

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-08

(UNFAIR LABOR PRACTICE)

THREE RIVERS EDUCATION)	
ASSOCIATION, SOBC/OEA/NEA,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
THREE RIVERS SCHOOL)	
DISTRICT,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on April 13, 2009, on Complainant's objections to a Recommended Order issued on January 9, 2009, by Administrative Law Judge (ALJ) Wendy L. Greenwald, following a hearing on September 12, 2008, in Salem, Oregon. The record closed on October 23, 2008, upon receipt of the parties' post-hearing briefs.

Elizabeth A. Joffe, Attorney at Law, McKanna Bishop Joffe & Arms, represented Complainant at oral argument. Margaret S. Olney, of Counsel, McKanna Bishop Joffe & Arms, LLP, represented Complainant at hearing.

Nancy J. Hungerford, Attorney at Law, Hungerford Law Firm, represented Respondent.

On April 29, 2008, the Three Rivers Education Association, SOBC/OEA/NEA (Association) filed an unfair labor practice complaint against the Three Rivers School District (District). The Association alleges that the District implemented a trimester schedule without first bargaining with the Association over its decision to implement the

schedule and the mandatory impacts of that decision in violation of ORS 243.672(1)(e). The Association further alleges that the District violated ORS 243.672(f) by failing to provide written notification of its decision prior to implementing the trimester schedule. The District filed a timely answer.

The issues presented for hearing are:

1. Did the District refuse to bargain the decision to implement a trimester schedule and the impacts of that decision in violation of ORS 243.672(1)(e)?

2. Did the District violate ORS 243.672(1)(f) by failing to send the Association notice of anticipated changes that impose a duty to bargain under ORS 243.698 when it decided to implement or implemented a trimester system?

RULINGS

1. The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

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

Background

2. Except for Grants Pass, which has its own school district, the District encompasses all of Josephine County. The District consists of nine elementary, three middle, and four high schools: North Valley (NVHS), Illinois Valley (IVHS), Hidden Valley (HVHS), and Newbridge High School.

3. The District's enrollment has dropped from a high of 6,625 students in 1997 to approximately 5,200 students in the 2007-2008 school year. The declining enrollment affects the District's budget, which is based primarily on state funding of approximately \$6,000 per student per year. Prior to 2007, the District cut staff and made other changes at its elementary and middle schools because these schools were affected first by the District's declining enrollment.

Prior High School Schedules

4. IVHS schedules in prior years provided:

Years	Instructional Blocks or Periods/Day	Minutes Per Period	Contact Minutes/Day	Preparation Minutes/Day
Before 1992-1993	7	unknown	unknown	unknown
1992-1994	5	one 95-minute; two 90-minute; and two 45-minute	270-275 ¹	90-95
1994-1996	5	two 90-minute; one 83-minute; and two 45-minute	308-312 ²	42-45
1996-1999	5	three 90-minute and two 45-minute	270	90
1999-2002	5	two 90-minute and three 55-minute	255-290	55-90
2002-2005	7	52-55 minutes, except Friday	312-318, except Friday	52-55, except Friday
2005-2007	6	five 53-minute and one 94-minute; except Friday	306, except Friday	53, except Friday

¹Although it is not reflected on the schedule, some teachers had 320 minutes of contact time because part of their preparation time was used as a student focus time, which counted as student contact time.

²Superintendent Dan Huber-Kantola testified that when he taught in 1994-1995, he had 360 minutes of student contact time because he had a study hall which he used for preparation. However, other teachers did not count study hall duty as preparation time. The 1994-95 school year schedule shows that all teachers had 45 minutes preparation time and 45 minutes of other duties, such as study hall, scheduled each day.

5. HVHS schedules in prior years provided:

Years	Instructional Blocks or Periods/Day	Minutes/Period	Contact Minutes/Day	Preparation Minutes/Day
Before 1992-1993	7	unknown	unknown	unknown
1992-1994	5	unknown	unknown	unknown
1994-1997	5	three 90-minute and two 45-minute	270	90
1997-2001	7	48 minutes	288	48
2001-2007	7 plus Team on Monday	Monday: seven 48-minute and one 24-minute; Tuesday - Thursday: 52-53 minutes; Friday: 43-44 minutes	312, except Friday	Monday: 48 minutes; Tuesday - Thursday: 52-53 minutes; Friday: 43-44 minutes

