

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-009-08

(UNFAIR LABOR PRACTICE)

HOOD RIVER COUNTY,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
OREGON AFSCME COUNCIL 75,)	
LOCAL 1082,)	
)	
Respondent.)	
_____)	

On February 4, 2009, this Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on December 9, 2008, following a hearing on July 1, 2008, in Salem, Oregon. The record closed on September 2, 2008, upon receipt of the parties' post-hearing briefs.

Nancy J. Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Complainant.

Jason Weyand, Legal Counsel, Oregon AFSCME Council 75, Pendleton, Oregon, represented Respondent.

On February 26, 2008, Hood River County (County) filed this unfair labor practice complaint against Oregon AFSCME Council 75, Local 1082 (Union or Local 1082). The complaint arises out of the Union's rejection of the parties' tentative agreement and its conduct in bargaining after the rejection. The complaint alleges that the Union (1) bargained in bad faith, a violation of ORS 243.672(2)(b), when it failed to recommend to the bargaining unit that it ratify the tentative agreement; (2) violated

the parties' written ground rules, a violation of ORS 243.672(2)(d), when it failed to recommend ratification of the tentative agreement; and (3) bargained in bad faith, in violation of ORS 243.672(2)(b), when it included a proposal in its final offer that it had not previously offered to the County.

The Union filed a timely answer on June 5, 2008. The issues are:

1. Did the Union fail to recommend and support ratification of the parties' tentative agreement in violation of ORS 243.672(2)(b)?
2. Did the Union violate the parties' written ground rules, in violation of ORS 243.672(2)(d), by failing to affirmatively recommend that members approve the tentative agreement the parties reached on September 13, 2007?
3. Did the Union violate ORS 243.672 (2)(b) by including a proposal in its final offer that it had not previously offered to the County?
4. Did the Union violate ORS 243.672(2)(b) by bargaining in bad faith under the totality of the circumstances?
5. Should the Board order the Union to reimburse the County's filing fees?

RULINGS

1. The County's complaint asserts that the Union failed to adequately support ratification of the parties' tentative agreement. At the Union ratification meeting, the bargaining unit members rejected the tentative agreement and then voted to authorize a strike. Two Union negotiators testified on direct examination that they supported the agreement at the meeting but a number of bargaining unit members did not and spoke against it. They also testified that they did not initiate the strike discussion, but that bargaining unit members did. On cross examination, the County asked the witnesses to identify the bargaining unit members who spoke against the tentative agreement and those who initiated the strike discussion. The Union objected to the questions on grounds that revealing what bargaining unit members said at a union meeting would have a chilling effect on the members' willingness to speak freely at future meetings.¹

¹The County argues that the Union objected to only one such question and is not entitled to challenge other similar questions to which it failed to object. We disagree. The ALJ provided a rationale for overruling the objection which made it clear she would permit all similar questions. The Union expressly stated it was preserving its objections. In these circumstances, it would serve no purpose to require the Union to continue to object to every question once the first question was allowed.

The County responded that the questions were proper cross examination. It argued that it has a right to test an opposing witness' recall of events discussed in direct examination and to obtain more complete descriptions of the conversations the witness partially described in direct examination.

The ALJ overruled the Union's objections and permitted the questions. We have reviewed the record and conclude this ruling was erroneous.

Confidentiality

In *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752 (2008), we held that a bargaining unit member's conversation with a union official is confidential. In that case, a union shop steward spoke to a bargaining unit member about workplace issues of concern to the member. The employer subsequently called the shop steward into an investigatory interview and ordered the steward to disclose the contents of her discussion with the bargaining unit member. We held that the employer's inquiries into such discussions violated ORS 243.672(1)(a).² We explained that employees engage in activity protected by the Public Employee Collective Bargaining Act (PECBA) when they talk to their union representatives about workplace issues. Keeping those conversations confidential furthers the purposes and policies of the PECBA by ensuring that employees have unfettered access to their union representatives. "If an employer could compel a union official to reveal the content of conversations with a bargaining unit member, and possibly use the information against the employee, employees would naturally and probably be reluctant to talk with or seek advice from their union representatives." 22 PECBR at 797.

Here, as in *AFSCME Local 189*, the employer sought to compel a union official to reveal the contents of communications with bargaining unit members. For the reasons expressed in *AFSCME Local 189*, such an inquiry is prohibited.

It is true that in *AFSCME Local 189*, the employer sought the information in an investigatory interview whereas here the County seeks the information through testimony in a contested case hearing. That is, however, a distinction without a difference. In *Ellen Baltus, et al. v. Multnomah County School District 1J and Portland Association of Teachers*, Case No. UP-51/52-94, 15 PECBR 781 (1994) (Interim Ruling), we applied similar confidentiality protection to testimony in a contested case hearing.

²ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed" by the Public Employee Collective Bargaining Act (PECBA.)

In *Baltus*, a group of employees filed an unfair labor practice complaint against their union. At the hearing, the employees called union officials as their witnesses and asked them about discussions at union executive board meetings. This Board held that opposing parties

“generally are not entitled to inquire about ‘in-house’ conversations such as bargaining caucuses and other like activities which, by their nature, are carried on with an expectation of confidentiality. The January 5 executive board meeting at which board members discussed whether to accept the proposed social worker [grievance] settlement falls in this category. Such deliberations are presumptively and entirely privileged³ without regard to the ‘objective’ or ‘subjective’ nature of the participants’ utterances or the body’s conclusion.” 15 PECBR at 782.

See also Tualatin Valley Bargaining Council/Hillsboro Education Association v. Hillsboro Union High School District 3J, Case No. UP-125-92, 14 PECBR 541, 542-43 (1993) (in a hearing on an unfair labor practice complaint, an employer may not cross examine the union president about deliberations of the union’s executive board).

We apply those principles here and conclude that an employer may not compel a union official to testify about statements made by employees at a union meeting held to discuss ratification of a collective bargaining agreement. One of the core purposes of the PECBA is to guarantee public employees the right to join and participate in the activities of a labor organization of their own choice. ORS 243.650(5) and 243.662. The right to participate in the activities of a labor union necessarily includes the right to engage in free and unfettered discussions at their union meetings. Such frank discussions would likely be inhibited if employees knew their statements might be disclosed to their employer. An employer holds the keys to its employees’ economic well-being.⁴ Many employees would be understandably reluctant to jeopardize that well-being. Employees would naturally fear their employer finding out that they led or supported discussions

³As we noted in *AFSCME Local 189*, 22 PECBR at 800 n 14, this Board probably lacks jurisdiction to impose a full evidentiary privilege that applies to parties outside the labor-management relationship. We can, however, impose confidentiality rules in proceedings before this Board when, as here, doing so would further the purposes and policies of the PECBA.

⁴As the US Supreme Court aptly observed when assessing the potential coercive effects of employer actions on employees, it “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing*, 395 US 575, 617 (1969).

to reject a tentative agreement which the employer clearly desired; few employees would want to be identified as the one who criticized the employer in front of other employees. Allowing an employer to compel the union to reveal such statements would interfere with the exercise of PECBA-protected rights. It would undermine the employees' trust and confidence in their union, it would impair the functioning of the union, and it would therefore be contrary to the purposes and policies of the PECBA.

