EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-04

(UNFAIR LABOR PRACTICE)

ENTERPRISE EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	
	)	WITHDRAWAL OF ORDER
	)	AND REISSUANCE OF
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
ENTERPRISE SCHOOL DISTRICT NO. 21,	)	AND ORDER
	)	
Respondent.	)	
	)	

The Board issued this Order on September 30, 2005. An incomplete draft of the Order was issued. Therefore, the Order is withdrawn and re-issued below.[1]

Oral argument was heard by the Board on April 27, 2005, on objections filed by Complainant and Respondent to a Proposed Order issued on February 10, 2005, by Chief Administrative Law Judge (ALJ) Vickie Cowan following a hearing on August 25, 2004, in Salem, Oregon. The hearing closed on September 27, 2004, upon receipt of the parties post-hearing briefs.

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

Lisa Freiley, Oregon School Boards Association, 1201 Court Street N.E., Suite 400, P.O. Box 1068, Salem, Oregon 97308-1068, represented Respondent.

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[1]There are modifications to the Discussion section but no change to the final Order.

On March 12, 2004, the Enterprise Education Association (Association) filed this unfair labor practice complaint alleging that Enterprise School District No. 21 (District) violated ORS 243.672(1)(g) when it discontinued paying employees early retirement benefits. On June 14, 2004, the Association amended its complaint. The parties were formally served on June 30, 2004, and the District filed a timely answer on July 14, 2004.

The issues presented for hearing are:

1. Did the District breach the 1996-1999 and 1999-2003 collective bargaining agreements and violate ORS 243.672(1)(g) by freezing its contributions for prior retirees at the 1999-2003 active employee level instead of increasing them to the 2003-2008 active employee level?

2. Did the District's termination of the retiring employees' stipend in the middle of their final year of employment violate the 1999-2003 labor contract and ORS 243.672(1)(g)?

3. Did the District breach the 1999-2003 labor contract and violate ORS 243.672(1)(g) by basing the retiring employees' stipend on a salary amount other than their 2003-2004 annual salary?

4. Did the District breach the 1999-2003 labor contract and violate ORS 243.672(1)(g) by announcing its intention to refuse to pay insurance benefits as set out in that labor contract?

We hold that the District breached the 1996-1999 and 1999-2003 collective bargaining agreements and hence ORS 243.672(1)(g) by freezing its contributions for prior retirees at the 1999-2003 active employee level instead of increasing them to the 2003-2008 active employee level. We dismiss the remaining portions of the complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT[2]

1. For approximately 30 years, the Association has served as the exclusive representative of a bargaining unit of licensed teaching personnel employed by the District, a public employer.

2. Beginning with the 1989-1992 labor agreement, the Association and the District created an early retirement program. The initial early retirement program provided that an employee who had reached PERS retirement age and had completed ten years of continuous service in the District could qualify to receive two-party insurance benefits to age 65 by giving at least 60 days notice to the District of his/her intent to retire. The pertinent contract language stated:

> "ARTICLE XI: EARLY RETIREMENT
>
> "* * * * *
>
> "B. Benefits:
>
> > "The District shall provide two-part current agreement medical/dental/vision coverage for the employee and employee's spouse until the employee reaches sixty-five (65) years of age."

3. In their 1992-1995 labor agreement, the parties expanded the early retirement benefit to include a post-retirement stipend to be paid for two years beginning from the month of retirement. The stipend amount was calculated at 1 percent of the teacher's annual income paid for 24 months. The contract provided as follows:

> "ARTICLE XI: EARLY RETIREMENT
>
> "A. Eligibility/Benefit
>
> "* * * * *
>
> > "2. The District shall provide two-party current agreement medical/dental/vision coverage for the

[2]The parties submitted a fact stipulation. The following findings of fact are based on that stipulation and the submitted exhibits.

employee and employee's spouse until the employee becomes eligible for Medicare.

"3. Cost not to exceed amount funded by District for other bargaining unit members."

4. In their collective bargaining agreement covering the period 1996-1999, the parties again changed the early retirement benefit. The language was moved to the "compensation" article (Article IX) and renamed the "incentive program." The early retirement incentive program continued to contain two components:

(1) A stipend component, which was changed to a pre-retirement benefit, paid monthly on top of the employee's regular salary in his/her final year of employment. The amount of the stipend was changed to 18 percent paid over 9 months, rather than 24 percent paid over 24 months;

(2) An insurance component, which provided that retirees may receive the same health insurance as that provided to active employees, at a cost to the District no greater than the amount funded for active employees. Entitlement to insurance coverage continued until the retired employee became eligible for Medicare.

