

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-9-04

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL	)	
EMPLOYEES ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
CLATSKANIE SCHOOL DISTRICT,	)	AND ORDER
	)	
Respondent	)	
	)	
	)	
	)	

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This Board heard oral argument in this case on January 19, 2005, on Complainant's objection to the Proposed Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on October 5, 2004, following a hearing on June 17, 2004, in Clatskanie, Oregon. The record closed with the receipt of the parties' post-hearing briefs on August 6, 2004.

Michael J. Tedesco, Attorney at Law, 1729 N.E. 65<sup>th</sup> Avenue, Hillsboro, Oregon 97007, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

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The Oregon School Employees Association (Association) filed the complaint in this case on February 25, 2004, alleging that the Clatskanie School District (District) had violated ORS 243.672(1)(e) by failing to bargain in good faith over the termination of the District's early retirement incentive program for Association unit employees. On April 16, 2004, the District timely filed its answer in which it admitted

and denied certain allegations, and raised a claim for a civil penalty. A hearing was held on June 17, 2004, at which the parties presented testimony and other evidence.

The issues are:

1. Did the District engage in bad faith bargaining with the Association regarding the District's proposal to terminate the early retirement incentive program, and unilaterally change that program without bargaining in good faith, in violation of ORS 243.672(1)(e)?

2. Should the Association be required to pay a civil penalty to the District?

We conclude that the District did not violate subsection (1)(e). We do not award a civil penalty.

Having the full record before it, this Board makes the following:

### RULINGS

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

### FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of approximately 60 classified employees employed by the District, a public employer.

2. The Association and the District were parties to a collective bargaining agreement effective July 1, 2003 through June 30, 2004, which was signed by the parties on September 22, 2003. The agreement did not include a provision governing early retirement benefits, but such a program existed under District policies.

3. On October 22, 2003, District Superintendent Mike Corley sent a letter to Association President Carmelita Moore and Association Field Representative Larry Miller, informing them that it planned to end the District's early retirement program.

4. On October 28, 2003, Miller e-mailed Corley with a timely demand to bargain. Between October 28 and October 30, Miller requested a seniority list of the employees in the District bargaining unit. The District provided that list on October 30.

5. On November 5, 2003, the parties held their first negotiating session. Corley presented the District's proposal to end the retirement program effective June 30, 2005.<sup>1</sup> Corley explained that the District was taking this step in response to cuts in school funding and the increasing cost of the program over time. Corley provided the Association representatives with charts projecting costs of the program up to 2014. The District calculated that the cost of the program, if terminated after the 2003-2004 fiscal year, would be \$604,544, assuming no increase in health care costs. The District estimated that, if all current employees eventually retired under the program, the cost to the District would be \$912,823, assuming no increase in health care costs.

6. The District never provided the Association with a specific amount of cost savings it sought through elimination of the early retirement program. However, the District's handouts regarding the projected costs of the program, and the proposed termination date, could be used to derive the amount of money at issue. The Association never asked the District for any additional cost information, and the District never refused to provide any information to the Association.

7. The parties met for a second time on December 11, 2003. A School Board member was present at these negotiations. The Association asked that the District grandfather all current employees into a continuation of the program, as the Knappa School District had recently done with another Association unit. Corley stated that he had no power to make such an agreement because the School Board wanted to end the program, but that he would review the issue with the School Board.

8. The parties met for a third time on January 27, 2004. The Association proposed to cap the benefit payments under the program at \$300 per month and end the program after five years. The Association also proposed extending the 2003-2004 collective bargaining agreement. Corley rejected these proposals, stating that he "had his marching orders" from the School Board.

9. Also on January 27, the District proposed that employees defer income into a tax sheltered annuity (TSA) and be permitted to pay for continued insurance benefits after retirement. The Association rejected these proposals on the grounds that unit members were already entitled to these options under federal law.

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<sup>1</sup>Corley's bargaining "parameters" from the School Board were to end the early retirement program and the costs associated with it.

Neither party proposed that the District contribute funds to employee TSAs.<sup>2</sup> The Association did not pursue the TSA proposal because it wished to “preserve the [early retirement] benefit” and because the wages paid Association members were low enough that employees were unlikely to be able to afford to make contributions to a TSA.<sup>3</sup>

10. On February 12, the parties met for the last time, 99 days after their first negotiation session. The District presented the Association with its “final offer,” which was virtually identical to its original proposal.<sup>4</sup>

11. On February 19, the District notified the Association that it intended to implement its final offer through adoption by the School Board on March 15, 2004. The School Board did in fact adopt the proposal on that date, which was 145 days after its October 22, 2003 notice. The District planned to use the funds saved from ending the program to hire additional teachers and program assistants.

### CONCLUSIONS OF LAW

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

2. The District did not violate ORS 243.672(1)(e) by engaging in bad faith bargaining with the Association regarding the District’s proposal to terminate the early retirement incentive program, or by implementing its final offer on this subject.

#### *Standards for decision.*

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” The Association argues that the District violated this statutory duty by engaging in surface bargaining.

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<sup>2</sup>Corley would have presented such a proposal to the School Board, had the Association asked him to, but he would have had to “sell it to the board.”

<sup>3</sup>TSAs had some advantages over the School Board early retirement policy in that they would be available to employees even if they terminated employment with the District before retirement age, and would pass to an employee’s heirs in the event of his or her death.

<sup>4</sup>The proposal changed the cutoff date for employee-paid health insurance from age 65 to age 62, and added a provision that employees could apply income from part-time employment with the District towards insurance benefits.

This Board's first surface bargaining case was *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196-202 (1985). In that case, we found that the District committed a *per se* violation of ORS 243.672(1)(e) when, in negotiations, it made a proposal directly to bargaining unit members rather than to their designated bargaining representative. Because of this violation, we also found that the District implemented its final offer in violation of subsection (1)(e). An employer may only lawfully implement when it has fulfilled its bargaining duty under the Public Employee Collective Bargaining Act (PECBA).

Lane Unified Bargaining Council (LUBC) also sought a ruling from this Board that the District violated subsection (1)(e) by engaging in surface bargaining, a term which refers to a party's unwillingness to bargain in good faith with the desire to reach an agreement. As in any case in which this Board does not find a *per se* refusal to bargain, we looked at the "totality of the circumstances." In particular, this Board reviewed six factors: use of dilatory tactics, proposals made by a party, the behavior of a party's spokesman, concessions or counterproposals, failure to explain or reveal bargaining positions, and the course of negotiations overall.

This Board found that the District's proposals were not evidence of bad faith, even though they were harsh and predictably unacceptable to the LUBC. Regarding concessions and counterproposals, we found that neither party made any concessions prior to factfinding, and that the District thereafter made none. Nevertheless, this Board did not find the District's conduct to be evidence of bad faith bargaining.

We then examined the overall course of negotiations, and found that the District's actions, taken as a whole, were not indicative of bad faith. We concluded that the District did not engage in surface bargaining, even though it committed the *per se* offense of direct dealing with employees. This unfair labor practice was not sufficient evidence that the District was unwilling to bargain in good faith to reach an agreement with the LUBC.

