

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UP-14-04

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY	)	
EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW
	)	AND ORDER
LINCOLN COUNTY SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

This Board heard oral argument on August 24, 2005, on objections by both parties to a recommended order issued by Administrative Law Judge (ALJ) Vickie Cowan, following remand by this Board and a supplemental hearing conducted on March 31, 2005, in Salem, Oregon. The hearing closed on April 18, 2005, upon receipt of the parties' supplemental post-hearing briefs.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

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

On March 4, 2004, the Lincoln County Education Association (Association) filed this unfair labor practice complaint alleging that the Lincoln County School District (District) violated ORS 243.672(1)(g) when it (1) refused to process Ana Becerra's grievance, (2) violated the contract by laying off Becerra, and (3) violated the contract by failing to recall Becerra. The District filed a timely answer and raised

affirmative defenses. ALJ Cowan conducted the initial hearing on June 11, 2004, in Newport, Oregon. The hearing closed on July 15, 2004, upon receipt of the parties' post-hearing briefs.

The ALJ issued a proposed order on September 29, 2004. Both parties submitted timely objections to the proposed order. This Board held oral argument on January 26, 2005. On February 9, 2005, this Board issued an interim order remanding the case back to the ALJ for further findings on the merits. 20 PECBR 823.

The ALJ conducted a supplemental hearing on March 31, 2005. That hearing closed on April 18, 2005, upon receipt of the parties' supplemental post-hearing briefs.

The issue presented for hearing is:

Did the District breach the parties' collective bargaining agreement in violation of ORS 243.672(1)(g)?

### RULINGS

The ALJ's rulings were reviewed and are correct.

### FINDINGS OF FACT

1. The Association represents a bargaining unit of licensed teachers employed by the District, a public employer.

2. The Association and District are parties to a collective bargaining agreement effective October 23, 2001 through June 30, 2005. The applicable contract language is as follows:

#### "ARTICLE 1

#### "RECOGNITION

##### "Exclusive Representation

"The District hereby recognizes the Association as the exclusive representative, as defined in ORS 243.650(8) of licensed teaching personnel, under contract.

“Specifically excluded from the bargaining unit are all administrative, classified, supervisory and confidential personnel, temporary teachers employed for 60 calendar days or less, and substitutes.”

ARTICLE 13—LAYOFF AND RECALL—provides, in relevant part:

“A. Seniority shall be defined as the employee’s total length of continuous service in the District as a licensed teacher. Seniority will be computed and accrue from the teacher’s first day of actual service in a bargaining unit position, and shall continue to accrue during approved leaves of absence. In case two or more teachers have the same date of actual service with this District, the tie will be resolved by drawing lots.

“B. Whenever the Board determines that a layoff is necessary, it will notify the Association with 30 days’ notice, absent emergency circumstances or unforeseen circumstances. As soon as practicable, notice will be given to the affected teachers of their layoff.

“C. In the event the Board, in its discretion, determines that a layoff is necessary, then it will determine the teachers to be retained by means of the following criteria:

“\* \* \* \* \*

“D. Nothing in this Article shall be construed so as to interfere with the Board’s right to dismiss or nonextend a contract teacher pursuant to the provisions of the Fair Dismissal Law or to dismiss or nonrenew a probationary teacher pursuant to ORS 342.835. This Article covers all layoffs of all teachers, regardless of whether conducted individually or as a group.

"E. In conducting a layoff under this Article, the District will first determine the program(s) or area(s) scheduled for reduction or elimination.

"1. After such determination, the District will make every reasonable effort to transfer teachers in such program(s) or area(s) to other vacant positions for which they are qualified and properly licensed.

"\* \* \* \* \*

"G. Recall

"If within 27 months from the first date of layoff, a vacancy occurs within the District for which a laid off teacher is qualified as per paragraph I below, the recall procedure outlined below will be followed:

"1. At the time of layoff, the District shall provide for laid off teachers to express in writing a desire to return to the District. The District shall also receive the teacher's address for recall notification. In the event of a recall, the District shall notify the teacher who has expressed a desire to return to the District of the recall by certified mail, return receipt, sent to the last address given by the teacher to the District office. \* \* \*

"\* \* \* \* \*

"I. Any 'appeal' from the Board's decision on layoff or recall pursuant to this Article shall be by means of a grievance filed pursuant to the Article on Grievance Procedure. The decision of the arbitrator will be final and binding on all interested parties as long as the arbitrator's decision is within his/her jurisdiction. The arbitrator's jurisdiction is further restricted as

follows: The arbitrator is authorized to reverse the layoff or recall decision made by the District only if the District;

- “1. Exceeded its jurisdiction;
- “2. Failed to follow the procedure applicable to the matter before it;
- “3. Made a finding or order not supported by substantial evidence in the whole record; or
- “4. Improperly construed the applicable law.”

