

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-15-04

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 2936,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW
	)	AND ORDER
COOS COUNTY,	)	
	)	
Respondent.	)	
<hr/>		

This case came before the Board on no objections to the recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 9, 2005, following a hearing on August 12 and 13, 2004, in Coquille, Oregon. The record closed with the submission of the parties' post-hearing briefs on October 18, 2004.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Kenneth E. Bemis, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented Respondent.

---

AFSCME Local 2936 (Union or Local 2936 ) filed this unfair labor practice complaint on March 4, 2004, alleging that Coos County (County) had engaged in regressive bargaining, refused to make concessions, sent bargaining representatives to mediation without the authority to bargain, bargained without the intention of reaching an agreement, threatened employees with dismissal for Union activities, intentionally misrepresented the Local Union's policy on fining members, and retroactively implemented a final offer for

health insurance. The Union also alleged that the County's conduct warranted imposition of a civil penalty. On June 3, 2004, the County timely filed its answer, admitting and denying certain allegations, raising affirmative defenses, and seeking a civil penalty against the Union. A hearing was held on August 12 and 13, 2004, at which the parties presented testimony and other evidence. The record closed with the submission of the parties' post-hearing briefs on October 18, 2004.

The issues are:

1. Did the County intentionally misrepresent to employees that the Union would or could fine employees for crossing picket lines? If so, did the County violate ORS 243.672(1)(a) and (b)?
2. Did the County violate ORS 243.672(1)(e) by (1) retroactively changing the status quo regarding health insurance premiums, or (2) unilaterally implementing a level of health insurance premiums that differed from its final offer?
3. In light of all the circumstances of this case, did the County refuse to bargain in violation of ORS 243.672(1)(e)?<sup>1</sup>

In his proposed order, ALJ Grew recommended dismissal of the complaint in its entirety. For reasons set forth below, the Board concludes that the County did not violate the PECBA as alleged, and dismisses the complaint.

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

### RULINGS

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

### FINDINGS OF FACT

1. The County, a public employer, employs approximately 425 employees in seven bargaining units. The Union is a labor organization and the exclusive representative of approximately 142 County employees known as the "courthouse" employees.

---

<sup>1</sup>During the hearing, the Union withdrew paragraphs 19, 20, and 28 of its complaint, which set forth a claim that the County had unlawfully threatened employees with dismissal if they engaged in lawful union activities, including a strike, in violation of ORS 243.672(1)(a). In turn, the County withdrew its claim for a civil penalty and filing fee reimbursement based on the filing of a frivolous or harassing claim.

2. The parties were signatories to a collective bargaining agreement in effect from July 1, 2002 through June 30, 2003.

3. There are six other County bargaining units: (1) Road Department employees (represented by AFSCME Local 502); (2) Sheriff's Department employees (represented by Coos County Association of Deputy Sheriffs, affiliated with Teamsters Local 223); (3) nurses (represented by Oregon Nurses Association (ONA)); (4) Solid Waste Department employees (represented by Teamsters Local 206); (5) district attorneys (represented by Coos County Prosecuting Attorneys Association); and (6) a strike-prohibited unit of parole and probation officers formed in 2004, pursuant to the 2003 amendments to ORS 243.736. The County's contracts with the Road Department employees, Sheriff's Department employees, and nurses also expired June 30, 2003.

4. In general, workers in the Union's bargaining unit are the lowest paid County employees; approximately 50 of them are paid less than \$25,000 per year.

5. The County and Union began bargaining for a successor agreement on March 21, 2003. The County's negotiating team consisted of Steve Allen, the County's Human Resources director and chief labor relations officer, and David Koch, assistant County counsel. In March 2003, the Union's negotiating team consisted of Union President David Jennings, Jan Long, Terry Mye,<sup>2</sup> and AFSCME Field Representative and Chief Negotiator Neil Bednarczek.

6. The County was concerned about several increasing, uncertain, or unequal personnel costs in the upcoming contract period, namely: (1) substantial rate increases in the Public Employee Retirement System (PERS) and potential increases in PERS rates caused by litigation challenging changes in PERS; (2) rising health insurance costs (premiums for employees on the County's Pacific Source Plan had roughly doubled in four years); (3) the unusually low costs to employees under the County's Pacific Source Plan;<sup>3</sup> (4) the state budget crisis, which caused uncertainty about the amount of state funds which would be available to the County; (5) uncertainty regarding the continuation of federal "O & C"<sup>4</sup> funds, scheduled to expire in 2006; (6) inconsistencies in health benefit levels and

---

<sup>2</sup>Long and Mye retired during the course of bargaining and left the bargaining team.

<sup>3</sup>The County Pacific Source plan covering Union employees required only \$5 co-payments for certain medical services. The insurance plans for other County employees required higher co-payments.

<sup>4</sup>The term "O & C land" is the label given to land the federal government originally provided to the Oregon & California Railroad to facilitate homesteading. The Oregon O & C land was transferred back to  
(continued...)

employee contribution rates among different County employee groups;<sup>5</sup> and (7) lack of liquid reserve funds to alleviate unexpected changes to the County's finances. The County discussed these concerns with Union officials at formal and informal negotiation sessions. In response to these concerns, the County chose to set aside money for a larger reserve fund.

7. On April 17, the Union presented proposals for a wage increase and changes to the contract sections titled Reclassification; Discipline and Discharge; and Safety Committee.<sup>6</sup>

8. Also at the bargaining session on April 17, 2003, the County proposed that the parties use a "total cost formula" approach. The County proposed that parties agree to a cap on total unit personnel costs. In turn, the Union would be given substantial latitude regarding the allocation of funds under the cap. The County proposed a cap of \$8,637,681 on bargaining unit personnel costs for 174 FTE in fiscal year 2003-04, with undefined percentage increases in 2004-05 and 2005-06. The County informed Union negotiators that the amount it proposed for the cap was the maximum amount the County would offer the Union in wages and benefits.<sup>7</sup>

---

<sup>4</sup>(...continued)

the federal government when no homesteading took place. Under the Oregon and California Lands Act, 43 U.S.C. 1181a et seq., logging this land generates revenue which is passed on to the counties containing the land. When logging of O & C land decreased in the late 1990's, Congress passed the Secure Rural Schools and Community Self-Determination Act of 2000 which provided federal revenue to O & C counties in lieu of logging revenue from 2000 through 2006. (Public Law 106-393, 106th Congress, 114 Stat. 1607), These funds are referred to in this order as "O & C funds."

<sup>5</sup>A number of County employee groups received health benefits through the Oregon Teamster Employers Trust (OTET). In 2002, an AFSCME bargaining unit in the County Public Works Department had decertified AFSCME and affiliated with the Teamsters in order to obtain insurance coverage under the OTET. Prior to bargaining, the County had moved unaffiliated employees from the Pacific Source plan to the OTET as well. Prior to July 2004, the eight-member Oregon Nurses Association unit negotiated a plan change that suited the particular circumstances of its members, who needed only secondary insurance. The net effect of all these changes was that Union employee health premiums cost substantially more, and were increasing at a higher rate, than premiums for all other County employees.

<sup>6</sup>The County eventually responded to the Union's safety committee proposal with a proposal that simply restated its obligations under current law. The County does not argue that this proposal represented a concession.

<sup>7</sup>Throughout the negotiations, the County did not contend that it did not have the funds to devote additional financial resources to unit employees. Rather, the County prioritized setting funds aside for a larger reserve fund. The County never wavered from its position that it would not offer unit employees more in 2003-04 than the amount provided in its draft and final budgets for that fiscal year, which was reflected

(continued...)

9. The County believed that it had placed everything it had budgeted for the bargaining unit in its total cost offer, and that it never retreated significantly from that position, even in the March 8, 2004 final agreement.

10. Union officials were initially interested in the County's total cost formula approach, but that interest faded because the County was unable to provide hard numbers for several key expenditures under the cap. Union officials also believed, based on their understanding of the actual costs involved, that the County's proposal would require a wage freeze and a reduction in health insurance premiums for Union employees.

11. Union negotiators were troubled by several features of the County proposal, including: (1) the County's use of 174 FTEs as a firm budgeting figure, when there were only 152 actual unit employees with little prospect of a significant increase in that number;<sup>8</sup> (2) inaccurate figures for workers' compensation costs; (3) health insurance cost figures that were substantially below then-current rates; (4) uncertainty as to the required PERS payments per employee; and (5) the County's retention of the authority to unilaterally increase items such as the PERS contribution rate, which could cause a reduction in wages for Union employees.

12. In June, the Union requested a copy of the County's budget. Allen responded that it had not been formally printed and would not provide an informal copy. The County provided the Union with a copy of the budget in July, but refused to discuss it with the Union, contending that the amount budgeted in its April 17 total cost proposal was all that it would make available to the Union.

13. The County's total cost formula proposal and all subsequent proposals were based on the assumption that the average composite cost of health insurance premiums per unit employee would be reduced from \$866 per month to \$727 per month. For almost all other County employees, the average composite cost of health insurance premiums per employee was \$727 per month or less. Weaning unit employees from their generous and expensive health insurance plan was a bargaining priority for the County. County officials believed that Union members clung to the expensive plan in part because there was no

---

<sup>7</sup>(...continued)  
in the cap.

<sup>8</sup>The County contended that some vacant positions had to be funded lest it lose state or federal funding for them, and that the number of filled unit positions varied day by day. However, the County did not provide evidence of plans to fill a significant number of these unfilled, budgeted positions, or dispute that vacant positions would result in monetary savings to the County. As a result, the County's proposal purported to offer unit employees approximately 15 percent more than they could allocate to actual unit employee costs.

incentive for them to leave it. Union employees, among the lowest paid in the County, viewed the medical insurance benefits as an important part of their compensation. County officials believed that the total cost formula approach, under which health insurance premium expenses reduced the total amount of funds available to unit employees for such things as wages and monetary benefits, provided unit employees with an incentive to switch to a lower cost plan.

14. In June 2003, Local 2936 Lead Negotiator Bednarczek was replaced by Jim Steiner, and Union Negotiation Team Member Mye retired. Steiner's approach to bargaining was more adversarial than Bednarczek's.

15. After many discussions about the total cost proposal, Union Negotiator Jennings told Allen that the Union needed a more "conventional" proposal from the County.

16. In July, the Union learned that the County's required PERS contribution would be 11.6 percent, less than the 12.25 percent that the County had used in its April proposal. Union negotiators sought to apply these newly available funds to other employee benefits, but County negotiators informed them that the County planned to raise its PERS contributions to 14.9 percent. Union leaders believed that this took money off the bargaining table to "buy down" the County's future PERS obligations. The County believed that this strategy did not change the total amount of funds available to Union employees for compensation.

17. In July, Local 2936 learned that the County had negotiated a health insurance plan design change with the eight-member ONA unit. The County did not present its proposals to change the ONA plan to the County-Union benefits committee. The change left only unit employees on the \$866 per month Pacific Source plan.