The pertinent contract language was as follows:

"ARTICLE IX: COMPENSATION

"* * * * *

"G. Incentive Program

"* * * * *

"1. Negotiated insurance coverage agreement benefits (*i e*, medical, dental, vision) will continue for the unit coverage until the employee becomes eligible for Medicare. Unit costs are not to exceed amount funded for current Enterprise Education Association Contract.

"2. Enterprise School District No. 21 will pay to the employee an additional 18% of the employee's

last year's salary for the employee's retirement based on the following criteria:

"* * * * *

"d. The employee's 18% will be incorporated into the teacher's last year total salary compensation. The 18% will be equally distributed during the last year's monthly payments."

5. The purpose of the early retirement incentive program in the 1996-1999 contract was to encourage teachers to elect to retire as soon as they qualified for retirement under PERS, and to get teachers to indicate interest in early retirement a year in advance of their retirement date.

6. Article IX(G) of the 1996-1999 contract required an employee to confirm in writing to the Superintendent his/her intent to retire on or before June 30 of the year immediately preceding the employee's final year of employment.

7. Under the 1996-1999 contract, the District funded insurance for active employees up to a maximum contribution of $435 per month. While the 1996-1999 labor contract was in effect, the District also contributed $435 per month on behalf of retirees.

8. In their contract covering the period 1999-2003, the Association and the District continued the early retirement incentive program in Article IX "COMPENSATION," section G, which provided in relevant part as follows:

"G. Incentive Program

"* * * * *

"When such eligible employee retires under provisions of PERS prior to age 65 and has completed ten (10) years of continuous service with Enterprise School District No. 21 immediately preceding his/her retirement, all qualified retiring employees are entitled to negotiated insurance coverage (*i.e.*, medical, dental, vision) which will continue until the employee becomes eligible for Medicare. Costs shall not to exceed the amount funded

for the current Enterprise Education Association Contract.

"1. In addition, employees hired prior to July 1, 1999 may receive an early retirement stipend: Enterprise School District No. 21 may pay up to an additional 18% of the employee's final year's salary based on the following criteria:

"a. The employee shall confirm in writing to the Superintendent his/her intent to retire on or before June 30th of the year immediately preceding the final year of employment.

"b. The eligibility for the stipend is available to a teacher during the first full academic year that the teacher reaches minimum retirement eligibility, whether by chronological age or years of PERS membership.

"c. Employee must be eligible for PERS retirement and have had ten (10) years of continuous service with Enterprise School District No. 21.

"d. The retiring eligible employee will receive an additional 2% of final salary for each month of the school year during which he/she is employed. Thus, an employee who completes their final teaching assignment would receive 18% additional compensation."

9. Under Article IX(F) of the 1999-2003 contract, the District funded insurance for active employees up to a maximum contribution of $515 per month.

10. Under Article IX(G) of the 1999-2003 contract, employees who took early retirement received the same health insurance provided to active employees, at a cost no greater than the amount funded for active employees.

11. While the 1999-2003 contract was in effect, the District contributed the $515 per month on behalf of retirees as well as active employees.

12. Carol Marr is a teacher who was employed continuously by the District from 1974, until her retirement in June 2004. At the time of her retirement, Marr was eligible for the contractual incentive program.

13. Dan Moody is a teacher who was employed continuously by the District from 1984, until his retirement in June 2004. During the 2002-2003 school year, Moody requested, and the school board granted, an exception to the initial requirements necessary for qualification for the incentive program. At the time of his retirement, with the school board-granted exception, Moody was eligible for the contractual incentive program.

14. Joe Neveau is a teacher who has been employed continuously by the District since 1974.[3]

15. On or about February 27, 2003, Marr, Moody, and Neveau gave written notice to the District school board that they intended to retire at the end of the school year 2003-2004.

16. Neveau subsequently requested to withdraw his notice of intent to retire and the school board agreed to allow him to return to a position in the District. Marr and Moody will be referred to jointly herein as "retiring teachers."

17. The District accepted the retiring teachers' resignation when they submitted their notice of intent to resign the following year.

18. In memos dated March 4, 2003, District Superintendent Brad Royse acknowledged receiving the retiring teachers' notice of intent to retire. Royse also stated the District's position that the retiring teachers' benefits would be governed by the contract under which they actually retired.

19. The 1999-2003 contract expired on June 30, 2003. At that time the parties were in negotiations for a successor collective bargaining contract.

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[3]Neveau was a member of the Association's negotiating team for the 2003-2008 contract

20. On or about September 8, 2003, the retiring teachers sent a letter to the school board reiterating their intention to retire and asking that the 1999-2003 contract language be followed.