6. NVHS schedules in prior years provided:

Years	Instructional Blocks or Periods/Day	Minutes/Period	Contact Minutes/Day	Preparation Minutes/Day
Before 1992-1993	7	unknown	unknown	unknown
1992-1994	5	unknown	unknown	unknown
1994-1997	5	three 90-minute blocks and two 45-minute periods	270-315	45 (a few teachers had 90 minutes)
1997-2001	7	48 minutes	288	48
2001-2007	7	52-53 minutes, except Friday	312-318, except Friday	52-53 minutes, except Friday

7. Newbridge High School is a detention facility run by the Oregon Youth Authority (OYA) for incarcerated youth and operates on an extended year schedule.³

8. To address a budget shortfall in 2000, the District and the Association agreed to cut 10 days from the school year rather than lay off teachers. As a result of the cut in days, the Oregon Department of Education (ODE) questioned whether seniors had enough "seat time" to meet graduation requirements. In response to this concern, the Association and the District agreed to increase period length to 52 - 53 minutes at HVHS and NVHS for the 2001-2002 school year, and at IVHS in 2002-2003. At the same time, the District adopted a late start time for students on Fridays, in which classes started approximately one hour later than the regular start time. High school administrators planned and assigned staff activities during the time before students arrived on Fridays. Among the activities in which staff participated were staff meetings, staff training, curriculum work, long-range planning, and other staff group work.

Relevant Contract Language

9. The Association and the District are parties to a collective bargaining agreement effective July 1, 2007 to June 30, 2010.⁴ The agreement includes the following relevant provisions:

(a) Article 3, "DISTRICT FUNCTIONS," provides that the District

"(A) retains and reserves unto itself and its designated administrative officers, without limitation, all powers, rights, authority, duties and responsibilities expressly or implied [*sic*] conferred upon or invested in it by the laws and the Constitution of the State of Oregon, and of the United States, and including, but not limited to, the right at all times:

"* * * * *

"6. To establish and revise the school calendar and to determine the following: class schedules; the hours of instruction and of employment; the assignments of work loads; and the duties, responsibilities and assignments of teachers and any other employees with respect thereto."

³Based on its correctional nature, the educational calendar at Newbridge differs significantly from the other high schools and is irrelevant to our consideration in this case.

⁴The parties completed negotiations for the 2007-2010 successor agreement in September 2007.

(b) Article 11 "TEACHING CONDITIONS," provides that high school teachers are to be assigned one period per day as a preparation period.⁵

(c) Article 15 "WORK SCHEDULE," provides that "[t]he normal school day for a teacher shall be eight (8) hours time on school premises and/or approved school business."

Change from Semester Schedule to Trimester Schedule

10. During the relevant time period, Jerry Fritts was the District's superintendent-clerk until February 2008; Dan Huber-Kantola was the District's special education director until he became the director of fiscal services and then replaced Fritts as superintendent-clerk; and Debbie Breckner was the District's human resources director and spokesperson in labor relations matters.

11. The District Leadership Team (Team) collects and reviews data regarding the District's budget and curriculum requirements. The Team reports this information to the District school board and makes recommendations on how best to serve the needs of the students and the District. The 2007-2008 Team consisted of the superintendent, human resources director, fiscal services director, and the director of curriculum and business services. In the spring and summer of 2007, the Team collected and reviewed data regarding the District's declining enrollment, budget issues, student state assessment scores, class failure rates, and graduation rates. The Team looked at options for addressing the budget shortfall at the high schools, including eliminating teaching positions. The Team was also concerned about high class failure rates. A significant number of high school students obtained a Graduate Equivalent Development (GED) certificate, rather than graduating from a District high school.

12. In September 2007, ODE notified the District that it was increasing student graduation requirements from 22 credits to 24 credits, with additional requirements in math, science, and vocational preparation. ODE required the District to implement this credit change for freshman by the fall of 2008. As a result, the Team was concerned that students who failed only one class would not graduate.

13. During September and early October 2007, the Team and other high school administrators explored options on how best to serve the needs of the students despite a \$1.2 million budget shortfall. They discussed scheduling options such as a six-

⁵In conjunction with this unfair labor practice proceeding, the Association filed a grievance alleging that the District violated the preparation time provisions of Article 11.

period schedule and a trimester schedule. The group was familiar with a six-period schedule because Grants Pass School District used such a schedule. The Team had never before considered a trimester schedule. In early October, the high school principals and Huber-Kantola visited several Oregon school districts that utilized trimester schedules. These trimester schedules consisted of five daily periods, including a preparation period. After the site visits, the administrators concluded that the trimester schedule offered possibilities that the Team should explore with the school board.