Waiver

The County asserts that even if confidentiality rights exist, the Union waived those rights when both the Union's bargaining spokesperson and the Local Union President testified about some of the discussions at the ratification meeting. In *Baltus*, this Board held that "the privilege may be waived or otherwise relinquished if those who are entitled to assert it act in a manner inconsistent with the confidentiality the PECBA seeks to guard." 15 PECBR at 782-83. We conclude there was no waiver here because the two Union official witnesses were not entitled or authorized to waive the confidentiality rights of individual members.

In *Baltus*, several union executive board members testified about some of the discussions and actions at a union executive board meeting held to consider a potential grievance settlement. This Board held that because of the testimony, the union was no longer entitled to assert confidentiality as to other portions of the discussions at the meeting. We permitted the opposing party to examine witnesses and to review minutes and notes of the executive board meeting.

Significantly, however, the underlying rationale for confidentiality in *Baltus* was that "disclosure would so chill the parties' deliberations as to render good faith bargaining impossible." 15 PECBR at 783 n 10. Here, an additional and different right is at stake, the right of individual bargaining unit members to speak to their union officials in confidence without fear of disclosure. We have never decided whether a union can waive these individual rights. For the reasons discussed below, we conclude it cannot.

We begin by noting that the Union and the individual employees may have divergent interests on this issue. The Union is defending itself against unfair labor practice charges involving the conduct of its officers. One of its defenses is that members, not the officers, took the challenged actions. To pursue this defense, it is helpful to the Union to identify the individual members who attended the meeting and reveal what they said. By contrast, for the reasons discussed above, the employees have an interest in remaining anonymous. Because of these potentially differing interests, we are

reluctant to allow the Union to waive an individual member's confidentiality rights in these circumstances.⁵

We also find guidance in cases concerning testimonial privileges. As to the lawyer-client, psychotherapist-patient, and clergy-penitent privilege, "the client, the patient, or the penitent *alone* holds the privilege * * * ." *State v Serrano*, 346 Or 311, 323, 210 P3d 892 (2009) (emphasis added). Applying that principle here, the bargaining unit member alone holds the confidentiality right. We find the analogy to the attorney-client privilege particularly apt. An attorney represents a client, much like the Union represents the bargaining unit members. In both relationships, frank discussion is crucial to ensure that the person represented receives proper representation. Frank discussion may be inhibited by fear of disclosure. In this type of relationship, it makes sense that the person represented rather than the representative would hold the privilege or right to confidentiality. It also makes sense that only the party that holds the right—in this case, the individual employee—can waive it. The testimony of two Union officials did not waive the confidentiality rights of bargaining unit members.

We conclude that the ALJ erred in allowing the County to question the Union's witnesses about the identity of bargaining unit members who made statements at the Union ratification meeting and the content of those statements.

Remedy

We turn now to the remedy. Questions about the identity of bargaining unit members who made particular statements, as well as answers to those questions, should not have been allowed. They are stricken from the record and will not be considered in this decision.⁶

⁵The Union suggests that we can harmonize the interests of the Union and those of the individuals by holding that the Union can reveal what was said but not who said it; in this way, the Union could present its defense and the individuals would remain anonymous. This resolution would, however, ignore a third interest, that of the County. The issues here arose in a contested case hearing. The County has a right to cross examine Union witnesses to test their recollection, to find other potential witnesses to bolster its case or undermine the Union's case, and to obtain a fuller recitation of conversations that were only partially revealed on direct examination. Any attempt to harmonize the interests of the Union with those of the employees would deprive the County of its right to fully cross examine the Union's witnesses. As we discuss more fully in the remedy section below, this resolution is untenable.

⁶Reversing the ALJ's ruling and excluding the evidence does not impact the outcome of the case. Union officials had little recollection of specific statements by bargaining unit members and could not provide the name or a physical description of any bargaining unit member who spoke at the ratification meeting.

If we were to stop here, we would be left with a situation we condemned in *Baltus* as “untenable.” In *Baltus*, we explained that “the use of *some* obviously confidential materials to bolster a party’s position, while at the same time claiming privilege for other related confidential communications and writings, arguably represents an untenable application of the PECBA policy protecting confidentiality.” 15 PECBR at 784 (emphasis in original). Here, striking the cross examination while retaining the direct examination would create just such an “untenable” situation. That is, the Union would be permitted to use some confidential material—the partial statements made by unidentified bargaining unit members at the ratification meeting—and the County would be prohibited from fully cross examining the witnesses about these matters. We agree that it would be “untenable” to allow such selective use of evidence. Accordingly, we will also strike the direct testimony from the Union’s witnesses that refers to statements or actions by bargaining unit members at the ratification meeting.⁷ In these circumstances, this resolution best accommodates both the bargaining unit members’ right to confidentiality and the County’s right to a fair hearing.⁸

⁷See *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-9-01, 20 PECBR 1, 6-9 (2002) (when a witness on direct examination discussed a statement by another employee and on cross-examination refused to identify the employee, the proper remedy was to strike all of the witness’ testimony about the statement).

⁸We recognize that this ruling makes it more difficult for the Union to present its defense. We note that the County faces similar difficulties. That is, the County may not call bargaining unit members as witnesses and require them to reveal what they said at the ratification meeting. All privileges, by their nature, hamper the search for truth to some extent, but we tolerate it because open communication in certain relationships is deemed to be of overriding importance. See *State v. Serrano*, 346 Or at 325 n 6 (“[g]enerally speaking, the purpose of the evidentiary privileges is to encourage open communication between the persons in the protected relationship, which theoretically, in turn, strengthens that relationship and encourages participation in such relationships.”). As discussed above and in *AFSCME Local 189*, the PECBA protects a public employee’s right to communicate with a union representative. Keeping those discussions confidential strengthens and encourages the relationship between a union and its members and thereby furthers the purposes and policies of the PECBA.

This ruling does not completely prevent the Union from presenting its case. The Union remains entitled to present other evidence of what occurred at the ratification meeting. It can rely on testimony from its witnesses about what they personally said and did at the ratification meeting. The Union could also have sought the voluntary testimony of other members of the bargaining unit about their statements at the meeting, or they could have obtained a waiver of confidentiality rights from one or more bargaining unit members. In addition, we note that it was the Union’s own objections that raised these issues in the first place. See OAR 115-010-0050(3) (the Board may receive any evidence not objected to).

2. The County requested the minutes of the Union's ratification meeting. The Union refused to provide them to the County and did not introduce them into the record of the hearing. The County asks this Board to infer from the Union's failure to produce these minutes that the minutes would have been unfavorable to the Union.

The Union's witnesses did not recall clearly what occurred during the ratification meeting. The minutes, if produced, would have provided the most contemporaneous evidence of what occurred at the meeting. The Union, which had control of the minutes, did not adequately explain why it refused to provide them to the County and failed to introduce them into the record.