ARTICLE 11—GRIEVANCE PROCEDURE—provides, in relevant part:

“PURPOSE

“The procedure set forth in this Article is to secure, at the lowest possible level, impartial, expeditious, orderly, and equitable solutions to grievances which may from time to time arise affecting teachers and their rights. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.

“A. Definitions

“1. Grievance

“A grievance is a claim by a teacher or the Association that the terms of the Agreement have been misinterpreted, inequitably applied or violated.

“2. Grievant

“A teacher, group of teachers or the Association making the claim or presenting the grievance.

“3. Party in Interest

“A ‘party in interest’ is the person or persons making the claim and any person who might be required to take action or against whom action might be taken in order to resolve the claim.”

3. The grievance procedure contains four steps that culminate in final and binding arbitration.

4. In the fall of 2001, the District hired Ana Becerra as a temporary curriculum resource teacher.<sup>1</sup> The District informed Becerra that the position was for two or three years, depending upon state funding.

5. On October 23, 2001, Becerra signed an “Initial Employment Agreement” with the District that effective November 1, 2001, she would begin working for the District in a temporary position as a curriculum resource teacher. The document said the school board would consider the employment recommendation at its next regularly scheduled meeting. Because Becerra was expected to work for more than 60 days, Becerra became a bargaining unit member on her first day of work and was paid in accordance with the collective bargaining agreement.

6. Although she began work on November 1, 2001, Becerra did not receive a final written contract from the District until February 12, 2002. That contract was for the period of November 1, 2001 through June 14, 2002. Superintendent Irv Nikolai signed Becerra’s contract on behalf of the District.

7. On or about March 12, 2002, the District notified Becerra that her temporary contract had not been renewed.

8. Becerra was concerned about the nonrenewal notice and contacted human resources. Human Resource Assistant Sylvia (Sid) Danielson informed Becerra

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<sup>1</sup>“Temporary teacher’ means a teacher employed to fill a position designated as temporary or experimental or to fill a vacancy which occurs after the opening of school because of unanticipated enrollment or because of the death, disability, retirement, resignation, contract nonextension or dismissal of a contract or probationary teacher.” ORS 342.815(10) The District adopted a policy to similar effect. It defines “temporary employees” as those “employed by the district for a specified length of time and/or specific assignment or for positions designated by the district as temporary.”

that nonrenewal of temporary teachers was standard procedure, and that she should not worry because her position would continue.

9. Becerra continued to work during the summer months of 2002. She was paid the per diem hourly rate provided in the collective bargaining agreement.<sup>2</sup>

10. Becerra and other summer employees recorded their summer work time on a weekly "substitute" payroll time sheet although they were not employed as substitute teachers. Their time was noted as "BFTE" (beyond full-time equivalent).

11. On June 5, 2002, Becerra signed an Initial Employment Agreement with the District for work to begin August 28, 2002. Becerra worked throughout the 2002-2003 school year, and continued to receive pay and benefits under the collective bargaining agreement. Unlike the prior year, however, Becerra never received a written contract from the District for 2002-2003.

12. On or about March 11, 2003, the District board voted to not renew Becerra's temporary contract for the upcoming 2003-2004 school year.

13. During spring 2003, the District undertook massive layoffs of both classified and licensed employees. Approximately 80 teachers were laid off at the conclusion of the 2002-2003 school year.

14. In late March or early April 2003, Becerra's supervisor, Lin Lindly, told Becerra that the District might return the grant money for Becerra's position to the state and suggested that Becerra look for a transfer.

15. On April 2, 2003, Becerra contacted Human Resource Director Len Geiger by e-mail indicating that she was concerned about the future of her position and wanted to reactivate her transfer request and application for a bilingual education position.

16. In early April 2003, Becerra met with Superintendent Irv Nikolai. Nikolai indicated that he believed that the District would retain the funds and further said he had "discretionary funds" he would use if the program needed it. He asked

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<sup>2</sup>Article 18.B.2 of the parties' agreement states, in relevant part: "Extended contracts will be reimbursed at a per diem rate of 1/190 of the teacher's annual salary." This rate is different from the \$134 per day the District pays its substitute teachers.