This Board has continued to apply the *McKenzie School District* standards in later cases. Among the factors we have considered are: (1) whether dilatory tactics were used; (2) the content of a party's proposals; (3) the behavior of a party's negotiator; (4) the nature and number of concessions; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations. *See, e.g., Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR

559, 584-85 (1996);<sup>5</sup> *Lincoln County Employees Association v. Lincoln County and Glode*, Case No. UP-42-97, 17 PECBR 683, 705 (1998); and *School Employees Local Union 140, SEIU v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420 (2003).<sup>6</sup>

We apply the *McKenzie School District* standards here. The Association does not argue that the District used dilatory tactics. We turn to the remaining factors.

*Content of the District's proposals:* Ending the early retirement program was predictably unacceptable to the Association. Proposing that employees contribute to TSAs, without any employer contribution, did not reduce the impact on employees of ending the program. By itself, a harsh and predictably unacceptable proposal is an insufficient basis on which to imply a lack of good faith, regardless of what the School Board may think of the proposal. *Lincoln County*.

*Behavior of the District's negotiator:* The parties agree that the District's representative was cordial throughout the negotiations. When the Association proposed capping benefits and modifying the term of the collective bargaining agreement to make continuation of the program more palatable to the District, Corley told Association negotiators that he was acting according to the School Board's "marching orders" in rejecting the Association's proposals. Corley's conduct at the bargaining table was not evidence of the District's intent to bargain without reaching agreement with the Association.

*Nature and number of concessions made:* The first proposal made by the District was to terminate the early retirement program. The second District proposal added a suggestion that the unit members adopt a TSA and pay for their own health insurance after retirement. The District's final offer changed the retirement cut-off age and added a provision that part-time employment could be applied to employee-paid health insurance benefits. Although the District argues that the second and third proposals included concessions because they could have opened the door to discussions about District contributions to TSAs, what the District actually proposed was something the unit employees already had the right to do. Corley repeatedly told the Association that the commissioners wanted to terminate the program. We conclude that the District made no concessions of any substance.

As a result of the District's refusal to change its position regarding elimination of the program, the Association made concessions which would have limited

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<sup>5</sup>Chairman Ellis, dissenting.

<sup>6</sup>Member Gamson, dissenting.

the benefits to \$300 per month per employee and ended the program in five years. This proposal was not acceptable to the District. However, the Association did not ever propose other methods of employee compensation, such as employer contribution to TSAs, because its goal was to maintain the early retirement program. *Compare, School District No. 1, Multnomah County.*

*District explanations of its bargaining position:* The District's bargaining position was unambiguous—it wished to end the early retirement program. At the bargaining table and at hearing, District representatives explained that the proposal was based on its desire to end the ballooning, somewhat unpredictable, costs of this program. The Association responded with proposals aimed at ameliorating these concerns, by capping program benefits and ending the program in five years.

The Association argues that the District did not explain its rationale or offer a specific financial target achieved by eliminating the program completely in a matter of months. It argues that the District's lack of clear communication about its financial goals made it difficult for the Association to propose alternatives that would meet those goals.

We conclude that the District's financial position was clear—it wished to zero out the program costs. The Association did not ask for more specific information, and there is no evidence that the District failed to respond to any of the Association's questions or refused to explain its proposals. This Board has stated:

“\* \* \* District negotiators explained that the proposals were needed for financial reasons, to increase management flexibility, and to streamline the contract. No further justification was required. A party need not articulate a justification which the other party deems sufficient in order to be able to pursue a contract proposal.” *Rogue Valley Transportation District*, 16 PECBR at 586.

The District suggests that the Association should have proposed that the District make contributions to TSAs or raised other alternatives outside the early retirement program structure. However, there is no evidence that the District would have accepted any Association proposal which required a financial contribution by the

District.<sup>7</sup> In any event, the Association chose to focus upon preserving the program. It did not ask Corley to present its proposal to the School Board.

*Course of negotiations:* The District and Association engaged in four bargaining sessions over approximately 99 days. Only one issue was on the table: the District's proposal to end the early retirement program. Thus, there were no other issues on which the parties could trade proposals and counterproposals. The District's position was consistent throughout the negotiations, and there were no last-minute changes in position. The Association maintained its position throughout negotiations. It made two proposals to the District: one which would preserve the program unchanged for all current employees; and another, which would preserve it for all current employees, cap the benefits, and extend the existing collective bargaining agreement for another year. On its face, neither proposal met the District's objective of eliminating the cost of the early retirement program. The District rejected these proposals. On March 15, 2004, the District implemented its final offer.

Negotiations between the District and the Association took place under ORS 243.698.<sup>8</sup> Bargaining under ORS 243.698 has substantially different dynamics than under the usual processes established by ORS 243.712 et seq. *Lebanon Association*

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<sup>7</sup>The District representative at the table was not authorized to accept such a proposal; Corley testified that he would have had to attempt to "sell" such a deal to the School Board.

<sup>8</sup>The statute provides that:

"\* \* \* (1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.

"(2) The employer shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain

"\* \* \* \*"

"At any time during the 90-day period, the parties jointly may agree to mediation, but that mediation shall not continue past the 90-day period from the date the notification specified in subsection (2) of this section is sent. Neither party may seek binding arbitration during the 90-day period."

*of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71 (2005).

For example, under ORS 243.712, collective bargaining negotiations are somewhat open-ended: after one hundred and fifty days, a party may request mediation; after mediation, a public employer may not implement its final offer—nor a labor organization call a strike—until the parties' final offers have been made public, and a "cooling off" period has ensued. That is not true of negotiations under ORS 243.698. Here, the District was free to implement its final offer, on the sole issue in dispute, 90 days after negotiations began. It did so.

*Conclusion:* In this case, we must decide if the District engaged in unlawful surface bargaining before it eliminated early retirement benefits. For reasons which follow, we conclude that the District did not engage in unlawful surface bargaining.

The Association argues that the District's first proposal to eliminate the early retirement program was predictably unacceptable to the bargaining unit. It also contends that the District made no concessions or meaningful counterproposals during negotiations. The Association urges this Board to find that the District engaged in unlawful surface bargaining. According to the Association, the District had to come into negotiations with an open mind about its proposed course of action. In addition, the Association argues that, once negotiations began, the District had an obligation to make some concessions along the way, because the bargaining obligation requires an open mind and a "willingness to resolve \* \* \* disputes." ORS 243.656(5). It urges this Board to reconsider, reverse, or distinguish our decision in *School District No. 1, Multnomah County*.

We agree that the District's proposed elimination of the retirement program was predictably unacceptable to the bargaining unit, and that the District made no concessions or meaningful counterproposals during negotiations. However, this does not compel the conclusion that the District acted unlawfully.