The Union argues that its failure to produce the minutes was justified to protect bargaining unit members. Consistent with Ruling 1 above, the Union might have been entitled to redact the minutes to avoid exposing the identity or statements of individual bargaining unit members who engaged in protected activity at the meeting. This does not, however, adequately explain the Union's failure to produce the portion of the minutes concerning statements by the Union's two witnesses. The minutes presumably would have clarified what these witnesses said and did at the ratification meeting. Both witnesses were Union bargaining team members, so their words and actions at the meeting are core to our determination of whether they adequately supported ratification of the tentative agreement. The Union offered no explanation for failing to produce this portion of the minutes.

A party's unexplained failure to produce relevant evidence within its control warrants an inference that the evidence would have been unfavorable to that party. *See Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 675 (2008) *appeal pending*; *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-104-88, 11 PECBR 820, 832 (1989); *Sandy Education Association and Jane Davey v. Sandy Union High School District No. 2 and Kent Heaton*, Case No. UP-42-87, 10 PECBR 389, 396 n 5, *amended* 10 PECBR 437 (1988); *IAFF, Local #1489 and Duane Brown v. City of Roseburg*, Case No. C-53-84, 8 PECBR 7805, 7817, *AWOP* 76 Or App 402, 708 P2d 1210 (1985). Here, the Union's unexplained refusal to produce the portion of the minutes that did not contain confidential information warrants such an inference.

3. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The County is a public employer within the meaning of ORS 243.650(20).

2. Local 1082 is a labor organization within the meaning of ORS 243.650(13). It is the exclusive bargaining representative for approximately 52 full-time and part-time strike-permitted general County employees. Part-time employees in the bargaining unit work between 20 and 39 hours a month.

3. The County and Local 1082 were parties to a 2005-2007 collective bargaining agreement. Under the agreement, the County provided health insurance benefits through two plans, an HMO plan and a more expensive plan called Triple Option. During the 2006-2007 contract year, the County contributed a monthly amount towards the premiums for employee health insurance as follows:

Employee-only coverage—100 percent of premium cost for either plan;

Employee plus spouse coverage—\$713.94;

Employee plus children coverage—\$627.19; and

Employee plus family coverage—\$994.05.

From July 2006 through June 2007, 10 employees had employee-only coverage under the HMO plan and 23 employees had employee-only coverage under the Triple Option plan.

4. For part-time employees, the County historically contributed an amount equal to 100 percent of the employee-only premium cost for health insurance. Part-time employees who wanted insurance coverage for their spouse or dependents paid the difference between the cost of the employee-only coverage and the coverage they selected.

5. Sometime prior to February 2007, the Union filed a grievance which alleged that the County was contractually obligated to contribute the same amount towards family insurance coverage for three part-time employees as it did for full-time employees. The grievance had not been resolved at the time the parties began bargaining for a successor contract.

6. In February 2007, the County and Local 1082 began bargaining for a successor agreement.⁹ Attorney Bruce Bischof acted as the County's chief spokesperson. Human Resources (HR) director Denise Ford was also on the County's bargaining team. The Local 1082 bargaining team included AFSCME representative Steven Marrs,

⁹All subsequent events occurred in 2007.

Local 1082 resident Hoby Hansen, and Local 1082 vice president Lidia Quezada. Marrs, who acted as the Union's chief spokesperson, had prior experience as a member of a bargaining team, but was a newly-hired AFSCME representative at the time of these negotiations. Hansen had worked for the County for six years and was Local 1082 president for five years.

7. To prepare for bargaining, the Union conducted a survey of bargaining unit members. The survey did not specifically ask whether single part-time employees were willing to pay a portion of their insurance contribution. The Union also obtained information from the County regarding the current distribution of employees under the health insurance plans and levels of coverage. However, the information provided by the County included employees in both Local 1082 and in a separate AFSCME unit, Local 2503.¹⁰

8. On February 22, the parties agreed to ground rules, which included the following provisions proposed by the Local 1082 bargaining team:

"4. All issues/articles tentatively agreed to (TA'd) shall be reduced to written form and signed/dated by each side's Chief Negotiator. TA'd articles are not enforce [*sic*] until the full contract has been signed.

" * * * * *

"7. Union ratification of the TA'd agreement shall be done by a vote of the Union members. Both teams shall recommend approval to their respective constituencies, should a tentative agreement be reached."

9. Between February 22 and July 24, the parties bargained at a number of sessions and reached agreement on all issues except health insurance and several compensation issues. During this time, the only Union proposal on health insurance would have required the County to pay 95 percent of insurance premium costs, with employees paying the remaining 5 percent. The Union also proposed a 3 percent wage increase for each year of the contract, which the County was willing to consider as part of a total financial agreement.

10. During the negotiations, Local 1082 met monthly with its bargaining unit members to provide negotiation updates. Between three and six members usually attended these meetings. During one of these meetings, Local 1082 president Hansen

¹⁰Local 2503 represents County employees in public works and forestry. The unit includes only full-time employees.

asked those attending what they thought about proposing that the County make smaller contributions toward employee-only health insurance for part-time employees in exchange for larger contributions for employees with dependants. The employees at this meeting included a few full-time employees and the three part-time employees with families who were named in the grievance. These employees all stood to gain from such a proposal and reacted positively to it. No part-time employees with employee-only insurance coverage attended these meetings, and the Union never sought their opinions on bargaining issues.

11. On July 24, the parties jointly asked the Conciliation Service Division of the Employment Relations Board (Board) for the assistance of a mediator. The primary issue that remained unresolved was health insurance.

12. The parties met with the mediator on September 13. In addition to County spokesperson Bischof and HR director Ford, County administrator David Meriwether attended the mediation session for the County. The parties met in separate rooms and exchanged proposals through the mediator. The parties did not make progress until the mediator brought the County an insurance proposal from the Union. Under the Union proposal, the County would pay 100 percent of the premiums for all levels of health insurance coverage for full-time employees, and for part-time employees, it would pay an amount equal to 50 percent of the premium paid for full-time employees. The proposal also included a three percent wage increase each year. When the Union bargaining team made this health insurance proposal, it believed the proposal would only affect three or four part-time employees, including the three involved in the grievance, and that these employees would support the proposal because they would receive a higher employer contribution towards their full-family coverage.

13. The County calculated that the Union's proposal could raise the County's current health insurance costs by approximately \$70,000 over the three years of the agreement. However, the County concluded that this increase would essentially be offset by a decrease in contributions for the single part-time employees who, under the Union's proposal, would pay 50 percent of their insurance premiums. The County representatives recognized that the Union's proposal would benefit full-time employees and part-time employees with dependent coverage, but would harm single part-time employees who currently had 100 percent of their insurance premium paid by the County. Under the Union's proposal, these employees would have to pay approximately \$200 per month for health insurance coverage. County representatives were concerned that the Union bargaining team did not understand the impact of its proposal on these single part-time employees and asked the mediator to discuss these concerns with the Union team.

14. Later during the mediation, AFSCME representative MARRS went into the County's caucus room and HR director Ford told him that she was concerned about the impact of the Union's health insurance proposal on the part-time employees who currently received employee-only coverage at no cost. MARRS told Ford that these employees were willing to pay a contribution for "the betterment of the group." Bischof later met with MARRS and the mediator in the hallway outside of the caucus rooms. Bischof again expressed the County's concern about the impact of the Union's proposal on part-timers' employee-only benefits. MARRS told Bischof that these part-time employees were willing to sacrifice for the full-time employees and part-time employees with dependents. MARRS told Local 1082 president Hansen about the County's concerns.