21 From the beginning of negotiations, the District had a proposal on the table to change the incentive program.

22. On or about September 20, 2003, the retiring teachers received their first monthly paycheck for the school year. As part of the status quo during negotiations, their paychecks included the 2 percent monthly early retirement stipend.

23. The stipend payments continued in the retiring teachers' monthly paychecks through January 2004.

24. In early February 2004, the parties ratified a new labor contract which covered the period 2003-2008. Under Article XVI (Terms of Agreement), the contract was effective as of ratification except that salary and insurance increases were retroactive to July 1, 2003.

25. Article IX(F) of the new contract raised the District's insurance contributions for active employees to $625 per month for 2003-2004.

26. Article IX(G) of the new contract decreased the early retirement "incentive program" for employees who retired after June 30, 2003 and prior to July 1, 2004 by eliminating the final-year stipend, freezing the cap on District insurance contributions at $515 per month, and limiting continuing health insurance benefits to four years from retirement. The early retirement incentive program was eliminated for employees who retired after June 30, 2004.

"G. Incentive Program

"* * * * *

> "When such eligible employee retires after June 30, 2003 and prior to July 2, 2004 under provisions of PERS prior to age 65 and has completed ten (10) years of continuous service with Enterprise School District No. 21 immediately preceding his/her retirement for all qualified retiring employees, the District will contribute $515 per month toward the premiums for negotiated insurance

> coverage (*i.e.*, medical, dental, vision) which will continue for four (4) years or until the employee becomes eligible for Medicare.
>
> "The employee shall confirm in writing to the Superintendent his/her intent to retire on or before March 15th of the year immediately preceding the final year of employment."

27. During negotiations for the 2003-2008 labor contract, the District proposed to maintain a maximum contribution of $515 on its contribution toward insurance for retirees who had already retired, but to raise the insurance contribution for active employees.

28. In a counterproposal dated December 15, 2003, the Association rejected the District's proposal. The Association explained it believed prior retirees had vested rights to whatever benefits existed in the contracts under which they retired.

29. On December 23, 2003, the Association's attorney, Monica Smith, sent a letter to the District's attorney, Lisa Freiley, stating the Association's position that the District's proposal to reduce the insurance benefits of prior retirees was either permissive or prohibited, and that the Association refused to bargain over the proposal.

30. Freiley subsequently spoke with Smith about the issue of prior retirees' early retirement benefits. During the conversation, Freiley stated the District's disagreement with the Association's position on the permissive or prohibited nature of prior retirees' early retirement benefits.

31. During later negotiations, the District submitted a revised proposal on early retirement. The Association accepted the District's revised proposal.

32. During negotiations for the 2003-2008 contract, the parties did not have specific discussions as to how the changes to the incentive program under Article IX would affect the retiring teachers. Marr, Moody, and Neveau were the only teachers who gave notice to the District by June 30, 2003 of their intent to retire during the 2003-2004 school year.

33. On or about February 20, 2004, the retiring teachers received their monthly paychecks which did not include the 2 percent stipend.

34. On or about February 20, 2004, Neveau contacted Judith Robb, payroll clerk for the District, about the retiring teachers' stipend payments. Neveau requested that the retiring teachers receive a retroactive increase in their stipends to reflect the increase in their salaries for their final year of employment.

35. On or about February 20, 2004, Superintendent Royse informed Neveau that the District did not intend to continue the stipend or to pay the retroactive increase on the stipend that had already been paid.

36. The District intends to apply the terms of the 2003-2008 contract to the retiring teachers which will reduce the number of years of insurance benefits after retirement compared to the labor contract that was in effect when their retirement notices were accepted.

37. At the beginning of the 2003-2004 school year, 20 retired District employees were receiving early retirement benefits. Thirteen of the 20 retirees pay insurance contributions in excess of the District's $515 contribution. Six of the 20 receive insurance that costs less than the $515 cap and have no current out of pocket cost.[4]

38. In the fall of 2003, the District contributed the same amount toward insurance (up to $515 per month) for active employees and for retirees, and active employees made the same contributions toward premiums as retirees.

39. After the labor contract was ratified in February 2004, the District increased contributions toward insurance for active employees to $625 per month.

40. The District continued to contribute $515 per month toward insurance for retirees. Prior retirees are now paying up to $110 per month more out of pocket for coverage than are active employees who receive the same coverage.

41. On June 1, 2004, the Association, acting through its attorney, sent a letter to the District's attorney, demanding that the insurance contribution for prior retirees be raised to the active employee level.

