

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-15-08

(UNFAIR LABOR PRACTICE)

WASHINGTON COUNTY POLICE	)	
OFFICERS' ASSOCIATION,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
WASHINGTON COUNTY,	)	
	)	
Respondent.	)	
_____	)	

Both parties filed, and subsequently withdrew, objections to a Recommended Order issued by Administrative Law Judge (ALJ) Larry L. Witherell on February 27, 2009, after a hearing on October 23 and 24, 2008, in Hillsboro, Oregon. The record closed on December 9, 2008, upon receipt of the parties' post-hearing briefs.

Sean Lemoine, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, Portland, Oregon, represented Complainant.

Adam S. Collier, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, Portland, Oregon, represented Respondent.

On April 28, 2008, the Washington County Police Officers' Association (Association) filed an unfair labor practice complaint against Washington County (County). The complaint, as amended, alleges that the County violated ORS 243.672(1)(e) by unilaterally transferring bargaining unit work to non-bargaining unit employees when it removed Association-represented corrections officers from positions in the Pod 3 control room and replaced them with civilian employees. The County filed a timely answer.

This case involves the allegation that in or about March 2008, the County removed Association-represented corrections officers from the control room position (Pod 3) at the jail and replaced the corrections officers with unrepresented civilian employees. Accordingly, this case concerns whether the County unilaterally transferred bargaining unit work to non-unit employees without bargaining in good faith over the decision and its impact.

The issues in this case are:

1. Is the complaint timely filed under ORS 243.672(3)?
2. Did the County unilaterally replace members of the Association bargaining unit members with non-bargaining unit employees in violation of ORS 243.672(1)(e)?
3. If so, what is the remedy?

### RULINGS

1. At the hearing, during its case-in-chief, the County called its attorney, Jacqueline Damm, as a witness.<sup>1</sup> During her direct testimony, the County offered Exhibits R-33 and R-34. Exhibit R-33 is Damm's contemporaneous notes from the June 19, 2007 meeting between the County and Association. Exhibit R-34 is her contemporaneous notes from the October 10, 2007 meeting between the County and Association.

The Association objected to receipt of the exhibits because they were not included on the Exhibit List as required by the ALJ's August 22, 2008 pre-hearing notice.<sup>2</sup> The County responded that it was offering Exhibits R-33 and R-34 as rebuttal

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<sup>1</sup>Damm was included on the County's Witness List as required by the ALJ's pre-hearing notice of August 22, 2008.

<sup>2</sup>The pre-hearing notice of August 22, 2008, directed the parties to do, in part, the following:

"By seven days prior to the hearing date, mail or deliver to each other all exhibits and exhibit lists regarding your cases-in-chief (exhibits offered at hearing that were not mailed or delivered seven days before hearing will be received only upon a showing of good cause under OAR 115-010-0068(4)); \* \* \*"

(continued...)

evidence. At the time, the ALJ admitted both exhibits and instructed the Association to explain in its post-hearing brief why the exhibits should not be admitted.

By letter dated November 7, 2008, after the close of the hearing and before post-hearing briefs were due, the ALJ ruled that Exhibits R-33 and R-34 were excluded from the record absent a showing of good cause why they were not on the County's Exhibit List and why they should be received into evidence. In its response to the ALJ's letter, the County asserted that it understood the Association to be "claiming a refusal to bargain in good faith – not a refusal to bargain at all." According to the County, it "came as a complete surprise" when the Association witnesses "testified that the County had refused to bargain *at all* with the Association over the creation of the JST position [the position at issue]." (Emphasis in original.) Therefore, the County argues, it offered the bargaining notes as evidence to rebut the testimony of the Association witnesses.

The County cannot successfully claim it was surprised by the Association's contention that the county completely refused to negotiate about the transfer of bargaining unit work. The County itself asserted that it had no duty to bargain about the new positions: it told the Association that although it would negotiate about this issue, it would not waive the right to assert it had no duty to bargain.<sup>3</sup>

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(...continued)

OAR 115-010-0068 provides, in part, that:

- "(3) Before the hearing, the Board or its agent may require the parties to:
  - (a) Mark and submit exhibits;
  - (b) Submit exhibit lists;
  - (c) Identify witnesses;
  - (d) Submit a statement of the issues;
- "and
  - (e) Comply with pre-hearing agreements.
- "(4) A party that fails to comply with prehearing requirements regarding an exhibit, witness or issue may be denied the right to offer such evidence or make argument regarding such matter at the hearing."

<sup>3</sup> A number of Association witnesses – Association attorneys Garrettson and Goldberg, Association representative Bailey and Association President Rau – expressed concern that the County could disavow its agreement to bargain at anytime. Several times, County Counsel Damm told the Association that this was the County's position. (See Findings of Fact 20-23.)

The ALJ correctly excluded Exhibits R-33 and R-34 from the record because the County failed to show good cause as to why these exhibits were not included in its pre-hearing exhibit list. See *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 675-76 (2008), *appeal pending* (respondent failed to show good cause for introducing evidence not included in its pre-hearing list when the exhibit pertained to an issue raised by respondent in its answer); *Cheryl Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948, 950 (2005) (“The ALJ has the discretion to exclude evidence on the basis of noncompliance with a pre-hearing notice.”)

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

### FINDINGS OF FACT

#### Background

1. The Association is a labor organization under ORS 243.650(13) and the exclusive bargaining representative of the following County employees: recruits, deputy sheriffs, senior deputy sheriffs, detectives, corrections officer trainees, corrections officers, senior corrections officers, fingerprint ID technicians, criminalists 1 and 2, civil deputies, evidence officers 1 and 2, and crime scene technicians.

2. The County is a public employer under ORS 243.650(20).

3. At all relevant times, the following individuals held the following managerial or supervisory positions with the County:

Gail Christiansen – Sergeant  
Robert Gordon – Sheriff  
David Hepp – Undersheriff  
David Kirby – Commander  
Debra Mateo-Boettcher – Lieutenant  
Anna Sestrich – Director of Human Resources  
Dustin Sluman – Sergeant  
Marie Tyler – Commander.

4. At all relevant times, the following individuals held the following positions with the Association:

Dave Bailey – Senior Division Representative  
Daryl Garrettson – Attorney <sup>4</sup>  
Jamie Goldberg – Attorney  
Murray Rau – Association President  
Robert Zimkas – Swing Shift Representative.

5. The Association and the County are parties to a collective bargaining agreement covering the period from July 1, 2006 to June 30, 2010.

6. Article 9 from the collective bargaining agreement provides:

“9.1 It is recognized that an area of responsibility must be reserved to the employer if the County is to effectively serve the public. Except to the extent expressly abridged by a specific provision of this Agreement, it is recognized that the responsibilities of management are exclusively functions to be exercised by the County and are not subject to negotiation. By way of illustration and not of limitation, the following are listed as such management functions:

“A. The determination of the services to be rendered to the citizens served by the County.

“B. The determination of the employer’s financial, budgetary, accounting and organization policies and procedures.

“C. The continuous overseeing of personnel policies, procedures and programs promulgated under any ordinance or administrative order of the County establishing personnel rules and regulations not inconsistent with any other term of this Agreement.

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<sup>4</sup>Garrettson and Goldberg are attorneys in the law firm that represents the Association. During the time period involving this dispute, they were job sharing. As a result, Garrettson would serve as the Association’s counsel for two or three months and then would be followed by Goldberg who served for two or three months.

- “D. The management and direction of the work force including, but not limited to, the right to determine the methods, processes and manner of performing work; the determination of the duties and qualifications of job classifications; the right to hire, promote, train, demote, transfer and retain employees; the right to discipline or discharge for proper cause; the right to lay off for lack of work or funds; the right to abolish positions or reorganize the departments or divisions; the right to determine schedules or work; the right to schedule employee vacations; the right to purchase, dispose and assign equipment or supplies; and the right to contract or subcontract any work.”