At the end of the mediation session, the County's bargaining team accepted the Union's mediation proposal. The parties then initialed the Union's proposal, and the County volunteered to prepare the written tentative agreement for the parties' signatures.

15. Either the day of or the day after the tentative agreement, Bischof and County Administrator Meriwether again spoke with Union spokesperson MARRS about the insurance agreement for part-time employees. Meriwether asked MARRS if he was aware that the agreement would result in a financial detriment to single part-time employees. MARRS dismissed Meriwether's concerns, stating that the part-time employees would do it for the good of the group.¹¹

16. On Friday, September 14, MARRS picked up the tentative agreement from the County offices. The tentative agreement incorporated the Union's insurance proposal as follows:

"Effective September 1, 2007, the County shall contribute a maximum dollar amount for full time employees and dependents for their major medical costs per month at the following amounts:

¹¹MARRS testified he believed that during this conversation he told Bischof and Meriwether that the part-time health insurance agreement would only affect three part-time employees. However, we find it more likely that he did not say this. Neither Bischof nor Meriwether recalled that MARRS said this and, since they were obviously attempting to make sure that the Union understood the impact of its proposal, we find it unlikely that they would not have corrected such a misstatement. MARRS also admitted that his recollection of specific events, names, and conversations related to these negotiations was limited, since he was bargaining with six other units at this time and these events had occurred almost a year prior to the hearing.

	<u>Full Time cap</u>		<u>Part time cap</u>
"A. Employee only	<u>\$392.56</u>	50%	<u>\$196.28</u>
"B. Employee & Spouse	<u>\$788.60</u>	50%	<u>\$394.30</u>
"C. Employee & Child(ren)	<u>\$692.72</u>	50%	<u>\$346.36</u>
"D. Employee & Family	<u>\$1098.19</u>	50%	<u>\$549.09</u>

(Emphasis in original.)

When Marris read the tentative agreement, he realized that part-time employees with employee-only coverage would lose the employer's full premium payment and instead would have to pay almost \$200 per month for insurance. Marris still believed this was not a problem because it would only apply to the three part-time employees involved in the grievance who would benefit from the increased dependant coverage. Marris signed the tentative agreement, mailed it back to the County, and mailed a copy to Hansen.

17. Sometime during the week of September 17, HR director Ford and Local 1082 president Hansen discussed the tentative agreement at least once.¹² Ford told Hansen that she had lost sleep over the part-time employee insurance portion of the tentative agreement and that the agreement also bothered Meriwether. When Hansen asked Ford what he could do, Ford said she had no authority to do anything and that he had to contact Meriwether.

At about this same time, Hansen received his copy of the tentative agreement from Marris. When he reviewed it, he saw the language that required single part-time employees to pay almost \$200 per month for health insurance. He realized that what Marris signed was not what he thought the Union had proposed. Hansen called Marris and told him that there was a problem with the provision of the tentative agreement regarding part-time employee health insurance, and that he had discussed the issue with Ford, who said the Union needed to talk to Meriwether. As a result of his discussion with Hansen, Marris realized for the first time that there was a problem with the tentative agreement.

Hansen also called Meriwether and requested a telephone conference with all of the bargaining team members to discuss the problem with the part-time employee

¹²Ford and Hansen had different recollections of who first approached the other regarding the problem with the part-time insurance agreement. Resolution of this conflict is not critical to our decision because Hansen admits he recognized there was a problem with the agreement prior to the ratification vote and contacted Meriwether to schedule a meeting to discuss the problem.

insurance. Meriwether said he would check his schedule, but when Meriwether called Hansen back, he told Hansen that he was turning the issue over to the County's legal counsel.

18. The County received the tentative agreement with MARRS' signature in the mail around September 19, at which time Meriwether signed the agreement for the County.

19. The Union scheduled its ratification meeting for noon on September 20. That morning, MARRS approached Meriwether in the hallway and told him there was a problem with the health insurance agreement. MARRS said the agreement needed to be changed so that part-time employee-only coverage was fully paid by the County. Meriwether told MARRS that he could not arbitrarily make this change because the parties had been through mediation and had a tentative agreement. Meriwether also told MARRS that there was a dollar value attached to the insurance agreement, and the County might be willing to discuss changes in the agreement that kept the costs the same. MARRS told Meriwether that the dollar amount at issue was small and suggested that the County pay it.¹³ Meriwether told MARRS that the County could not change its position at that time and suggested that the Union have its ratification meeting and then come back with something different. Nothing was resolved and MARRS went to the ratification meeting.

20. The Union did not provide employees with any written information about the tentative agreement prior to the ratification meeting. Before the start of the ratification meeting, MARRS wrote out on a white board the list of articles that had been changed and the impacts of those changes. Approximately 44 bargaining unit members attended the meeting. The meeting proceeded generally as follows:

a. Hansen opened the meeting by explaining what had occurred in mediation. He then read a copy of the tentative agreement to the group and presented a neutral picture of the pros and cons of the agreement. Some members requested a copy of the tentative agreement, which was provided.

b. Hansen believed it was his job to present the tentative agreement to the bargaining unit but did not feel it was his job to sell the agreement to them. Hansen

¹³MARRS testified that his discussion with Meriwether was limited to whether the parties could return to bargaining. However, we find it more likely that the discussion occurred as Meriwether described. MARRS admitted that his recollection of the events regarding these negotiations was somewhat limited. On the other hand, Meriwether's recollection of the conversation was specific and clear.

viewed his role as the Local 1082 president in regard to the ratification to be “[a]t that time, just an information giver. I’d get the information, I’d give it to them.” He also believed that his role in recommending the contract was to present the tentative agreement to the bargaining unit employees and recommend that they vote on it. Hansen also did not think he was supposed to talk the employees into anything they did not want. Hansen’s belief was based on his understanding of the democratic nature of the Union which entitled members to make their own decisions.

c. After Hansen’s initial presentation, Marrs reviewed the tentative agreement in more detail, using what he had written on the whiteboard. Marrs testified that the Union bargaining team

“gave a positive outlook on that initial tentative agreement. We went through each article, we gave all the information we had on how it would impact the members both pro and con, and made sure that they understood they had to make up their own mind on this, but we thought it was a good deal.”

Hansen presented the tentative agreement and described its pros and cons.

d. After Marrs and Hansen made their presentations, they opened up the meeting for questions. Marrs and Hansen realized the employees were upset about the reduced health care contributions for single part-time employees. Marrs explained that “[t]his is the tentative agreement. What are your questions? They asked questions, we respond, and they voted.”

Marrs did not have a clear recollection of the specifics of what occurred during the ratification meeting. He and other members of the bargaining team generally told the members “many times, this is not a bad deal, this is a pretty good contract, but you have to look at the whole thing and you can see that there’s a lot of benefits to this contract, but you’ve got to do what you’ve got to do.” Neither Marrs nor Hansen told the bargaining unit members that the agreement was based on the Union’s proposal. The bargaining unit members were left with the impression that the part-time insurance proposal was the County’s fault.

e. The bargaining team then conducted a secret ballot vote. Approximately 90 percent of the members voted against ratification.

f. After the ratification vote failed, Marrs explained what would happen next: the parties would probably return to mediation, but there were few options after mediation. Marrs said that the last resort if the parties did not reach an agreement was

a strike. After a motion to take a strike vote and discussion, a significant majority of members voted by secret ballot for a strike. Neither Hansen nor Marrs addressed the motion for a strike or said anything to discourage members from taking a strike vote or voting for a strike. Hansen believed that since the union was a democratic organization, he was required to call for a vote when a motion was made. The entire ratification meeting lasted an hour.