14. By memorandum dated October 18, 2007, the Team told the school board that it recommend the District adopt a common preparation period at the high schools using a trimester schedule. The Team projected that the District could reduce between 8 to 13 high school teaching positions through use of a common preparation period, with a savings of approximately \$570,000 to \$890,000. The Team explained that a common preparation schedule allowed a school to teach the same number of students with fewer staff because the teachers taught every period instead of one seventh of them being away from students on a prep period. The Team looked at implementing the common preparation period in the current schedule, but did not see it as a good option because it would reduce the number of elective classes a student could take. With the new state requirement of 24 credits to graduate, there would be no “wobble room” if a student failed a class — something that often occurred with freshman and sophomore students. The Team felt the trimester schedule would best meet the needs of high school students, but was willing to look at other options that also met those needs.

15. The Team developed a PowerPoint presentation, which included information regarding the District’s enrollment decline, financial situation, assessment scores, failure and graduation rates, the Team’s recommendation for a common preparation period, an overview of the four schedules the Team had considered, and the Team’s recommendation for the trimester schedule. On October 29, 2007, Human Resources Director Breckner reviewed the PowerPoint presentation with Association President Chuck Robertson. The Team presented the PowerPoint at a joint meeting of District site councils on October 30 and at a school board work session on November 5.

16. At a November 19, 2007 school board meeting, the Team recommended to the board that the District go to a common preparation period and trimester schedule at IVHS, HVHS, and NVHS. The Team also presented the board with a schedule of the following actions needed to change to a trimester schedule:

- In November 2007, the Team planned to secure the school board’s approval of its recommended structure. The District would then notify the Association of the schedule change and impact on student contact time, begin work on the

2008-2009 course offerings, and determine whether the entire district would operate on a trimester grading schedule. Regarding the notice to the Association, the Timeline specified:

“The licensed Association has 90 days to bargain any impact of a change in working conditions; in this case adding additional student/teacher contact time. They may or may not respond with an official request to bargain the impact, however under the collective bargaining laws, they do have the right to ask for 90 day bargaining.”

- In December 2007, the District planned to continue work on course offerings, work with site councils to establish parent meeting schedules and other methods of input, and draft master schedules with no specific staff names attached.

- In January 2008, the District planned to finalize the 2008-2009 course offerings, develop a transition plan for students on the semester credit system, and determine graduation requirements.

- In February 2008, the District planned to meet with parents to explain the transition plan and course offerings, make final staff assignments, establish daily start/end times, approve the District 2008-2009 school calendar, and establish classified staff work schedules.

- In March 2008, the District planned to approve the draft of the course catalog, print and deliver catalogs to the schools, notify staff of layoffs, and notify parents of the daily start/end times.

- In April 2008, the District planned to program the master schedule into the computer scheduling system, and develop individual school bell schedules.

17. The November 19, 2007 school board meeting minutes, reflect that the following discussion occurred regarding the Teams’s recommendation for a trimester schedule:

“[Board] Member Meier made a motion to give tentative or conditional approval on this proposal for the staff to move forward but wanted monthly reports on the progress. Director Breckner stated that a lot of work needed to be done in the next two months. Member Meier moved to amend her motion to give tentative or conditional approval on this proposal for the staff to move forward with final approval in February. This

would give the committee time to look at it but she asked that the board get regular updates in the meantime. This would let them move forward on this time line.

“* * * * *

“Chairperson Strahan asked if Member Meier’s motion had a second. Hearing none the motion died. Member Weaver moved to adopt the process recommended by the Leadership Team. Member Stephens seconded. Member Meier stated she would vote for it but she did not like the way they were doing it. She wanted regular reports from the team. The motion carried 3-2 with Chairperson Strahan and Member Litak opposing.”

18. On November 20, 2007, HVHS Principal Dennis Misner notified staff that as a result of the board’s decision, staff would use the remaining Friday mornings before students arrived to work on tasks required for the change to trimesters. On or about November 26, 2007, the District surveyed HVHS teachers and students about their preferences for new electives under the trimester schedule.