18. On July 23, 2003, the County gave the Union a new proposal. The proposal was consistent with the budget assumptions regarding medical insurance made by the County in its April total cost formula proposal. The proposed contract language regarding medical insurance stated:

"Section 1. Health Insurance.

"The County agrees to provide coverage in the following areas:

"(a) employee and dependent health insurance

“(b) employee and dependent optical (Vision II)

“(c) employee and dependent prescription drug

“(d) employee only dental

“The parties agree that any contribution required by an employee will be deducted from the employee’s paycheck.

“Effective September 1, 2003, the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$691.00 per month, per eligible employee.

“Effective July 1, 2004, the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$727.00 per month, per eligible employee.

“The parties agree that this section shall be open for negotiation on January 1, 2005 for the purpose of establishing the County’s contribution towards medical, dental, and vision insurance effective July 1, 2005.”

19. The County’s July proposal also provided for a wage freeze, with the proviso that the wage schedule would reopen for negotiation on January 1, 2005, to establish wage rates effective July 1, 2005.

20. Under its July proposal, the County’s monthly insurance contribution was less than \$727 from September 2003 through June 2004, because, as County negotiators explained to their Union counterparts, unit employees were already spending their \$8,724 in 2003-04 benefits at a faster rate on the Pacific Source plan. For the same reason, County negotiators told Union officials that the amount of health insurance premium payments that it would offer would continue to decrease with each month after September 2003 that the Union and County failed to reach a new collective bargaining agreement.

21. The County’s July 23 proposal also provided that the agreement would automatically reopen for negotiation if the County’s required PERS contributions fell below

11 percent or exceeded 14.9 percent.<sup>9</sup> The County proposed to absorb future PERS rate increases, from the present 11.6 percent up to a total employer contribution of 14.9 percent, along with any workers' compensation rate increases.<sup>10</sup> By making these changes, the County believed it had shifted part of the risk of increases in unit employee benefit costs from the employees to the County. County officials believed this represented a significant economic concession to the Union compared to its previous proposal.

22. At an August 21, 2003 bargaining session, the County proposed the same language regarding health insurance as in July. It did not further reduce the 2003-04 fiscal year monthly insurance premium contribution because September 2003 was the date its July and August proposals used to begin the change.

23. Also on August 21, the County added a proposal that "[t]he parties may mutually agree to meet and discuss adjustments to wages if the County's financial condition improves during the course of the 2003-2004 fiscal year." The County also proposed to tentatively agree to the reclassification of certain Juvenile Detention Department employees separately from the rest of the agreement. The parties had reached agreement on this issue in April 2003, but had never entered a formal tentative or final agreement. The Union did not accept the County proposal. Nor was it willing to reach a separate tentative agreement on the reclassification proposal.

24. In October 2003, Union leaders told County negotiators that they believed Union members would overwhelmingly approve a strike if necessary.

25. On October 20, the parties held their first of six sessions with Mediator Robert Nightingale. The parties had met for bargaining nine times between March 21, 2003 and October 20, 2004.

---

<sup>9</sup>The County's Public Employee Retirement System contribution rate was 11.6 percent. Any money reserved in the County budget for contribution rates between 11.6 percent and 14.9 percent was, under the County's proposal, not available for unit employee wages and benefits.

<sup>10</sup>Under the County's total cost proposal, workers' compensation insurance payments for unit employees were deducted from the total amount of money budgeted for unit employees. The County had budgeted for an increase in workers compensation rates of 6 percent. Any increase over this amount would have reduced the money available for unit employee wages, health insurance, or other benefits under the total cost formula. In a July 15, 2003 bargaining session, the Union had argued that workers' compensation should not be included in the total compensation package because employees have little control over the rate. The County told Union negotiators that the actual increase in workers compensation insurance rates would be approximately 20 percent.

26. In the first mediation session, the County negotiating team informed the mediator of its authority, which was to remain within the scope of the total budgeted amount for unit employee wages and benefits set out in its total cost proposal of April 17, 2003. As Associate County Counsel Koch testified:

“We had discussions with Mr. Nightingale from day one—the first session we had in October—about what the County’s position was and what the financial constraints were relating to our ability to make offers and consider offers from the Union. At no point did we imply that we couldn’t make proposals or consider proposals that came from the Union, but we did make it clear to him as I think it’s necessary in order for him to help us strike a deal, what our limitations were in terms of dollars and things that we could actually put on the table.”

27. In November, Local 2936 presented the County with a health insurance proposal based on the research of the County’s insurance broker. The proposal was based on 160 FTE in the bargaining unit and fit within the total costs the County had allocated for health insurance in its proposals. At the time, the unit contained 156 actual FTE. The County rejected the proposal and did not make a counteroffer.

28. On December 4, the County declared that negotiations had reached an impasse.

29. The County filed its final offer on December 11, 2003. The text of the final offer regarding health insurance stated:

“Section 1. Health Insurance.

“The County agrees to provide coverage in the following areas:

“(a) employee and dependent health insurance

“(b) employee and dependent optical (Vision II)

“(c) employee and dependent prescription drug

“(d) employee only dental

“The parties agree that any contribution required by an employee will be deducted from the employee’s paycheck.

“Effective July 1, 2003, the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$727.00 per month, per eligible employee (or \$8,724.00 per fiscal year, per eligible employee) in the monthly amounts as follows.

- “1. Effective July 1, 2003, the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$864.00 per month, per eligible employee.
- “2. Effective January 1, 2004, the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$590.00 per month, per eligible employee.
- “3. Effective July 1, 2004 the County’s contribution towards health, optical, prescription drug, and dental insurance shall not exceed an average composite rate of \$727.00 per month, per eligible employee.

“The parties agree that this section shall be open for negotiation on January 1, 2005 for the purpose of establishing the County’s contribution towards medical, dental, and vision insurance effective July 1, 2005.”

30. In late November or early December, some unit employees asked their managers strike-related questions such as what would happen if they crossed a picket line, and whether they could be harassed or fined for doing so.<sup>11</sup>

---

<sup>11</sup>Representatives of the County and Union received questions from employees about Union fines prior to issuance of the County’s December 19 memo.

31. On December 19, 2003, the County issued a memo regarding the rights of Coos County employees in the event of a strike. The memo was mailed to employees at home and posted on County bulletin boards. The text of the memo is reproduced below:

“To: Courthouse AFSCME Members

“From: Steve Allen

“Re: **RIGHTS OF COOS COUNTY EMPLOYEES  
DURING A STRIKE**

“Although Coos County does not want a strike, the AFSCME union has announced that a strike vote was taken in October, and that it could go on strike as early as January 11, 2004. Unfortunately, the County must prepare for that possibility. The County has decided to operate to the greatest extent possible during any union strike. Many employees have asked questions about their rights during a strike. We have decided to prepare a brief summary of the answers to some of the most commonly asked questions.

“1. Will the County continue to operate throughout the strike? Yes. Management has decided to operate throughout the strike. We believe this is in the best interest of the public that depend on County services.

“2. Must I participate in the strike? Generally, every employee has the legal right not to strike as well as the right to strike unless they are strike prohibited. The decision is an individual one, and no one can interfere with that decision, or make it for you. Even if you voted for a strike at a Union meeting, you are not bound by that vote and may return to work.

“3. If I strike, will I be fired? No. We will not ‘fire’ any employee for striking. We will, however, hire replacements for striking employees. If the County hires permanent replacements, you may not be able to return to work for the County until work becomes available.

“4. May I cross the picket line and continue to work if there is a strike? Certainly. We will continue to operate and will return you to work during the strike if work is available when you decide to cross the picket line.

“5. May I be ‘fined’ by the union if I cross the picket line to work for Coos County? Yes, IF you are a member of the union, the union may fine you if you cross the picket line and collect that fine in a court of law.

“6. If I decide to cross the picket line, is there a way to avoid being-fined? Yes. Under current law the union cannot fine persons crossing a picket line to work IF they are NO LONGER members of the union and choose not to be bound by the union’s constitution and bylaws when they cross the picket line. In other words, if you effectively resign your full membership in the union prior to crossing the picket line, you cannot legally be ‘fined.’

“In order to resign from the union, you need to deliver in person or by certified or registered mail a letter stating your resignation, along the following lines:

“SAMPLE LETTER FOR RESIGNATION

“ \_\_\_\_\_,20 \_\_\_\_\_

“TO: Union  
“[Address]

“I am an employee of Coos County. This is to notify you that I am resigning my membership in the \_\_\_\_\_ (‘union’), effective immediately, without any waiting period. I am not in arrears in any payment of dues or other fees. In resigning my membership, I no longer consider myself bound by the union’s constitution and local bylaws.

“Sincerely,

“(Employee’s Signature)

“Whether you maintain union membership or resign from membership in the union, the County has notified the union that it is exercising its right under the law to discontinue ‘fair share’ obligations under the expired labor agreement, effective immediately. This will have the effect of increasing the amount of your monthly take home pay by the amount of the dues that were previously deducted from your paycheck pursuant to the labor agreement. Although union members may still have financial obligations to the union during the strike, anyone that is not a union member or that has elected ‘fair share’ status will be free from such obligations.

“Another way to avoid being fined is to notify the union that you wish to elect ‘fair share’ status, whereby you resign your membership in the union, but agree to pay the equivalent share of dues. To elect fair share status, the employee should deliver a letter to the Union, in person or by certified or registered mail, containing the following information:

“SAMPLE LETTER TO ELECT FAIR SHARE STATUS

“TO: Union  
“[Address]

“I am an employee of Coos County. This letter is to notify you that I wish to have my full membership status in the union changed immediately to the status of a financial core member. I will continue to pay to the union an amount equal to the dues and other fees uniformly required as a condition of acquiring and maintaining membership in the union if required by the labor agreement as a condition of my continued employment at Coos County. In electing financial core membership, I no longer consider myself bound by the union’s constitution and local bylaws.

“Sincerely,

“(Employee’s Signature)

“You should keep a copy of the letter as proof that it was mailed.

“7. May I get a withdrawal approval from the union and avoid being fined for crossing the picket line? No. You can still be fined while on withdrawal status. You may be on ‘automatic’ withdrawal status, but never formally ‘resigned’ from a union or if you simply stopped paying union dues. You may also be on withdrawal card status as a result of a formal request. A formal resignation from the union or the election of fair share status are the only two ways to avoid being subject to a union fine if you want to come to work across a picket line.

“8. How much could the union fine me? The law says all union fines must be ‘reasonable.’ Fines equal to all monies earned by an employee during a strike have been found ‘reasonable’ by the courts

“9. Can the union or any other union later blacklist me from future employment if I cross the picket line? No. It is illegal under the federal law for a Union to blacklist you from later employment with any employer because you have crossed any picket line. The union could be liable for any wages you might lose if they ‘blacklist’ you.

“10. If I decide to stay on strike, can I be replaced at my job either permanently or temporarily? Yes. Coos County has the right to hire either permanent or temporary replacements for striking employees.