21. On September 21, Marrs sent the County the following e-mail:

“A letter will be following, but this is to give you the gist of what has happened.

“Local 1082 held a membership meeting on Sep 20 [sic], 2007 to vote on the contract proposal. The proposal was overwhelmingly defeated. The key issue was the part-time employee health care rate.

“Further, there was a vote on whether to strike. That vote was overwhelmingly passed.

“We have agreed to withhold strike notice for a period of 30 days to allow the teams an opportunity to resolve this issue.

“It is my belief that if we can resolve this issue, the local will ratify. The local seemed pleased with the other aspects of the proposal.

“Please let me know when you would like to meet on this. Next week I’ll be out of town on business Tues, Thurs, Fri, and Sat. The following week is pretty clear.

“Thanks for your attention to this, and I hope we can now fix what we both agree is a big problem.”

22. The County did not respond to the Union’s e-mail or its question about scheduling a meeting. Neither party contacted the mediator to request another mediation session.

23. During their lunch hours on October 3 and 4, Local 1082 bargaining unit members conducted informational picketing regarding their objections to the part-time employee insurance agreement. On October 6, a newspaper article in the *Hood River News* reported on the picketing and noted that the Union planned to strike in November if the County refused to change the part-time agreement. The article stated:

“Union officials and the county’s labor attorney are in disagreement about how the disputed provision ended up in the contract.

“Steve Marrs, union representative, said a ‘misunderstanding’ led to a contract requirement that part-time singles foot the bill for half of their health care coverage. He said the union asked that all employees continue to have 100 percent of their premiums paid by the county. He said the union proposed that part-time staffers pay 50 percent of the cost to a spouse and/or child.

“Marrs said the language submitted in the final contract did not reflect that proposal. The union bargaining team agreed to run the issue by its members – and received a solid ‘no’ vote.

“* * * * *

““This was just an honest misunderstanding and we need to go back to the mediation process and figure it out,’ said Don Loving, public affairs director for AFSCME.”¹⁴

24. After the ratification meeting, several bargaining unit members asked HR director Ford why the County would make a proposal that required part-time employees to pay for their employee-only insurance and why County Administrator Meriwether had said the members should “take it or leave it.” Other County supervisors told Meriwether that after the ratification meeting, employees made similar comments to them.¹⁵

25. By letter dated October 5, the Union notified the State Conciliation Service that it was declaring an impasse in its negotiations with the County.

¹⁴Marrs testified that the reporter misrepresented what he had said, because the article implied that the County was partially at fault in regard to the “misunderstanding.” However, we find that this is unlikely since Marrs’ quotes in the article are also consistent with the quotes from the AFSCME public affairs director, who obtained his information from Marrs.

¹⁵The Union argued that we should give no weight to Meriwether’s testimony concerning these second- and third- hand comments. Although we would not normally give this type of testimony alone much weight, we find it significant here because it is consistent with Ford’s testimony, who heard it directly from employees.

26. By letter dated October 11, the County filed its final offer with the State Conciliation Service and stated that it was prepared to attend a mediation session, should one be called by the mediator.

27. By letter dated October 13, the Union filed its final offer with the State Conciliation Service. The Union's final offer included a health insurance proposal, which essentially provided that during the first year the County would pay 100 percent of all levels of insurance for full-time employees, 100 percent of part-time employee-only coverage, and a prorated amount of part-time dependant coverage based on the number of hours worked by the employee. The Union had not previously presented this proposal during bargaining, and it had a higher cost to the County than the health insurance provision in the tentative agreement.

28. The parties met in a mediation session on October 31. The County started with the tentative agreement as its initial position, but indicated it was willing to look at a proposal that paid 100 percent of part-time employee-only coverage if the economic agreement was modified to balance the increased costs. At some point during the mediation, the Union presented a proposal which included a three percent wage increase in each contract year and a new health insurance proposal, both effective November 1. The health insurance proposal essentially provided that during the first year of the contract, the County would pay 100 percent of all levels of full-time employee coverage and part-time employee-only coverage. For part-time employees with dependants, the County would pay an amount equal to the employee-only contribution plus an additional subsidy of \$150 in year one; \$200 in year two; and \$250 in year three.

29. After the Union filed its final offer, it sent the County notice that the Union intended to go on strike on November 29 if the bargaining dispute was not resolved. The parties participated in two additional mediation sessions, exchanging concepts and proposals through the mediator. During the mediation session on November 28, the parties agreed on the terms of the 2007-2010 collective bargaining agreement. Under the health insurance provision in this agreement, the part-time employees did not receive a contribution from the County for dependant coverage.

30. Before the hearing in this matter, the County sent an information request to the Union for any records or minutes taken during the ratification meeting. The Union refused to provide the minutes.

CONCLUSIONS OF LAW

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

2. The Union violated ORS 243.672(2)(b) by failing to recommend ratification of the tentative agreement.

It is an unfair labor practice for a labor organization to refuse to bargain in good faith with the public employer of employees for whom the labor organization is the exclusive representative. ORS 243.672(2)(b). The obligation to bargain in good faith does not require either party to agree to particular contract terms. ORS 243.650(4); *Baker Education Association v. Baker School District 5J*, Case No. UP-5-00, 19 PECBR 712, 726 (2002). However, once the negotiators agree on contract terms, subject only to ratification,¹⁶ the obligation to bargain in good faith requires the negotiators “to present the agreement to their ratifying entities and to support its approval.” *School District 549C of Jackson County v. Oregon School Employees Association and Anne Foster*, Case No. UP-102-86, 10 PECBR 304, 313 (1987). The negotiators must recommend ratification to their principles, *City of Central Point v. International Association of Firefighters, Local 1817*, Case No. UP-44/53-95, 16 PECBR 458, 469 (1996), and they may not act in a way that undermines the agreement or discourages ratification, *Baker Education Association v. Baker School District 5J*, 19 PECBR at 727.

The parties here reached a tentative agreement and reduced it to writing. Union representative Steven Marrs, the Union’s chief spokesperson in negotiations, reviewed and signed the agreement. The Union held a meeting of its members to vote on the agreement. The membership overwhelmingly rejected it. The County alleges that the Union negotiators acted in bad faith by failing to recommend to its members that they ratify the tentative agreement.

The Union argues that the County did not carry its burden of proving that the Union bargaining team failed to recommend ratification of the agreement. The Union asserts that the only direct evidence regarding the ratification meeting is Marrs and Hansen’s unrebutted testimony that they told the bargaining unit members that it was a good agreement and recommended that it be ratified. The Union argues that the circumstantial evidence presented by the County, much of which is hearsay, lacks credibility and is insufficient to outweigh the direct testimony of Marrs and Hansen.