19. On November 26, 2007, District Human Resource Director Breckner, hand-delivered a letter to Association President Chuck Robertson and Oregon Education Association (OEA) UniServe Representative Jane Bilodeau which notified the Association that the District had

“approved a change in the high school structure for the 2008 - 2009 school year. The change moves the structure of the high schools from a 7-period semester schedule to a 5-period trimester schedule. * * * it will require substantial changes in the existing school day, including moving to a common prep period.

- “■ Currently, the average Three Rivers School District high school teacher teaches 312 minutes a day, 6 periods a day. The average period length is 52 minutes, as is the prep period.
- “■ Under the new structure, a high school teacher will teach approximately 340 minutes, 5 periods a day. While the daily schedule is yet to be determined, the period length is likely to be 68 minutes.

- “■ Under the new structure, teacher prep periods will increase as required by the collective bargaining agreement to be equal in length to the class periods.
- “■ Teachers will have one less class per trimester and will see fewer students on a daily basis; although it is possible once course lengths have been determined that teachers will be teaching more classes over the course of the year than they currently do.”

20. During the late start time on November 30, 2007, administrators asked HVHS teachers to identify electives they might teach under the trimester schedule.

21. On December 12, 2007, OEA Representative Bilodeau sent Superintendent Fritts and Breckner the following e-mail:

“Your letter made no reference to bargaining. However we consider aspects of the District’s restructuring to be mandatory for bargaining purposes. Please consider this letter to be the Association’s demand to bargain over all mandatory aspects of both the decision and impacts of the decision to restructure your high school program. We are especially concerned about the impact on workload that will result from the need to restructure existing curricula to fit a trimester format and from the increase in the number of classes that will be offered in a year.

“I note that under the Public Employee Collective Bargaining Act [PECBA], bargaining over mid-contract changes that are mandatory in nature is intended to occur when changes are ‘anticipated,’ rather than after a decision has been made to implement the change. Although we share your interest in working collaboratively, we also questions [*sic*] whether legitimate bargaining can occur now that the board has already made its decision.”

22. On Friday December 14, 2007, during the time prior to student arrival, administrators asked HVHS teachers to complete a writing assignment regarding what curriculum changes they planned for the new trimester schedule and the advantages of a trimester schedule.

23. By letter dated December 17, 2007, HR Director Breckner notified Bilodeau that the District was prepared to meet with the Association on January 7, 8, 9, 15, and 16. She requested that the Association come to the meeting prepared to identify the mandatory impacts of the decision to change to a trimester system and present its proposals. The letter also stated:

“The decision to change a student schedule is a permissive subject, and therefore the Board had no obligation to bargain prior to making that decision. Now that the decision has been made and the Association has been notified of that decision, we have received your request for bargaining. The District will bargain over any mandatory aspects of the impact of the decision on members of your bargaining unit. By law, ORS 243.698, this bargaining occurs under an expedited 90-day process that began with your receipt of my letter on Nov. 28.”

24. At the January 24, 2008 school board meeting, Breckner provided the board with an updated schedule for converting to a trimester system.⁶ The updated schedule showed that some of the action items had been completed, some were currently in progress, but that many actions were on hold “due to Rightsizing Committee, Bargaining, or Information to be returned from a school.”⁷ Breckner also told the board that

“[o]n Friday evening, we learned there might be another trimester option to consider. We have not flushed out this option in terms of what it could look like. When we offered the trimester to the board, we said at that time, if anyone had other options that would meet the goals to increase our high school credit requirements, reduce the staff at the high schools, and maintain a comprehensive high school for kids, we were open to investigating it as an option.”

25. After Breckner’s presentation, a number of parents addressed the board regarding their concerns about the trimester schedule. The minutes of the meeting reflect that the following discussion then occurred:

⁶All subsequent events occurred in 2008.

⁷During the fall of 2007, a Rightsizing Committee, consisting of District staff and parents, was created to recommend to the school board ways of addressing the budget deficit. However, the committee was not involved in determining the trimester schedule.

“Member Meier stated that the board all were there because they were also parents and she was very torn over this issue. She agreed that we would be better off waiting but also was aware of the district’s financial situation. We have to balance the budget next year. We have the challenge of what do we do. How do we meet this financial challenge.

“* * * * *

“Chairperson Strahan stated he felt strongly this was decision [*sic*] was made little [*sic*] input from the parents other than the site council members. Member Meier encouraged the parents at the meeting to bring their new information forward to the board or the ‘Rightsizing’ committee to give us more options. She stated she shared their concerns both as a board member and as a mother of high school students but she had voted for it because she did not see another option available.