“A temporary replacement is an individual who is hired to work at your job until the strike is over or until you return to work.

“A permanent replacement is an individual who is hired permanently to replace you, and, when the strike is over or when you want to return to work, you have no right to return to work at your old job until the permanent replacement leaves, or until another opening occurs for which you are qualified.

“11. Will replacements be hired for employees who strike? Yes. As stated above, we plan to continue to operate; replacements will be hired. It may be necessary to make replacements permanent.

“12. Will I be disciplined or discharged for violent or unlawful action during a strike? You can be disciplined or discharged for violence against any person during a strike, for unlawfully interfering with our operations, for damaging property or for any other unlawful strike activity.

“13. If I go on strike, will it affect my pay or benefits? You will not receive pay or continued benefit accrual from the County for time that you choose not to work. However, benefits that you already have earned (vacation, sick leave, PERS, etc.) will not be lost if you choose to go on strike.

“14. Can the Union harass me for crossing a picket line? Union pickets typically engage in name calling and shouting at any employee who works during a strike. This is ‘part of the game’ during any strike. However, the law prohibits picketing employees from engaging in violence against any employee working during a strike. Coos County has been assured of the full cooperation by the police authorities during the strike. The County will take immediate legal action against any employee who engages in illegal misconduct at the picket line.

“15. If I am still considering coming to work and want further information, whom do I contact? Please contact Steve Allen at (541)396-3121, ext. 249 if you have additional questions. You can also ask about your rights by calling the Employment Relations Board in Salem at (503)378-3807.

“This letter is provided to you in response to your request for further information on the above subjects. Coos County does not advocate or suggest that you revise your union membership in any way or that you cross a picket line and return to work. You will not receive any benefits or suffer any reprisals from the County for changing or not changing your union membership or

for crossing a union picket line and the County will not interfere with your choices in these matters.” ( Emphasis in original.)

32. The Union has its own constitution, as does AFSCME Council 75 and the AFSCME International Union. Local Union members are subject to the terms of each of these constitutions.

33. In preparing the portion of the memo regarding the Union’s ability to fine workers who crossed picket lines, Allen did not speak with any AFSCME officials. Allen relied upon the AFSCME International Constitution, which provides in part:

“**Section 1.** Except as hereafter provided in this Article, any member of the Federation may file charges against any individual for actions taken while a member of the Federation or a subordinate body.

“**Section 2.** The following and no other shall constitute the basis for the filing of charges:

“\* \* \* \* \*

“D. Acting in collusion with management to the detriment of the welfare of the union or its membership;

“\* \* \* \* \*

“F. Refusal or deliberate failure to carry out legally authorized decisions of the International Convention, the International President, the International Executive Board, the Judicial Panel, or of the convention or executive board of a subordinate body of which the accused is a part.

“\* \* \* \* \*

“**Section 15.** A trial body may, if it finds the accused person guilty, assess any one or more of the following penalties:

“\* \* \* \* \*

“B. A fine in an amount not to exceed one year’s dues, to be paid to the union at the level at which the charges originate.

“C. Full or partial restitution, where the consequences of the offense can be measured in material terms.”

34. The membership provision in the International Constitution provides:

“I, \_\_\_\_\_, promise to abide by the Constitution of the American Federation of State, County and Municipal Employees and Local Union \_\_\_\_\_. I further promise to carry out all duties assigned to me and to do my best to uphold and promote the principles of trade union democracy.”

35. Most unit employees received Allen’s memo in the mail on Saturday, December 20. Others saw copies on County bulletin boards. The memo caused consternation among unit employees and infuriated Union activists. Jennings spent most of that weekend on the telephone answering questions from unit employees. He spoke to approximately 50 unit employees that weekend.

36. During the following week, Local 2936 President Jennings encountered Koch, assistant County counsel and a member of the County’s bargaining team. Jennings told Koch that the Union had no policy of fining members who crossed picket lines, had never done so, and definitely would not do so.<sup>12</sup> Koch stated that Local 2936 was bound by the International Constitution, and that, in his opinion, the Union had the authority to fine as described in the County’s memo. County officials declined to stop distributing the memo after hearing Jennings’ assertions.

37. Members of Local 2936 had engaged in informational picketing about their disputes with the County several times during their negotiations. That picketing was peaceful and without incident, and managers and County workers passed freely through the picket lines. In the event of a strike, the Union’s leadership intended to ask workers who crossed the picket lines to remain Union members.

38. The Union responded to the County’s memo in an “AFSCME 2936 Bargaining Update” newsletter dated December 22, 2003. The newsletter stated, in part:

---

<sup>12</sup>Jennings believed that members who crossed a picket line because they felt an economic or moral necessity to work would not be acting in collusion with management within the meaning of the International Constitution.

“Perhaps the most inaccurate statement in the memo is Mr. Allen’s claim AFSCME may fine members who cross picket lines during a strike. This claim is blatantly false. AFSCME 2936 has no authority under our constitution or otherwise to fine members. Had we such authority we still would not use it to take money from our co-workers, even if we disapproved of their conduct.

“\* \* \* \* \*

“\* \* \* To repeat, contrary to Mr. Allen’s claim AFSCME does not have the authority or wish to fine members.” (Emphasis in original.)

39. Also on December 22, the Union issued a press release, which stated in part:

““\* \* \* Mr. Allen’s letter tells employees that the union may ‘fine’ them if they cross the picket line during the strike,’ said [AFSCME Public Affairs Director Don] Loving. ‘The reality is — while legally possible — that’s archaic language from mostly private sector labor law. \* \* \*”

40. There was no reasonable likelihood that the Union would fine members who crossed the picket line, assuming it were possible for it to do so.

41. Between December 22, 2003 and March 5, 2004, fourteen unit Union members wrote the Union to resign their membership. Twelve of those letters used language copied from the County’s letter.

42. On December 23, the Union filed an unfair labor practice complaint against the County in Case No. UP-72-03, alleging that the County had wrongfully repudiated the grievance procedure as to a preexisting grievance and failed to withhold dues from bargaining unit members, and remit them to the Union, following the expiration of the contract.

43. On January 6 and 7, 2004, the Union unit members voted to strike, if necessary.

44. During the mediation period, the Union sought permission from the OTET to allow unit employees to join its medical insurance plan. The request was denied.

45. On February 19, 2004, Allen sent a letter to Steiner stating, in part, that the portion of the County's final offer regarding health benefits would be implemented on February 26. The letter stated, in part:

“\* \* \* The county implements only that portion of its final offer for Article XI (Insurance) that relates to contribution rates to be effective on July 1, 2003 (average composite rate of \$727.00 per month, per eligible employee or \$8,724.00 per fiscal year, per eligible employee).”

46. On February 20, 2004, Allen sent a letter to unit employees stating, in part, that the portion of the County's final offer regarding health benefits would be implemented on February 26. The letter stated, in part:

“\* \* \* This letter contains important information regarding how this will affect your paycheck if agreement is not reached.

“Among other things, the County is implementing a portion of its final offer that relates to health insurance contribution rates to be effective on July 1, 2003 (average composite rate of \$727.00 per month, per eligible employee or \$8,724.00 per fiscal year, per eligible employee).

“Because AFSCME bargaining unit employees elected to continue their health insurance benefits coverage on a plan that has cost an average composite rate of \$866.15<sup>[13]</sup> per month, per eligible employee, or a total of \$6,063.05 per eligible employee for the months of July 2003 through January 2004, the available remaining County contribution towards health, optical, prescription drug, and dental insurance for the months of February 2004 through June 2004 is \$2,660.95 (\$8,724.00 minus \$6,063.05) per eligible employee, or \$532.19 per month (\$2,660.95 divided by 5 months), per eligible employee.

---

<sup>13</sup>The County's actual cash outlays for insurance which it was required to make during the status quo period were an average composite cost of \$866.15 per employee per month, instead of the \$864 it had projected in its various proposals.

Therefore, for the months remaining in this fiscal year, (February through June) the County's contribution towards health, optical, prescription drug, and dental insurance will not exceed an average composite rate of \$532.19 per month, per eligible employee or a total of \$2,660.95 per eligible employee.

“Based upon current enrollment, the average composite cost of health, optical, prescription drug, and employee only dental insurance for those employees having the Pacific Source plan 4754 (PPO) is \$851.53 per month, per eligible employee. Because the available remaining maximum County contribution for the months of February 2004 through June 2004 is \$532.19, the difference between the cost (\$851.53) and the County contribution (\$532.19) of **\$319.34 will be deducted from your February 2004 paycheck if you have the Pacific Source plan 4754 (PPO) and employee only dental coverage.**

“Based upon current enrollment, the average composite cost of health, optical, prescription drug, and employee only dental insurance for those employees having the Pacific Source plan 4756 (Prime) is \$882.91 per month, per eligible employee. Because the available remaining maximum County contribution for the months of February 2004 through June 2004 is \$532.19, the difference between the cost (\$882.91) and the County contribution (\$532.19) of **\$350.72 will be deducted from your February 2004 paycheck if you have the Pacific Source plan 4756 (Prime) and employee only dental coverage.**

**“If you have also elected dental coverage for your spouse, family, or children, the County will also continue deducting \$33.62, \$66.37, or \$33.96 respectively from the your [sic] paycheck for that additional coverage.**

“Your current health insurance carrier, Pacific Source, has notified me that if your group enrollment changes they will exercise their option to re-rate the cost of the plan. If this occurs, the monthly cost could be higher, or lower than the current amount. Further, if AFSCME bargaining unit employees select either a different plan, or different plan design, the monthly cost could be higher, or lower than the current amount. You will be

notified if the amount deducted from your paycheck for health insurance changes again.” (Emphasis in original.)

47. On February 23, during a six-hour mediation session, the Union presented several proposals to provide health insurance to unit employees that it had obtained through the County’s insurance broker. These proposals came within the County’s cap, but only for a number of FTE close to the actual number of employees. The County rejected these proposals and offered no counter proposals.<sup>14</sup>

48. Throughout the negotiations, both before and during mediation, the County bargaining team had authority to settle the contract within the parameters established by the Board of Commissioners in its budget, and no more. The County did not place limits on the negotiators’ ability to make and receive proposals, or to discuss how the funds offered to the bargaining unit employees were spent.

49. On February 23, 2004, the penultimate mediation session, Mediator Nightingale told County negotiators that the parties were still far apart financially and that agreement was not imminent unless the County put some additional financial incentive on the table. The County negotiators told Nightingale that they had no authority to exceed the financial parameters set by the County Commissioners and the County budget, and had already offered the maximum authorized. Nightingale informed Union negotiators of the County’s position.<sup>15</sup>

50. On February 24, 2004, Local 2936 sent its notice of intent to strike to ERB and the County. The proposed strike date was March 8, 2004.