### Staffing at the Jail

7. The Sheriff's Office has jail, patrol, investigation, and services divisions. The present jail opened in April 1998. A commander oversees the jail; the jail commander reports to the Sheriff and undersheriff. Two lieutenants and 12 sergeants supervise the corrections officers (corporals and deputies). The jail has funding authorization for 130 corrections officers. The jail generally experiences an annual turnover of 10-11 corrections officers due to transfers to other divisions, resignations, retirements, and officers' failure to complete training. Overall, the jail has approximately 190 authorized positions (FTEs) for represented and unrepresented employees.

8. Prior to about March 2008, eight or nine employees worked in master control room operator, specialist, or monitor positions. The master control room operators were unrepresented employees.

The principal duties of the master control room operators were to monitor and control access to all secured perimeter entry and departure points; to monitor and control all internal movement doors; to monitor complex public safety radio frequencies; to operate and monitor closed circuit consoles; to monitor selected areas within the jail perimeter, which are under either constant or intermittent closed circuit television surveillance; to serve as the central point of contact for all internal communications from officers on mobile radios, telephones, or intercoms; to dispatch officers in response to alarms; to perform dispatch duties for jail operations; to maintain inventory control of keys, pagers, radios, and other similar equipment; and to monitor and oversee the security alarm system, fire alarm system, and pager alarm system. Essentially, master

control operators were responsible for controlling movement within the jail through a set of monitors and touch screens. They occasionally responded to or communicated with inmates through the intercom system; usually, they only did so when a corrections officer was unavailable for some reason.

The master control room is staffed 24 hours per day, 7 days per week. Because of the small number of employees who consistently worked together in confined physical conditions, problems developed among some of the operators.

Corrections officers occasionally worked in the master control room for short periods to relieve an operator who needed a lunch break and when another operator was not available. Before the new jail opened in 1998, corrections officers performed master control duties. The master control operator classification was created for the new jail.

9. Before March 2008, 22 employees were classified as administrative specialists 2 (AS2);<sup>5</sup> they worked in the jail as booking clerks, property room clerks, and visiting desk clerks. The AS2s were and are unrepresented employees.

The booking clerk performed data entry for the initial booking of an inmate, taking information from the paperwork brought in by the arresting officer, and information from a face-to-face interview with the inmate. The visiting desk clerks worked day and swing shift and worked in the lobby where visitors and family come to meet an inmate. Before 1989, corrections officers performed the booking work.

Two additional AS2s remain employed at the jail, one as a support person in the jail programs unit and one as a support person in jail administration, handling inmate mail and other clerical functions. These two positions were unaffected by the changes discussed within this decision.

It took six to eight months for the County to recruit, test, hire, conduct background checks on, and train AS2s for employment in the jail. Besides the visiting desk assignment, the AS2s worked jail positions that required coverage 24 hours per day, 7 days per week. The AS2 classification is a generic classification used throughout the County government. The County employs about 200 to 250 AS2s in various County departments.

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<sup>5</sup>Various documents in this case use either ASII or AS2. Except where quoted differently, for consistency we will use AS2.

Before March 2008, there was nearly 40 percent turnover among the AS2s working in the jail.<sup>6</sup> In the jail, the AS2s could be scheduled to work any of the three shifts (day, swing, and graveyard), and weekends or holidays. They also worked large amounts of overtime. The AS2 position was and is considered a lower-paid position within the County. The AS2 was a common administrative support position in County departments other than the jail. These AS2s worked only day shifts, and worked no weekends or holidays; in addition, they were rarely required to work overtime. As a result, AS2s in the jail regularly transferred to other County departments where the work schedules were more attractive. At any given time, about one-fourth of the AS2 positions in the jail were unfilled.

10. The jail has a capacity for 572 inmates, and is divided into several units or “pods.” Pod 3, which is the focus of the present dispute, houses the highest security risk and the most dangerous inmates.

Pod 3 is divided into three sections based on the classification of the inmates: section C contains the “8-max” or the highest risk inmates; section B contains inmates who may have originally been classified as high security but have been downgraded due to good behavior or other factors; and section A contains inmates, often returning from the corrections center or work release center, who are awaiting disciplinary hearings for alleged misconduct. The maximum capacity in each section is 20, and 60 for the entire pod.

11. From about April 1998, when the current jail opened, until March 2008, the County staffed Pod 3 with two corrections officers, who were represented by the Association. One corrections officer served in the secured control room or “bubble” in Pod 3. The other served as a rover in the area accessed by the inmates as they were released from their cells. Six corrections officers staffed the Pod 3 control room 24 hours per day, 7 days per week.

The Pod 3 control room corrections officer was responsible for getting inmates up for their visits, medical appointments, trials or hearings, and education activities. The control room corrections officer controlled the release of inmates from their cells and access into the general assembly area. The control room corrections officer was never permitted to leave the control room without proper and secured relief, even if the roving

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<sup>6</sup>Sheriff Gordon estimated the annual turnover among the AS2s to have been between 25 and 40 percent. In an August 2006 communication, Commander Kirby stated that the rate of turnover was 35 percent. Commander Tyler testified that the annual turnover was 37 percent.

corrections officer was in distress. The control room corrections officer was essentially responsible for the safety of the rover officer, and responsible for summoning outside assistance.

12. Since approximately 2000, overtime worked by the corrections officers has been a serious issue for the Sheriff's Office and the County. Corrections officers work a significant amount of overtime, both mandatory and voluntary. They often work voluntary overtime to avoid the mandatory overtime. An overtime calendar is usually created six months in advance. This allows deputies to voluntarily sign up for overtime and thereby control their work hours. The County budgets approximately \$900,000 per year for overtime work at the jail.

### Consideration of Changes in Jail Staffing

13. In 2005 or 2006, Lt. Mateo-Boettcher proposed that the Sheriff create a new position, the Jail Services Technician (JST). JSTs would be assigned the duties currently performed by the AS2 booking, property, and visiting clerks and master control room operators. JSTs would receive higher salaries than the AS2s, and would also have better and more attractive career development opportunities. The Sheriff's Office believed that this change would help stabilize the workforce by encouraging the AS2s not to transfer to other positions in the County.

The Sheriff's Office then considered assigning the Pod 3 control room operator duties to the JSTs in the new classification. This would open a new assignment opportunity for the master control room operators. It would also reduce the overtime burden on corrections officers. The County could release six officers assigned to the Pod 3 control room to other duties and theoretically reduce the overall overtime for employees working in the jail.

14. On August 22, 2006, Sheriff Gordon met with the master controllers and the AS2s to discuss the reclassification plan. Senior Association representative Bailey also attended the meeting at the invitation of Commander Kirby. Kirby then sent an e-mail about the reclassification to the deputies, corporals, and sergeants:

"Good Afternoon,

"I wanted to get a communication out to all of you in hopes that the rumor mill won't go wild – I apologize it's via email, but this is the quickest way to get the same message to you all."

“This morning, the Sheriff, Undersheriff, and Chief Deputy held a meeting attended by the ASII’s, the Master Controllers and a representative of the union. The reason for that meeting was to discuss a reclassification that has been in the works for the last several months, but now appears to be gaining a bit of steam and looking as if implementation could potentially occur. So, I wanted to write to you all to let you know a bit about this so you might be more informed, hoping that this communication will help you understand what our goals are in pushing for this reclassification and how it might affect you.

“A very simplistic version of the reclassification is this: Merge the ASII’s with the Master Controllers and have them also take on the control room functions of Pod 3 (not the Rover duties). The current ASII’s and Master Controllers will then be folded into a new classification called Jail Technician. There will be a Jail Technician I position (this is where the current ASII’s and Master Controllers will begin) and a Jail Technician II position (this is where anyone cross-trained to perform all of both job functions will fall). So, a Jail Technician II will be trained to handle Booking 1, Booking 2, Lobby, Property, Pod 3 and Master Control. Once cross-trained, they will have the ability to work any of those positions any given day.