This Board has considered surface bargaining allegations in many cases. We have found unlawful surface bargaining only twice: first in *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 453-54 (1996), *AWOP 146 Or App 777, 932 P2d 1216* (1997), and a few months later in *Rogue Valley Transportation District*. In each, it was the employer's overall conduct, not the content of the employer's proposals, which led this Board to conclude that the employer had acted unlawfully.

In *Rogue Valley Transportation District* this Board found the District guilty of surface bargaining, in spite of the fact that it met all or most of the *McKenzie School District* standards. As discussed more fully below, in *Hood River County* the County's conduct both at and away from the bargaining table was so egregious that we did not need to go beyond appearances in order to determine that the County never intended to bargain in good faith with the exclusive bargaining representative of its employees.

This Board has consistently held that a party may engage in "hard bargaining" at the table, so long as it remains willing to negotiate toward a collective bargaining agreement. In *McKenzie School District* itself, the District's negotiator made what the complainant characterized as an "ultimatum" in post-factfinding negotiations: the District would not sign a contract that did not contain certain language which the District had proposed. The District made no significant concessions thereafter. We characterized the District's conduct as permissible "hard bargaining," not as an unlawful refusal to bargain. In any event, we emphasized that this Board must consider all aspects of the parties' negotiation history, and not merely whether a party refused to make certain concessions. 8 PECBR at 8201-2. We concluded that the District was not guilty of surface bargaining, even though it had committed a *per se* refusal to bargain when it negotiated directly with members of the bargaining unit.

In *Hood River County*, the Union alleged—among other things—that the County violated ORS 243.672(1)(e) when it (1) circumvented the Union's designated spokesman, (2) refused to meet and confer with the Union or explain the County's proposals, and (3) refused to bargain with AFSCME, based on the totality of its conduct. We held that the County had flatly refused to meet and confer with AFSCME, a *per se* refusal to bargain under *Lane County v. Lane County Peace Officers Association*, Case Nos. UP-102/105/109-93, 15 PECBR 53 (1994). Taking the County's *per se* unfair labor practice into account, this Board held separately that the County had bargained in bad faith, all things considered. We found that the County acted in near total disregard of its duty to bargain under the PECBA.

Its first spokesman made no proposals or counterproposals to the Union, and said that he had little or no authority to negotiate anyway. He neither read nor responded to the Union's proposed ground rules. The County later named a new spokesman. On his watch, the parties had only one day of meaningful bargaining in a three- or four-month period. However, the parties did reach a negotiated settlement in mediation—which the County Board promptly rejected.

The County then refused to meet with the Union concerning the bargaining dispute in general, or the County's proposals in particular. In so doing, it committed a *per se* refusal to bargain. Meanwhile, the County continued to tinker with

the language of its proposals. After its rejection of the mediated settlement, the County made the Union a new proposal, which differed markedly from its previous proposals and from the Union's version of what had been tentatively agreed on. The new proposal was submitted without explanation, and without involving the County's second spokesman. The County refused to answer the Union's questions about portions of this new proposal.

According to this Board, these actions alone constituted bad faith, but the County was not done. While continuing to refuse to meet with the Union, or explain its new proposals, the County thereafter submitted a new series of "final offers." In each, the County threatened to withdraw its proposal for retroactive pay to bargaining unit members unless the County's final offer was accepted by the bargaining unit by a certain date. The Union eventually gave up, and gave in. The parties reached agreement on a contract.

This Board found that the County's conduct, including its commission of the *per se* "refusing to meet and confer" violation, amounted to bad faith bargaining. We concluded that the County wanted to "*get through* rather than *use*" the procedures of the PECBA. *Hood River County*, 16 PECBR at 455.<sup>9</sup> It is clear that this Board did not base this conclusion on the County's intransigent refusal to budge on a single contract proposal, which is all that is at issue in this case. The opposite is true: part of the County's illegal conduct included continual tinkering with its contract proposals, without explanation or willingness to meet and negotiate regarding them.

Similarly, in *Rogue Valley Transportation District*, we found that the District committed a number of unfair labor practices during negotiations with ATU. Applying the *McKenzie School District* factors and reviewing the totality of circumstances, we concluded that the District was guilty of surface bargaining, even though the District met the *McKenzie School District* standards for the most part.

The District's proposals were not evidence of bad faith, even though they were harsh and predictably unacceptable. Nor did this Board find fault with the District's refusal to make any meaningful concessions to ATU during bargaining and mediation. This Board also concluded that the District sufficiently explained its proposals. At most, the District's course of bargaining "tended" to indicate that the District had not bargained with the proper intent.

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<sup>9</sup>This Board awarded complainant a civil penalty.

Instead, this Board ruled the District engaged in surface bargaining based on other factors, including the District's conduct away from the bargaining table. The District committed a number of unfair labor practices during negotiations: by meeting directly with, and making contract proposals to, bargaining unit members during negotiations and thereby bypassing the Union; by polling employees on whether they would go out if the Union called a strike; by submitting a final offer to the mediator containing proposals never given to the Union; and by refusing to meet unless a particular Union spokesman was excluded from its bargaining team.

In addition, this Board found that the District gave deliberately false information to the Union regarding its financial difficulties: that is, it blamed its financial difficulties on the loss of federal funds, when the real cause was compensation increases given to nonbargaining unit members. In short, we found that the District engaged in unlawful surface bargaining *despite* its conduct at the bargaining table.

In our case, the Association established only that the District's proposal to eliminate early retirement was unacceptable to the Association, and that the District made no concessions during bargaining. Under *Rogue Valley Transportation District*, this does not amount to unlawful surface bargaining.

This conclusion is in accord with our decision in *Lincoln County*. There, the Association contended that the County engaged in unlawful surface bargaining by making predictably unacceptable proposals to the Association regarding a group of employees and thereafter adopting a "take it or leave it attitude" concerning those proposals. We agreed that the County's proposals were predictably unacceptable, but nevertheless found that the County bargained in good faith. We stated that:

"In cases involving predictably unacceptable proposals, the generally recognized principle is that, viewed in isolation, such a proposal is an insufficient basis to find a lack of good faith, 'provided the proposal does not foreclose future discussion.' [Citation omitted.] Absent additional indicia of a lack of intention to reach an agreement, we cannot conclude that the Respondents' proposals constitute a bad faith violation, regardless of what we think of the proposals." *Lincoln County*, 17 PECBR at 705 (footnote omitted).

In *Lincoln County*, the Association alleged the County acted in bad faith by (1) giving inconsistent justification for County demands, (2) conditioning a retroactive wage increase on acceptance of the County's proposals and (3) giving misleading information regarding the County's proposals. Rejecting the Association's arguments,

this Board held that the record established no additional indicia of bad faith. We stated that:

“\* \* \* A party may lawfully take a hard line on an issue, so long as its conduct in negotiations, as a whole, reflects a willingness to reach an agreement. We cannot conclude, under these circumstances, that Respondents were unwilling to reach a negotiated agreement.” *Lincoln County*, 17 PECBR at 707.

As in *Lincoln County*, so here. That District was willing to enter into an agreement—even if only on its terms. The same is true of this District. It follows that this District is not guilty of surface bargaining.

