMLA/OFLA Leave

GPOA failed to prove that the City unlawfully changed the *status quo* when it implemented GAR 4.45. The *status quo* regarding employees' rights to family and medical leave is established by the City's Family and Medical Leave Guidelines. The City applies these Guidelines to all City employees. The Guidelines are published on the City's intranet site. As recently as January 2008, the City provided GPOA and all City employees with notice of changes to the Guidelines.

⁶GAR 4.05(b) permits Department management to apply the GARs under Chapter 4 which do not conflict with an applicable collective bargaining agreement. However, application of these rules is not required.

When the City changed GAR 4.45, it deleted the language regarding parental leave rights. However, the evidence shows that the parental rights language in the GARs was outdated, and that the City previously incorporated the parental rights leave provision into the Guidelines. There is also no evidence that the City's substitution of a somewhat generic paragraph, referencing employee's rights to OFLA and FMLA leave pursuant to policy and law, resulted in a change to any of the actual benefits available under the Guidelines. Accordingly, GPOA did not establish that the amendment to GAR 4.45 resulted in a change to the *status quo*.

GPOA objected that the City changed its method of calculating an employee's entitlement to parental leave. Before it amended the applicable GAR, the City allowed employees 12 weeks of parental leave during a 12 month period. The City amended GAR 4.45 so that employees were entitled to 12 weeks of parental leave during a calendar year. Although amended GAR 4.45 incorporates the City's use of the calendar-year basis, this does not change the current *status quo*. The City changed the Guidelines in January 2008 to specify that employees were entitled to take 12 weeks of parental leave during a calendar year. At that time, it notified all City employees and its unions of the change. Any challenge to that change at this point is untimely. The change in 2008 became the new *status quo*, and GPOA failed to prove the City changed it.

Remaining GAR amendments

We will dismiss without discussion GPOA's allegations related to 15 of the 19 rule changes, including GARs 4.15.040(b), 4.15.050(c), 4.15.050(m)(1)(b) and (c), 4.15.050(u), 4.15.050(v), 4.25.050(d)(5), 4.25.050(e)(1)(e) and (f), 4.30.040(d) and (f), 4.35.090, 4.50.030(c), and 6.020.010(c) and (d). GPOA specifically alleged the changes to these rules as violations in its complaint. However, the record of the hearing included little, if any, evidence supporting these allegations and GPOA did not address them in its arguments.⁷

Information Request

GPOA alleges that the City violated ORS 243.672(1)(e) by failing to provide it with the IAFF tentative agreement, as requested. The duty to bargain in good faith under ORS 243.672(1)(e) includes a duty to exchange information during the collective

⁷The fact that GPOA pled 19 violations, but limited its presentation of evidence and argument to only four of these violations, without notifying either the City or this Board that it was narrowing the focus of its case prior to the hearing or the filing of the post-hearing briefs, may be taken into account should the parties request representation costs in this proceeding.

bargaining process. *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79, 5 PECBR 4398 (1981). During “contract negotiations, the duty arises so long as the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal.” *Id.* at 4405.

We begin our analysis of a party’s obligation to provide requested information based on the premise of full disclosure. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 70 (1999). To determine whether a party has violated its duty to produce the requested information, we consider four factors: (1) the reason given for the request; (2) the ease or difficulty of producing the information; (3) the kind of information requested; and (4) the parties’ labor-management history. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5031-32 (1982).

Three of these factors are not at issue here. There is no dispute that the information requested was reasonably necessary to the parties’ bargaining process. The City possessed the tentative agreement and would have had no difficulty providing a copy of it to GPOA. Finally, there is no evidence that the GPOA has a pattern of making numerous information requests, or that the City has a pattern of unreasonably delaying its response to legitimate requests for information. Therefore, the parties’ labor-management history is not at issue.

The issue before us concerns the kind of information requested. The City refused to provide the information sought by GPOA on the basis that the information was confidential at the time GPOA made its request. We have held that an employer has no obligation to provide confidential information. In *OSEA v. Colton*, 6 PECBR at 5032 we stated:

“[i]n dealing with union requests for relevant, but assertedly confidential information, this Board is required to balance a union’s need for information against any legitimate and substantial confidentiality interests established by the employer. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims may be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation.”

See also Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Case No. UP-7-98, 18 PECBR 64, 71 (1999).

We need not decide whether the information was confidential when GPOA requested it. Even if it was, the City subsequently violated subsection (1)(e) when it failed to timely provide the information after the basis for its confidentiality claim disappeared. The City bases its confidentiality claim on the ground rules in its bargaining with IAFF. Under those ground rules, the parties would keep the terms of contract proposals confidential until the parties ratified an agreement.

Although the City ratified the IAFF tentative agreement on December 16 it waited until January 20, and the filing of this complaint, to respond to GPOA's information request. When it did respond, the City did not give GPOA the information it requested; instead, it sent GPOA a link to the IAFF collective bargaining agreement.

The duty to provide information requires not only that relevant requested information be provided, but that it be provided in a timely manner. Whether the period of time between the request and the response is reasonable depends on the totality of the circumstances. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 672 (2004). When determining the timeliness of a response to a request for information we consider the accessibility of the data, the clerical time necessary to produce the information, workload priorities of the responding party and the amount of data requested. None of these factors was an issue here. The City had no legitimate reason for delaying its response to the information request once the tentative agreement was ratified on December 16. Accordingly, the City violated ORS 243.672(1)(e) when it failed to respond to GPOA's request in a timely manner, and failed to provide GPOA the information it requested.

Civil Penalty

The City requests a civil penalty. We may award a civil penalty to a respondent when the Board finds that "[t]he complaint has been dismissed * * * and that the complaint was frivolously filed, or filed with the intent to harass the other person, or both." ORS 243.676(4)(b). Here, the complaint has not been dismissed. In fact, we have found that the City engaged in several of the unfair labor practices alleged in the complaint. Therefore, a civil penalty is not appropriate in this case.

ORDER

1. The City shall cease and desist from unilaterally changing its practice regarding the effective date for salary advancement for GPOA members.

2. The City shall cease and desist from unilaterally changing its practice regarding the application of its sick leave incentive program to GPOA members.

3. The City shall cease and desist from refusing to provide GPOA a copy of the IAFF tentative agreement.

4. All other allegations in the complaint are dismissed.

DATED this 16 day of December, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.