“Member Litak stated he had voted against the trimester option but the status quo is not an option. No option was going to make all the people happy. Chairperson Strahan stated he had also voted against this option but had not heard of any other option.

“* * * * *

“Superintendent Fritts stated that the leadership team worked long and hard as they contemplated this issue. The common prep was an option considered in saving \$1.2 million. We need options for this district not only to just survive but also to flourish. The team has been considering this for seven months and has done the best they know how to provide a quality education for our students and still cut \$1.2 million from programs. They did not want to consider cutting ten school days as this impacts all of our students.”

26. On January 17, HVHS Assistant Principal Kelly Christensen notified teachers that all three high schools would be meeting on Friday morning to convert the current class offerings from semester credits to trimester credits.

27. During the time before students arrived on Friday, February 1, HVHS administrators asked teachers to identify their personal and department professional development needs related to the implementation of the trimester schedule.

28. At the Association's request, the parties met for their first bargaining session on February 6. At the beginning of the meeting, Breckner and Huber-Kantola reviewed the Rightsizing Committee's recommendations, which addressed strategies to increase revenues and student enrollment and decrease expenses. They also reviewed District concerns over student achievement and budget information, which showed that regardless of what schedule was used, the District would need to reduce five high school teachers to balance the 2008-2009 budget. After some discussion, Association President Robertson stated that the Association was not refusing to consider a trimester schedule but thought that it was not appropriate now. He proposed that the group create a team ("design team") to design a system to be implemented in the 2009-2010 school year.

The bargaining teams discussed concerns about both implementing and delaying implementation of the trimester schedule. Breckner was worried that such a delay would impact class sizes because the board would need to reduce additional staff. When Bilodeau suggested that a "design team" be developed to consider the future implementation of a trimester schedule and look at other models, Breckner responded:

"The financial problems of the district are why we are wrestling with the issues of where we are at. Can we delay a change? Yes. However, I want to make sure all of the staff are in this and it serves 1600 kids.

"We can certainly meet again as to what this Design Plan committee looks like. What kind of communication needs to be put in place? My fear is that we don't have this same discussion a year from now. We need to keep this district surviving with a balanced enrollment."

At the District's request, the Association agreed to meet with its members to confirm that they were willing to work with larger classes in order to delay implementing the trimester schedule.

29. On Thursday, February 7, Breckner notified the Association that it could meet with the teachers during the late start time the next day. She asked the Association to inform her of the meeting results by noon the next day so she could communicate those results to the board before the Monday night board meeting. Breckner stated she wanted Association members to understand that the District would eliminate at least five high school teaching positions regardless of the schedule and add additional math classes for juniors due to increased graduation requirements. Breckner emphasized that keeping the current schedule probably would result in cuts in electives. Since maintaining acceptable classes was part of their goal, it may be necessary to go to a common preparation period to maintain acceptable classes. Breckner further explained:

“5. In additional conversations following our meeting, there may be flexibility to allow us to study this issue during a longer period of time (remember that I have to communicate with the Board), however while the district appreciates the offer to just absorb additional students into existing classes, there also will have to be reasonable class sizes in order for kids to be served.

“ * * * * *

“8. We agreed that if this were to change directions, a Design Team is necessary and that a meeting was scheduled two weeks from now to begin outlining what needs to happen. In reality, that team may also have to deal with other issues in terms of how to meet everyone’s needs, (kids, staff, parents) while we work on addressing issues.”

30. At the February 8 meeting, Association members told the bargaining team that they understood the class size ramifications and felt it was educationally sound to postpone a change in structure to allow adequate planning. On Monday afternoon, Association President Robertson attempted to call Breckner to tell her the results of the Association meeting. However, Breckner did not receive this information before the school board meeting.

31. At the February 11 school board meeting, Huber-Kantola updated the board on the trimester conversion process. He provided scheduling updates and recommendations from the high schools on graduation requirements, and said administrators were currently considering the best calendar makeup and possible electives.

At the meeting, a number of parents again expressed concerns about the trimester schedule. Board Member Meier responded that the District was in a budget crisis and there were no easy answers; while “she was not for or against the trimesters. It may be the very best educational plan that we have but she was in agreement that it would be preferable if we could take more time to implement it.” Board member Weaver stated that the District was in a budget crisis and he felt this was the way to go because the common preparation period resulted in savings. When one parent asked what it would take for the board to reconsider its decision, Chairperson Strahan stated that “it would take a motion from one of the board members.” Member Meier then stated that she would only change her vote if she was presented with a budget upon which a majority of the patrons, staff, and administrators agreed.

