

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-14-07

(UNFAIR LABOR PRACTICE)

PORTLAND FIREFIGHTERS')	
ASSOCIATION, LOCAL 43, IAFF,)	
Complainant,)	
)	RULINGS AND ORDER
v.)	ON PETITION FOR
)	RECONSIDERATION
CITY OF PORTLAND,)	
)	
Respondent.)	
_____)	

On March 26, 2009, this Board issued an Order which found that the City of Portland (City) violated ORS 243.672(1)(e) when it refused to bargain with the Portland Firefighters' Association, Local 43, IAFF (Association) about the impacts of a return-to-work program. 23 PECBR 43.

On April 9, 2009, the City filed a timely motion for reconsideration. OAR 115-035-0050. The Association responded to the City's motion.

We grant reconsideration to address some of the issues raised in the City's motion and to clarify our Order. The City contends that we made a number of errors in our Order. First, the City contends that we erroneously failed to dismiss a portion of the Association's complaint. The Association's complaint alleged that the City violated ORS 243.672(1)(e) when it refused to bargain about its decision to implement a return-to-work program, and the impacts of that decision. Our Order held that the City was obligated to bargain about the impacts of the return-to-work program, but not the decision to create the program. The City asserts that we should have dismissed a portion of the City's subsection (1)(e) allegations in our Order, and that we erred when we did not do so. We disagree.

Here, the Association offered two legal theories to support its allegation that the City violated subsection (1)(e): (1) that the City unlawfully refused to bargain the *decision* to create the return-to-work program, and (2) that it refused to bargain the *impacts* of that decision. We concluded that the City violated subsection (1)(e) based on one of the proffered legal theories.

Teamsters Local 670 v. City of Vale, Case No. UP-14-02, 20 PECBR 337, *on reconsideration*, 20 PECBR 388 (2003) considered similar circumstances. In *City of Vale*, the complainant union alleged that the city violated subsection (1)(e) by refusing to bargain about its decision to eliminate the police department and the impacts of that decision. We held that the City was not obligated to negotiate its decision to close the police department, but was required to bargain the impacts of that decision. We concluded that the City's conduct violated subsection (1)(e), but did not dismiss any portion of the union's (1)(e) allegation. *City of Vale*, 20 PECBR at 361.

Here, we based our conclusions that the City violated subsection (1)(e) on one legal theory offered by the Association. We explained why we rejected the other theory. Consistent with our practice in *City of Vale*, it is neither appropriate nor necessary to indicate in our Order that we rejected one of the Association's legal theories by dismissing part of the subsection (1)(e) allegation.

Second, the City contends that we erred by holding the City to a legal standard that "came into existence after the hearing." In its answer to the unfair labor practice complaint, the City pled, as an affirmative defense, that the parties had "bargained to completion" over all the issues raised by the return-to-work program. We rejected the City's "bargained to completion" defense and cited *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008) to support our conclusion. *Lebanon Community School District* held that an employer could no longer defend against a charge that it made a unilateral change by alleging that the parties had "bargained to completion" over the disputed subject. Instead, we concluded that an employer could defend against a unilateral change charge by asserting one of the following affirmative defenses: (1) that language in the contract permitted the change, or (2) that applicable contract language clearly and unmistakably waived the union's right to bargain over the subject at issue.

The City notes that we issued our order in *Lebanon Community School District* on March 25, 2008 – more than three months after the parties submitted their post-hearing briefs in this case. The City asserts that it is "fundamentally unfair" for us to retroactively apply legal principles announced after the record in this case closed.

We note that the Administrative Law Judge (ALJ) cited *Lebanon Community School District* in his Recommended Order to support his conclusion rejecting the City's affirmative defenses. Although the City objected to the Recommended Order, its objections did not assert that the ALJ unfairly applied the law retroactively when he cited this case. We will not consider an argument the City raised for the first time on reconsideration when it had ample opportunity to raise it earlier. The standards developed in *Lebanon Community School District* are a correct statement of the law, and we apply them here. We reject the City's argument that we should allow it to assert a defense we have disavowed.

Third, the City contends that we made both factual and legal errors in ruling on the City's motion to amend its answer. At the hearing, the City moved to amend its answer to allege the following affirmative defenses: (1) that the Association waived its right to bargain about the return-to-work program, and (2) that the Association was equitably estopped from asserting that the City failed to bargain about the return-to-work program. The City contends that we erred when we rejected these defenses. The City contends that "all that is required with respect to affirmative defenses, in order for them to be considered, is that they be pled." The City asserts that it adequately raised the affirmative defenses of waiver and equitable estoppel by pleading them in its answer and in its motion to amend its answer. We disagree.

Contrary to the City's assertion, a respondent must do more than plead an affirmative defense – it must also prove it. OAR 115-035-0042(6). The City was allowed to present evidence at the hearing to support these defenses. We rejected the City's defenses on the grounds that the City provided no legal argument in support of these defenses, either at the hearing or in its post-hearing brief. We did not err when we held that the City failed to meet its burden to prove these affirmative defenses.¹

¹In its petition for reconsideration, the City notes that the ALJ did not rule on its motion to amend its answer to assert the affirmative defenses of equitable estoppel and waiver. The City contends that we erred in our Order when we stated that we agreed with the ALJ's denial of the City's motion to amend.

The City is partially correct that the ALJ did not specifically deny the City's motion to amend its answer to add the affirmative defenses of waiver and equitable estoppel. Thus, our statement that we agree with the ALJ's ruling was not completely accurate, but any inaccuracy has no impact on the outcome. The ALJ considered and specifically denied the City's motion to amend the answer to include an affirmative defense of equitable estoppel. The ALJ also considered the City's attempt to include the affirmative defense of waiver and rejected the substance of that claim. We agree with the ALJ and also reject those affirmative defenses.

The other issues the City raised were adequately addressed in our Order and do not require additional consideration or clarification.

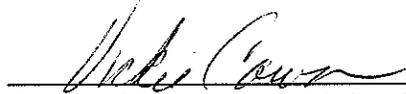
ORDER

Reconsideration is granted. We adhere to our March 26, 2009 Order as clarified herein.

DATED this 1st day of June 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.