This conclusion is supported by this Board’s decision in *School District No. 1, Multnomah County*. In that case the District proposed to contract out all custodial work. The Union charged the District with surface bargaining. It contended that the District’s economic proposal, which called for an approximate one-third reduction in economic benefits, was unduly harsh and predictably unacceptable. The Union also argued that the District never intended to reach agreement. It never varied from its initial position of demanding economic concessions, refused to consider Union proposals, and failed to make meaningful concessions.

We agreed that the District’s proposals were predictably unacceptable to the Union, but not unlawful on that account, citing *Lincoln County*, among other cases. On the question of concessions, this Board first reaffirmed that the obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. ORS 243.650(4). This Board concluded that the District acted lawfully:

“The Union asked the District to ‘meet in the middle.’ The PECBA does not require that; it specifically provides that parties are not obliged to make concessions. The District was required to remain willing to reach an agreement, but it did not have to make concessions of any particular size or number.” *School District No. 1, Multnomah County*, 20 PECBR at 433.

The District’s refusal to make concessions acceptable to the Union did not mean that the District engaged in unlawful surface bargaining. Again relying on *Lincoln County*, we said that:

“\* \* \* [A] party may lawfully take a hard line, so long as its conduct in negotiations, as a whole, reflects a willingness to reach an agreement. The District here remained willing to make a deal, provided that the agreement met its financial goals. Though the Union made numerous proposals, it was not until after the District board voted to contract out that the Union advanced a proposal that was even in the ballpark of the savings the District wanted to achieve. By then it was too late.” *School District No. 1, Multnomah County*, 20 PECBR at 434.

Here, also, the District was willing to make a deal, provided that the agreement met its financial goals. The Association never made such a proposal at any time. Indeed, the Association did not propose employer contributions to TSAs because it did not wish to abandon the early retirement plan. The District’s conduct is lawful under *School District No. 1, Multnomah County*. It is also lawful under this Board’s more recent surface bargaining cases.

In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, and Oregon State Police Officers’ Association v. State of Oregon, Department of State Police*, Case Nos. UP-25/35-04, 21 PECBR 139 (2005), both the Association of Oregon Corrections Employees (AOCE) and the Oregon State Police Officers’ Association (OSPOA) accused the State of unlawful surface bargaining in violation of ORS 243.672(1)(e) by offering harsh proposals and refusing to make significant concessions during negotiations, and by presenting a salary freeze proposal on a take-it-or-leave-it basis. Complainants also alleged that the State committed an independent act of bad faith bargaining in striking a deal with Service Employees International Union Local 503 (which also represents State employees) that no other union would receive a better economic package.

Applying the same analysis used in earlier cases, we found that the State did not engaged in unlawful surface bargaining. While the State’s wage freeze proposals were “obviously unacceptable” to the unions, this did not alone establish bad faith bargaining. The parties met regularly over a period of several months, and exchanged proposals and counterproposals. The State made some—insignificant—concessions regarding its wage proposals. Relying on our decisions in *Lincoln County* and *School District No. 1, Multnomah County*, we held that the State did not engage in unlawful surface bargaining. According to this Board:

“AOCE and OSPOA would have us find that Respondents engaged in bad faith bargaining, not because

they refused to make *any* concessions regarding salary but because they refused to make *significant* concessions regarding salary. We decline to find bad faith bargaining on this basis. In *Lincoln County*, the employer proposed substantial modifications in the collective bargaining agreement: the elimination of guaranteed just cause for discipline and removal of job security protections. Throughout negotiations, the employer never significantly modified its position regarding these two matters. We characterized the employer's proposals as 'predictably unacceptable' to the union, but refused to find a violation of (1)(e) because there were no other indicia of bad faith bargaining present." *Corrections and State Police*, 21 PECBR at 151 (emphasis in original)

This Board also relied on *School District No. 1, Multnomah County* for the proposition that "the PECBA 'specifically provides that parties are not obliged to make concessions.'" A public employer must remain willing to reach an agreement, but it does not have to make concessions of any particular size or number. *Corrections and State Police*, 21 PECBR at 152.

Reviewing the totality of the State's conduct during negotiations, this Board concluded that the State did not engage in surface bargaining, even though it never wavered from its initial wage-freeze proposal. The parties met regularly in negotiations, reached agreement on a number of contract articles, and eventually made some concessions on economic issues. We found that the State demonstrated a sincere desire to reach a negotiated agreement with AOCE and OSPOA. In addition, we declined to find the State guilty of any independent unlawful refusal to bargain.

In *Oregon AFSCME Council 75, Local 2926 v. Coos County*, Case No. UP-15-04, 21 PECBR 360 (2006), this Board again ruled that an employer does not engage in surface bargaining merely because it refuses to make concessions or counterproposals. Coos County proposed to make a substantial reduction in medical insurance premiums it paid on its employees' behalf. In its complaint, AFSCME Council 75 alleged that the County (1) intentionally and unlawfully misrepresented to employees that the union would or could fine employees for crossing picket lines; (2) unlawfully changed the status quo regarding health insurance premiums, and implemented a level of health insurance premiums that differed from its final offer; and (3) unlawfully engaged in surface bargaining. This Board unanimously dismissed AFSCME's first two charges. *Id.* at 394.

A majority of this Board applied the rubric of *McKenzie School District* to the union's third charge, and dismissed it. The majority concluded the County's proposal was not "predictably unacceptable" to the bargaining unit, because other bargaining units had accepted it.<sup>10</sup> This Board found that the County was unwilling to make concessions which "put additional money into Union wages and benefits." We held, as we do here, that this alone does not amount to surface bargaining. We found that the County's bargaining position was clear and consistent, and that the County did not engage in regressive bargaining. *Coos County*, 21 PECBR at 394.

As here, AFSCME claimed that the County had not given its negotiators sufficient authority. We disagreed, stating that "Local 2936's objections are not really directed at the authority of the negotiator, but to the County's position on these issues. *Lincoln County Employees Association v. Lincoln County and Glode*, Case No. UP-42-97, 17 PECBR 683,703 (1998)." *Coos County*, 21 PECBR at 394. The same is true of the District's actions in this case. The Association had no doubt of Mr. Corley's authority. It was his message that was distasteful. A majority of this Board concluded that the County acted lawfully, and that the County's conduct was not evidence of bad faith.<sup>11</sup>

Applying the *McKenzie School District* factors, as interpreted by this Board in the cases discussed above, we find that the District did not engage in unlawful surface bargaining. The District's behavior at the bargaining table was unexceptionable, as was the course of negotiations. The District's explanations for its proposals were consistent and clear. The District's proposal to end the early retirement program was unacceptable to the Association, but not unlawful for that reason.