“There were several things we are trying to accomplish with this idea. First and foremost, as many of you know, the ASII’s in the jail have a difficult job and they do it well. Within their classification, no other ASII within the county network has to work shift work, holidays, mandatory OT and face-to-face with inmates who may be less than civilized at times. The ASII’s who work in records come closest to this as they also work shift work and holidays. Having said this, we pay our ASII’s exactly the same as every other ASII in the county despite the [*sic*] some of the less-than-desirable job conditions. Due to this, once an ASII gets up and trained and realizes that they can get better hours/days off for the same pay, they end up transferring to other positions and it hurts all of us. In studying this issue, we have discovered that over the last few years, we incur [*sic*] an approximate 35% turnover in this workgroup, which is extremely high. So, we believe that offering our ASII’s higher pay and the ability to work several different areas (creating less stagnancy) will enable us to retain these wonderful people that we hire and train.

“The next major issue lies with the jail deputies. I am continually reminded when I roam our halls that the main thing that bothers deputies the most about their jobs here is the mandatory OT. We simply don’t have enough staff to mitigate this issue and despite attempts to add deputy FTE over the years, we have not added as many full time deputy FTE in the jail that could potentially be considered commensurate with the increase in workload and changes in things like FMLA use that has dramatically increased over the last few years. Ergo . . . . . [sic] OT goes up. By having a civilian employee work the control position in Pod 3, we would gain 6 certified deputy slots (based on shift relief factor) to spread amongst the shifts. In theory, we will be able to reduce OT and then hopefully allow for more training and more time off, by adding these six positions to the shifts.

“Then come our Master Controllers. Let’s face it, they are our lifeline – our eyes and ears who are watching our backs. One of their main issues is that they work in a box away from the world for their shift and can get a feeling of being isolated from everyone else. Adding the Jail Tech positions would allow them to cross train and earn a little more money. However, it would also give them some options as far as work assignments. We all like having a change in scenery once in a while and doing something a little different each day keeps our lives ‘spicy’ – which we humans like. Therefore, we felt this was a positive thing for them as well.

“Now, this certainly doesn’t answer all the questions out there and I really need to underscore that point that there is a chance that NONE of this could happen as there are still several obstacles to overcome. So, I send this communication to you asking that you not jump to conclusions or read into something that just isn’t there. If you have a question, please ask Lt. Mackley, Lt. Bender or myself. We will answer any question that we have answers for, but there are many things that still have not been worked out – pay, how will we train these folks, when will all this happen, etc. Those are things we can’t answer because we don’t know. What I can tell you is that this is a work in progress and will continue to be even if this does come to fruition. So, please be patient with us – we are trying to do what’s best for the division and the Sheriff’s Office and believe we are close to making a positive impact.”

## Notification to the Association and the Association's Demand to Bargain

15. On January 11, 2007, the Association executive board met. Sheriff Gordon asked to attend the Association meeting in order to present information about the new job classification and the plan to assign the Pod 3 control room duties to the new JST classification.

At the meeting, the Sheriff, Undersheriff Hepp, and Commander Tyler explained the rationale for creating the new JST classification, moving the master control room operators and AS2s into that classification, and "civilianizing" the Pod 3 control room position by assigning duties currently performed by corrections officers to the new JSTs.

The Sheriff explained the problems he was attempting to solve: excessive overtime and high annual turnover rate among the AS2 employees (booking clerks, property clerks, and visiting desk clerks) who were transferring from the jail to other County departments. He told the executive board members that he wanted to create a new classification at a higher compensation range in order to recruit people with an interest in law enforcement, and people who purposefully applied for a position involving significant holiday, weekend, and shift work. He also explained the problem among the small group of master control room operators, and said that he wanted to alleviate these problems by giving operators a chance to work in other locations. He told the Association executive board that because he planned to place the JSTs into the Pod 3 control room, he would be able to pull six deputies from that position and place them into intake to reduce the need for overtime. The Sheriff said that he intended to implement the new classification plan on July 1, 2007.

16. Association attorney Garrettson, who attended the July 11 executive board meeting, reminded Sheriff Gordon that he had a bargaining obligation before he could move forward with his plans and asked whether the Sheriff was prepared to bargain the change with the Association. The Sheriff responded that he had not come to the meeting to ask permission to move forward, but to talk about and answer questions about his plans. The Sheriff also said he did not think he had a bargaining obligation because he believed that the management rights clause gave him the authority to make the changes he planned.

17. By letter to Sheriff Gordon dated January 26, 2007, Garrettson repeated his demand to bargain. The letter stated:

“Dear Sheriff Gordon:

“Based upon your presentation of January 11, 2007, relating to your desire to civilianize the deputy position in POD 3, the Executive Board of the Washington County Police Officers’ Association has requested that I send you this letter.

“Specifically, the Executive Board is concerned over the safety and security of the institution, including the safety of the roving deputy. The Association is also concerned over the *transfer of its work outside of the bargaining unit*. Both of these are mandatory subject to [*sic*] bargaining under the Public Employees Collective Bargaining Act [PECBA].

“Therefore, please consider this letter [*sic*] demand to bargain on the part of the Washington County Police Officers’ Association *before any such implementation of any proposal to transfer the POD 3 deputy position to civilian status*.

“If at this time, there is no intent to move forward with the proposal, you may consider this letter to be premature. Otherwise, the Association would expect a timely response to this demand.” (Emphasis added.)

#### County Response to the Association’s Demand to Bargain

18. By letter dated February 1, 2007, Sheriff Gordon responded to the Association’s demand to bargain.

“Dear Mr. Garrettson:

“The County received your demand to bargain yesterday regarding what you categorize as ‘POD 3 Civilianization.’ You assert in your letter that the County has a duty to bargain because you believe that the County is proposing to transfer bargaining unit work outside of the bargaining unit, and because the Association is concerned about the safety of the roving deputy. We have evaluated your demand to bargain in light of all of the relevant circumstances, and disagree with your conclusion that the County has a duty to bargain over this situation. We reached that conclusion for a number of reasons.

“First, as you know, the assignment of work is not a mandatory subject of bargaining because ORS 243.650(f) excludes ‘assignment of work’ from the definition of ‘employment relations’ under the PECBA.

“Second, while it is true that transfer of bargaining unit work outside of the bargaining unit may trigger a duty to bargain in certain situations, we do not believe this is that situation. The work at issue is performed at the County by both bargaining unit and non-bargaining unit employees. Specifically, the monitoring work performed by Corrections Officers in POD 3 is performed by non-bargaining unit members elsewhere in the facility. Therefore, ERB does not consider it ‘bargaining unit work.’ *See Milwaukie Police Employees Association v. City of Milwaukie*, 15 PECBR 1 (1994). Moreover, even if it was considered bargaining unit work, the impact on the bargaining unit is *de minimus*, and therefore there is no duty to bargain. *Id.*; ORS 243.650(d).

“With regard to your safety concerns, we have discussed with the Association, in detail, a training program to ensure the safety of our Corrections Deputies, and everyone else in the jail. Under that program, an Association member would have to sign off on the training provided. In light of that training program, we do not believe there will be safety issues at all, much less any ‘which have a direct and substantial effect on the on-the-job safety of public employees.’ *See* ORS 243.350(f) [*sic*].

“Finally, even if a duty to bargain over this decision existed under the PECBA, the Association has waived it in Article 9 of the Collective Bargaining Agreement.

“For all of these reasons, we do not believe the County has a duty to bargain over this situation. Nevertheless, we have expressed repeatedly to Association representatives our desire to work through this issue with them, and to obtain their input prior to moving forward. We have already had two meetings with the Association in order to do that. Thus, we are not interested in getting hung up on the legal issue of whether or not we have a duty to bargain. If the Association is more comfortable discussing this matter in a more formal bargaining setting, the County is willing to do so.

“By agreeing to bargain here, however, the County does not intend to set a precedent for future situations that may arise, each of which will be evaluated on its own merits. The County also does not intend that our

decision to bargain in this situation will be construed in the future to reflect the County's interpretation of Article 9 of the Collective Bargaining Agreement, which it does not. Rather, this is a one-time agreement to bargain, applicable to the current situation only.