42. The District has refused to increase its contributions for the prior retirees.

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[4]Although the parties stipulated that there were 19 retirees who retired under either the 1996-1999 labor contract or the 1999-2003 contract, the exhibits indicate there were actually 20 retirees. Two people are listed on the same line.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(g) by freezing the insurance contributions for prior retirees.

3. The District did not violate ORS 243.672(1)(g) when it terminated the retiring teachers' stipend in the middle of their final year of employment.

4. The District did not violate ORS 243.672(1)(g) by failing to pay the retiring teachers' stipend based on their 2003-2004 salary after ratification of the 2003-2008 agreement.

5. The District did not violate ORS 243.672(1)(g) by applying the provisions of the 2003-2008 contract regarding post-retirement insurance to retiring teachers after February 2004.

DISCUSSION

At issue in this case are the early retirement benefits for two separate sets of employees: (1) prior retirees, who retired under the 1996-1999 and 1999-2003 labor agreements, and (2) retiring employees, who gave the District notice of their intent to retire but who had not yet retired when the 2003-2008 labor agreement took effect. The Association asserts that both the prior retirees and the retiring employees' benefits vested under the expired contracts, and the District could not modify or terminate those vested benefits. The District argues that it has complied with the terms of the expired contracts regarding prior retirees, and that benefits for retiring employees have not yet vested. The District also argues that the *McMinnville trilogy*[5] was wrongly decided and should be overruled. We decline to do so.

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[5] *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-78-94, 16 PECBR 107 (1995) (hereafter *McMinnville I*); *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-71-95, 16 PECBR 481 (1996); and *McMinnville Education Association and Mid-Valley Bargaining Council v McMinnville School District #40*, Case No. UP-4-97, 17 PECBR 539 (1998).

Since 1989, the parties' labor contracts have included an early retirement benefit which provided for post-retirement insurance. Prior to 1996, the applicable contract also contained provisions for a post-retirement stipend.

In their 1996-1999 contract, the parties changed the early retirement program to include the same post-retirement insurance benefits for prior retirees as provided for active employees, and also agreed that the District would not contribute more toward premiums for prior retirees than it paid for active employees. The stipend was changed to an 18 percent pre-retirement benefit to be paid over nine months on top of the employee's regular salary during the employee's final year of employment. To receive the stipend, an employee was required to give the District notice of his/her intent to retire by June 30 of the year prior to the final employment year. The language of the 1996-1999 and 1999-2003 labor contracts was essentially identical.

For the duration of the 1996-1999 and 1999-2003 contracts, the District contributed the same amount towards insurance premiums for both active and prior retirees.

In the spring of 2003, the parties began negotiating a successor agreement. As a result of those negotiations, the pre-retirement benefit program was eliminated altogether for those employees retiring after July 1, 2004. However, provision was made for those employees who retired after June 30, 2003 and prior to July 1, 2004, *i.e.*, the retiring teachers. These employees receive the same insurance coverage as active employees for four years, and the District contributes $515 per month towards the monthly premiums.

Prior retirees

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *." The early retirement provisions regarding insurance in the 1996-1999 and 1999-2003 contracts provide that the retiring employees will receive the same insurance benefits as active employees until the employee is eligible for Medicare, and that the costs shall not exceed the amount funded for the "*current Enterprise Education Association Contract*." (Emphasis supplied.)

The Association argues that the language of the labor contracts provides for vested benefits beyond the term of the labor contracts, that the past practice has been to pay the same amount of premium for prior retirees as active employees, and therefore the District is violating the labor contract by paying a premium amount for prior retirees which is less than that paid for active employees.

The District argues that the contractual language does not provide a vested benefit beyond the end of the respective contract. In the alternative, it contends that if the language provides for a vested benefit, the language allows the District to pay an amount less than that paid for current employees.

A labor contract may include provisions that survive the term of the agreement itself. *Executive Department v. FOPPO*, 92 Or App 331, 758 P2d 410 (1988). The language here provides an incentive for teachers to take retirement prior to age 65. In return, the District will provide the same insurance to prior retirees that it provides to active employees until the prior retiree becomes eligible for Medicare. Since meeting Medicare eligibility could take years, the early retirement insurance benefit language was clearly intended by the partes to survive the contract. *McMinnville I*. It is the interpretation of the contractual language, "with a cost not to exceed that provided for active employees" that is the real dispute.

The District argues that this language allows them to contribute towards prior retirees' premiums an amount less than it contributes for active employees. The Association argues that the language in essence puts a cap on prior retiree contributions of no more than that paid for active employees.