The County has the burden of proving that the Union did not recommend the tentative agreement in good faith. *See* OAR 115-035-0042(6) (complainant has the

¹⁶Under the PECBA, an agreement reached by the negotiators may be enforceable without the constituents’ ratification unless final agreement is conditioned on ratification. *South Benton Ed. Assn. v. Monroe Union High*, Case No. UP-97-85, 9 PECBR 8556, 8567 (1986), *aff’d* 83 Or App 425, 732 P2d 58, *rev den* 303 Or 331 (1987). Here, the parties’ ground rules conditioned final agreement on ratification.

burden of proof). The County's ability to carry this burden is complicated by the fact that employer representatives are generally not entitled to attend a union's ratification meeting.¹⁷ Further, as discussed earlier in Ruling 1, the County may not question bargaining unit members about what occurred in the Union's ratification meeting. *Baltus v. Multnomah School District No. 1J and Portland Association of Teachers*, Case No. UP-51/52-94, 15 PECBR 781 (1994) (Interim Ruling); see *Sandy Education Association and Davey v. Sandy Union High School District No. 2*, Case No. UP-42-87, 10 PECBR 389, 399, amended 10 PECBR 437 (1988) (questioning an employee about her union activity violates ORS 243.672(1)(a) and (c)). Because of these limitations, an employer must usually rely on circumstantial evidence to show that the union bargaining team failed to affirmatively recommend ratification.

Despite these difficulties, we conclude that the County carried its burden of proving that the Union bargaining representatives did not affirmatively support the tentative agreement. *Baker School District* provides some guidance. The employer there—much like the Union here—discovered a problem with the parties' tentative agreement and sought to renegotiate it before proceeding with the ratification vote. This Board stated: "While requesting that the Association reopen negotiations, in and of itself, may be benign—in this instance the timing of this request, the District's reasons for doing so, as well as other District actions, ran afoul of its good faith bargaining obligation." 19 PECBR at 727. We concluded that "[t]he District's conduct, taken as a whole and in context, undermined the tentative agreement and signaled to the District board that it should reject the agreement." *Id.*

Prior to the ratification meeting here, both Hansen and Marrs saw a problem with the tentative agreement and sought to renegotiate it. The perceived problem was that part-time employees would have to pay \$200 more out-of-pocket for employee-only insurance coverage. The unusual circumstance here is that this problem arose out of the Union's own proposal. On several occasions, the County pointed out to Marrs that the Union's proposal would add a substantial new financial burden on part-time employees with employee-only coverage. Marrs assured the County that the few affected employees were willing to make the sacrifice for the benefit of the majority. After the negotiators reached agreement, Marrs learned that more employees than he realized would have to pay the new out-of-pocket costs. On the morning of the ratification vote, Marrs proposed to the County that the parties change their tentative agreement to eliminate the

¹⁷Public employers, by contrast, must vote on labor agreements in open session, and the union may have access to the minutes of the board's executive sessions in which such labor matters were discussed. *Olney Education Assn. v. Olney School Dist. 11*, Case No. UP-37-95, 16 PECBR 415 (1996), *aff'd*, 145 Or App 578, 931 P2d 804, *disclosure order*, 17 PECBR 205 (1997).

\$200 premium cost for part-time employees and that the County assume the full cost of that change. The County refused. As a result, both Marrs and Hansen went to the ratification meeting dissatisfied with the tentative agreement and unhappy with the County for refusing to reconsider it. These circumstances did not establish benign conditions for the upcoming ratification vote.

At the ratification meeting, Marrs and Hansen failed to take the type of steps one would expect of negotiators who honestly and in good faith supported ratification of the tentative agreement. Members rejected the tentative agreement because of the increased out-of-pocket cost to some part-time employees. Although this increased cost was the result of the Union's own proposal, the Union's negotiators never took responsibility for the proposal. They did not, for example, inform members that the proposal came from the Union or describe why it was a good proposal worthy of ratification. To the contrary, the negotiators let employees believe the County was to blame.¹⁸ This misunderstanding about the source of the proposal tainted the discussions at the meeting and the ratification process. Members might have viewed the tentative agreement more favorably if they understood it was based on the Union's proposal and if Union officials explained why they thought it was a good proposal. In these circumstances, the negotiators' failure to inform members that the Union was the proponent of the disputed provision undermined the agreement.

We are not convinced by Marrs and Hansen's testimony that they affirmatively supported the ratification of the tentative agreement. First, in Ruling 2, we inferred from the Union's failure to produce the minutes of the ratification meeting that the minutes would not have supported the Union's position that Marrs and Hansen affirmatively recommended the agreement. Second, both Marrs and Hansen's testimony was conclusory and vague. Neither testified about what they actually said at the ratification meeting regarding the insurance issue or any other issue. They offered only their own conclusion that they adequately supported ratification. The circumstantial evidence suggests otherwise. Third, Marrs admitted that his recollection of what happened during the bargaining process was not good. Fourth, Marrs was a relatively new AFSCME representative and admitted he was unfamiliar with the Local 1082 members. Hansen, by contrast, worked for the County for six years and served as Local 1082 president for five years. As a result, Hansen was the bargaining team member employees were more

¹⁸The Union argues that it never blamed the County for the agreement. Even if the Union never explicitly blamed the County, it took no steps to clear up the bargaining unit's obvious misunderstanding regarding the source of the proposal. The bargaining unit members' decision to take a strike vote is really only understandable if they somehow believed that the County was at fault. The comments employees made to Ford and other managers after the ratification vote also indicate that members believed the County was to blame.

likely to listen to. Although Hansen said he “recommended” the tentative agreement, he did not understand what this obligation under the PECBA actually entailed. Hansen understood that he was obligated to recommend that the tentative agreement be submitted to the bargaining unit for a vote, and he acted in accordance with this understanding. Hansen admitted that he made a neutral presentation of the tentative agreement and then left the decision up to the bargaining unit members. In other words, he recommended that the bargaining unit vote *on* the agreement, but he did not recommend that they vote *for* it. This falls short of the Union’s PECBA obligation to support ratification of the parties’ tentative agreement.

The duty to bargain in good faith requires the bargaining team to make some affirmative effort to convince or persuade its constituency to vote for the agreement. Based on our review of the evidence as a whole and in context, we conclude that the Union failed to affirmatively seek ratification of the tentative agreement.

3. The Union violated ORS 243.672(2)(d) by failing to recommend ratification of the tentative agreement as required by the parties’ ground rules.

ORS 243.672(2)(d) makes it an unfair labor practice for a labor organization to “[v]iolate the provisions of any written contract with respect to employment relations * * *.” A negotiated and signed ground rules agreement is a “written contract with respect to employment relations” which we will enforce under ORS 243.672(1)(g)¹⁹ and (2)(d). *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80, 5 PECBR 4237, 4242 (1980). A written ground rule that requires a party to submit a tentative agreement to a ratification vote constitutes “a binding contract between the parties.” *School District 549C of Jackson County*, 10 PECBR at 314.

The parties’ ground rules provide that

“7. Union ratification of the TA’d agreement shall be done by a vote of the Union members. Both teams *shall recommend approval* to their respective constituencies, should a tentative agreement be reached.” (Emphasis added.)