"With that said, please contact Undersheriff Hepp immediately to schedule bargaining. We are hopeful that the parties can expedite this process, especially in light of the discussions we already have had on this issue, and the positive impact we expect the proposed change to have on the bargaining unit by putting six more Corrections Deputies back into their core job duties."

19. On March 8, 2007, Association attorney Goldberg, Association President Rau, and Association representatives Bailey, Jerry Stark, and Zimkas met with Undersheriff Hepp, Commander Tyler, and County Human Resources Director Sestrich.

Tyler did not believe the County representatives came to this meeting to bargain, even though she attended the meeting because she was a member of the County's bargaining team. She thought the purpose of the meeting was to discuss the personal relationship policy and legal fees issues.<sup>7</sup>

At the beginning of the meeting, Hepp expressed surprise at Goldberg's presence and asked Goldberg what he was doing there. Goldberg responded that he was there to bargain. Hepp said that the County did not intend to bargain. After some general discussion about the new JST classification, Goldberg stated that this was not bargaining. Hepp responded that the County would discuss the issue but would not bargain. Goldberg and Stark explained that the Sheriff sent the Association a letter in which he agreed that the County would bargain. Hepp was unaware of this letter. Although the Association showed Hepp the letter, Hepp repeated that he was willing to discuss but not bargain. Goldberg asked when the County planned to implement the proposed classification plan. Hepp replied that he did not know. Little more was said and the meeting ended.

20. On April 23, 2007, County attorney Damm talked with Association attorney Goldberg. Goldberg asked if the County was going forward on the JST classification and "civilianization" of Pod 3. Damm answered that "no, we're willing to

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<sup>7</sup>The legal fees issue was apparently an unresolved issue from negotiations over the 2006-2010 collective bargaining agreement. The personal relationship policy was another new issue. However, neither issue was associated with the present unfair labor practice.

bargain over it,” but “we’re reserving our right to assert that we don’t have a duty but we’re willing to bargain.” Goldberg asked for clarification on what Damm meant. She responded that “we will bargain in good faith under the PECBA standards for what bargaining in good faith means” and “we’ll follow the interim bargaining obligations and hopefully the parties will be able to reach an agreement.” However, she added, “If we aren’t \* \* \* we are not waiving our argument that we didn’t have a duty, and if the Association decides to proceed to arbitration, we would decide at that point whether or not to assert that right.” Goldberg responded that if the County was just discussing the issues, then the Association was not willing to participate. Damm again emphasized the County would not waive its claim that the County does not have a duty to bargain. Goldberg asked Damm to put her position in writing.

21. In an e-mail to Goldberg dated April 30, 2007, Damm confirmed their April 23 conversation:

“Jaime --

“Pursuant to our earlier discussion, I am writing to clarify the County’s position regarding your request to bargain over the assignment of work in the Control Room in Pod 3 of the Washington County jail. As the Sheriff previously stated in a letter dated February 1, 2007, the County does not believe it has a duty to bargain over this issue. If you disagree with the analysis articulated in that letter, I will be happy to discuss the issue further. That should not be necessary, however, because in the same letter, the Sheriff agreed to bargain with the Association, without waiving the argument that there was no duty to bargain.

“As we discussed, the practical effect of the County’s position is as follows: the County agrees to bargain with the Association in good faith over this issue, and to otherwise follow the requirements for interim bargaining outlined in ORS 243.698. In the event the parties reach impasse, however, this agreement to bargain should not be construed as an agreement by the County to submit the dispute to arbitration. If the parties reach impasse, the County reserves its right to assert its arguments in support of its position that it has no duty to bargain, rather than proceed to arbitration.

“I hope this clarifies the County’s position on this issue. I understand from our discussion that you were willing to proceed under this approach. We will anticipate hearing from Daryl Garrettson to schedule a bargaining session on this issue.”

22. Association attorney Garrettson responded to Damm by letter dated May 7, 2007:

“Dear Jackie:

“I have reviewed your email of April 30, 2007 forwarded to me by Jaime Goldberg. I am not sure your email clarifies the Counties [*sic*] position. The Association sent a demand to bargain. The Sheriff wrote a long rambling letter in which he agreed to bargain. The parties then met and the undersheriff asserted that they were not bargaining. Now we have a letter from you that indicates that you agree to bargain but in the event of impasse then your [*sic*] going to assert that you did not have to bargain. The Associations [*sic*] position on the other hand is fairly straight forward. We believe that this is either a mandatory subject of bargaining or impacts a mandatory subject of bargaining and must be negotiated through the impasse resolution process prior to any implementation. Certainly you may at anytime invite an unfair labor practice by unilaterally implementing. In any event the Association in [*sic*] certainly willing to meet and negotiate, however the Association does not accept the Counties [*sic*] position that this is not a mandatorily bargainable subject.

“As indicated in my other correspondence relating to the personal relationships policy any negotiations must however unfortunately take place on either a Saturday or Sunday because of the Sheriff’s current Policy relating to requiring the Association members to burn their leave to deal with these matters. Therefore please let me know what Saturdays and Sundays your people are available, and I will check with mine and we can schedule a bargaining date.”

23. By letter dated May 25, 2007, Damm replied to Garrettson.

“Dear Mr. Garrettson:

“I am responding to your letters [*sic*] of May 7 regarding scheduling meetings to discuss the Relationship Policy, POD 3 issues, and legal fees. The County believes your insistence on meeting only on weekends is unreasonable given the parties’ past practice, and given that the County

provides Association leave time under Section 24.2 of the parties' Agreement for just this type of meeting. The County further believes that it would prevail in an unfair labor practice proceeding on this issue. Nevertheless, in order to expedite the process of resolving the outstanding issues between the parties, the County has decided against pursuing an unfair labor practice charge, and is willing to meet in the evening and/or on weekends to allow Association Representatives to attend during off-duty time. This agreement extends to the current situation only."

24. On June 1, 2007, Commander Tyler sent an e-mail to the jail staff in which she discussed several topics, including the reclassification plan. In regard to the plan, Tyler explained:

"4. **Reclassification of our ASII's and control room monitors to Jail Technicians** — This issue is one that may be surrounded with some misunderstanding. It has two primary purposes:

"a. We have long understood that no matter how much a booking clerk liked working for us, it was difficult for many to stay knowing they could work somewhere else in the county in the same job classification for the same pay and not have to work 24/7, give up their holidays, and be around cursing and drunk inmates. We feel they should be a different classification than an ASII in LUT—they do a completely different and more complex job.

"b. By combining our ASII and control room workgroups, creating a training program to cover the control room in pod 3, and providing them with the exceptional training we are known for—we can free up 6 deputies. We think it will reduce the mandatory overtime and it appears it would allow for some creative scheduling changes, perhaps even the option of 4x10's on both swing and grave."

25. On June 19, 2007, Association representative Bailey, Association President Rau, and Association attorney Garrettson met with County attorney Damm, Undersheriff Hepp, Lt. Mateo-Boettcher, Commander Eberhart, and Commander Tyler.

26. Damm began the meeting by announcing that there were three topics: the legal fees issue, the personal relationship policy, and the classification change. With respect to the classification change, Garrettson asked whether they were negotiating or just talking. Damm responded that the County agreed to bargain, although the County believed it had no duty to do so, and that the County reserved the right subsequently to assert that it had no duty to bargain. She further stated that the County was willing to bargain in good faith for the 90-day statutory time period.<sup>8</sup>

Garrettson said that the Association had heard that Sheriff Gordon planned to implement the reclassification plan on July 1, 2008. Damm responded that she had not heard that, and that it benefitted everyone to have the Association's input.