When examining contract language, we may look to the past practice of the parties to determine the intent of the parties. In *OSEA, Chapter 84, v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726 (1981), we established a method for determining whether a particular action constitutes a binding past practice. In order for a practice to be binding, the alleged practice must be (1) an appropriate subject for enforcement; (2) clear and consistent, occurring repetitively over a long period of time; and (3) acceptable to both parties. Acceptability may be implied from a long acquiescence in a known course of action.

The practice at issue here meets the *Redmond* standards. Since at least 1996, the District has contributed the same amount towards premiums for prior retirees as it has provided for active employees. The insurance is a benefit and therefore can be enforced, the District has consistently paid the same insurance premium amount for both prior retirees and active employees for at least eight years, and both parties were well aware of this fact and agreed to the practice.

Based on the contractual language and the past practice of the parties, we conclude that the parties' intent regarding the early retirement insurance language requires the District to pay the same amount in premiums for both active employees and prior retirees, unless the premium for prior retirees is actually less than that of active employees. Such is

not the case here. Prior retirees are paying a significant amount out of pocket in order to retain their insurance. We will require the District to pay the difference between the premium amount it paid for prior retirees ($515) and that paid for active employees ($625), retroactive to July 1, 2003.

Retiring teachers

In February 2003, the retiring teachers gave notice to the District that they intended to retire in June 2004. When they inquired as to what benefits they would receive upon retirement, the District informed them that they would receive the retirement benefits under the labor contract in effect at the time of their actual retirement.

The 1999-2003 contract expired at the end of June 30, 2003, and thereafter the parties were in the process of negotiating a successor agreement. Those terms of the expired contract which were mandatory subjects of bargaining were continued as part of the status quo until the parties reached a new contract. In maintaining the status quo, the District began in September 2003 to pay the retiring teachers the monthly pre-retirement stipend as set out in the 1999-2003 labor contract.

In early February 2004, the parties ratified the 2003-2008 collective bargaining agreement. Other than salary and insurance increases, which were retroactive to July 1, 2003, the new agreement became effective as of ratification. The new agreement eliminated the pre-retirement stipend, reduced post-retirement insurance to four years, and capped the District's premium contribution to $515 per month for those employees retiring after June 30, 2003 and prior to July 2, 2004. The new agreement also totally eliminated early retirement benefits for anyone retiring after July 1, 2004. Based on its understanding of the new contract, the District ceased paying the stipend to the retiring teachers effective February 2004.

The Association contends that the retiring teachers were vested under the 1999-2003 contract as opposed to the 2003-2008 contract, which was in effect at the time they actually retired in June 2004. The Association argues that by meeting the eligibility requirements and giving their notice under the 1999-2003 contract, the retiring teachers met the conditions precedent for vesting under the 1999-2003 agreement. We note that the Association's assertion is inconsistent with its position regarding prior retirees. For prior retirees, the Association argues that the early retirement benefits vest under the labor contract in effect at the time of retirement.

The Association cites *Oregon State Police Officers' Assn. v. State of Oregon*, 323 Or 356, 918 P2d 765 (1996); *Harryman v. Roseburg Fire Dist.*, 244 Or 631, 420 P2d 51

(1966); *Taylor v. Mult. Dep. Sher. Ret. Bd.*, 265 Or 445, 510 P2d 339 (1973); and *McHorse v. Portland General Electric*, 268 Or 323, 521 P2d 315 (1974), in support of its arguments. These cases are not helpful to Complainant.[6] In the first place, a pre-retirement stipend is not a pension, but is an addition to an employee's salary.[7] As the Supreme Court noted in the *OSPOA* case, salary can be modified prospectively (323 Or at 374 (1996)). Upon ratification of the 2003-2008 contract, the District was entitled to eliminate the pre-retirement stipend to retiring teachers in accordance with the terms of the contract.

In the second place, Oregon courts have distinguished between statutory "contracts," such as that between PERS and an employee, and private contracts such as that involved here. *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (2005). In *Strunk*, the Court held that an employee's PERS retirement rights do not form part of the employee's employment contract with a public employer. Also in *Strunk*, the Court held that the mere fact that an employee performed services under PERS did not prevent the legislature from modifying future benefits; instead, it was also necessary to look at the terms of the initial contract: whether it was "unambiguously promissory, applicable to work yet to be performed, and containing no reservation of the right to future amendment." (338 bOr at 198). As the Court of Appeals stated in *Taylor, supra*, a contract right can arise before completion of the service necessary for a pension, but its exercise may nevertheless be subject to subsequent completion of service. In other words, you must retire in order to collect retirement benefits.