Similarly, while the District made no concessions regarding its proposals during negotiations before implementation of its last offer, neither ORS 243.650(4) nor our case law requires a party to make concessions. *Lincoln County, School District No. 1*

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<sup>10</sup>Member Gamson disagreed with this conclusion, and also dissented from the majority's holding that the District was not guilty of surface bargaining

<sup>11</sup>In *Coos County*, this Board's majority stated that a party may engage in hard bargaining so long as it remains willing to negotiate toward a collective bargaining agreement; but that a party may not condition participation in the collective bargaining process upon concessions by the other party. As the dissent properly points out, we did not also say that the latter course of action constitutes a *per se* unfair labor practice under ORS 243.672(1)(e). We should have. *Hood River County*. We here clarify our opinion in *Coos County*, 21 PECBR at 395-96, to reflect this analysis.

*Multnomah County, and Corrections and State Police.*<sup>12</sup> This is particularly true when the parties engage in one-issue bargaining, and do not make proposals or counterproposals in other areas.

Finally, the District's conduct away from the bargaining table was also unexceptionable. It engaged in none of the behavior which gave rise to liability in *Hood River County* or *Rogue Valley Transportation District*.

3. The District is not entitled to a civil penalty in this case. The complaint was not frivolously filed, nor filed with the intent to harass the prevailing party.

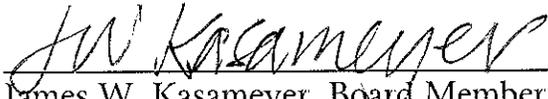
ORDER

The complaint is dismissed.

DATED this 24<sup>th</sup> day of January 2007.

  
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Donna Sandoval Bennett, Chair

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\*Paul B. Gamson, Board Member

  
\_\_\_\_\_  
James W. Kasameyer, Board Member

\*Member Gamson Dissenting

This Order may be appealed pursuant to ORS 183.482.

\_\_\_\_\_  
<sup>12</sup>As we have noted earlier in *Lebanon School District*, negotiations under ORS 243.698 have different dynamics than those conducted under ORS 243.712. Given the conduct of the District here, we do not need to decide what effect, if any, the language of ORS 243.698 may have on the statutory obligations created by ORS 243.650(4).

Member Gamson, Dissenting:

The Association alleges that the District acted in bad faith by engaging in surface bargaining. In surface bargaining cases, we must “judge the overall *quality* of bargaining.” *Lincoln County Employees Association v. Lincoln County and Glode*, Case No. UP-42-97, 17 PECBR 683, 704 (1998) (emphasis in original). Good faith requires a party to do more than merely go through the motions; it must come to the bargaining table with a sincere willingness to negotiate towards agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 (1985). I have examined the evidence and conclude that the District merely went through the motions.

The majority validates the conduct of an employer that did little more than show up and cordially explain its position, or, as the Association’s counsel more colorfully puts it, “an employer may tell a union to go to hell, so long as it also encourages the union to enjoy the trip.” I believe more is required if collective bargaining is to remain a viable way to resolve labor-management disputes. As I explained in my dissent in *School Employees Local Union 140 v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420, 436 (2003) (Gamson, dissenting):

“The Public Employee Collective Bargaining Act (PECBA) establishes a bargaining process. Without more, however, the process is an empty shell—a body without a heart. Parties could go through the motions of bargaining and mechanically fulfill the literal requirements of the law, but without accomplishing anything. To prevent this from happening, the legislature wisely infused the collective bargaining process with the overarching obligation of good faith. Good faith is the life blood of the PECBA.

“Good faith is neither self-defining nor self-executing. It is the job of this Board to ensure that the parties to the process bargain in good faith. In carrying out this task, we are guided by the express statement of the legislature that the purpose of the PECBA is to obligate the parties to collective bargaining to participate ‘with willingness to resolve grievances and disputes relating to employment relations \* \* \*’ ORS

243.656(5). Our rigorous adherence to this policy goal helps assure that the process remains a viable method for resolving disputes.”

In my view, the majority has lost sight of these policies. The District did little to show it was willing to resolve its dispute with the Association, and much to show it was unwilling. Approval of the District’s conduct does not encourage “practices fundamental to the peaceful adjustment of [labor] disputes,” ORS 243.656(3), and I fear that the main casualty is the vitality of our bargaining scheme.

## I

In surface bargaining cases, there is no direct evidence of a party’s bad faith. We instead examine circumstantial evidence to determine if the totality of the party’s conduct indicates a willingness to bargain. *McKenzie School District*, 8 PECBR at 8196. Over the years, we have identified a number of factors we will consider.

I first examine those factors individually. I next consider whether the statute requires us to look at additional factors when the parties use the expedited bargaining process as they did here. Last, I look at all of the factors together in the totality of the circumstances.

I begin with the factors identified in *McKenzie School District* and subsequent cases.

### Content of the District’s Proposals

A party’s predictably unacceptable proposal may be evidence of bad faith. *Lincoln County*, 17 PECBR at 705. Here, the District proposed to eliminate a long-standing early retirement program. I agree with the majority that the District’s proposal was predictably unacceptable to the Association.<sup>13</sup> Under our cases, this constitutes evidence of the District’s bad faith.

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<sup>13</sup>The District implemented its early retirement program in 1994. Some employees worked for 10 years to obtain the benefit, only to have it taken away before they qualified. The current value of the benefit is \$700-\$800 per month for each retiree. This means that during the 7-year period in which an employee could collect the benefit (from full PERS retirement at age 58 until age 65), it is worth between \$58,800 and \$67,200 to each qualified employee. Taking away this benefit is especially harsh because most of these employees—even those who work full time—earn wages below the federal poverty level for a family of four.

The majority dismisses this factor in one sentence. It says that “by itself,” a harsh and predictably unacceptable proposal does not prove surface bargaining. Even if this accurately states the law in the abstract, it is not pertinent here because the harshness of the District’s proposal does not stand “by itself.” The majority itself concludes that at least one other factor (lack of concessions) is present. The salient point is that the District’s predictably unacceptable proposal is some evidence of bad faith; this Board must determine if additional evidence points in the same direction.

*Behavior of the District’s Negotiator*

The conduct of the negotiators is another factor we consider. In this and a prior decision,<sup>14</sup> the majority focuses on whether the employer’s negotiators were “cordial.” This misses the point. “Emily Post-approved deportment is not a requirement of good-faith bargaining \* \* \*.” *McKenzie School District*, 8 PECBR at 8198.

The proper focus is the impact of the negotiator’s conduct on the bargaining process. Conduct that tends to delay or impede the bargaining process is evidence of bad faith. Here, the District’s lead negotiator, Superintendent Michael Corley, stated at the bargaining table that he had his “marching orders” from the School Board. The majority acknowledges the statement but concludes, without explanation, that it does not constitute evidence of surface bargaining. I disagree.

In the context of these negotiations, the Association bargaining team understood the “marching orders” comment to mean that the District’s lead negotiator was directed by the School Board—his boss—to eliminate the early retirement benefit, and that he lacked authority to consider or propose anything else. Superintendent Corley verified that understanding in his testimony. Under oath, he confirmed the “parameters” of his authority: the School Board wanted to eliminate the early retirement policy, and he was to make it happen.<sup>15</sup> He reiterated that the School Board “was firm in its direction to eliminate the early retirement policy.”<sup>16</sup> Corley followed his marching orders. He never varied from the District’s initial position.