There was some discussion on how "civilianizing" the Pod 3 control room operator would impact the roving corrections officer. The parties also discussed whether the JST or the officer would have to write reports. The Association wanted some clear understanding of how the County would deal with the security and safety issues. Garrettson said they wanted to have a corrections officer in Pod 3 because the most dangerous inmates are housed there. The Association explained its safety concerns, which primarily focused on training and experience, and asserted that there had to be adequate training for the JSTs to ensure the safety of the corrections officers serving on the floor of Pod 3. The Association was concerned that JSTs would need to be trained and experienced in observing and controlling inmates.

27. Because the Association's principal safety concern related to the training of the new JSTs, the parties decided that it was more appropriate that employees experienced in working with inmates consider the safety, security, and training issues. The parties agreed to set up a subcommittee of corrections officers and sergeants who had experience working with inmates.<sup>9</sup> Garrettson believed that if the parties could agree on the subcommittee's work on safety and training, the Association might be able to withdraw its objections to "civilianizing" of the Pod 3 control room position. The parties agreed that none of the attorneys would participate in the subcommittees. The County also agreed to pay the Association participants for time spent at the meetings.

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<sup>8</sup>Under ORS 243.698(4), bargaining over employment relations during the life of a collective bargaining agreement ends 90 days after the employer notifies the exclusive representative in writing of a change that imposes a duty to bargain.

<sup>9</sup>Damm and Garrettson each credibly testified that each believed their side had made the proposal for a safety/training subgroup or subcommittee. It is unnecessary to resolve this conflict in testimony.

## Summer 2007 Subgroup Meetings

28. Commander Tyler instructed Lt. Mateo-Boettcher to form a subcommittee of corrections officers and sergeants who would work on a training plan for the new JST position. The Association was responsible for selecting corrections officers to participate in the subcommittee. The subcommittee was charged with constructing a training plan that would effectively train civilians to work in the Pod 3 control room position.

29. The Association selected Gordon Reid, Jeff Webber, Association Swing Shift Representative Zimkas, and Association Senior Division Representative Bailey to serve on the subcommittee. Mateo-Boettcher then selected Sgt. Christiansen, Sgt. Iverson, and Records Division Supervisor Melanie Cook to represent management.<sup>10</sup>

30. Beginning on July 10, the subcommittee met five or six times during the summer of 2007.<sup>11</sup> Each meeting was held on a Thursday and lasted an entire day. The participants were divided into two groups; one group considered Pod 3 control room functions and the other considered former AS2 functions, such as the booking duties.

At the initial meeting, Matteo-Boettcher explained that the goal was to create a training manual. She began each meeting by giving the subcommittee directions. She believed her role was to make sure that everyone had what they needed (e.g., copies of documents, a laptop, and a room with an overhead screen) and to answer subcommittee members' questions.

31. At the meetings, the participants entered the Washington County Sheriff's Office Corrections Officer Training Manual, which is approximately 70 pages, into a computer and then displayed it on an overhead screen. Each group went through the training manual, line by line, in an effort to determine what the Pod 3 control room corrections officer did.

Subcommittee members discussed and considered the items for inclusion in a proposed JST training manual. The subcommittee members tried to reach consensus on what items would be included in the training manual; if they could not, a supervisor

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<sup>10</sup>Zimkas testified that Commander Tyler asked him to attend the safety meetings. He further testified that he understood the meetings were to help management put together a plan to ensure the safety of the rover deputies in Pod 3 and to create a workable document that would be used for a quality training program for JSTs.

<sup>11</sup>Neither party kept an exact calendar of the subcommittee meeting dates.

made the decision. Thus, the supervisors had the final say about what should be included in the manual. However, the recommendation of a non-supervisory subcommittee member prevailed on at least one occasion. One of the deputies on the subcommittee proposed that the JSTs take psychological tests, and this requirement was eventually included in the JST job description. Only newly-hired JSTs are required to take these tests, however; incumbent master controllers and AS2s who were transferred to JST positions need not be tested.

32. After the subcommittee had met five or six times, Goldberg told Damm that the Association was dissatisfied with the process and would no longer participate in the meetings. The Association stopped participating in the subcommittee process because it believed that supervisors dominated the meetings. The Association requested another bargaining session, and the parties agreed to meet on October 10, 2007.

33. On October 10, 2007, Association attorney Goldberg, Association President Rau, and Association Representatives Bailey and Zimkas met with County attorney Damm, Commander Tyler, and Undersheriff Hepp. The purpose of the meeting was to resolve the dispute over using the JSTs in the Pod 3 control room.

The Association claimed that the subcommittee should have equal participation by representatives from the Sheriff's Office and the Association. The Association told the County that they considered the subcommittee to be a management dominated group, and that the Association did not want to participate any further in the subcommittee.

The Association again raised the issue of safety problems that could result if a civilian employee worked in the Pod 3 control room. The County asked if it could alleviate that concern through a JST training program. The Association answered no. The Association then stated that it wanted the JSTs to be in the bargaining unit. The parties divided into separate caucus meetings to consider this issue. However, the Association soon ended the caucus meetings by withdrawing the demand that the JSTs be included in the bargaining unit. Instead, the Association proposed that corrections officers continue to fill positions in the Pod 3 control room. Undersheriff Hepp explained the County's rationale for the creation of the JST position, but the meeting ended without any resolution.

34. By letter to Goldberg dated October 19, 2007, Damm confirmed their discussions about the JST position:

“Dear Jaime:

“This will confirm the status of our discussion regarding the creation of a Jail Technician position in Washington County, whose duties are to include acting as a control room monitor in Pod III. As we have explained, the new Jail Technician position would include duties currently performed by non-bargaining unit Master Control Room Technicians and Booking Clerks, as well as the Pod III control room monitor duties currently performed by deputies in the bargaining unit, most often in a light-duty assignment. As we have explained in the past, no current bargaining unit employees will lose work opportunities as a result of this reclassification. Rather, the Sheriff intends to redeploy them to other work assignments within the corrections deputy job description which includes contact with inmates, or assign them to other light-duty work, as appropriate. It is anticipated that this reclassification will help address, at least partially, the ongoing problem of mandatory overtime for deputies working in the jail.

“Sheriff’s office representatives and Association representatives have met on this issue more than once, and have discussed in detail the duties to be performed by employees in the Jail Technician position. We agreed on a subcommittee to address training issues, which met on a number of occasions to develop a training program for the new position. At our meeting last week, the Association put forward a potential resolution involving placing the new Jail Technician position into the bargaining unit. Our team indicated a willingness to consider that possibility and requested a caucus in order to discuss it. The Association cut the caucus short, however, and went back to its original position that only certified deputies be allowed to perform the control room duties in Pod III—in other words, the only acceptable resolution from the Association’s perspective was to continue the status quo. That resolution is unacceptable to the County.

“As you know, the County does not believe it had a duty to bargain over this issue in the first place because it involves the creation of a new position and the determination and assignment of duties of that position. Nevertheless, the County agreed to bargain over the issue for 90 days, while reserving its argument that it did not have a duty to bargain.

“Our first meeting was on June 15 [*sic*], so the 90-day statutory bargaining period has expired. Therefore, whether the County had a duty to bargain or not, the County now may implement its plan to create the Jail Technician job, and intends to start the implementation process immediately. The County will use the training material developed in the subcommittee, with input from Association members. As we stated in our meeting last week, the County will forward the current draft of the training manual to subcommittee members for their review.

“While we are disappointed that the Association remains unwilling to alter its position that only certified deputies may perform the Pod III control room duties, we appreciate the input into the training materials and remain hopeful that the parties can resolve their differences during the implementation phase of this process. The parties share a mutual interest in having well-trained Jail Technicians performing control room duties.”

35. By letter dated October 23, 2007, Goldberg responded to Damm.

“Dear Jackie:

“I am in receipt of your letter sent via facsimile dated October 19, 2007.

“In the first paragraph of your letter, you claimed that a sub-committee ‘met on a number of occasions to develop a training program for a new position.’ As we explained in our meeting of October 10, 2007, the ‘sub-committee’ was not a democratic institution. In fact, it was run by the management representatives with unequal input into the work product of the group.