¹⁹The wording of subsection (1)(g) is identical to subsection (2)(d) except that it applies to public employers rather than to labor organizations.

This provision unequivocally requires the Union's bargaining team to recommend that bargaining unit members ratify the tentative agreement. As discussed above, the Union's bargaining team failed to do so. The Union's actions violated the parties' ground rules and ORS 243.672(2)(d).

4. The Union violated ORS 243.672(2)(b) by including a modified proposal in its final offer without first offering it to the County.

After the membership rejected the tentative agreement, the Union declared impasse in its negotiations with the County. Pursuant to ORS 243.712(2)(b), the Union then submitted its final offer to the mediator. A final offer must include the party's proposed contract language. ORS 243.650(11). The Union's final offer included proposed contract language that would require the County to pay 100 percent of the premiums for part-time employee-only insurance coverage. The Union had not previously presented this proposal to the County, and the parties had no opportunity to bargain over it. The County alleges that the Union bargained in bad faith by presenting this proposal for the first time in its final offer.²⁰ We agree.

Parties must resume the statutory bargaining process in good faith after one of the parties rejects a tentative agreement. *Lane County v. Lane County Peace Officers Association*, Case Nos. UP-102/105/109-93, 15 PECBR 53 (1994) (the union was required to resume good-faith bargaining after an employer rejected a tentative agreement); *City of Central Point v. International Association of Firefighters, Local 1817*, Case No. UP-44/53-95, 16 PECBR 458 (1996) (an employer was required to continue good-faith bargaining after union members rejected a tentative agreement, even though the union's proposals were more favorable to its members than those submitted prior to the tentative agreement).

²⁰The Union's proposal was "new" in the sense that it had not previously been proposed. We are reluctant, however, to call it "new" because that word has become a term of art in Oregon's public sector labor relations. Under this Board's cases, a proposal is considered "new" if it deals with an issue that was not previously raised in bargaining and does not "logically evolve" from prior proposals. Such "new" proposals are unlawful in the later stages of bargaining. *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754-59 (2007). The County does not contend that the Union's insurance proposal is "new" in this sense. The proposal clearly evolved from the parties' prior proposals on health insurance. Thus, the issue here is not whether the proposal is "new" in this technical sense; instead, we must determine whether a party needs to bargain over (or at least offer to bargain over) a proposal before including it in its final offer.

We have not previously decided whether rejection of a tentative agreement permits a party to include a proposal in its final offer that it had never before presented in bargaining. We have, however, decided the issue in a case that did not involve a rejected tentative agreement. In *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707 (1996) (Order on Reconsideration), we held that a proposal must be bargained before it can lawfully be included in a party's final offer. We explained:

“Our decisions in this area are intended to require parties to put their proposal on the table in hopes of generating meaningful bargaining that will narrow the disagreement and lead to a settlement. The essence of our conclusion in this case is that if a party intends to include a proposal in a final offer, it is obligated to first bargain about that proposal with the other party.” 16 PECBR at 710.

These same policy considerations apply after rejection of a tentative agreement. As noted, the parties are required to resume the statutory bargaining process in good faith after the rejection. Requiring a party to negotiate over a proposal before submitting it as part of the final offer furthers the PECBA policy of promoting meaningful bargaining. A failed ratification vote does not excuse a party from meeting this obligation.

The duty to bargain in good faith obligated the Union to submit its revised health insurance proposal to the County for bargaining before including the proposal in its final offer. We recognize that the County is partially at fault here because it failed to respond to the Union's proposed bargaining dates. However, when the County failed to respond, the Union neither sent its proposal to the County nor contacted the mediator to schedule a mediation session to discuss the proposal. Instead, the Union simply included its proposal, which it had not previously submitted to the employer during bargaining, in its final offer. The Union's conduct is a *per se* violation of ORS 243.672(2)(b).

5. The Union did not violate ORS 243.672(2)(b) by bargaining in bad faith under the totality of the circumstances.

The County also alleges that the Union acted in bad faith by engaging in surface bargaining. In surface bargaining cases, we “judge the overall *quality* of bargaining.” *Lincoln County Employees Association v. Lincoln County and Daniel Glode, District Attorney*, 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); *see also* ORS 243.656(5) (parties must enter collective bargaining with a “willingness to resolve” labor disputes). In such cases, we look at the totality of the circumstances.

The County alleges that, under the totality of the circumstances, the Union’s conduct during bargaining violates ORS 243.672(2)(b). The County asserts that because this dispute involves the same parties that were involved 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, *compliance order*, 16 PECBR 696 (1996), *AWOP*, 146 Or App 777, 932 P2d 1216 (1997) (*Hood River County I*), “the County has the right to a decision consistent with the standards for ‘good faith’ bargaining set by ERB thirteen years previously.” (County’s Post-Hearing Brief at 10.) The County contends that consistent with the standards set in *Hood River County I*, we should find that the Union was not interested in entering into a negotiated agreement but intended “to merely get *through* rather than *use* that PECBA procedure” and to force the County to accept the Union’s terms on insurance. 16 PECBR at 455 n 30. (Emphasis in original.)

In support of its argument, the County contends that the Union failed to obtain sufficient information or authority to engage in meaningful bargaining over insurance, did not affirmatively support the ratification vote, and made no effort to reach agreement after the tentative agreement was rejected. The County also asserts that the Union participated in activities subsequent to the ratification vote which demonstrated its unwillingness to engage in meaningful bargaining. Some of the Union’s activities the County relies on include failing to contact the mediator to arrange another session after the failed ratification vote, taking the strike vote immediately after rejecting the tentative agreement, engaging in informational picketing activities, attempting to shift the blame for the insurance proposal to the County, declaring impasse immediately after the 15 days of mediation had passed, notifying the County of its intent to strike, and submitting the revised insurance proposal in its final offer and in mediation after the ratification vote failed.

In considering whether a union violated ORS 243.672(2)(b) by engaging in surface bargaining, the “question is whether the [employer] has established a totality of conduct on the part of the [union] demonstrating that it was not bargaining with a ‘bona fide intent to reach an agreement if agreement is possible.’” *Washington County, Oregon v. Washington County Police Officers Association*, Case Nos. C-34/36/70/74-80, 5 PECBR 4411, 4416 (1981). As we explained in *Hood River County I*,

“[i]t is not enough for a party to go through the motions of negotiating, even if that party has a sincere desire to execute a contract at some point. The PECBA requires that a party have a ‘willingness’ to reach an

agreement that is the result of good faith negotiations.” 16 PECBR at 451-52. (Footnote omitted.)

Under the totality of conduct standard, we consider a number of factors to determine whether a party’s conduct constitutes unlawful surface bargaining. The factors considered in analyzing a party’s conduct include:

“(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 made; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations.” *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 393 (2006).

In considering the totality of circumstances in this case, we conclude that the Union did not violate its duty to bargain in good faith.

The facts here are very different from those in *Hood River County I*. In *Hood River County I*, the employer refused to meet with the union, failed to communicate with the union, failed to make proposals, refused to explain its proposals to the union, failed to respond to the union’s proposals, and continued throughout the bargaining process to change its proposals. There is no evidence here that the Union acted in a similar manner.