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<sup>14</sup>*Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 394 (2006) (“[t]here is no evidence that the County’s representatives were less than cordial throughout the negotiations”).

<sup>15</sup>Transcript (Tr ) at 80.

<sup>16</sup>Tr. at 89.

The superintendent's comments and actions are evidence that the District did not enter negotiations with the requisite open mind and "willingness to resolve \* \* \* disputes." ORS 243.656(5). They indicate that the District came to the table with a fixed determination to implement its proposal, either with or without the Association's agreement.

The majority does not dispute that the District came to the table with a fixed intent to eliminate the early retirement program; it simply sees nothing wrong with that. The majority concludes the District acted lawfully because it "was willing to enter into an agreement—even if only on its own terms." Pertinent case law suggests otherwise. As this Board observed in *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707, 711 (1996) (Order on Reconsideration), "[i]f one party comes to the table \* \* \* and essentially says 'no contract except on my terms,' that leaves the other party with precious little room to bargain." The NLRB is even more direct: "A violation may be found where the employer will only reach an agreement on its own terms and none other." *Regency Service Carts, Inc.*, 345 NLRB No. 44 (2005); *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enf'd sub nom. NLRB v. Hardesty Co.*, 308 F3d 859 (8<sup>th</sup> Cir. 2002).<sup>17</sup>

The District's take-it-or-leave-it mind-set impedes the bargaining process because it reduces or eliminates the range of potential compromises available to resolve the parties' dispute. It is also repugnant to the statutory requirement "to enter into collective negotiations with willingness to resolve \* \* \* disputes." ORS 243.656(5). For these reasons, I view the District's mind-set as evidence of surface bargaining.

The District's statements and actions raise a related issue. "The employer is under a duty to vest its negotiators with sufficient authority to carry on *meaningful* bargaining" *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 453 (1996), *AWOP* 146 Or App 777, 932 P2d 1216 (1997) (emphasis added). The District gave its negotiator authority to eliminate the early retirement program, and nothing else. It seems to me that sending a negotiator to the table with authority to say nothing besides "no," regardless of how compelling an argument the Association makes for a different outcome, is not a practice that fosters "meaningful" bargaining as envisioned in *Hood River County*. See also ORS 243.656(3) (a core policy of the PECBA is to "encourag[e] practices fundamental to the peaceful adjustment of [labor] disputes \* \* \*").

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<sup>17</sup>We generally look to NLRB cases for guidance in surface bargaining cases. *E.g.*, *McKenzie School District*, 8 PECBR at 8196-202.

The District's statements and actions at the table might not *by themselves* prove that the District engaged in surface bargaining, but, unlike the majority, I believe they constitute *some evidence* of surface bargaining.

### Nature and Number of Concessions

Another factor in surface bargaining cases is "whether the party showed any willingness to reach agreement by making concessions and counterproposals." *Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94, 15 PECBR 692, 717 (1995). I agree with the majority's conclusion that the District made no meaningful concessions or counterproposals. The proposal the District implemented is identical to the proposal it made at the first bargaining session. Under our case law, this is evidence of the District's bad faith.

The majority attributes little or no significance to this evidence. It observes that the PECBA does not require a party to agree to a proposal or make a concession.<sup>18</sup> The majority is correct as far as it goes, but it fails to appropriately consider the full scope of the bargaining obligation described in our prior cases:

"\* \* \* Even though this Board, like the NLRB, cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union . . . ' if the bargaining duty prescribed by the PECBA and

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<sup>18</sup>ORS 243 650(4) states in part that "[t]he obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession." The unstated premise in the majority's argument is that this statute is inconsistent with considering a lack of concessions as a factor in surface bargaining cases. Although there may be some tension between the concepts, they are not inconsistent. Virtually all of our surface bargaining cases recognize that the two concepts can coexist. *E.g., McKenzie School District*, 8 PECBR at 8198 ("[e]ven though this Board \* \* \* cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union") If we found bad faith based on a lack of concessions *alone*, the majority's concern would be well-taken. But lack of concessions is merely a factor which alone is not enough to constitute bad faith. A party can bargain lawfully without making concessions so long as other indicia of bad faith are not present. Considering the District's lack of concessions as a factor among many does not, in the words of the statute, "require the making of a concession."

the NLRA “ . . . is to be read as imposing any substantial obligation at all.” *McKenzie School District*, 8 PECBR at 8198 (emphasis and ellipses in original; citation omitted).

We have quoted this passage and reaffirmed its importance numerous times over the years.<sup>19</sup> We have explained that it requires us to determine “whether the party showed any willingness to reach agreement by making concessions and counterproposals.” *Portland School District*, 15 PECBR at 717. We have stated that “the lack of concessions or counter proposals by a party may be evidence of bad faith.” *School District No. 1*, 20 PECBR at 432-33.<sup>20</sup> The majority nevertheless characterizes the District’s lack of concessions and other conduct as “unexceptionable.” Under our cases, I consider it evidence of the District’s bad faith.

### Dilatory Tactics

Dilatory tactics that tend to unreasonably delay or impede bargaining can be evidence of bad faith. I find no evidence that the District engaged in dilatory tactics.

### District’s Explanation of its Bargaining Position

A party’s failure to explain its positions can impede the bargaining process and is therefore evidence of bad faith. The District explained its position. We should not, however, confuse the District’s willingness to explain its proposal with a willingness to bargain over it.

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<sup>19</sup>*Bend Police Association v. City of Bend*, Case Nos. UP-44/48-03, 20 PECBR 611, 625, n. 15, *adhered to on reconsideration*, 20 PECBR 645 (2004); *Public Works Association Local 626 v. Lane County*, Case No. UP-1-98, 17 PECBR 879, 886 (1998); *Cascade Bargaining Council v. Jefferson School District No. 509J*, Case No. UP-32-90, 12 PECBR 781, 787, n. 3, *adhered to on reconsideration*, 12 PECBR 870 (1991); and *Clackamas County Peace Officer’s Association v. Clackamas County*, Case No. UP-41-86, 9 PECBR 9174, 9177 (1986).

<sup>20</sup>In our most recent surface bargaining case before this one, the majority, over my dissent, construed “some reasonable effort in some direction” to mean that “a party *may not condition participation in the collective bargaining process* upon concessions by the other party.” *Coos County*, 21 PECBR at 395 (emphasis in original). The majority has now rightly abandoned that formulation. It is not a reasonable reading of the words it purports to construe, and it confuses “*per se*” violations with surface bargaining. See *Rogue Valley Transportation District*, 16 PECBR at 583 (describing the difference between *per se* violations and surface bargaining).

### Course of Negotiations

The majority notes that the parties engaged in four bargaining sessions over a period of 99 days. The *quantity* of bargaining alone tells us little. In surface bargaining cases, we must also “judge the overall *quality* of bargaining.” *Lincoln County*, 17 PECBR at 704 (emphasis in original). Here, the other factors provide insight into the quality of bargaining.