Becerra to prepare a budget for the 2003-2004 school year. Becerra prepared the budget as requested. She did not pursue a transfer.<sup>3</sup>

17. Becerra was never given a new temporary teacher contract for 2003-2004.

18. Becerra continued to work throughout the summer and into the fall of 2003. Her paychecks indicate that she was paid as a "licensed" employee.<sup>4</sup>

19. The regular school year began on or about August 27, 2003, and Becerra continued working on the same project for which she was initially hired.

20. On or around September 1, 2003, Becerra met with Geiger. Geiger suggested that Becerra's position might be transferred to the local Education Service District and if she accepted, she would be paid a lower salary. Becerra indicated she did not want to take the pay cut.

21. Becerra spoke with Association Representative Ron Hahn about her conversation with Geiger. On or about September 4, 2003, Hahn sent an e-mail to Danielson in human resources asking about Becerra's status. Danielson responded that Becerra's temporary contract had been nonrenewed.<sup>5</sup>

22. On or about September 8, 2003, Geiger called Becerra into his office and told her that she would no longer be employed by the District. He also informed her that she had been employed as a "substitute" since July 1. When Becerra asked Geiger who she was substituting for, Geiger responded, "nobody."<sup>6</sup> Becerra's last day with the District was September 16, 2003.

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<sup>3</sup>Nikolai, who is an Oregon resident, no longer works for the District and was not called as a witness at the hearing. Becerra testified that her supervisor, Lin Lindly, was also in this meeting. Lindly testified at hearing, but was not asked whether she was present at the meeting. Lindly did testify, on cross-examination, that she assumed Becerra had been renewed for the 2003-2004 school year.

<sup>4</sup>In contrast, substitute teachers' pay stubs indicate that they are a "licensed sub."

<sup>5</sup>The District did not formally notify the Association of Becerra's nonrenewal.

<sup>6</sup>Geiger testified at hearing that he did not know that Becerra had worked over the summer.

23. On or about October 15, 2003, Hahn, on behalf of the Association, grieved Becerra's termination, alleging that she was improperly laid off under Article 13 of the contract.

24. On or about October 28, 2003, Geiger responded to Hahn that the District would not process the grievance because the District considered Becerra a substitute employee who was not covered under the collective bargaining agreement. In his response, Geiger stated: "In short, it can be said with positive assurance that the District did not agree to provide substitutes with grievance and arbitration rights under the collective bargaining agreement."

25. On or about November 18, 2003, Geiger reiterated to Hahn that the District considered Becerra to be a substitute teacher from July 1, 2003 until her termination, and therefore would not process her grievance. He further stated that the Association need not continue to exchange letters to confirm the District's position.

26. The Association did not pursue the grievance further.

27. On March 4, 2004, the Association filed this unfair labor practice complaint.

28. A substitute teacher is defined by District policy and ORS 342.815(8) as any teacher who is employed to take the place of a probationary or contract teacher who is temporarily absent.<sup>7</sup>

29. District policy provides that:

"All persons who receive compensation for services rendered to the district must be regular, temporary or substitute employees or employees of another agency, business or service with which the Board/superintendent has a valid contract to receive specified services."

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<sup>7</sup>ORS 342.815(8) states: "Substitute teacher' means any teacher who is employed to take the place of a probationary or contract teacher who is temporarily absent " District policy states: "Substitute employees are those persons employed to work in the absence of a regular employee."

## CONCLUSIONS OF LAW

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

2. The District violated the parties' collective bargaining agreement and ORS 243.672(1)(g) when it terminated Becerra's employment.

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations including an agreement to arbitrate \* \* \*." The Association asserts that the District violated the parties' written collective bargaining agreement when it terminated Becerra and then refused to process or arbitrate her grievance.

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

The recognition clause of the parties collective bargaining agreement is clear on its face. Temporary teachers employed for more than 60 days are covered by the terms and conditions of the contract. Substitute teachers are expressly excluded from the terms and conditions of the contract.

The Association argues that Becerra was a temporary teacher subject to the terms and conditions of the collective bargaining agreement; that the District violated the agreement when it terminated Becerra instead of going through the contractual steps provided for layoff; that it violated the agreement when it failed to recall Becerra to vacant positions for which she was certified and qualified; and that it further violated the agreement when it refused to process Becerra's grievances. The District argues that it terminated Becerra's employment as a temporary teacher and that her work during the summer and fall of 2003 was as a substitute teacher. Because substitute teachers are expressly excluded from the bargaining unit, the District asserts it had no contractual obligation to follow the contract's layoff and recall provisions or to process Becerra's grievances.