51. Kathy Parker was a lead worker and bargaining unit member at the County Mental Health Department. Parker exercised some authority over unit members Annette Ballinger and Sally Daugherty by authorizing sick and vacation leave and completing their performance evaluations. During the weeks before the proposed March 8

---

<sup>14</sup>The County never presented, at the bargaining table, any specific health insurance plan or plan design that met its financial criteria.

<sup>15</sup>Union witnesses recalled that the mediator reported to them that the County negotiators said that they had been instructed to make no new proposals or concessions. The Union witnesses recalled that they asked the mediator to inform the County negotiators of the Union’s belief that such limits on their authority constituted an unfair labor practice. The County negotiators did not recall explaining the limits on their authority in those terms, nor did they recall receiving a warning of unlawful conduct. We conclude that the Union did not meet its burden in proving that the authority of County negotiators was as limited as the Union alleges.

strike, Parker made several statements in meetings with bargaining unit employees that “she knew we would all be fired and replaced if we go on strike.”

52. In preparation for the scheduled strike, to begin Monday, March 8, County officials told unit employees to turn in their keys and County property (such as cell phones and laptop computers) to their supervisors by the end of the work day on Friday, March 5. Some employees understood that they were also required to take their personal property home, and did so. Some County managers waited after hours for employees under their supervision to complete the removal of personal articles and the return of their keys.

53. Hours before the scheduled strike, the Union and County settled their dispute after a lengthy mediation session.<sup>16</sup> The final, three-year agreement retained the annual rate of health insurance of \$8,724 per year. However, it spread the burden of the status quo’s higher insurance payments over two years instead of one year. The contract provided for one additional annual holiday, and added a modest wage increase in the third year of the contract.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County did not misrepresent to employees that the Union would or could fine employees for crossing picket lines in violation of ORS 243.672(1)(a).

ORS 243.672(1)(a) provides that it is an unfair labor practice for a public employer or its designated representative to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” The statute establishes two separate claims, a “because of” violation and an “in the exercise of” violation. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733 (2004). The Union does not identify which provision of (1)(a) it alleges the County violated.

In *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 348 (2003), this Board summarized the standards for evaluating “because of” claims.

---

<sup>16</sup>This was the sixth mediation session between the parties. They met three times in mediation before the declaration of impasse, and three times after impasse.

“To state a claim, a complainant must plead protected employee activity, employer action toward the employee, and a connection between the two that suggests a causal relationship. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *reconsid* 17 PECBR 549 (1998), *rev'd and remanded* 171 Or App 616, 16 P3d 1189 (2000), *order on remand* 19 PECBR 284, 295 (2001). The employer has the opportunity to offer a legitimate, nondiscriminatory reason for its action. If it does, then a question of law or fact exists which requires a hearing. *Amalgamated Transit Union v. Tri-County Metropolitan Transit District [Tri-Met]*, Case No. UP-48-97, 17 PECBR 780, 786-787 (1998).

“In analyzing a subsection (1)(a) ‘because of’ claim, we focus on the reason for the employer’s conduct. If the employer acted to interfere with, restrain, or coerce employees because of the employees’ exercise of protected rights, the action is unlawful. *[Tri-Met]*, 17 PECBR at 786.” 20 PECBR at 348.

In *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004), this Board summarized the standards for evaluating “in” claims:

“In analyzing an ‘in’ subsection (1)(a) claim, we decide whether the natural and probable effect of the employer’s conduct would tend to interfere with, restrain, or coerce employees in the exercise of their PECBA rights. The Union need not prove anti-union motivation, actual interference, restraint, or coercion. *Tri-Met*, 17 PECBR at 789 and n. 10 (citing *[OPEU and Termine v.] Malheur County*, [Case No. UP-47-87], 10 PECBR [514] at 521 and 523, [(1988)] and *OSEA v. The Dalles School District*, Case No. UP-75-87, 11 PECBR 167, 171-172 (1989)). The possible effect of the employer’s actions is insufficient to establish a violation. *Tri-Met*, 17 PECBR at 789 and n. 11 (citing *OSEA v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988)). The subjective impressions of employees are not controlling. *Tri-Met*, 17 PECBR at 789 and n. 12 (citing *Spray Education Association v. Spray School District*, Case No. UP-91-87, 11 PECBR 201, 219-220 (1989)).” 20 PECBR at 776.

Before applying these tests, we must determine whether the County's December 19, 2003 memo was inaccurate or misleading. The Union argues that the memo contained "false information and a threat:"

"\* \* \* The memo stated that union members who crossed a picket line could be fined by the union. It also made an estimate of how much a member could be fined by a union. Additionally, the memo stated that it was normal for union members who crossed picket lines to be harassed by strikers."

The Union's press release, issued in response to the County's claim that the Union could fine members, states, in part, that "[t]he reality is — while [fining is] legally possible — that's archaic language from mostly private sector labor law." On this record, we conclude that it was possible for the Union to fine its members for crossing a picket line.

Hence, the Union did not establish that the County's statements in the memo regarding the Union's ability to fine members were inaccurate. We turn to the issue of whether distribution of the accurate information in the memo was unlawful.

In *Oregon School Employees Association v. Aumsville School District No. 11*, Case No. UP-90-91, 13 PECBR 509 (1992), the employer had distributed three memos to its employees informing them of their right to withdraw from union membership. The union claimed that the memos violated section (1)(a). This Board stated:

"\* \* \* The District's conduct consisted of issuing several factual memos. The 'natural and probable effect' of distributing factual information does not tend to coerce or intimidate employees. *OACE, et al v. Douglas Sch. Dist. No. 4*, Case No. UP-82-89, 12 PECBR 547 (1990); *AFSCME Council 75 v. Oregon Health Sciences Univ.*, 9 PECBR 8885 (1986), *aff'd* 91 Or App 365, 755 P2d 141 (1988). The evidence supports the conclusion that employees who dropped OSEA membership were motivated by their personal economic concerns, not District interference with their rights.

"It should be noted that ORS 243.662 also protects employees in their right to refrain from joining or participating in union activities. Four employees did just that. [The four employees who dropped their membership had each inquired about dropping their deduction before any of the employer's

memos were sent.] There is no indication that the District's actions caused those employees to drop their dues deduction and membership in OSEA.

“While we have concluded that the District's action here was not a violation of ORS 243.672(1)(a), our holding is limited to the facts presented in this case. There is a definite line between soliciting employees to decertify a union, drop union membership, or withdraw authorization cards and informing employees of their contractual rights. The determination in this case was based on several factors including the presence of specific contractual language and employee inquiries rather than employer initiation, the absence of threats or promises in the memos, and the manner of delivery.

“In sum, the ‘totality of the circumstances’ in this matter do not indicate interference, restraint or coercion of employees in the exercise of their rights. The District's actions do not constitute solicitation to withdraw from union membership. There was nothing about the delivery or content of the memos which could be considered threatening or coercive. Based on the record before us, we cannot conclude that the natural and probable effect of the District's issuance of the memos would be to interfere with, restrain or coerce employees in the exercise of their rights under PECBA.” 13 PECBR at 516-17. (Emphasis and footnote omitted.)

In our case, the County's memo was prepared, at least in part, to respond to questions from employees. It stated, accurately, that the Union had the ability to fine its members. It also stated that employees had the right to remain in, or leave, the Union. However, the memo also included form letters aimed at those who wished to withdraw from Union membership in order to avoid possible fines for crossing picket lines.<sup>17</sup>

---

<sup>17</sup>As noted above, the memo was inaccurate regarding the size of the fines which could be imposed by the Union, and presented speculation about the nature of picket line activity as fact. The complaint, however, focuses on the memo's statements regarding the Union's ability to fine its members for crossing a picket line.

In any event, although the specific resignation language suggested by the County, and used by several employees, was linked to avoidance of a Union fine, there is no evidence in the record to support a

(continued...)

Employees who planned to cross a Union picket line could have reasonably concluded, based on the potential to be fined, that it might be preferable for them to resign his or her Union membership. We conclude that the statements about the Union's ability to fine members, combined with the resignation forms, simply informed employees of their contractual and legal rights, and did not constitute "solicitation to withdraw from union membership." *Aumsville School District*, 13 PECBR at 517.

The Union has failed to prove its claim that the County interfered with, restrained, or coerced Union employees *because of* their exercise of PECBA rights by misrepresenting to employees that the Union would fine employees for crossing picket lines. Although the strike preparation and labor dispute activity was protected activity, and the County's letter was intentional action related to that activity, informing members of their contractual and legal rights does not constitute interference, restraint, or coercion of employees *because of* the employees' exercise of protected rights.

The Union also has failed to prove its claim that the County interfered with, restrained, or coerced Union employees *in their exercise of* PECBA rights by misrepresenting to employees that the Union would or could fine employees for crossing picket lines. The natural and probable effect of the County's distribution of information about these legal and contractual rights of Union members' would not tend to interfere with, restrain, or coerce employees *in the exercise of* their PECBA rights.

We will dismiss this portion of the complaint.

3. The County did not violate ORS 243.672(1)(b) by informing employees that the Union would or could fine employees for crossing picket lines or by providing unit employees with Union membership resignation form letters.

ORS 243.672(1)(b) provides that it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to prevail on a (1)(b) claim, a complainant must show interference that directly affected the labor organization. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-9-99, 18 PECBR 128, 141 (1999); *Amalgamated Transit Union, Division 757 v. Rogue Valley*

---

<sup>17</sup>(...continued)

conclusion that the difference between a dues-based fine and a salary-based fine was determinative in any unit employee's decision to resign from the Union. Nor did the Union establish that the memo's statements about the prospect of picket line harassment led to any unit member resignations.

*Transportation District*, Case No. UP-80-95, 16 PECBR 559, 576, 580 (Chairman Ellis dissenting), *adhered to on reconsideration* 16 PECBR 707 (1996); *AFSCME Council No. 75 and Local Union No. 3669 v. Mid-Willamette Valley Senior Services Agency*, Case No. UP-12-91, 13 PECBR 180 (1991); *Josephine County Education Association v. Josephine County School District and Peters*, Case No. UP-94-85, 9 PECBR 8724, *amended* 9 PECBR 8792 (1986); and *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980).

In *Jefferson County*, the County distributed a union dues deduction and membership form to bargaining unit employees along with the County's implemented final offer. The form stated that the term of membership was three years, the life of the County's implemented final offer. This Board ruled that the distribution of the membership form violated section (1)(b):

“Here there was no contract between OPEU and the County governing either dues deduction or OPEU membership. The County had dues deduction authorizations from OPEU members that it was statutorily obligated to honor. Under the circumstances, the County had no legitimate reason to directly contact bargaining unit members about their membership in OPEU.

“Union membership requirements are a key element in the administration or existence of the union. There are few examples of more direct employer interference in the existence and administration of a union than soliciting union membership applications from employees and dictating to employees the length of time they must remain union members. By distributing the dues membership elective form and requiring bargaining unit members to fill it out and return it, the County interfered with the administration and existence of OPEU as a labor organization and exclusive representative of County employees.” *Jefferson County*, 18 PECBR at 142.