### Cases

The majority recites the facts of numerous other surface bargaining decisions. Although case law is not a separate factor, I discuss it separately for clarity.

I begin with an observation on the use of precedent in this context. Precedent is helpful in identifying general principles, the appropriate analytical framework, and the list of factors we consider in surface bargaining cases. The majority, however, relies on cases in a less useful way—it attempts to match the facts of prior cases with this one. We must be especially mindful when we rely on fact-matching in a “totality of circumstances” analysis because, as the cases demonstrate, the circumstances in two cases are rarely identical, and even a slight difference can affect the outcome. There is no exact match here. For that reason, I focus on the important differences between this case and the cases recited by the majority; I make no attempt to engage in fact-matching of my own.

In *McKenzie School District*, our seminal surface bargaining case, there was no evidence that the employer entered negotiations with a closed mind. It was not until about nine months into the bargaining process, during post-factfinding negotiations, that the employer gave an ultimatum that fixed its bargaining position. Here, by contrast, the evidence indicates the employer came to the table with a closed mind. It gave its negotiator “marching orders” to eliminate the early retirement benefit, and it never wavered from that fixed mind-set. There is an important difference between entering bargaining with an open mind that is not convinced to change, as in *McKenzie School District*, and entering bargaining with a closed mind that is not susceptible to change, as here.

The majority likens this case to *Lincoln County Employees Association v. Lincoln County and Glode*, Case No. UP-42-97, 17 PECBR 683 (1998). The differences are as great as the similarities. There, this Board found the employer’s proposal predictably unacceptable, but it found no other indicia of bad faith, and thus no surface bargaining. 17 PECBR at 705. It specifically noted that the employer “made numerous proposals and concessions throughout bargaining.” *Id.* The facts here are different. Unlike *Lincoln*

*County*, the District's harsh and predictably unacceptable proposal is not the only factor present. The District entered negotiations with a fixed mind-set and made no concessions or other effort to compose its differences with the Association. Further, the parties in *Lincoln County* reached agreement, a circumstance which makes it more difficult to prove surface bargaining. 17 PECBR at 705. That factor is not present here.

The majority relies heavily on *School Employees Local Union 140, SEIU v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420 (2003). Its reliance is based on a selective reading of that case. It fails to note that this Board considered the decision "a close call." *Id.* at 430. This means that any significant factual difference could change the outcome. The facts here are significantly different from those in *School District No. 1*.

First, in *School District No. 1*, the employer's contracting out proposal was in response to a \$36-\$40 million budget shortfall. This Board stated: "*If it were not for the District's dire financial straits*, its proposal to contract out absent significant financial concessions from the Union would be viewed in a different light." 20 PECBR at 432 (emphasis added).<sup>21</sup> Here, by contrast, there is no evidence that the District was in "dire financial straits." That difference alone is enough to make *School District No. 1* inapplicable here.

Another significant difference is that the employer in *School District No. 1* provided evidence of its good faith by making concessions and counterproposals. The employer here made none.

A third significant difference is that the proposal in *School District No. 1* involved contracting out. This Board noted that contracting out disputes "differ from typical bargaining disputes." One reason is that "[u]nlike many economic disputes, there really is no middle ground, no halfway point. The union either meets the employer's financial goals or jobs will be lost." 20 PECBR at 430.<sup>22</sup> Here, unlike *School District No. 1*,

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<sup>21</sup>See also *Portland School District*, 15 PECBR 692. There, we recognized that in the totality of the circumstances, a "serious financial crisis" might justify an employer's proposal for economic rollbacks that would otherwise be evidence of bad faith. 15 PECBR at 717 and n. 9. Here, the District did not assert that a financial crisis justified its proposed rollback.

<sup>22</sup>The unique status of contracting out shapes this Board's analysis in a number of ways. For example, we apply a different notice standard in contracting out cases than we do in other unilateral change cases. *Tualatin Valley Bargaining Council v. Tigard School District 23J*, Case No. UP-120-87, 11 PECBR 53, 54 (1988) (Order on Reconsideration). We apply a different scope of bargaining analysis to contracting out issues than we do to other issues. *Federation of Oregon*

the distinctive considerations presented by contracting out are not in play. This dispute concerns early retirement benefits, an area with acres of middle ground. *School District No. 1* was a “close call.” The significant differences here make it inapplicable.

*Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and Oregon State Police Officers’ Association v. State of Oregon, Department of State Police*, Case Nos. UP-25/35-04, 21 PECBR 139 (2005) is similarly distinguishable. The employer there made counterproposals and concessions. *Id.* at 151. In addition, it was faced with a “severe budget shortfall,” *id.* at 152, predicted to be “in excess of one billion dollars,” *id.* at 141. Neither of these crucial factors is present here.<sup>23</sup>

The majority also reviews the two prior cases in which this Board found an employer guilty of surface bargaining. There are some general principles that apply here. In *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433 (1996), *AWOP 146 Or App 777, 932 P2d 1216* (1997), we observed that it is not enough for an employer to be willing to reach a contract only on its own terms. It must be willing to bargain “in good faith in order to reach a negotiated—and thus mutual—agreement.” 16 PECBR at 452; *see also id.* at 454-55. Here, the District made a take-it-or-leave-it proposal at the outset of bargaining. It demonstrated no willingness to seek a mutual agreement. We also found surface bargaining in *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 583 (1996). We relied in part on the employer’s lack of concessions and the substantial rollbacks the employer proposed. Both factors are also present here.

In both cases, the employer’s conduct was extreme. In *Hood River County*, we described the conduct as “egregious” and assessed a civil penalty. 16 PECBR at 455. Here, the majority reasons that the District did not engage in the type of extreme conduct present in *Hood River County* and *Rogue Valley Transportation District*, and it therefore concludes the District is not guilty of surface bargaining. The logic is flawed. *Hood River County* and *Rogue Valley Transportation District* describe sufficient, rather than

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*Parole and Probation Officers v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654-56 (1983). And, as in *School District No. 1*, we demand less in the way of concessions in contracting out disputes than in other economic disputes. Here, the majority mistakenly applies the contracting out standard even though contracting out is not at issue.

<sup>23</sup>The majority also cites *Oregon AFSCME Council 75, Local 2926 v. Coos County*, Case No. UP-15-04, 21 PECBR 360 (2006). That case applies the same analysis the majority uses here. It is distinguishable and wrongly decided for the same reasons I identify here as well as those described in my dissent in that case.

necessary, conditions for finding surface bargaining. That is, a finding of surface bargaining is not dependent on similar facts. The majority's reasoning converts the circumstances of those cases from sufficient conditions to necessary ones.

The Court of Appeals has observed that "fact-matching can be a fool's errand." *Stevens v. First Interstate Bank*, 167 Or App 280, 294, 999 P2d 551 (2000). That observation seems especially apt here where we apply a "totality of the circumstances" analysis. The majority's attempt to match the distinct facts of this case to other cases with different facts is a shaky analytical foundation on which to build a decision.