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[6]Chair Gamson, dissenting in part, relies on *McHorse, supra*, as well. That case is distinguishable because it does not involve rights created entirely pursuant to a series of collective bargaining contracts, but instead involved only a unilateral offer of benefits, which became a contract upon the performance of services by an employee. In any case, *McHorse* had retired on disability by the time the employer changed its mind and decided that he was not disabled. Here, retiring teachers had not completed their employment when they became subject to the 2003-2008 contract.

In addition, Complainant and Chair Gamson seem to assert that *McHorse, supra*, stands for the proposition that an employer may not change benefits prospectively. That conclusion cannot survive the Supreme Court's decision in *Strunk, supra*, and its subsequent decision in *City of Eugene v. PERB*, 339 Or 113 (2005). In the latter case, *Eugene* and other public employers claimed that PERB had wrongfully credited certain amounts to employees' retirement accounts for certain years. The trial court ruled in favor of the public employers. PERB and affected current and former public employees appealed. Thereafter, the public employers and PERB entered into a settlement which required retired former public employees to repay sums to PERB from their retirement earnings, in order to compensate for improper pension accruals, even though the retirees had performed all acts necessary to retire with a sum certain in retirement compensation. Current and former public employees were not parties to the settlement agreement, even though they would fund it. This notwithstanding, the Supreme Court held that the settlement agreement rendered the appeal moot, and dismissed it.

[7]Although this case does not involve a retroactivity dispute, we agree with Chair Gamson that a stipend which is calculated on salary would also be recalculated based on a retroactive salary increase.

Finally, the *Strunk* court made it clear that, as far as impairment of contract is concerned, the standard of scrutiny is higher when – as in that case – one of the parties to the contract is trying to renege on its promise of continued benefits. This reasoning has particular applicability to our case at hand because all of the contracts on the record are the product of collective bargaining.

In the current case, the contract – the unilateral offer, if you like – is a product of collective bargaining between the District and the Association. The prior retirees are entitled to benefits as provided in the 1996-1999 and 1999-2003 contracts because they accepted the contractual offer and completed their employment with the District. There was nothing more they needed to do to be entitled to benefits, and so their benefits could not subsequently be bargained away. We have determined in this case that the benefits promised them under the 1996-1999 and 1999-2003 contracts require the District to pay prior retirees health premiums as set forth in the 2003-2008 contract.

The same is not true of the two retiring teachers. The Association charges the District with breach of contract by applying the new 2003-2008 contract to the two teachers who gave the District a one-year notice of retirement. The terms of the new contract are substantially less favorable to retiring teachers than the 1999-2003 contract. However, the District did not unilaterally reduce benefits payable to the two retiring teachers under the successor agreement; instead, the benefit reductions were agreed to by both the District and the Association.

This is precisely the opposite of the retired teachers' situation. In that instance, the District and the Association disagreed on the meaning of the phrase "with a cost not to exceed that for active employees." Here, by contrast, the two retiring teachers fit specifically under that new contract language by which the parties agreed that the pre-retirement stipend was eliminated for those teachers retiring after June 30, 2003 and prior to July 1, 2004. The new contract language specifically did not grant the two retiring teachers the right to continue receiving pre-retirement benefits set forth in the prior agreement. It follows that the District did not violate the 2003-2008 agreement, which was in effect at the time the retiring teachers actually retired.

The Association has the right and duty to engage in collective bargaining on behalf of employees it represents, and the concomitant ability to agree to eliminate benefits contained in an expired labor agreement, in order to obtain a successor labor contract with the District. We have held that retirement benefits vest for employees who have already retired, but a union may negotiate to eliminate benefits for current employees.

That is what happened here: the retiring teachers had not completed performance of all of their obligations under the 1999-2003 contract until after it expired and the 2003-2008 contract became effective. Once the latter contract became effective, retiring employees were subject to its terms. There is nothing in the language of the 1999-2003 or 2003-2008 contracts which states otherwise.[8]

In subsection (1)(g) allegations, we review the contractual language to determine the intent of the parties. This Board interprets labor contracts in the same manner and using the same rules of construction as do courts. *OSEA v. Rainier School Dist. No. 13*, 311 Or. 188, 194, 808 P2d 83 (1991). When interpreting a contract, we look at the contract as a whole.

Labor contracts generally have a specific term; they become effective as of a certain agreed-upon date and expire on an agreed-upon date. Upon the expiration of the labor contract, the parties are legally obligated to continue the "status quo" regarding mandatory subjects of bargaining until the parties either negotiate a new labor contract, or reach impasse and the employer implements its final offer.