“Also, in the third paragraph of the letter, you stated that ‘the County agreed to bargain over the issue for 90 days, while reserving its argument that it did not have a duty to bargain.’ You further claim that the 90 days has expired and the County ‘may now implement its plan.’

“The history of this matter illustrates that the County was not engaged in true ‘bargaining,’ mid-contract or otherwise. Let us review the history in this matter.

“On January 25, 2007, Daryl Garrettson sent Sheriff Gordon a letter demanding to bargain. On February 1, 2007, Sheriff Gordon responded in a letter in which he stated as follows: ‘(W)e do not believe the County

has a duty to bargain over this situation . . . we are not interested in getting hung up on the legal issue of whether or not we have a duty to bargain . . . if the Association is more comfortable discussing this matter in a more formal bargaining setting, the County is willing to do so . . . this is a one-time agreement to bargain, applicable to the current situation only . . (w)ith that said, please contact Undersheriff Hepp immediately to schedule bargaining.'

"Pursuant to that letter from Sheriff Gordon, we scheduled a bargaining session with Undersheriff Hepp for March 8, 2007. When we came to this meeting, Undersheriff Hepp stated that we were not 'bargaining,' just 'discussing' the issue. With this apparent change of tactics by the County, the WCPOA representatives left this 'discussion' session. It should be noted that during this meeting the Undersheriff also stated that the Sheriff's Office had not yet decided whether or not to implement their plan to have civilians take over pod 3 duties.

"On April 30, 2007, you sent an e-mail stating that the County would bargain but would reserve its position that it did not have to bargain if the parties could not agree on the matter. As Daryl Garrettson informed you in a letter dated May 7, 2007, this position is not a straightforward acknowledgment of an intent to bargain.

"On June 19, 2007, the parties met and decided to have a subcommittee review the functions and training of the contemplated civilian position.

"When we met again on October 10, 2007, we again informed the County representatives that their position that they could withdraw from the bargaining process was not good faith bargaining, and we urged you to bargain in good faith and proceed to mediation or arbitration if we could not agree on this issue.

"To summarize this history, the County has never acknowledged that it was 'bargaining' as that term is understood in PECBA, that both sides come to the table without reserving the right to 'pull out at any time.' Furthermore, until your letter of October 19, 2007, the County has never indicated whether it will in fact, implement its plan.

"Now that you have finally indicated the Sheriff's Office intentions, we will follow-up on our promise to file an unfair labor practice complaint."

36. Also in October 2007, Cpl. Steele, who is proficient with computer-based printing programs, transformed the notes from the subcommittee meetings into the Jail Services Technician Field Training Manual. On October 22, 2007, Mateo-Boettcher distributed copies of the training manual to members of the subcommittee. She then contacted Association representative Bailey and asked when she might expect some Association feedback on the manual. Bailey answered that the Association was not going to look at the manual any further.

37. On October 22, 2007, Lt. Mateo-Boettcher sent an e-mail to members of the subcommittee regarding the JST training manual:

“Hello all,

“With the help of Cpl. Steele, the compilation of the work of this committee building a Jail Technician Field Training Manual is now ready for your review. I printed off copies for each of the committee members and put them in your mailboxes for review. Please take time to give it a critical eye and, by all means, share it with other FTO’s [field training officers] or staff for comments or suggestions.

“I am interested in hearing your feedback – so please talk to me.

“I am copying this email to FTO’s along with the path to the document. It is large and takes a long time to ‘load’, thus the printed hard copies for those of you on the original committee. (Just want to reiterate my thanks to all of you – this was task that was completed professionally and cooperatively. I think it is a strong outline for a training program, one you should be proud of.)”

### Implementation of Changes

38. On December 11, 2007, the County board of commissioners approved the new JST position and approved funding for hiring new JST employees. Within a few weeks, the Sheriff’s Office began cross training the incumbent AS2s for transfer into JST positions. In March 2008, the County began transferring the incumbent AS2s to the JST classification.

39. On December 14, 2007, Commander Tyler sent an e-mail communication to the jail staff that announced:

“Hello all -

“On Tuesday of this week the County Board of Commissioners approved the reclassification of our ASII’s and Master Control Technicians to *Jail Technician I*. I know there have been a lot of questions that have sort of been in limbo as we waited for this to occur.

“Today, an ad went into the Oregonian advertising for the 7 open JT I positions. It will be open for 3 weeks. Early next week when Lt Mateo is back, we will begin setting out the plans for transition, cross training, etc. that will start ramping up soon.

“The biggest thing I want to convey in this message, is that as of tomorrow (start of the pay period), our current staff will be placed into the new classification. There are 2 immediate effects to that for the ASII’s. First, your work week, as of tomorrow, is no longer 37.5 hours, you are all now 40-hour per week employees. Also, you will begin to be paid at the higher rate.

“There will be many questions and lots for us to figure out as we go along. Please be patient with the process. The change is expected to take some time, so other than the things mentioned above, you shouldn’t be seeing a lot of things shift ‘overnight.’” (Emphasis in original.)

40. In December 2007, a job description for the new JST classification was finalized and issued. The new classification provided:

“New opportunity with the Sheriff’s Office to provide a variety of services within the Washington County jail correctional facility. \* \* \*

“This position works within a 24 hour per day, 7 day per week maximum security facility. Jail Services Technicians may be assigned to work day, swing or graveyard shifts, and must be willing to work on holidays and weekends.”

41. In March 2008, the County began “civilianizing” the Pod 3 control room. The County transferred the duties in the Pod 3 control room from the corrections officers to the new JSTs. The County removed the corrections officers from the Pod 3 control room and replaced them with the new JSTs.

42. Prior to the changes in March 2008, there were 22 AS2s and 8 or 9 master control operators working in the jail. After the changes, there were to be 38 JSTs, although it appears that not all of the authorized positions had been filled by the time of the hearing in October 2008. Only two AS2s remained employed in that classification at the jail after the change; one support person in the jail programs unit and one support person in jail administration, handling inmate mail, and performing other clerical functions.

Prior to the changes in March 2008, corrections officers worked all three shifts in the Pod 3 control room.<sup>12</sup> After the changes, the JSTs began working the three shifts in the Pod 3 control room. As a result, corrections officers were removed or displaced from 21 shifts or approximately 168 hours per week.<sup>13</sup>

43. With the transfer of the Pod 3 control room work to the JSTs, the corrections officers lost significant overtime opportunities working the Pod 3 control room. Between March and September 2008, the corrections officers lost approximately 175 overtime shifts due to the loss of the Pod 3 control room duties.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The complaint was timely filed under ORS 243.672(3).

The County asserts that we should dismiss the Association's complaint because it is untimely. ORS 243.672(3) provides that an injured party may file a written complaint "not later than 180 days following the occurrence of an unfair labor practice." Because the Association filed this complaint on April 28, 2008, the complaint is timely for any alleged unfair labor practices that occurred on or after November 1, 2007.

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<sup>12</sup> The day shift was and is 8 hours; the swing (evening) shift was and is 8 hours; and the graveyard shift was and is 10 hours, overlapping the other shifts an hour at each end.

<sup>13</sup> There was testimony from Commander Tyler that some deputies who were on light duty restriction have been assigned to the Pod 3 control room because they do not have any direct contact with the inmates and the job can be performed sitting down.

This is a unilateral change case. The complaint alleges that the County unlawfully transferred work traditionally performed by the bargaining unit to employees outside of the bargaining unit without first bargaining to completion with the Association. Under the statute, we must determine when this occurred. The County identifies October 19, 2007 as the critical date. On this date, the County notified the Association that it considered bargaining complete and would implement its plan to reassign the Pod 3 control room duties to employees who are not in the Association bargaining unit. According to the County, the 180-day limitation period began to run on this date. We disagree.