The facts of this case are quite different. The County provided Union members with factual information about the Union's ability to fine its members, and forms Union members could fill out, or decline to fill out, as they chose. The Union failed to prove that the County's actions constituted solicitation to withdraw from Union membership, or otherwise

unlawfully dominated or interfered with the existence or administration of the Union.<sup>18</sup> We will dismiss this portion of the complaint.

4. The County did not violate ORS 243.672(1)(e) by (1) retroactively changing the status quo regarding health insurance premiums, or (2) unilaterally implementing a level of health insurance premiums that differed from its final offer.

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.”

“An employer may violate ORS 243.672(1)(e) by (1) conduct ‘so inimical to the bargaining process that it amounts to a per se violation of the duty to bargain in good faith,’ or (2) ‘by the totality of conduct during the period of negotiations that indicates an unwillingness to reach a negotiated agreement.’” *Portland Police Association v. City of Portland*, Case No. UP-64-01, 20 PECBR 295, 310 (2003), quoting *Public Works Association Local 626 v. Lane County*, Case No. UP-1-98, 17 PECBR 879, 885 (1998); and *Rogue Valley Transportation District*, 16 PECBR at 583.

Conduct “so inimical to the bargaining process” that it constitutes a per se violation of the duty to bargain in good faith includes “(1) an employer’s unilateral implementation of a change in a mandatory subject of bargaining; (2) submitting a new proposal at the mediation stage; and (3) submitting a new proposal in a final offer.” *City of Portland*, 20 PECBR at 310, quoting *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 464-466, *reconsid* 12 PECBR 646 (1990); and *Rogue Valley Transportation District*, 16 PECBR at 583-588.

The Union argues that the County committed a per se violation by (1) retroactively changing the status quo regarding health insurance premiums, and (2) unilaterally implementing a level of health insurance premiums that differed from its final offer.

In its February 20, 2004 letter to employees, the County states that it is “implementing a portion of its final offer that relates to health insurance contribution rates to be effective July 1, 2003.” The status quo between the expiration of the 2002-03 collective

---

<sup>18</sup>As noted above, there is no evidence in the record to support a conclusion that the difference between a dues-based fine and a salary-based fine was determinative in any unit employee’s decision to resign from the Union. Nor did the Union establish that the County’s comments about the prospect of picket line harassment led to any Union member’s resignation.

bargaining agreement and implementation of the County's final offer was a County contribution of \$851 per month per employee, or \$10,212 annually. The final offer proposed to limit that contribution to \$8,724 per employee per year. In implementing its final offer in February 2004, retroactively to July 2003, the County (1) calculated how much the unit employees had depleted the \$8,724 under the status quo (by \$6,063.05), and then (2) divided the remaining funds (\$2,660.95) equally among the five months remaining till the end of the fiscal year, for a total average of \$532.19 per employee per month.

The Union argues as follows:

“In its February 20, 2004 letter to employees, the County states ‘the County is implementing a portion of its final offer that relates to health insurance contribution rates *to be effective July 1, 2003.*’ *emphasis [sic] added.* This unilateral change in the status quo for the period of July 1, 2003 to February 2004 is a per se violation of section 1(e).”

We note that parties in collective bargaining routinely agree to “retroactive” provisions, especially regarding wage increases. Nothing in the PECBA provisions regarding the bargaining process explicitly prohibit such agreements. ORS 243.712(2)(d) provides, in part:

“\* \* \* After a collective bargaining agreement has expired, and prior to agreement on a successor contract, the status quo with respect to employment relations shall be preserved until completion of impasse procedures except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise.”

Assuming, without deciding, that the County's implementation retroactively changed the status quo,<sup>19</sup> the issue reduces to whether the term of a collective bargaining

---

<sup>19</sup>Arguably, the status quo was not retroactively changed—unit employees received their status quo medical insurance premium payments during the status quo period, and they were never required to pay that money back. Instead, upon implementation, the County simply identified the amount of money left over in the designated fund after completion of the status quo payments and divided that up over the remaining

(continued...)

agreement is a mandatory or permissive subject of bargaining. This Board has held that, in general, term of agreement clauses are mandatory subjects of bargaining. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 859-60 (1993), *AWOP* 133 Or App 602, 892 P2d 1030, *rev den* 321 Or 268, 895 P2d 1362 (1995). This Board has also held that “\* \* \* there is nothing *per se* unlawful about a retroactive contract effective date.” *City of Portland v. Portland Police Commanding Officers Association*, Case No. UP-16-95, 16 PECBR 43, 51 (1995). The Union offers no reason why the retroactive language of this particular collective bargaining instrument should be treated differently than any other proposal regarding a mandatory subject of bargaining implemented in accordance with ORS 243.712(2)(d). The Union has not established that the County’s implementation of its final offer, effective at the termination of the prior contract, was conduct so inimical to the bargaining process to constitute a *per se* violation of section (1)(e).

The Union argues that the terms of the County’s implementation of its final offer in February 2004 differed from the terms of the County’s December final offer. The County’s December 11, 2003 final offer included the following terms:

- (1) The County’s payments for employee medical insurance premiums “shall not exceed” an average composite rate of \$727 per month, per eligible employee (or \$8,724 per fiscal year, per employee) “in the monthly amounts as follows.”
- (2) Effective July 1, 2003, the County’s insurance payments “shall not exceed” an average composite rate of \$864 per month, per employee.
- (3) Effective January 1, 2004, the County’s insurance payments “shall not exceed” an average composite rate of \$590 per month, per eligible employee.
- (4) Effective July 1, 2004, the County’s payments “shall not exceed” an average composite rate of \$727 per month, per eligible employee.
- (5) Any contribution required by an employee will be deducted from the employee’s paycheck.

The County implemented its final offer in February 2004. In its letter explaining the details of the implementation, the County stated:

---

<sup>19</sup>(... continued)  
months in the fiscal year. Had the County identified this package as “effective” February 1, 2004, it would not have changed the actual benefits provided to unit employees.

(1) The County's insurance payments "shall not exceed" an average composite rate of \$727 per month, per eligible employee (or \$8,724 per fiscal year, per employee).

(2) During the status quo period, the County's actual medical insurance premium payments averaged \$851 per month per unit employee.

(3) Because of the \$851 payments during the status quo period, the unit employees had used \$6,063.05 of the \$8,724 available from July 2003 through January 2004. Therefore, only \$2,660.95, or \$532.19 per employee per month, was left for payments for the rest of the fiscal year, February through June 2004.

(4) Because the current cost of the insurance was \$851.53 per month, the County would deduct an average of \$319.34 from each employee's paycheck per month from March through June 2004.

(5) Because the actual insurance plans of individual unit employees included two types of plans and an additional charge for dependent dental coverage, resulting in several different monthly premiums, the County would actually deduct between \$319.34 and \$417.09 from the monthly paychecks of individual employees.

The Union asserts that these two sets of terms are inconsistent. We disagree.

(1) Both the December final offer and the February implementing letter state that the County's premium contributions would be limited to an average composite rate of \$727 per month, per employee, or \$8,724 per fiscal year, per employee. The terms of both documents meet the \$8,724 average in the 2003-04 fiscal year through higher payments in the first part of the year and lower payments in the rest of the year.

(2) For the first part of fiscal year 2003-04, the final offer provides for County contributions that "shall not exceed" an average composite rate of \$864 per month, per employee from July 1, 2003 through December 31, 2003. The February implementing letter provides for County contributions that have cost an average composite rate of \$866.15 per month per employee<sup>20</sup> from July 1, 2003 through January 31, 2004.

---

<sup>20</sup>The County arguably acted inconsistently with its final offer by paying an additional average composite rate of \$2.15 per month per employee from July 1, 2003 through December 31, 2003, and \$76.15 per employee in January 2004. The County did include these funds in calculating the money it had left to pay from February 1, 2004 through June 30, 2004, to meet the \$8,724 fiscal year total. However, the Union does

(continued ...)

(3) The December final offer provides for County contributions that “*shall not exceed*” an average composite rate of \$590 per month from January 2004 through June 2004. The February letter provides for County contributions of \$816.15 in January 2004, and \$532.19 from February through June 2004, or an average of approximately \$580 per month for the period.

(4) Both the December and February documents provide that, effective July 1, 2004, the County’s payments “shall not exceed” an average composite rate of \$727 per month.

(5) The December document permits the County to deduct “any contribution required by an employee” from the employee’s paycheck. The February document sets out the contributions required by employees and states that they will be deducted from the employees’ paychecks.

The Union argues as follows:

“The County implemented a composite rate of \$532.19 in February 2004, when its final offer on December 11, 2003 the rate was \$590 per month. Implementing a condition of employment not found in the final offer is a per se violation of section 1(e).”

The actual language of the County’s December final offer and February implementation letter does not support the Union’s claim. The County’s final offer was for a composite rate that “*shall not exceed*” \$590 per month in February 2004; the February letter implemented a rate that “*will not exceed*” \$532.19 per month in February 2004. The implemented \$532.19 is less than \$590, but the \$590 was an upper limit, not a fixed amount.

Moreover, Union negotiators were aware, long before the County’s final offer, that the County’s proposals were based on a fixed sum of money for medical insurance premiums for each fiscal year, and that higher payments during the status quo period would result in commensurately lower payments after implementation.<sup>21</sup> The County’s proposed

---

<sup>20</sup>(...continued)

not argue that the County erred in overpaying for insurance from June 2003 through January 2004; rather, it contends that the County unlawfully implemented insurance contributions of less than \$590 per month in 2004.

<sup>21</sup>It is certainly true that the County’s fiscal year approach had serious consequences for bargaining (continued )

annual allocation of \$8,724 per employee per year in the 2003-04 fiscal year never changed; what changed was the allocation of those dollars by month.

We conclude that the County did not violate section 1(e) by implementing terms which differed from its final offer.

5. The County did not otherwise refuse to bargain in violation of ORS 243.672(1)(e).

The Union argues that the totality of the circumstances demonstrate that the County violated its duty to bargain in good faith. The conduct alleged falls under the rubric of surface bargaining. This Board's analysis in surface bargaining cases was first set out in *Lane Unified Bargaining Council v. McKenzie School District*, Case No. UP-14-85, 8 PECBR 8160, 8196-8202 (1985). In that case, we found that the District had committed a *per se* violation of ORS 243.672(1)(e) when it made a negotiations proposal directly to bargaining unit members rather than to their designated bargaining representative. Because of this violation, we also found that the District had implemented its final offer in violation of subsection (1)(e). This Board held that an employer may only unilaterally implement when it has fulfilled its bargaining duty under the PECBA.

LUBC also sought a ruling from ERB that the District violated subsection (1)(e) by engaging in surface bargaining. We began our discussion of what constituted surface bargaining as follows:

“In interpreting the ‘good faith bargaining’ requirement under the NLRA, the National Labor Relations Board and the federal courts examine a variety of factors (footnote omitted). This is done where there is no direct evidence of a party’s unwillingness to bargain in good faith with the desire to reach an agreement. In such cases, this Board . . . must carefully examine and weigh circumstantial evidence in order to draw an inference concerning good faith or bad faith bargaining.” 8 PECBR at 8196.