In *Hood River County I*, the County’s original bargaining spokesman admitted that the County had given him little or no authority, and as a result, he made no proposals or counterproposals to the union. Here, bargaining authority was not the problem. The Union bargaining team simply did not comprehend the impact of its proposal until after it signed the tentative agreement. By then, it was too late. We recognize how frustrated the County must have been when the bargaining unit members rejected the tentative agreement because of the Union’s own proposal, especially since the County tried a number of times to point out the problem to the Union representatives. However, the Union representatives’ failure to recognize the impact of the Union’s proposal and the bargaining unit’s likely reaction to it resulted from a mistaken belief or lack of experience rather than the lack of authority or subjective bad faith.

The Union’s revised proposal in the mediation session after the bargaining unit rejected the tentative agreement does not establish the Union’s unwillingness to engage in good faith bargaining. Neither a union nor an employer violates its obligation to bargain in good faith when it makes a regressive proposal after a failed ratification vote. *Lane County*, 15 PECBR at 67-68; *City of Central Point*, 16 PECBR at 470. In the face of a rejected tentative agreement, a party may have little choice besides making a proposal more acceptable to its constituents. Such a proposal, necessarily, will be more generous in some way than the one bargaining unit members rejected. In addition, even though

the Union's proposal was more generous to County employees than the tentative agreement, it was less generous than the Union's final offer proposal and was also an attempt to address the County's expressed need to offset any increased costs.

Another difference from *Hood River County I* is the Union's continued willingness here to meet and explore settlement options before and after the tentative agreement was rejected. These meetings ultimately led to an agreement acceptable to both parties. The fact that the parties actually reached agreement makes it difficult for the County to show the Union was not bargaining with the intent to reach an agreement. *Lincoln County*, 17 PECBR 683, 707 (1998) (an agreement creates a "difficult hurdle" to clear in proving a surface bargaining charge); *Hood River School District*, 15 PECBR at 615; *Washington County*, 5 PECBR at 4417.

The County also relies on the fact that the Union declared an impasse in mediation after only 15 days, the minimum time required by statute. ORS 243.712(2)(a). A party that "rushes through the negotiation process mandated by the PECBA, may thereby demonstrate a lack of serious intention to reach an agreement." *Hood River School District*, 15 PECBR 603, 614 (1995). We do not, however, consider strict adherence to the statutory negotiation timelines alone to be evidence of surface bargaining. *Blue Mountain Community College*, 21 PECBR 673, 779 (2007).

Here, the parties began bargaining in February 2007 and resolved all issues except insurance. The Union proposed to meet with the County after the failed ratification vote. It then declared impasse only after the County failed to respond to the Union's request to meet. After impasse, the parties participated in three mediation sessions during which they continued to exchange concepts and proposals through the mediator. Although the parties ultimately reached agreement on the day before the Union's strike date, the agreement was made possible by the Union's concession. The Union abandoned its proposal that the County pay a contribution to dependant insurance coverage for part-time employees. There was no evidence here that the County felt forced to accept the ultimate agreement. This is in direct contrast to *Hood River County I*, where the employer threatened to withdraw its offer of retroactive pay unless the Union accepted the offer by a certain date.

The Union did commit two violations of ORS 243.672(2)(b) during bargaining. However, the Union's submission of a modified proposal in its final offer arose out of a situation not yet addressed by this Board. Therefore, we do not conclude that the conduct related to this violation indicates that the Union failed to bargain with a bona fide intent to reach an agreement. We also concluded that the Union failed to adequately support ratification of the tentative agreement. However, as previously indicated, the circumstances related to the rejection of the tentative agreement arose out of the Union's mistaken understanding of the impact of its proposal, and not out of its

subjective bad faith. Again, this is in contrast to the situation in *Hood River County I*, where the County's bargaining team entered into a tentative agreement even though they had little hope that it would be ratified.

We are troubled by the fact that the Union negotiators did not argue against the strike vote during the ratification meeting. We recognize that the Union bargaining team neither initiated nor encouraged the vote. However, since it was the Union's own proposal that caused the members to reject the tentative agreement, the bargaining team might have encouraged members to allow the Union an opportunity to return to bargaining before taking a strike vote. Yet, it is clear that at a certain point the Union bargaining team lost control of the ratification meeting. After that, there was little they could do. While the Union's good faith bargaining conduct was derailed during this ratification meeting, after that meeting the Union got back on track and remained on track until the parties reached an agreement. Therefore, we conclude that the Union did not violate its obligation to bargain in good faith under the totality of the circumstances.

Remedy

The parties ultimately entered into an agreement and the County does not seek to invalidate that agreement. Instead, the County requests that this Board order the Union to cease and desist, post a notice of its violations, and reimburse the County for filing fees.²¹

ORS 243.676(2)(b) requires this Board to issue a cease and desist order against a party that commits an unfair labor practice. We will do so here.

In *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590 (1983), *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984), we established criteria we will consider when deciding whether to order a party to post a notice of its wrongdoing. Not all of the criteria need to be met to order a posting. *Blue Mountain Community College*, 21 PECBR at 782. Here, the Union's violations meet several of the *Fern Ridge School District* criteria. Its failure to affirmatively recommend the tentative agreement involved a significant portion of bargaining unit employees, and significantly affected the County's function as bargaining representative. We will order the Union to post a notice of compliance in the facilities where bargaining unit members work.

²¹The County also requests that this Board order the Union to pay its representation costs. A petition for representation costs is appropriately filed after the issuance of this Board's Order. OAR 115-035-0055(2).

6. The Union is not required to reimburse the County's filing fees.

We will not order the Union to reimburse the County for its filing fees under ORS 243.672(3). The Union's answer was neither frivolous nor filed in bad faith. *See Northwest Education Association/OEA/NEA v. Northwest Regional Education Service District*, Case No. UP-23-06, 22 PECBR 247, 258 (2008).

ORDER

1. The Union shall cease and desist from violating ORS 243.672(2)(b) and (d).

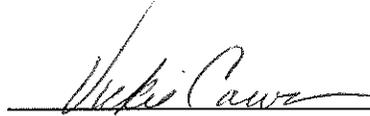
2. The Union shall immediately sign and prominently post one copy of the attached notice in each County facility in which the employees represented by Local 1082 work. The notice shall be posted within five days of the date of this order and shall not be removed for 30 consecutive days.

3. The remaining portions of the complaint are dismissed.

DATED this 25th day of February, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-9-08, *Hood River County v. Oregon AFSCME Council 75, Local 1082*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify bargaining unit members that:

The Employment Relations Board has found that Oregon AFSCME Council 75, Local 1082 (Local 1082), violated the PECBA by refusing to bargain in good faith with Hood River County and by violating the terms of the parties' ground rules for bargaining. The violations occurred when Local 1082 failed to adequately support the ratification of a tentative agreement reached by the parties and included a modified proposal in its final offer without prior bargaining.

The Employment Relations Board has ordered that Local 1082 shall:

1. Cease and desist from such unlawful activities.
2. Within five days of the date of this Order, sign and prominently post a copy of this notice for 30 consecutive days in each facility where Local 1082 bargaining unit members work.

Dated _____, 2010

By: _____
Union Representative

Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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