## II

In my view, there are additional relevant circumstances we should consider. The list of factors we apply in surface bargaining cases was first announced in the *McKenzie School District* case in 1985. The statute has changed since that time but we have not examined how those changes impact our analysis. I conclude that the statutory changes require us to consider additional factors.

Some brief background puts the issue in context. Prior to 1995, the same process applied to both mid-term bargaining<sup>24</sup> and to bargaining for a new or successor contract. The parties first met at the table; if they did not reach agreement, they proceeded to mediation, then factfinding, and finally to a cooling-off period. The parties could engage in self-help (unilateral implementation by the employer, a strike by the union) only after completing this process in good faith.

In 1995, the legislature amended the PECBA. The most significant change for our purposes was to adopt a separate expedited bargaining process that applies "during the term of a collective bargaining agreement." Under ORS 243.698, the parties to mid-term bargaining meet at the bargaining table for 90 days. After that, the employer can lawfully implement its proposal and the union can lawfully strike. Unlike regular bargaining, the mid-term bargaining process does not include mediation, where a neutral, professional mediator from this agency assists the parties in resolving their dispute; it does not include a final offer and cost summary, the purpose of which is to provide a basis for reasoned debate on the parties' proposals, *Rogue Valley Transportation District*, 16 PECBR at 589-90; and it does not include a 30-day cooling-off period which is intended to allow additional bargaining and to provide the public an opportunity to

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<sup>24</sup>A mid-term bargaining obligation is one that arises during the life of the contract. During this period, the employer must bargain before it can change working conditions that involve a mandatory subject not covered by the contract. *Oregon School Employees Association v Klamath County School District*, Case No. UP-18-92, 14 PECBR 1, 4 (1992)

pressure the parties into altering their positions and reaching agreement, *Oregon Trail School District No. 46 v. East Education Association*, Case No. DR-01-05, 21 PECBR 157, 169 (2005).

The underlying purpose of expedited bargaining is the same as in all collective bargaining: to resolve labor-management disputes through mutual agreement. In regular bargaining, meeting at the table is just the first step in the process. In expedited bargaining, it is the entire process; the parties do not have the added help of mediation, impasse, and cooling off. Table bargaining alone must fill all of those roles. If expedited bargaining is to remain a viable means of dispute resolution, we must demand more of table bargaining in the expedited process than we do in the regular process.

The parties here were in the expedited process. They met four times for an hour or less each time. At the first meeting, the District presented its proposal. At another meeting, the District steered the discussion to rights the employees already had—employee contributions to a tax sheltered annuity and employee self-payment of insurance premiums after they retire. The final meeting was very brief. In all, the parties spent only minimal time negotiating the District's proposal to eliminate the early retirement program, and even less time discussing compromises or alternatives. Such abbreviated discussions are not conducive to reaching agreement, especially in the expedited process where there are no other steps. We should consider this as some evidence of bad faith in the totality of the circumstances.

The facts here raise yet another issue related to the two-track bargaining system. The parties signed their successor collective bargaining agreement on September 22, 2003. Just 30 days later, with the ink barely dry on the contract, the District sent the Association notice of its intent to eliminate the early retirement policy. The timing is suspicious. By delaying the notice until the parties completed the regular 150-day bargaining process for their successor agreement, the District forced bargaining over the early retirement issue into the 90-day expedited process.

The purpose of the expedited process is to provide a faster way to address issues that arise outside of the normal bargaining period. It is "not intended to override the regular bargaining process." *In the Matter of the Petition for Declaratory Ruling Filed By the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699, 705 (1996). "The regular bargaining process would be undermined if the employer was allowed to segregate out a particular (and usually difficult) issue for expedited treatment." *Id.*

Here, it appears that the District purposely segregated the early retirement issue for expedited treatment. The District apparently had been considering elimination

of the policy for some time. The Association was aware that eliminating the early retirement policy was an issue in bargaining with the teachers in the District, and it anticipated that the District would also raise the issue with them during their bargaining for the successor agreement.<sup>25</sup> The District instead waited until the 150-day successor bargaining process was complete before raising the issue. It did not explain why it waited. By waiting, the District maneuvered bargaining over the early retirement issue into the expedited process. It thereby avoided mediation, final offers, cost summaries, and cooling off, and it eliminated any potential for settlement that these procedures bring.

The majority excuses the District's lack of compromise because "there were no other issues on which the parties could trade proposals and counterproposals." But if the District had timely raised the early retirement issue in successor bargaining when the entire contract was open for negotiation, it would have been part of the larger mix of issues in dispute and subject to the type of "horse trading" that is characteristic of good-faith bargaining. The parties could have explored a wide range of potential trade-offs and compromises, making agreement on early retirement more likely. Instead, the District isolated the early retirement issue in expedited bargaining, precisely the conduct condemned in the *Sandy Union High School District Declaratory Ruling*. Such conduct reduced the potential for compromise and avoided procedures designed to assist the parties in reaching agreement. In my view, such a bargaining strategy is repugnant to the policy of "encouraging practices fundamental to the peaceful adjustment of disputes." ORS 243.656(3).

I find the District's unexplained manipulation of the bargaining process to be a strong indication of its bad faith. The majority does not consider this factor.

### III

The final step in the analysis is to consider all of the factors together in the totality of the circumstances.

On one side of the scale, the District attended four bargaining sessions and cordially explained its proposal. On the other side of the scale, it made a harsh proposal that was predictably unacceptable to the Association; it proposed a significant economic rollback that was not justified by a financial crisis; it spent a minimal amount of time bargaining the issue; it made no concessions or other movement to resolve its differences with the Association; and there is evidence it came to the table with a closed mind. If

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<sup>25</sup>Tr. at 37.

this were all, I might consider it a reasonably close call. In my view, the scale tilts heavily to the side of bad faith because of the way in which the District manipulated the process. It timed its proposal to eliminate early retirement benefits so that the negotiations were expedited rather than part of the successor bargaining that had just ended. It offered no legitimate explanation for doing so.

In balancing the evidence, I am guided by two basic policies underlying the PECBA. One is to “encourag[e] practices fundamental to the peaceful adjustment of [labor] disputes \* \* \*” ORS 243.656(3). The second is to obligate the parties to participate in collective bargaining “with willingness to resolve grievances and disputes relating to employment relations \* \* \*” ORS 243.656(5).<sup>26</sup> In my view, the District did not engage in the type of conduct one would normally expect of a party that had an open mind and sincere desire to resolve the early retirement dispute. Based on the totality of the circumstances, I conclude that the District merely went through the motions of bargaining with no sincere intent to reach a negotiated agreement, a violation of ORS 243.672(1)(e).

I respectfully dissent.



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Paul B. Gamson, Board Member

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<sup>26</sup>The majority does not consider whether the District’s actions further these policies or impede the bargaining process. Other than fact matching, the majority does not explain how it reached its conclusion.