---

<sup>21</sup>(. . . continued)

unit employees. The County's February 20 implementation letter states that, if unit employees continued their current insurance, the County would deduct up to \$350.72 for medical and \$66.37 for dental coverage from unit employee paychecks each month.

We looked at six factors, in light of all of the circumstances of the case: dilatory tactics, proposals made by a party, the behavior of a party's spokesman, concessions or counter proposals, failure to explain or reveal bargaining positions, and the course of negotiations overall.

This Board found that the District had not engaged in dilatory tactics; and that the District's proposals were not evidence of bad faith, even though they were harsh and predictably unacceptable to the LUBC. Regarding concessions and counterproposals, we found that neither party had made any concessions prior to factfinding, and that the District thereafter made none. Nevertheless, we did not find the District's conduct to be evidence of bad faith bargaining. We found LUBC's allegations, that the District's explanations for its proposals were improper, to be time-barred.

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

In later cases, we have continued to review:

“\* \* \* [T]he totality of conduct during the period of negotiations that indicates an unwillingness to reach a negotiated agreement. \* \* \* [T]he conduct is analyzed to determine whether, cumulatively, it indicates bad faith. *Hood River Employees Local Union v. Hood River County*, Case No. UP-92-94, 16 PECBR 433 (1996).” *Rogue Valley Transportation District*, 16 PECBR at 583.

Among the factors we consider are: (1) whether dilatory tactics were used; (2) the content of a party's proposals; (3) the behavior of a party's negotiator; (4) the nature and number of concessions made; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations. 16 PECBR at 584.

The Union does not argue that the County used dilatory tactics. We turn to the remaining factors.

*Content of the County's proposals:* Reducing the amount the County paid for employee medical insurance to an average composite rate of \$8,724 per employee per year

was not unduly harsh nor predictably unacceptable to the Union. Other labor organizations had agreed with the County to accept this level of medical premium payment. Although the Union did not have access to the lower cost OTET plan, the reduced level of premiums offered by the County was a far cry from the elimination of a significant benefit long held by bargaining unit members. *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02, 20 PECBR 420 (2003). As we noted in that case, the fact that a proposal is predictably unacceptable does not thereby render it unlawful, 20 PECBR at 432. *See also, Hood River County*.

*Behavior of the District's negotiator*. There is no evidence that the County's representatives were less than cordial throughout the negotiations. Late in the mediation process, the County negotiation team informed the Union, through the mediator, that it was without authority to put additional money into Union wages and benefits. This representation was little different from those the County negotiating team had made throughout the negotiation process. From the beginning of negotiations, the County bargaining team was clear and consistent regarding its financial parameters, and the Union negotiators understood the County's position. Local 2936 failed to establish that, during mediation, the County unlawfully used bargaining representatives who lacked authority to make or respond to proposals. Local 2936's objections are not really directed at the authority of the negotiator, but to the County's position on these issues. *Lincoln County Employees Association v. Lincoln County and Glode*, Case No. UP-42-97, 17 PECBR 683, 703 (1998).

*Nature and number of concessions made*. The County identifies nine economic concessions that it made: (1) the County changed its approach from a total cost proposal to a more conventional proposal; (2) the County proposed a medical insurance reopener in the third year of the contract; (3) the County would absorb all PERS rate increases between 11.6 percent and 14.9 percent; (4) the County would absorb all increases in workers compensation insurance rates; (5) a reopener for wages if the County's finances improved in 2003-04; (6) acceptance of Union proposals regarding the reclassification of positions in the County Juvenile Department; (7) the County would absorb all rate increases for supplemental insurance for on-the-job injuries and long-term disability; (8) a two-year wage freeze with the option to reopen wage negotiations if PERS rates exceeded 14.9 percent or fell below 11 percent; and (9) a wage and insurance reopener in the third year of the agreement.

The Union argues that the reclassification proposal had already been agreed to, and that it did not represent a concession to simply add this language to a tentative agreement. It also argues that the rest of the County's concessions were based on contingencies, and that the County did not make concessions which put any actual, additional funds into wages or benefits of Union employees. We agree with these characterizations of the County's proposals. However, that does not end the matter. While the lack of concessions and counter

proposals may be evidence of bad faith, ORS 243.650 specifically provides that the obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession.

In *Mckenzie School District*, we stated that

“Even though this Board, like the NLRB, ‘ . . . cannot force an employer to make a ‘concession’ on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union . . . ‘if the bargaining duty prescribed by the PECBA and the NLRA’ . . . Is to be read as imposing any substantial obligation at all’ 8 PECBR at 8198.

What do we mean when we say that a party must “make some reasonable effort in some direction to compose its differences” with the other party in negotiations? A review of our surface bargaining cases shows that a party may engage in “hard bargaining” at the table, so long as it remains willing to negotiate toward a collective bargaining agreement. On the other hand, a party *may not condition participation in the collective bargaining process* upon concessions by the other party. Finally, a finding that a party has gone beyond hard bargaining is not itself determinative of a surface bargaining charge – which requires consideration of the totality of circumstances.

As is shown by the cases discussed below, the Board has applied a consistent process of analysis in surface bargaining cases. ERB has never based a finding of surface bargaining solely on a party’s refusal to make concessions at the bargaining table. Our conclusion that the County has not engaged in unlawful surface bargaining is supported by ample authority; whereas a contrary result finds no support in existing ERB case law.

In *McKenzie School District* itself, the District’s negotiator made what the Complainant characterized as an “ultimatum,” in post factfinding negotiations: the District would not sign a contract that did not contain certain District proposals. The District made no significant concessions thereafter. We characterized the District’s conduct as permissible “hard bargaining,” not as an unlawful refusal to bargain. In any event, we emphasized that the Board must consider all aspects of the parties’ negotiation history, and not merely whether a party refused to make certain concessions. 8 PECBR at 8201-2. We concluded that the District was not guilty of surface bargaining, even though it had committed a *per se* refusal to bargain when it negotiated directly with members of the bargaining unit.

By contrast, in *Clackamas County Peace Officers Association v. Clackamas County*, Case No. UP-41-86, 9 PECBR 9174 (1986), the County responded to an Association bargaining proposal—which the County termed “outrageous”—by refusing to offer *any* counterproposals until the Association withdrew the offending proposal. We ruled that the County violated its bargaining duty under the PECBA. Although the County “was not obligated to agree with the Association’s proposal or make concessions regarding its own proposals, \* \* \*it cannot condition participation in the bargaining process on the making of concessions by the Association.” 9 PECBR at 9178.

In *Lane County Peace Officers Association v. Lane County and Lane County Sheriff*, Case Nos. UP-102/105/109-93, 15 PECBR 53 (1994) the Association and the County accused each other of bad faith bargaining. Negotiations were difficult. After the County rejected a previous tentative agreement, the County submitted a new proposal which included a two-year wage freeze and other proposals that were not acceptable to the Association. The Association’s negotiator reviewed the proposal. He then cancelled a scheduled bargaining session, and refused to meet with the County prior to mediation. According to the Association, further bargaining sessions would have been futile. Relying on *Clackamas County*, we ruled that the Association’s conduct violated ORS 243.672(2)(b). Following the rejection of the tentative agreement, the Association was presented with a new proposal, over which the Association had a duty to bargain for a reasonable period of negotiations.

In *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603 (1995), the Association alleged that the District had unlawfully refused to bargain by rejecting the Association’s initial bargaining proposal without sufficient explanation, by declaring impasse and refusing to negotiate unless a mediator was present, and by later refusing to proceed to factfinding while the Association had an unfair labor practice pending. We held that the District did not violate ORS 243.672(1)(e) by rejecting the Association’s first proposal without a more extensive explanation, nor by refusing to bargain without a mediator’s assistance.

The Association then argued that the District had nevertheless engaged in surface bargaining under the “totality of circumstances” test. We disagreed. Applying the *McKenzie School District* factors, we concluded that the District had not engaged in dilatory tactics, that it was willing to meet with the Association and make counterproposals— even if the counterproposals were “not generous.” We found no evidence that the behavior of the District spokesman was offensive. Further, we found that:

“\* \* \*[a]lthough the District made no significant concession in bargaining or mediation, we do not view this as proof of bad faith. Both the District and the Association firmly adhered to

their initial bargaining positions throughout table negotiations and mediation; \* \* \*The course of events in bargaining does not demonstrate that the District lacked a sincere intention to reach agreement: the District \* \* \*reached an agreement with the Association after approximately nine months of bargaining.” 15 PECBR at 614-615.

In *Amalgamated Transit Union, Division 757 v Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 599 (1996), we found that the District committed a number of unfair labor practices during negotiations with ATU. Applying the *McKenzie School District* factors, and reviewing the totality of circumstances, we concluded that the District was guilty of surface bargaining, even though the District met the *McKenzie School District* standards for the most part.

We did not fault the content of proposals made by the District in negotiations, even though the District proposed to eliminate numerous contractual rights and benefits which had been enjoyed by bargaining unit members for years; nor did we base our conclusion on the District’s refusal to make any meaningful concessions to ATU during bargaining and mediation, although the District did so refuse. In addition, the Board concluded that the District had sufficiently explained its proposals. We found only that the District’s course of bargaining “tended” to indicate that the District had not bargained with the proper intent.

The Board relied instead on other factors, including the District’s conduct away from the bargaining table. The District had committed a number of unfair labor practices during negotiations: by meeting directly with, and making contract proposals to, bargaining unit members during negotiations and thereby bypassing the Union; by polling employees on whether they would go out if the Union called a strike; by submitting a final offer to the mediator containing proposals never given to the Union; and by refusing to meet unless a particular Union spokesman was excluded from its bargaining team. In addition, ERB found that the District had given deliberately false information to the Union regarding its financial difficulties: that is, it blamed its financial difficulties on the loss of federal funds, when the real cause was compensation increases given to non-bargaining unit members. In short, we found that the District had engaged in unlawful surface bargaining, for the most part, *without regard* to its conduct at the bargaining table.

ERB’s next surface bargaining case arose in Lincoln County, in *Lincoln County Employees Association v. Lincoln County and Glode*, discussed earlier in this opinion. There, we first concluded that the County did not violate the Act by giving insufficient authority to its negotiators. The Board then ruled that the County had not engaged in unlawful surface bargaining, even though the County had made proposals which were “predictably

unacceptable” to the Association, and had evidenced a “take it or leave it” attitude concerning those proposals. We said that:

“In cases involving predictably unacceptable proposals, the generally recognized principle is that, viewed in isolation, such a proposal is an insufficient basis to find a lack of good faith, ‘provided the proposal does not foreclose discussion’ (citation and footnote omitted). Absent additional indicia of a lack of intention to reach an agreement, we cannot conclude that the Respondents’ proposals constitute a bad faith violation, regardless of what we think of the proposals.” 17 PECBR at 705.