32. By letter dated February 13, Breckner and Huber-Kantola told OEA Representative Bilodeau and Association president Robertson that:

“* * * we left last week’s meeting with the Association being willing to look at your proposal that we hold off a year on the conversion to a trimester schedule. Unfortunately, the District did not receive any information from your work on Friday to share with the Board in advance of last night’s meeting, although the board members we spoke to were supportive of the time the district gave on Friday for the meetings at individual high schools.

“* * * * *

“Currently, all three high school principals are putting together draft schedules in three different formats (existing 7-period schedule, 6 periods on a common prep day, and rough drafts of a trimester schedule) with staffing reductions identified so that the district can evaluate the impact of your proposal on students. While we are continuing to look at the information, at this time, it does not appear that the impact of staying on the existing schedule will be acceptable.

“Dan’s and my recommendation is that since we have another meeting already established for next Thursday, February 21, 2008 at 5:00, we reconvene the bargaining team to discuss the impact of moving forward with a change to the existing high school structure.”

33. In response, Robertson emailed Breckner that the Association believed the District made procedural errors when it proposed the trimester change and that it short changed teachers and students in the time needed to prepare for the change. Robertson reaffirmed that the Association proposed that the District postpone any change until the 2009-2010 school year and create a design team of Association and District members to review and make recommendations for any future changes. Robertson also explained that he had called Breckner on Monday to relay the teacher survey results.

34. On February 14, Breckner emailed Robertson that she did not think the Association’s proposal would change, but had hoped to receive the survey results to present to the Board. She also told Robertson that the District was still analyzing the Association’s proposal.

35. The parties met on February 21 for their second bargaining session. Breckner provided a handout listing the District’s goals, data to support those goals,

impacts that prevented the current structure from meeting those goals, current preparation for the trimester schedule, and District concerns about a lack of stakeholder support for the changes. Items which prevented the District from meeting its goals were doubling of class sizes, elimination of classes, and reducing or eliminating teachers' ability to provide adequate instruction.

The Association proposed retaining the current schedule and working with larger class sizes. Breckner then gave the Association a handout analyzing different schedules and staffing reductions, including the seven-period schedule, a six-period common preparation schedule, and a trimester schedule. She also provided a handout on current class size averages. Breckner told the Association that the school board was unwilling to accept increased class sizes and proposed that the parties continue moving forward with the trimester schedule. Breckner provided information on the trimester conversion, potential bell schedules, and examples of different work days. The Association requested that the District present its proposal in writing and agree to extend the bargaining process to allow the Association an opportunity to respond. The District presented a written proposal, which provided:

- “+ Move forward with the 3x5 trimester conversion
- “+ Provide up to 16 hours of student free planning time in addition to remaining Friday late start staff development times
- “+ Increase overall preparation time for teachers by 48 hours, or 32% a year
- “+ Periods would be 70 minutes in length in order to meet the state mandated 65 hour requirement for earning a ½ credit
- “+ Every effort will be made with the school calendar to account for snow days during the second trimester.
- “+ While draft work days and daily schedules have been distributed, the district is willing to consider alternative proposals on these items.
- “+ The district is willing to allow flexible work schedules in terms of whether individual prep periods are in the morning or in the afternoon.

- “+ The district is committed to protecting preparation time by including a common meeting time to accommodate IEP’s [sic] and other meetings.
- “+ In developing a staff development model for next year, a priority will be placed on assisting teachers with meeting the state requirement for Professional Development Units.”

36. On February 25, Breckner notified Robertson and Bilodeau that the District was willing to extend bargaining until March 10, but stated that “[t]here is a need to have a final decision prior to the March 17 Board meeting as there are a number of items requiring Board action in connection with the proposed schedule change, including approving any agreement reached with the Association or the decision to take unilateral action on the items impacting teachers.”

37. At the parties’ February 27 labor management meeting, Bilodeau asked why the District could not absorb the cuts through attrition if it went with a six-period common preparation day. Breckner responded by email on February 28 that the six-period common preparation schedule detrimentally impacted the elective program. To illustrate her point, Breckner provided Bilodeau with sample student schedules under the seven-period schedule, the six-period common preparation schedule, and the trimester schedule.