Here, the parties' 1999-2003 contract expired on June 30, 2003. That contract provided for a stipend for those employees choosing early retirement. Effective February 2004, the new 2003-2008 contract eliminated the stipend, limited post-retirement insurance benefits to four years, and capped premium contributions at $515 per month for those employees retiring after June 30, 2003 and prior to July 2, 2004. This language directly applies to the retiring teachers, who retired at the end of June 2004. The 1999-2003 contract also provided in relevant part that benefits commence, "[w]hen such eligible employee retires under provision of PERS prior to age 65 * * *." In other words, to receive benefits under the 1999-2003 labor contract, an eligible employee must actually retire during the term of the 1999-2003 contract. The retiring employees did not retire during the term of that contract, and therefore they did not meet all the conditions precedent for early retirement benefits.

The 1999-2003 contract language regarding the stipend provides that the employee may receive an early retirement stipend based on certain criteria. However, when the new labor contract was ratified in February 2004, the stipend provision was specifically eliminated by the parties. Therefore, as of February 2004, the two retiring teachers no longer

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[8]Chair Gamson also relies on *Olson v. F&D Publishing Co.*, 160 Or. App. 582, 982 P2d 556 (1999) in his dissent from this portion of the majority opinion. *Olson* did not involve retirement benefits at all but rather the right to company stock. Nor did *Olson* deal with rights created by successive collective bargaining agreements.

had a contractual right to receive a stipend. Because they no longer had a contractual right to receive a stipend, they were not entitled to receive a retroactive increase to the stipend they did receive. The 2003-2008 labor contract does not provide for a retroactive increase for the stipend, only salaries and insurance premium contributions.

ORDER

1. The District shall cease and desist from violating the 1996-1999 and 1999-2003 labor contracts as regards prior retirees. The District shall make the prior retirees whole by paying the difference between the amount the District currently pays for active employees ($625) and what it currently pays for prior retirees ($515), retroactive to July 1, 2003.

2. The remaining allegations of the complaint are dismissed.

SIGNED AND ISSUED this 6th day of October, 2005.

*

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

JW Kasameyer

James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson, Concurring in Part and Dissenting in Part:

I agree with the majority that the District violated ORS 243.672(1)(g) when it refused to pay the same amount towards health insurance premiums for retired teachers that it paid for its active teachers.

I part company with the majority regarding the District's treatment of the teachers who announced their intent to retire. The facts indicate that these employees met all of the contractual conditions for receiving a pre-retirement stipend. Under controlling Oregon precedent, their right to the stipend was therefore vested, and the District violated ORS 243.672(1)(g) when it ceased paying the stipend.

The expired contract, which I discuss in more detail below, provides two basic early retirement benefits. First, a qualified retiree receives District contributions towards insurance premiums until Medicare becomes available; and second, a qualified employee who gives notice of intent to retire at least a year in advance receives a pre-retirement stipend each month during the final year of employment.

This dispute arises because the early retirement provisions are implemented over time. During the status quo period, several employees gave notice of their intent to retire, and the District began paying the pre-retirement stipend. The employees did not, however, actually retire until after the parties agreed to a new contract that reduced the District's contribution towards health insurance premiums and eliminated the stipend. We must decide which set of benefits these employees should receive.

The majority properly frames the issue as a question of vesting. If the retiring employees' rights under the old labor agreement vested before the new agreement took effect, then those rights cannot be altered. If, however, the rights were not vested, then the retiring employees get their benefits under the new contract.

In *McHorse v. Portland General Electric*, 268 Or 323, 331, 521 P2d 315 (1974), the Supreme Court discussed when a right vests: "in the situation where the employee has satisfied all conditions precedent to becoming eligible for benefits under a plan, the better reasoned view is that the employee has a vested right to the benefits."[1] Judge (now Justice) Kistler elaborated in *Olson v. F & D Publishing Co.*, 160 Or App 582, 588-589 n. 5, 982 P2d 556 (1999): "The question of when a benefit is earned or vested will vary in each case depending on the terms of the contract and the nature of the promised benefit." I will therefore examine each benefit separately, in light of the particular contract language that

[1] The majority argues that the Supreme Court has somehow disavowed *McHorse*. The Court has never said any such thing, and the principles articulated in McHorse are entirely consistent with later Court decisions. As recently as 1996, the Supreme Court quoted with approval the same passage from McHorse that I quote above. *Oregon State Police Officers' Association v. State*, 323 Or 356, 369, 918 P2d 765 (1996). See also State ex rel *Roberts v. Public Finance Co.*, 294 Or 713, 718, 662 P2d 330 (1983) (citing *McHorse* for the proposition that an "employee's rights only vest when he has satisfied all conditions precedent.").

created the benefit, to determine whether the employees satisfied all conditions precedent before the new contract language went into effect.