We next turn to our decision in *Multnomah County School District*. In that case the District proposed to contract out all custodial work. The Union charged the District with surface bargaining. It contended that the District’s economic proposal, which called for an approximate one-third reduction in economic benefits, was unduly harsh and predictably unacceptable. The Union also argued that the District never intended to reach agreement. It never varied from its initial position of demanding economic concessions, refused to consider Union proposals, and failed to make meaningful concessions.

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

“The Union asked the District to ‘meet in the middle.’ The PECBA does not require that; it specifically provides that the parties are not obligated to make concessions. The District was required to remain willing to reach an agreement, but it did not have to make concessions of any particular size or number.” 20 PECBR at 433.

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

“[a] party may lawfully take a hard line, so long as its conduct in negotiations, as a whole, reflects a willingness to reach an agreement. The District here remained willing to make a deal, provided that the agreement met its financial goals. Though the Union made numerous proposals, it was not until after the District Board voted to contract out that the Union advanced a proposal that was even in the ballpark of the savings that the District wanted to achieve. By then it was too late.” *Id.*, 434.

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

Applying the same analysis used in earlier cases, we found that the State had not engaged in unlawful surface bargaining.

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

“AOCE and OSPOA would have us find that Respondents engaged in bad faith bargaining not because they refused to make *any* concession regarding salary but because they refused to make significant concessions regarding salary. We decline to find bad faith bargaining on this basis. In *Lincoln County*, the employer proposed substantial modifications in the collective bargaining agreement: the elimination of guaranteed just cause for discipline and removal of job security protections. Throughout negotiations the employer never significantly modified its position regarding these two matters. We characterized the employer’s proposals as ‘predictably

unacceptable' to the union, but refused to find a violation of (1)(e) because there were no other indicia of bad faith present." 21 PECBR at 151.<sup>22</sup>

The Board also relied on *School District No. 1, Multnomah County* for the proposition that "the PECBA specifically provides that parties are not obliged to make concessions." The District was required to remain willing to reach an agreement, but it did not have to make concessions of any particular size or number.

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

Existing Board precedent controls the result that the majority reaches in this case. Even though the County did not make any significant concessions to the Union, the County did not thereby engage in bad faith bargaining. The County remained willing to, and did, bargain with the Union until agreement was reached. Even if the County's actions constituted "some evidence" of bad faith bargaining, this would not itself suffice to establish unlawful surface bargaining under all of the cases discussed above.

*County explanations of its bargaining positions:* The County's bargaining position was clear. The County's primary goal was to reduce the medical insurance premium average composite rate applicable to unit employees to the same level as other County employees, \$727 per month per employee or \$8,724 per year. County negotiators told Union officials that the funding for each fiscal year was a set amount, and that payment of higher premiums in the near term would result in lower employer contributions towards the end of the fiscal year. The County also explained to the Union that it would not spend more money on unit employees than it had previously budgeted. The County never represented that it was without funds to pay for additional unit employee benefits.<sup>23</sup>

---

<sup>22</sup>We noted that, in Lincoln County, the employer had not engaged in dilatory tactics, had met regularly with the union, had made proposals and concessions on other issues in bargaining, and had signed a contract which resolved all issues except the disputed ones.

<sup>23</sup>We are puzzled by Member Gamson's emphasis on the County's unwillingness to discuss the (continued...)

Course of negotiations: The Union and County bargained for approximately 353 days, through numerous negotiation and mediation sessions. The County maintained its proposal to cap medical insurance premiums at \$8,724 per year per employee, and refused to offer additional funds for bargaining unit employee wages or benefits. The County reduced the amount of benefits for the remainder of the 2003-04 fiscal year in proportion to the expenditures at the status quo rate at the beginning of the fiscal year.

The Union eventually offered medical insurance proposals that came within the actual employer cost for 160 FTE positions, which was a higher number than the actual, filled County unit FTE. The County rejected these proposals because they failed to provide benefits for 174 FTE under the cap it had set. The County position was consistent throughout the negotiations, and there were no last-minute changes in position. The County made no concessions of any substance in this area. The final agreement, after extensive mediation and an imminent strike, included such things as an additional holiday and other relatively minor concessions that did not represent significant increased monetary costs to the County.

The Union did not establish that the County unlawfully threatened employees with termination if they went on strike. Local 2936 also failed to establish that the County misrepresented to employees that the Union would or could fine employees for crossing picket lines. The County did not unlawfully provide employees with union membership resignation form letters. The County did provide inaccurate information, and information without any basis in specific facts, to unit members regarding the amount the Union could fine members who crossed picket lines, and the likelihood of picket line harassment.

The County did not retroactively change the status quo regarding health insurance premiums, nor did it unilaterally implement a level of health insurance premiums that differed from its final offer. Moreover, Local 2936 did not establish that the County engaged in unlawful regressive bargaining.

---

<sup>23</sup>(. continued)

County's overall budget document on one occasion in July 2003. The Union had requested a copy of the County's budget in June. The County furnished a copy of its budget in July. By that time, the parties had been discussing the County's economic proposals for months; and the County had furnished Local 2936 with its cost proposal on April 17. In July, the County said that it would make available no more money than had been provided for in that cost proposal. The parties continued to negotiate regarding the County's economic proposals until October, when the parties commenced mediation. During that time, the County offered explanations of its proposals. In any event, Local 2936 has not charged the County with an unlawful refusal to furnish information under ORS 243.672(1)(e)

We find no evidence of bad faith with regard to the behavior of the County's negotiators or the authority given them, nor with the County's explanation of its proposals. We do not find that these proposals were "unduly harsh and predictably unacceptable." We do not find that the County committed any other unfair labor practices as alleged in the complaint.<sup>24</sup> While it is true that the County did not offer concessions of any substance on economic matters, this is not sufficient to permit us to conclude that the County thereby engaged in surface bargaining in violation of subsection (1)(e).

We must also keep in mind that Local 2936 and the County entered into a labor agreement voluntarily. This is part of the "totality of circumstance" as well. It supports our conclusion that the County conducted negotiations with an intent to reach agreement with Local 2936. In *Washington County v Washington County Police Officers Association*, Case Nos. UP-34/70-80, 5 PECBR 4411(1981), the County contended, *inter alia*, that the Association had unlawfully refused to bargain in violation of ORS 243.672(2)(d) when it sought early mediation rather than continue negotiations with the County. The parties subsequently entered into a labor agreement. We stated that:

"In the face of that fact, the County must carry a difficult burden to show, by a preponderance, in the totality of all the circumstances, that WCPOA was not bargaining . . . with an intent to reach agreement." *Id.*, at 4417.

In *Lincoln County Employees Association*, this Board also noted that the fact that the County was willing to enter into a labor contract, and did so, "create[d] a difficult hurdle for the Union to overcome." We determined that a party may lawfully take a hard line, so long as its conduct in negotiations, as a whole, reflects a willingness to enter an agreement. In *Lincoln County*, the County remained willing to make a deal with the Association, provided the deal met the County's financial goals. The resulting labor contract reflected those financial goals. We found no violation of subsection (1)(e).

By contrast, the parties did not agree on a labor contract in *McKenzie School District*, or in *Rogue Valley Transportation District*. In each of those cases the public employer had implemented its final offer or bargaining position without agreement from the

---

<sup>24</sup>Member Gamson correctly notes that we have recently decided another case involving the same parties, and the same negotiations. In *AFSCME Local 2936 v Coos County*, Case No. UP-72-03, 21 PECBR \_\_\_\_ (March 13, 2006), we recently determined that the County violated ORS 243.72(1)(f) when it denied Union members their statutory right to have union dues deducted from their paychecks, pursuant to ORS 243.766 and 292.055. Our decision in that case does not change the result here, see, e.g. *McKenzie School District, Rogue Valley Transportation District*.

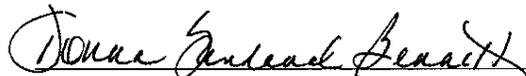
labor organization involved. In *McKenzie School District*, we held that the District had unlawfully implemented its final offer – notwithstanding our finding that the District had not engaged in “surface bargaining” – because it had committed a separate refusal to bargain.<sup>25</sup>

We conclude that the County did not engage in unlawful surface bargaining in violation of ORS 243.672(1)(e). We will dismiss this portion of the complaint as well.

ORDER

The Complaint is dismissed.

DATED this 21<sup>st</sup> day of April 2006.

  
\_\_\_\_\_  
Donna Sandoval Bennett, Chair

\_\_\_\_\_  
\*Paul B. Gamson, Board Member

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

This Order may be appealed pursuant to ORS 183.482.

---

<sup>25</sup>While a resultant labor contract may create a heavy burden for a complainant, the presence or absence of a contract is not necessarily issue-determinative. In Hood River, the employer’s conduct was so egregious that we found surface bargaining – and imposed a civil penalty—even though the union ultimately accepted one of a series of the employer’s “final offers” as a labor contract. Similarly, in Rogue Valley Transportation District, this Board found that the public employer had engaged in unlawful surface bargaining—not because it made predictably unacceptable proposals and did not budge from them, but because the employer’s conduct away from the bargaining table established that it did not intend to enter into an agreement with the Union. Rather, the District intended to—and did – impose its terms of employment without the Union’s agreement.

\*Member Gamson, Concurring and Dissenting:

I write separately about the surface bargaining charge addressed in Conclusion of Law 5.<sup>26</sup> Both the County's actions and the majority's analysis are troubling.

In surface bargaining cases, there is no direct evidence of a party's bad faith. We examine circumstantial evidence to determine whether the party merely went through the motions of bargaining, or whether the totality of its conduct demonstrates a sincere willingness to bargain towards agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 (1985). After examining the evidence, I conclude that the County merely went through the motions.

## I

Over the years, we have identified a number of factors we will consider in surface bargaining cases. One important factor is the nature and number of concessions. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 584, *Order on Reconsideration* 16 PECBR 707 (1996). Here, the County made no meaningful concessions. I view this as powerful evidence that the County was unwilling to make a good faith effort to resolve the parties' differences.

The majority finds little significance in the County's lack of concessions. It observes that the PECBA does not require a party to agree to a proposal or make a concession. The majority is correct as far as it goes, but it fails to appropriately consider the full scope of the bargaining obligation described in our prior cases:

“Even though this Board, like the NLRB, ‘ . . . cannot force an employer to make a ‘concession’ on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union . . . ’ if the bargaining duty prescribed by the PECBA and the NLRA ‘ . . . is to be read as imposing any substantial obligation at all.’” *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985) (Emphasis and ellipses in original; citation omitted).