38. In an executive session on February 28, Breckner and Huber-Kantola presented the school board with three potential schedules for each high school. The schedules showed the classes to be offered and the corresponding student class sizes under a seven-period semester schedule, a six-period semester schedule, and a five-period trimester schedule. After considering each of the schedules, the board became concerned about the impact of staff cuts on class sizes and on elective, specialty, and advanced placement classes under the seven-period and six-period schedules. As a result, the board directed Breckner and Huber-Kantola to continue working on the trimester schedule.

39. At the third bargaining session on March 6, Bilodeau presented the Association’s proposal for a six-period day with a common preparation period for the 2008-2009 school year, including changes in contract language addressing voluntary transfers, non-teaching duties, paid days for packing classrooms during construction and moving, and attendance at student programs. The Association proposed that teachers be assigned a common preparation period at the beginning or end of the day and that the parties create a new High School Design Committee.

40. After reviewing the Association's proposal, the District rejected the proposal because it would eliminate elective classes and vocational programs and leave no room for students to fail a class. The District proposed to move to the trimester schedule, which allowed teachers to select their common preparation period at the beginning or end of the day and to create a Trimester Implementation Committee, whose members were appointed by the Association and the District.

41. After a caucus, the Association presented a bargaining "SUPPOSAL" under which it would agree to a trimester if the District would:

- "● Limit number of teacher preps to 3 per trimester, but no more than 5 per year.
- "● A minimum of 3 paid days for training, with said training to be determined by teachers themselves. For example, include [*sic*] time to meet with other teachers currently in a trimester structure.
- "● A minimum of 10 paid days prior to August 22, 2008 for planning and preparation without students or other duties.
- "● Excluding probationary teachers, evaluations must be suspended for 2 years.
- "● All 4 personal leave days will be paid by the District and can be utilized at any time of the year with no restrictions.
- "● Information on teachers' schedules and assignments will be provided no later than April 1, 2008.
- "● A Trimester Implementation Resolution Committee will be established consisting [*sic*] of two representatives from each high school, to be chosen by the Association, and three representatives chosen by the District in order to resolve any issues arising from the trimester structure.
- "● Due to the approximate 10% increased student contact time, high school teachers will receive a \$2500 stipend.
- "● Everything in our previous proposal stands, with the exception of accepting the Districts language on the common prep."⁸

42. After considering the "supposal," Breckner told the Association that some of the proposed options might be possible, but that they could not agree to the 10 paid planning days or the \$2,500 stipend due to the cost. The District projected that the 10 planning days would cost \$187,000 and the stipend would cost \$250,000. The parties

⁸The minutes of the meeting reflect that in reference to the "SUPPOSAL" Bilodeau stated that "[t]his is not a paper proposal. It does not legally exist. We just want to know, what if?"

then discussed the number of days teachers needed to prepare for the trimester schedule. Breckner told the Association that there was room for discussion, but the proposal was something they would have expected at the beginning of the process and the parties were still very far apart. She proposed to meet with legal counsel, the school board, and the superintendent and get back to the Association. The parties tentatively set another bargaining session for March 13.

43. At an executive session on or about March 10, Breckner reviewed the Association's supposal with the school board. The board rejected the supposal based on cost.

44. On March 12, Breckner emailed Bilodeau and Robertson and attached a letter notifying them that the District intended "to move forward with the implementation of the trimester schedule." Breckner also addressed possible time that teachers could use to plan for the new schedule, including parent conference and clerical days. The attached letter of notification provided:

"The purpose of this letter is to notify you that a recommendation will be presented to the Board on March 17, 2008 to begin the process of implementing the trimester schedule by approving new graduation requirements mandated by ODE and required by the trimester schedule. The 2008-2009 school year calendar will be adopted at the April Board meeting, and will be provided, as required by contract, at least ten days prior to the April 21, 2008 Board meeting. Every effort will be made to account for snow days during the second trimester as the calendar is being developed.

"As you know, we met on Thursday, March 6, 2008, to continue bargaining the impact of the trimester schedule for student instruction on the workload of teachers. W [*sic*] were unable to come to agreement, and still remain very far apart in coming to resolution on this issue. We have exhausted the 90-day expedited bargaining period and the extended bargaining period agreed to by the District. Many of the proposals we have made involve assistance for teacher planning to take place in the spring of 2007; other proposals we made incorporated your responses to concerns. Therefore, the result of the recommendation to the Board will be to implement the following:

1. Beginning in the fall of 2008, high school teachers will teach five periods of approximately 70 minutes each

and the grading periods will move from quarters/semesters to trimesters.