The unambiguous wording of the statute indicates that the timeline for filing a complaint begins to run on the “occurrence of an unfair labor practice.” We long ago rejected the position the District asserts here—that an unlawful change in working conditions “occurs” when the employer notifies the union that it intends to make the change. In *Riddle Association of Classified Employees v. Riddle School District #70*, Case No. UP-114-91, 13 PECBR 654, 663 (1992), we held that “[a]n unfair labor practice generally occurs when the alleged act became final, not when the employer gives notice of intent to change.” We concluded that “[n]o practices were changed in September and October 1990, when the superintendent made his announcement. The alleged unfair labor practices did not occur until September 1991, when the District actually changed its practices.” *Id.*

As we subsequently explained, “[o]ur reasoning in such cases is that the ‘occurrence’ is not the respondent’s announcement but rather the effective date of the action, because until the announced action takes effect, the respondent could change its decision or be persuaded not to take the action.” *AFSCME Council 75, Local 3327, and Martin Lahr, M.D. v. State of Oregon, Department of Human Resources, Mental Health and Developmental Disability Division*, Case No. UP-64-97, 18 PECBR 257, 264 (1999). *See also Oregon School Employees Association v. Astoria School District*, Case No. UP-40-02, 20 PECBR 46, 47, *adh’d on recons*, 20 PECBR 63 (2002) (“[t]he 180-day period for filing a subsection(1)(e) complaint alleging a unilateral change begins when the change occurs.”) *Washington County Police Officers Association v. Washington County Sheriff’s Office*, Case No. UP-12-02, 20 PECBR 274, 276 (2003) (same).<sup>14</sup>

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<sup>14</sup>Several recent cases apply the same general legal principle to slightly different factual circumstances. For example, in *Oregon State Police Officers’ Association v. State of Oregon, Oregon State Police*, Case No. UP-30-07, 22 PECBR 970 (2009) *appeal pending*, we rejected the union’s argument that the timeline in a unilateral change case began to run long *after* the change, when  
(...continued)

We apply those principles here. The County did not begin to replace bargaining unit members in the Pod 3 control room until March 2008. This is the date of “the occurrence” of the alleged unfair labor practice for purposes of ORS 243.672(3). The Association filed this complaint on April 28, 2008. Accordingly, we conclude that the complaint is timely. We turn now to the merits of the complaint.

3. The County did not unilaterally replace members of the Association bargaining unit with non-bargaining unit employees in violation of ORS 243.672(1)(e).

This case involves the County’s plan to replace bargaining unit members working in the Pod 3 control room with unrepresented employees. According to the Association, the County violated ORS 243.672(1)(e) by transferring bargaining unit members’ work without first bargaining about its decision to change staffing in the Pod 3 control room and the impacts of that decision. We begin our analysis by considering the relevant law.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Generally, this means that a public employer must bargain in good faith before it changes the *status quo* concerning conditions of employment that are mandatory subjects of bargaining. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008); *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, Case No. UP-99-94, 16 PECBR 245, 250 (1995), *AWOP*, 142 Or App 206, 920 P2d 181 (1996). “An employer may not change the status quo with regard to extra-contractual employment relations without first bargaining over the change and its impact.” ORS 243.698 establishes an expedited process for bargaining over proposed changes in working conditions during the life of a collective bargaining agreement. An employer must give the exclusive representative notice of any proposed changes that trigger a bargaining obligation; the labor organization then has 14 days from the date of this notice to demand bargaining. ORS 243.698(2) and (3). Under ORS 243.698(1), mid-term bargaining generally may not exceed 90 days.

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the union discovered it; here, we reject the *employer’s* argument that the timeline in a unilateral change began to run long *before* the change, when the employer announced it. The controlling principle in both instances is the same: in a unilateral change case, the violation occurs, and the statute of limitations begins to run, on the date the employer makes the allegedly unlawful change, and not on the date when the employer announces it or the union finds out about it.

In a case alleging an unlawful unilateral change, we begin by identifying the *status quo*, which may be established by an expired collective bargaining agreement, past practice, work rule, or policy. We then decide if the employer changed the *status quo*; if it did, we consider whether the change concerns a mandatory subject for negotiations. If it does, we examine the record to decide if the employer completed its bargaining obligation. *Lebanon Community School District*, 22 PECBR at 360.

Here, the parties agree that the *status quo* is established by a past practice of employing only bargaining unit members in the Pod 3 control room. From April 1998, when the new jail opened, until March 2008, when the County began employing JSTs, the County staffed the secured Pod 3 control room with corrections officers. Six corrections officers filled the Pod 3 control room positions for three shifts per day, seven days per week. No other classifications worked in Pod 3. The mutual, long-standing, and consistent practice of employing only corrections officers in the Pod 3 control room establishes the *status quo*. See *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005) (“To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties.”)

There is no serious dispute that the County’s actions changed the *status quo*. In March 2008, the County removed the corrections officers from the Pod 3 control room and replaced them with newly-hired JSTs, who are unrepresented. Accordingly, we now determine whether this change concerns a mandatory subject for bargaining.

To determine whether an employer has an obligation under the PECBA to bargain over a proposal to transfer bargaining unit work, this Board applies an “all-things-considered” approach. *Salem Police Employees Union v. City of Salem*, Case No. UP-2-87, 9 PECBR 9378, 9386 (1987), *aff’d*, 92 Or App 418, 758 P2d 427 (1988), *aff’d*, 308 Or 383, 781 P2d 335 (1989). We consider all the relevant circumstances, including the employer’s right to manage its enterprise and the interests of the bargaining unit members. *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437 (2008). An important consideration in our analysis is the impact of the change on bargaining unit members’ working conditions. If the employer’s transfer of work traditionally performed by bargaining unit members has the potential to significantly and adversely affect bargaining unit members’ working conditions, we will require the employer to bargain its transfer decision and the impacts of that decision. *Id.*, citing *International Association of Fire Fighters, Local #890 v. City of Klamath Falls*, Case No. UP-43-92, 13 PECBR 810, 818 (1992).

In *Multnomah County Corrections Deputies*, we held that the county was required to bargain about the decision, and the impacts of the decision to transfer work from one

bargaining unit to another<sup>15</sup> because the change resulted in a loss of overtime opportunities for the bargaining unit members who had traditionally performed the work. We concluded that the loss of overtime adversely affected bargaining unit members' working conditions. *Id.* at 438, citing *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrative & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5657 (1983). Here, Association bargaining unit members who traditionally worked in the Pod 3 master control room lost a significant number of overtime opportunities when the County transferred the work to the new JSTs. Similarly, the other bargaining unit members lost overtime opportunities when the former Pod 3 employees were integrated into the existing workload. For the same reason we held the employer was obligated to bargain in *Multnomah County Corrections Deputies*, we conclude the County must bargain its decision to transfer Pod 3 control room work and the impacts of that decision.

Because the County was obligated to bargain about the decision to transfer Pod 3 control room work to the JSTs and the impact of that decision, we now determine whether the County completed its bargaining obligation. *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 360. To make this determination, we review the course of the parties' discussions and meetings about staffing the Pod 3 control room.

At an Association meeting on January 11, 2007, the Sheriff announced his decision to replace bargaining unit members in the Pod 3 control room with new, unrepresented employees. The Association's attorney orally demanded to bargain about

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<sup>15</sup>For purposes of deciding whether a proposal is mandatory, we make no distinction between the transfer of bargaining unit work to an outside entity, as in subcontracting, and the transfer of bargaining unit work to different employees of the same employer, as is the case here. *Multnomah County Correction Deputies Association*, 22 PECBR at 437 n 3; *Milwaukie Police Employees Association v. Milwaukie Police Department*, Case Nos. UP-111-92/UP-19-93, 15 PECBR 1,8(1994); *Oregon School Employees Association v. Sherman Union High School District No. 1*, Case No. C-218-80, 6 PECBR 4715 (1981), *recons.*, 6 PECBR 5009, 5011 (1982). We have held that "the term contracting out includes a variety of forms used by an employer in divesting bargaining unit work. It may be by actual contractual arrangements with persons who are not in the bargaining unit, or by a transfer of work to other employees of the public employer who are not in the bargaining unit." *Oregon School Employees Association v. Colton School District 53*, Case No. UP-85-87, 10 PECBR 811, 817 (1988) (citation omitted). Therefore, we apply the same analytical framework regardless of whether the employer subcontracts, contracts out, or transfers bargaining unit work.

the plan and subsequently made a written demand to bargain by letter dated January 26, 2007. In his letter, the Association attorney expressed concern about the impact the plan would have on the safety and security of bargaining unit members.