PRE-RETIREMENT STIPEND

The majority properly concludes that the stipend is a form of salary. It then cites cases for the proposition that salary can be modified prospectively.[2] That is accurate only to a point. If the salary has already been earned, it is vested, and the payments, even if they are to occur in the future, cannot be reduced or eliminated. *Olson v. F & D Publishing Co.*, 160 Or App at 588 ("Wages for past work in the employment relationship are 'earned' and 'vested.'").

To determine when the stipend was earned, we must look to the contract language that created the stipend:

> "1. In addition, employees hired prior to July 1, 1999 may receive an early retirement stipend: Enterprise School District No. 21 may pay up to an additional 18% of the employee's final year's salary based on the following criteria:
>
> "a. The employee shall confirm in writing to the Superintendent his/her intent to retire on or before June 30th of the year immediately preceding the final year of employment.
>
> "b. The eligibility for the stipend is available to a teacher during the first full academic year that the teacher reaches minimum retirement eligibility, whether by chronological age or years of PERS membership.

[2]If the majority is to be logically consistent in its position, it must award the retiring employees an increase in the stipend they received during the status quo period. The amount of the stipend was calculated as a percentage of their salary. The new contract increased their salary, retroactive to the start of the status quo period. If the employees are, as the majority holds, bound by the reductions in the new agreement, they should also be entitled to the increases, including the salary increase and the impacts of that increase.

"c. Employee must be eligible for PERS retirement and have had ten (10) years of continuous service with Enterprise School District No. 21.

"d. The retiring eligible employee will receive an additional 2% of final salary for each month of the school year during which he/she is employed. Thus, an employee who completes their final teaching assignment would receive 18% additional compensation."

The contract thus lists four conditions an employee must meet to receive the stipend. Notably, actual retirement is not one of those conditions. Indeed, actual retirement would be inconsistent with receipt of the stipend which, under subsection 1.d. of the contract, is paid only during those months when the teacher is employed.[3]

As we will see below, the parties made actual retirement a condition of receiving the insurance benefit. They thus knew how to impose retirement as a condition, but they chose not to do so regarding the stipend. In my view, the majority erred when it inserted into the parties' agreement a requirement that the employee actually retire in order to receive the stipend. ORS 42.230 (when construing an instrument, a court may not insert what the parties omitted).[4]

The District received what it bargained for: an advance commitment to retire from employees who were otherwise qualified for the stipend.[5] The employees did everything required by the contract to "earn" the stipend. The benefit was therefore vested and could not subsequently be taken away.

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[3]The majority says that "[y]ou must retire in order to collect retirement benefits." This is nicely written and perhaps true, but it has no application here. We are not dealing with a retirement benefit. It is a pre-retirement stipend, and the contract that created it does not require an employee to retire in order to be eligible.

[4]The majority ignores the contract language on grounds that the District and the Association subsequently changed it. This, of course, begs the question. If the employees' rights had already vested, then the changes cannot apply to them. That is what it means to have a vested right.

[5]The District does not (and could not credibly) argue that the employees failed to meet the contractual requirements for receiving the stipend. The fact that the District initially paid the stipend until the new contract went into effect indicates its belief that the employees met all of the requirements.

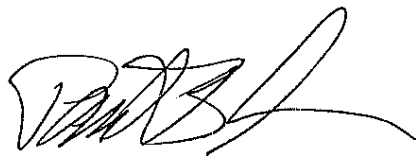
I respectfully dissent from the portion of the majority decision that allows the District to take away the vested stipend benefit which the employees already earned.

MEDICAL INSURANCE

I apply the same principles to the medical insurance benefits. That is, we review the controlling contract language to determine whether the retiring employees met all of the conditions precedent before the benefit changed. The expired contract establishes the status quo in effect when the employees announced their intent to retire. The pertinent contract language states:

> "When such eligible employee retires under provisions of PERS prior to age 65 and has completed ten (10) years of continuous service with Enterprise School District No. 21 immediately preceding his/her retirement, all qualified retiring employees are entitled to negotiated insurance coverage (*i.e.*, medical, dental, vision) which will continue until the employee becomes eligible for Medicare. Costs shall not to exceed the amount funded for the current Enterprise Education Association Contract."

Unlike the stipend language, this provision expressly requires an employee to retire in order to qualify for the specified medical benefits ("[W]hen such eligible employee retires * * *"). The employees here did not retire before the benefit changed. They therefore had not met all of the contractual conditions for receipt of the benefit (*i.e.*, it had not vested). I agree with the majority's conclusion that the District did not violate subsection (1)(g) when it paid the retiring employees the insurance benefits in place when they actually retired.



Paul B. Gamson, Chair