The decisive issue is whether Becerra was a temporary or a substitute teacher. If she was a temporary teacher, she was covered by the terms and conditions of the collective bargaining agreement, and we will proceed to determine whether the District violated that agreement. If she was a substitute teacher, she was specifically excluded from the benefits of the agreement, and we will dismiss the complaint. We conclude that Becerra was a temporary teacher covered by the terms and conditions of the contract.

“Temporary teacher” and “substitute teacher” are not defined in the contract. They are, however, terms of art frequently used in the education community. The terms are defined by statute and District policies that mirror the statute. (See footnotes 1 and 7.) We conclude that the parties intended and understood these terms in their contract to have the meaning expressed in the statutes and District policies. As pertinent here, a temporary teacher is employed in a position designated as temporary. ORS 342.815(10). A substitute teacher is employed to fill in for a probationary or contract teacher who is temporarily absent. ORS 342.815(8).<sup>8</sup>

There is no dispute that Becerra was hired as a temporary teacher. Her assignment was designated as temporary and was expected to continue for two or three years, depending on state funding. Because the anticipated length of her employment exceeded 60 days, she was immediately placed into the bargaining unit. She began working for the District on November 1, 2001. However, she did not receive a contract from the District until February 2002. Despite the lack of a signed contract, the District considered Becerra a temporary teacher and paid her under the terms of the agreement.

In March 2002, the school board notified Becerra that her contract was not renewed. Human Resource Assistant Danielson informed Becerra that nonrenewal of temporary teachers was standard procedure, but she should not worry because her position would continue. Becerra continued to work during the summer months of 2002, and received the rate of pay and benefits provided in the contract.

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<sup>8</sup>The District objects to our consideration of statutes and policies outside the contract, but it offers no other source for defining these crucial contract terms. The difference between a substitute and temporary teacher is not clear on the face of the contract. We look to the statute as an indication of how the terms are used in the education community, and to the policies as an indication of how the terms are understood in the District. The definitions in the statutes and policies are similar. (See footnotes 1 and 7.) We conclude that the parties understood and intended these meanings when they used the terms in their contracts. Indeed, it seems likely that the parties did not bother to define the terms in their agreement precisely because the terms were so well understood.

Becerra continued working as a temporary teacher through the 2002-2003 school year, despite the fact that *her contract had been nonrenewed*, and despite the fact that *the District never gave her a new temporary teacher contract*. The District continued to pay her the salary and benefits provided in the parties' agreement.

In March 2003, the school board again voted to nonrenew Becerra's contract.<sup>9</sup> When Becerra questioned whether her position would be eliminated, Superintendent Nikolai assured her that she still had a position. The Superintendent is the official who signed Becerra's 2001-2002 teaching contract on behalf of the District, and he told Becerra that if necessary, he would use discretionary funds at his disposal to continue her program. He directed Becerra to develop her budget and proceed accordingly. Becerra and her supervisor, Lin Lindly, both thought Becerra had been renewed. The fact that she did not have a written contract did not concern her, because she had worked for three months in her first year before receiving a contract, and she worked the entire previous year without ever receiving a contract.

Becerra continued to work throughout the summer and into September of the 2003-2004 school year. Again the District paid her according to the labor contract. The nature of Becerra's work never changed. She continued working on the curriculum project for which she was originally hired.

The 2003-2004 school year began on August 27, 2003. Five days later, on September 1, Human Resource Director Geiger met with Becerra to discuss the possibility that her position might be transferred to the local Education Service District. Approximately eight days later, Geiger once again met with Becerra to inform her she would no longer be employed by the District. He also said that she had been employed as a substitute during the summer and at the start of the regular year, although she was not replacing anyone.<sup>10</sup>

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<sup>9</sup>We view the school board's nonrenewal of Becerra's contract as a recognition that Becerra had a teaching contract for 2002-2003. Otherwise, the school board would have had no contract to nonrenew. The school board recognized this, even though it nonrenewed Becerra's contract of the prior year and gave her no new written agreement to replace it. The same circumstances—nonrenewal and lack of a written agreement—also existed the following year when Becerra was terminated. Based on the parties' practice, we reject the District's argument that nonrenewal and lack of a written agreement preclude the existence of a teaching contract when Becerra was terminated.

<sup>10</sup>Geiger testified at hearing that he did not know that Becerra had worked over the summer. He obviously knew she continued to work for the District at the beginning of the fall

The facts do not support the District's position that Becerra was employed as a substitute teacher from July 1, 2003 until September 16, 2003. Both the statute and District policy define a substitute teacher as one who replaces another teacher who is temporarily absent. Becerra did not replace another teacher. She continued to perform the same duties she was originally hired to perform until her termination on September 16, 2003. She never received a substitute teacher rate of pay but rather received the salary and benefits established in the parties' labor agreement. The District's pay stubs for this period designate Becerra as "licensed"; they do not contain the "licensed sub" designation the District uses on the pay stubs of its substitute teachers. In addition, there are certain requirements which the District must meet in order to designate a teacher as a substitute. The District did not meet these requirements.