---

<sup>26</sup>I concur in the results the majority reached in the other conclusions of law

We have quoted this passage numerous times over the years, most recently in 2004.<sup>27</sup> The majority pays lip service to these cases but then proceeds to write the concept out of existence. According to the majority, “some reasonable effort in some direction” means only that “a party may not condition participation in the collective bargaining process upon concessions by the other party.” (Emphasis in original.) I believe more is required than merely refraining from such unlawful conditioning. A party must do something to demonstrate its sincere willingness to compose its differences with the other party.

The majority recites a litany of cases that are all factually distinguishable. The County’s lack of meaningful concessions is not the “sole” indication of its bad faith; the County’s failure to make concessions is not limited to post-factfinding negotiations or to “the early stages of negotiation”,<sup>28</sup> and the union has not insisted on a particular concession such as “meet in the middle.” The majority does not explain how the County’s lack of meaningful concessions furthers the purposes and policies of the PECBA.

In my view, the lack of meaningful concessions clearly demonstrates that the County did not fulfill its obligation to “make *some* reasonable effort in *some* direction” to reach agreement with the Union. Such an intransigent bargaining position thwarts the purposes and policies of the PECBA. A major purpose underlying the PECBA is to obligate the parties to “enter collective negotiations with willingness to resolve \* \* \* disputes relating to employment relations \* \* \*.” ORS 243.656(5). The County’s lack of meaningful concessions demonstrates that it failed to bargain with the requisite willingness to resolve disputes. As we observed in *Amalgamated Transit Union, Division 757 v Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707, 711 (Order on Reconsideration) (1996): “If one party comes to the table \* \* \* and essentially says ‘no contract except on my terms,’ that leaves the other party with precious little room to bargain.”

---

<sup>27</sup>*Bend Police Association v. City of Bend*, Case No. UP-44/48-03, 20 PECBR 611, 625 n. 15, *adhered to on reconsideration*, 20 PECBR 645 (2004); *Public Works Association v Lane County*, Case No. UP-1-98, 17 PECBR 879, 886 (1998); *Cascade Bargaining Council v. Jefferson School District No. 509J*, Case No. UP-32-90, 12 PECBR 781, 787 n. 3, *adhered to on reconsideration*, 12 PECBR 870 (1991); *Clackamas County Peace Officer’s Association v. Clackamas County*, Case No. UP-41-86, 9 PECBR 9174, 9177 (1986).

<sup>28</sup>The majority’s discussion includes a long recitation and lengthy quote from *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603 (1995). The majority leaves out a portion from the middle of the quote which describes the employer’s conduct as occurring “in the early stages of the parties’ negotiations.” 15 PECBR at 615.

To the extent the County did modify its bargaining position, it was to reduce its offer rather than to make a concession. In April, the County offered a “total cost formula” in which it identified the dollar amount it was willing to spend on personnel costs, and it gave the Union substantial latitude in how to allocate those funds. Several months later, the County learned that its “formula” contained more money for PERS contributions than would be required. When the Union sought to allocate these funds to other employee benefits, the County refused. In effect, the County took this money off the table.

The goal of good-faith collective bargaining is to move the parties closer to agreement. This goal is frustrated when a party makes a regressive proposal that moves the parties farther apart.<sup>29</sup> The County’s regressive economic proposal is repugnant to the policies of the PECBA and provides substantial evidence of bad faith.

I find the County’s proposal disturbing for another reason. It purports to offer a fixed dollar amount for personnel costs related to the bargaining unit. The County steadfastly insisted, however, that the amount be allocated based on 174 FTE, even though there were only 152 bargaining unit employees and little prospect of any significant increase. The majority concluded that “[a]s a result, the County’s proposal purported to offer unit employees approximately 15 percent more than they could allocate to actual unit employee costs.”<sup>30</sup> Thus, the County rejected a Union insurance proposal that came within the County’s allocated budget amounts based on a more realistic 160 FTE. Whatever else it may have been, the County’s proposal was not an offer to the bargaining unit as it existed or was likely to become. I find the County’s sleight-of-hand approach to negotiations inconsistent with its obligation of good faith.

I am also concerned that the County unilaterally adopted a budget for the total amount of money it would offer to the bargaining unit, and thereafter refused to discuss it. The adoption of a budget before negotiations are complete does not constitute bad faith *so long as the employer remains willing to bargain over its budget decisions. Portland Association of Teachers v. Portland School District No. 1J*, Case No. UP-35/36-94, 15 PECBR 692 (1995). The majority’s findings establish that the County was not willing to

---

<sup>29</sup>In *Portland Association of Teachers v. Portland School District No. 1J*, Case No. UP-35/36-94, 15 PECBR 692 (1995), we held that an employer did not act in bad faith when it introduced regressive proposals in response to an unexpected deterioration in financial circumstances. The County here does not allege any such change in circumstances to justify its regressive proposal.

<sup>30</sup>Finding of Fact 11, footnote 14

bargain over its budget decisions: “The County provided the Union with a copy of the budget in July, *but refused to discuss it with the Union*, contending that the amount budgeted in its April 17 total cost proposal was all that it would make available to the Union.”<sup>31</sup> Further—again according to the findings of the majority—“the County bargaining team had authority to settle the contract within the parameters established by the Board of Commissioners in its budget, and no more.”<sup>32</sup>

In other words, even though the amount of money the County was willing to put on the table was *the major issue* in negotiations,<sup>33</sup> the County itself was unwilling to discuss the amount, and it sent negotiators to the table with no authority to discuss the amount. This is not merely hard bargaining, as the majority attempts to characterize it; on this crucial issue, the County was unwilling to bargain at all. Such conduct is inconsistent with the County’s obligation to bargain in good faith.<sup>34</sup>

Another significant factor is our recent determination in a separate case that the County committed an unfair labor practice during these negotiations when it unlawfully refused to honor written requests from employees to withhold union dues from their paychecks. *AFSCME Local 2936 v. Coos County*, Case No. UP-72-03, 21 PECBR \_\_\_\_\_ (2006). The commission of other unfair labor practices can be probative of an employer’s unwillingness to bargain towards an agreement. *Amalgamated Transit Union, Division 757*

---

<sup>31</sup>Finding of Fact 12 (Emphasis added).

<sup>32</sup>Finding of Fact 48. See *Hood River Employees Local 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 453 (1996), *AWOP* 146 Or App 777, 932 P2d 1216 (1997) (“The employer is under a duty to vest its negotiators with sufficient authority to carry on meaningful bargaining.”)

<sup>33</sup>“[M]atters concerning direct or indirect monetary benefits” are mandatory subjects for bargaining, ORS 243 650(7)(a), and the County was obligated to discuss such matters upon demand by the Union.

<sup>34</sup>The majority says it is “puzzled” by my concern because “the parties had been discussing the County’s economic proposals for months” and continued to do so until mediation. The fact that the parties discussed the County’s proposal misses the point. The Union wanted to discuss changing the County’s proposal by adding more money to it. The County refused to engage in that discussion and did not give its negotiators authority to do so. In other words, the County was willing to discuss how to slice the pie it brought to the table, but it was unwilling to discuss the Union’s request for a bigger pie. This constitutes strong evidence of the County’s bad faith.

I am puzzled that the majority characterizes my concern as a refusal to furnish information. It is not. The County refused to discuss the total amount of money it would make available for employee wages and other monetary benefits. County negotiators responded to Union requests for additional money to settle the contract by saying they lacked the authority. (FF 48, 49)

*v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 587, *Order on Reconsideration* 16 PECBR 707 (1996). The County's violation undermined the Union's financial ability to represent its members in bargaining.

## II

In surface bargaining complaints, our task is to weigh the totality of the circumstances. The discussion above focuses on the factors that demonstrate the County's bad faith. It is also true that some of the factors we traditionally consider do not indicate bad faith. For example, the majority points out that the County's negotiators were cordial, gave a clear explanation of their bargaining positions,<sup>35</sup> did not make predictably unacceptable proposals,<sup>36</sup> and did not threaten employees with termination if they went on strike.<sup>37</sup>

In addition, the majority relies heavily on the fact that the parties eventually reached agreement. That is certainly an important factor, but like all other factors, it must be viewed in the larger context. Execution of an agreement is by no means dispositive. As we aptly observed in a similar case:

"It 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

---

<sup>35</sup>The majority confuses the County's willingness to explain its proposals with bargaining in good faith over them.

<sup>36</sup>The Majority concludes that the County's offer was not harsh or predictably unacceptable. I disagree. The offer must be considered in context. Bargaining unit employees are the lowest paid in the County. More than 1/3 of them earn less than \$25,000 per year, only slightly above the federal poverty level for a family of four. The County's offer required these employees to pay an additional \$286.15 per month for six months out of their own pockets for health insurance, and it offered no wage increase. This represents a reduction of more than 10 percent of their monthly pre-tax earnings, and they lose additional purchasing power due to the effects of inflation. It does not take a mind reader or a crystal ball to predict that the employees would find such a proposal unacceptable, especially in light of the fact that the County does not assert an inability to pay. The majority's conclusion to the contrary is not grounded on the facts and reality of the situation.

<sup>37</sup>The County did, however, provide employees with inaccurate information regarding the likelihood of picket-line harassment and the amount the Union could fine them if they crossed the picket line.

negotiations. We have no doubt that the County wanted to enter into an employment relations contract with AFSCME. Based on the totality of the County's conduct, however, we conclude that the County was not willing to fully and responsibly bargain with AFSCME in good faith in order to reach a negotiated—and thus mutual—agreement.”

“ \* \* \* \* \*

“After it rejected the mediated settlement, the County simply decided to try to force AFSCME to accept a contract on the County's terms. Although that strategy ultimately succeeded, the County's employment of it illustrates an unwillingness to enter into a negotiated agreement. The County's post-mediation conduct (and its actions prior to mediation) evidence a desire to execute a ‘collective bargaining’ contract with AFSCME, but the County's conduct also shows that it preferred to form such an ‘agreement’ without complying with the purposes and policies of that pesky PECBA.” *Hood River Employees Local 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-452, 454-455 (1996), *aff'd without opinion* 146 Or App 777, 932 P2d 1216 (1997) (Footnotes omitted).

The same is true here. The County may have been willing to enter a contract, but it demonstrated no willingness to negotiate in good faith over its terms.

### III

On one side of the scale, the County was cordial in bargaining, explained its positions and did not unlawfully threaten employees. On the other side, the County gave a harsh take-it-or-leave-it offer and made no meaningful concessions in negotiations; it made a regressive economic proposal several months into negotiations; it purported to offer money but then refused to make about 15 percent of it available to the bargaining unit; it refused to discuss the total amount of money it would offer; it made false statements to employees about some consequences they would face if their Union called a strike; and it committed an unfair labor practice during bargaining which undermined the Union's ability to represent its members.

On balance, the evidence strongly indicates that the County was unwilling to bargain towards agreement. In my view, the County's conduct falls far below the standard of good faith necessary to make the PECBA process meaningful and workable. I therefore dissent.

A handwritten signature in black ink, appearing to read 'P. Gamson', written over a horizontal line.

Paul B. Gamson, Board Member