In his February 1, 2007 response to the Association, the Sheriff initially denied that the County was obligated to bargain about the Pod 3 control room staff, but agreed to talk about the matter "in a more formal bargaining setting" if the Association wished to do so. The parties met on March 8, 2007; at that meeting, the undersheriff refused to bargain about the Pod 3 issue, apparently unaware of the Sheriff's February 1 letter.

Then, in April 2007, attorneys for the County and Association discussed the County's obligation to bargain. Damm, the County's attorney, told the Association's attorney that the County was willing to bargain, but said that the County reserved its right to assert it had no duty to bargain. She explained that if the parties reached impasse, the County might assert it had no duty to bargain and might refuse to proceed to arbitration.

The parties met on June 19, 2007. At this meeting, the parties discussed safety problems that could result if the County employed the new JSTs in the Pod 3 control room; they decided to create a joint union-management subcommittee which would develop a training manual for the JSTs. The subcommittee met five or six times during the summer of 2007 and put together a field training manual for the JSTs. However, at the conclusion of the process, the Association stopped participating in the subcommittee because it believed that supervisors dominated the meetings.

The Association requested another bargaining session with the County, and the parties met on October 10, 2007. The Association initially proposed that the new JSTs be included in the bargaining unit; it withdrew this proposal, however, and proposed that corrections officers continue working in the Pod 3 control room. The District rejected the Association's second proposal, and the meeting ended. The parties scheduled no additional meetings, and the Association made no additional proposals regarding the Pod 3 control room staff. The Association never requested arbitration.

On October 19, 2007, the County's attorney notified the Association that the County had completed its statutory obligation to bargain for 90 days about changes in the Pod 3 Control room staff and would immediately implement its plan. The County advertised for applicants for the new JST positions in December 2007, and began removing corrections officers from the Pod 3 control room and replacing them with the new JSTs in March 2008.

Based on this record, we conclude that the Association waived its right to bargain about the County's decision to change staffing in the Pod 3 control room, and chose to bargain only about the impacts of the decision. When the County agreed to bargain about its proposal to change the Pod 3 control room staffing, it did not limit bargaining to impacts. Throughout the spring and summer of 2007, however, the Association pursued bargaining only about the impacts of the County's decision to transfer bargaining unit work in the Pod 3 control room. The subcommittee, in which the Association agreed to participate, addressed only the effects of the County plan—concerns about safety and security. The Association abandoned the subcommittee approach after several meetings during the summer of 2007, and the parties met for a bargaining session on October 19, 2007. At that meeting, the Association initially proposed that JSTs be included in the Association bargaining unit. Although the County was receptive to the proposal, the Association withdrew it. The Association then proposed that corrections officers continue to perform the Pod 3 control room work. The County was also willing to bargain over this proposal, but ultimately rejected it. After the October 19 bargaining session ended without an agreement, the Association pursued no further negotiations concerning the County's staffing plan for the Pod 3 control room. The Association made no attempt to schedule additional bargaining sessions, made no additional proposals, and never demanded interest arbitration.

A union may waive its right to bargain over a unilateral change in working conditions, either expressly or by inaction. When a union does not expressly waive its right to negotiate, we examine the circumstances to determine if a waiver may be implied. *Tualatin Valley Bargaining Council/Hillsboro Education Association v. Hillsboro Union High School District 3J*, Case No. UP-125-92, 14 PECBR 541, 549 (1993). Once an employer notifies a union about a proposed change, the union has the duty both to demand and to pursue negotiations; if it does not, we will hold that it waived its right to bargain. *Id.* at 551-552 n 13. A union may waive its right to negotiate about an employer's decision to change working conditions, but may choose to bargain about the impacts of that decision. *International Association of Fire Fighters v. City of Klamath Falls*, 13 PECBR at 819. In *City of Klamath Falls*, the city announced that it was transferring bargaining unit work. Although the union made a timely demand to bargain about the decision to transfer work and the impact of that decision, it did not

“diligently pursue bargaining over the transfer decision. In the negotiations sessions that were held, Local 890 did not attempt to bargain about the transfer decision. Discussions were limited to proposals to deal with effects on employees of the pending transfer of the firefighting functions to the District.” *Id.* at 818-19.

We concluded that the union waived its right to bargain about the County's decision to transfer bargaining unit work, but not the impacts of that decision.

Here, as in *City of Klamath Falls*, the Association made a timely demand to bargain about the County's decision to change the Pod 3 control room staff, and the impacts of that decision. The County agreed to bargain. The Association did not, however, "diligently pursue" bargaining about the decision. Instead, it decided to address the effects of the County's plan by participating in a subcommittee to consider bargaining unit members' safety and security concerns. When the subcommittee process failed, the Association participated in one bargaining session. When those negotiations produced no agreement, the Association made no additional attempts to bargain about the County's planned change. By failing to "diligently pursue" bargaining about the County's decision to change the staff in the Pod 3 control room, the Association waived its right to negotiate about this decision.

We now consider the County's bargaining obligation regarding the impacts of the planned change in the Pod 3 control room staff. The Association does not dispute that the parties met for more than 90 days to bargain about the impacts of the change in Pod 3 control room staffing. It contends, however, that the County did not bargain in good faith. Specifically, the Association asserts that the County's actions in placing "impermissible" conditions on negotiations constituted a refusal to bargain under ORS 243.672(1)(e). According to the Association, the County unacceptably restricted the parties' bargaining by repeatedly telling the Association that the County would bargain about changes in the Pod 3 control room staff, but reserved the right to claim it had no duty to negotiate this matter. We disagree.

In *Oregon School Employees Association, Eagle Point Chapter 30 v. Eagle Point School District No. 9*, Case No. C-253-80, 6 PECBR 4618 (1981), the union alleged that a school district refused to bargain in good faith when it notified the union representative that it was not required to bargain about the salary for a position newly added to the bargaining unit. We noted that despite its assertion, the school district willingly bargained with the Association about compensation for the new position. We concluded that the school district's "statement of position" did not constitute a refusal to bargain. *Id.* at 4624.

As we did in *Eagle Point*, we hold here that the County did not refuse to bargain when it stated its legal position that it had no duty to bargain about the transfer of bargaining unit work in the Pod 3 control room. The County demonstrated its willingness to negotiate about the transfer of bargaining unit work when it met with the Association on June 19 and October 10, 2007 and also when it agreed to form a

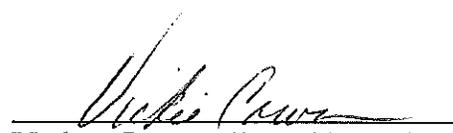
subcommittee to address the impacts of its planned change in the Pod 3 control room staff. The County negotiated in good faith with the Association for more than 90 days from the date on which it announced its plan in January 2007. As a result, the County fulfilled its obligation to bargain about changes in working conditions during the life of the collective bargaining agreement, as required by ORS 243.698(1), before it transferred bargaining unit work to non-bargaining unit employees. We will dismiss the complaint.<sup>16</sup>

ORDER

The complaint is dismissed.

DATED this 31<sup>st</sup> day of December 2009.

  
\_\_\_\_\_  
Paul B. Gamson, Chair

  
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Vickie Cowan, Board Member

  
\_\_\_\_\_  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>16</sup>Given our conclusion that the County completed its bargaining obligation before it implemented the change in the *status quo*, it is unnecessary to consider the County's affirmative defenses. In particular, we do not decide the County's affirmative defense that the language in Article 9, "Assignment of Work," from the parties' collective bargaining agreement gives the County the right to contract or subcontract work.