We do not find persuasive the District's argument that it did not know that Becerra was employed during the summer and into September. She submitted time sheets and received regular paychecks, so payroll knew she worked during the summer and in September. Becerra's supervisor also knew she worked. Even without Nikolai's confirmation, the District had notice that Becerra was still performing work for it.

District policy provides that all persons who receive compensation for services rendered to the District must be a regular, temporary, or substitute employee, or an outside contractor. Becerra was not a regular employee or an outside contractor. She was not replacing another teacher, so she was not a substitute teacher. The only category left is temporary. Becerra was originally hired as a temporary employee. Her job duties never changed. The District continued to pay her as if she were a temporary employee, even though she worked for more than a year without a written contract. We conclude Becerra was a temporary employee on September 16, 2003, when the District terminated her employment.

As a temporary employee for more than 60 days, Becerra was a bargaining unit member when the District terminated her on September 16. She was thus entitled to the rights and benefits of the collective bargaining agreement.

Becerra's position was eliminated effective September 16, 2003. This staff reduction was not personal to Becerra, but rather was a question of funding. As a result, the District had one less position in the bargaining unit. This was clearly a layoff. As such, Becerra was entitled to the protections accorded to her by Article 13 of the agreement. She did not receive them.

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term since he met with her to discuss the possibility of her position being transferred to the Education Service District

Under Article 13, the District should have notified the Association 30 days prior to Becerra's lay off. It did not do so. The District does not argue that there was an emergency or unforeseen circumstances that excused compliance; instead, it maintains Becerra was a substitute teacher and therefore not subject to the collective bargaining agreement. Nor did the District process Becerra's termination as a layoff. In other words, it did not compare her seniority and qualifications with those of other teachers to see if she could transfer to another position. Nor did it consider her for recall for subsequent positions that may have become available after her layoff.

Article 13 I. of the parties' agreement (Finding of Fact 2) expressly authorizes the reversal of a layoff if the District fails to follow the applicable procedures. We conclude that the District laid off Becerra without following the applicable procedures. We therefore reverse the layoff and order the District to make Becerra whole by reinstating her with back pay and benefits, plus interest at the legal rate, minus interim earnings.

The Association alternatively urges us to find that the District violated the collective bargaining agreement, and thus subsection (1)(g), by failing to recall Becerra. There is evidence that the District hired people from outside the District rather than recall Becerra to these positions for which she was certified and qualified.

Under the contract, however, recall rights belong only to those who have been laid off. We reverse Becerra's layoff, so she is not a laid-off teacher who is entitled to recall rights.

The Association also asks us to find the District in violation of subsection (1)(g) based on the District's refusal to process the grievance. We decline. As we described in our Interim Order, 20 PECBR 823, the Association disavowed any intention to seek arbitration and opted instead, with the District's agreement, to seek this Board's decision on the merits. We will not find a refusal to process a grievance (or a refusal to arbitrate) when the parties mutually agree to use another method to resolve their contract dispute.

### Civil Penalty

The Association seeks a civil penalty on grounds that the law is clear and the District had no good-faith reason to believe its position was legitimate. The District took the position that Becerra was a substitute teacher who was not covered by the collective bargaining agreement. Its argument is essentially that the issue was not substantively arbitrable, *i.e.*, there was no agreement to submit this particular dispute to arbitration. Substantive arbitrability is a question of law for this Board to decide.

*Luoto v. Long Creek School District No. 17*, Case No. UP-16-86, 9 PECBR 9314, 9320-23, *aff'd* 89 Or App 34, 747 P2d 370 (1987), *rev den* 305 Or 576, 753 P2d 1382 (1988). Although we rejected the District's arguments, we do not find them to be frivolous or so lacking in merit that a civil penalty is warranted.

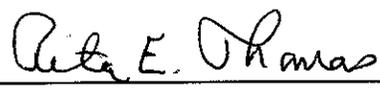
ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(g) and the parties' collective bargaining agreement.

2. The District shall reinstate Becerra with full back pay and benefits, plus interest at the legal rate from the date the pay became owing, minus any interim earnings.

DATED this 7<sup>th</sup> day of September 2005.

  
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Paul B. Gamson, Chair

  
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Rita E. Thomas, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.