“2. Provide up to 16 hours of student free planning time in addition to eight of the remaining ten late start Fridays, beginning Friday, March 14th. * * *

“3. High school teachers will be offered the choice of a common preparation time within their 8 hour work day, either at the beginning of the day, at the end of the day, or in a split combination with periods of preparation at both ends of the day in equal segments, * * * .

“* * * * *

“5. A Trimester Implementation Committee will be formed consisting of two representatives from each high school, representing each high school department * * * chosen by the Association, and an equal number of administrative representatives chosen by the district to review and research various issues that arise from the implementation of the trimester schedule.”

45. The parties met one more time on March 13. Bilodeau did not view the meeting as a bargaining session since the District had already decided to implement the trimester schedule. She asked Breckner about the purpose of the meeting. Breckner replied that the purpose was to talk about the planning time. Breckner identified over seven days of paid time that the District would make available for teacher planning. Bilodeau said the Association team was there to bargain, but could not do so because the District intended to implement the trimester schedule, therefore, there was no purpose for the meeting. Bilodeau also stated that the Association believed the District was legally wrong and engaging in bad management and it did not agree with the implementation.

46. On March 14, Breckner notified Bilodeau and Robertson that she regretted that the parties were unable to reach an agreement regarding the schedule change, that the District intended to adopt the trimester schedule with five class periods of 70 minutes, and that the District also intended to implement the teacher planning time ideas presented at the March 13 meeting.

47. On March 17, the board voted to approve the new graduation requirements for the next year.

48. On April 21, the board adopted the trimester school calendar for 2008-2009.

49. The Trimester Implementation Committee met in May and June. As a result, break times were modified and the periods reduced to 68 minutes. On August 25, the District issued the official 2008-2009 high school teacher daily schedule. Teachers now have 340 minutes of student contact time and 68 minutes of preparation time which equates to 28 more minutes of student contact time per day than in the 2007-2008 school year. Under the new schedule, teachers are responsible for three more classes per year than they were under the semester schedule. Teachers began the new trimester schedule on September 2, the first day of the 2008-09 school year.

CONCLUSIONS OF LAW

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

2. The District did not violate ORS 243.672(1)(e) by refusing to bargain its decision to implement a trimester schedule and the impacts of that decision.

3. The District did not fail to notify the Association of anticipated changes that impose a duty to bargain under ORS 243.698 in violation of ORS 243.672(1)(f).

DISCUSSION

This case concerns the District's implementation of a new trimester schedule which significantly increased student contact time and teacher workload. The Association alleges that the District violated ORS 243.672(1)(e) when it refused to bargain over its decision to implement the new schedule and the impacts of that decision. In most circumstances, an employer must bargain with a labor organization before unilaterally changing conditions of employment that are mandatory for negotiations. *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422 (2008).

When, as here, a labor organization alleges that an employer made a unilateral change in the *status quo*, we apply the analysis as set out in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323,

360 (2008). First, we must identify the *status quo* and then determine whether the employer changed it. If the employer changed the *status quo*, we then determine whether the change concerns a mandatory subject for bargaining. If so, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. An employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision. While the employer need not bargain a decision to change a permissive subject, it is obligated to bargain about the impacts of its decision before it implements the change. *Greater Albany Education Association v. Greater Albany School District No. 8J*, Case No. C-6-80, 5 PECBR 4158 (1980); *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986). If the employer did not complete its bargaining obligation, we then consider any affirmative defenses raised by the employer (e.g., waiver, emergency, or failure to exhaust contract remedies).⁹

We typically determine the *status quo* by reference to an expired collective bargaining agreement, work rule policy, or past practice. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd.*, 187 Or App 92, 67 P3d 951 (2003). Here, the parties' contract is silent regarding student contact time and class load. The Association asserts that the high schools had a past practice which limited student contact time to no more than 318 minutes per week, and class load to an average of 12 classes per year. To constitute a legitimate past practice, the practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005).

The record supports the Association's contention. For the past six years, student contact time in District high schools has consistently averaged between 312 - 318 minutes with an average class load of 12 classes per year. This practice was well known and accepted by both parties. Thus, the *status quo* was that each teacher had no more than 318 student contact minutes per week and a teaching load of 12 classes per year.

⁹In its objections to the Recommended Order, the Association alleged that the District violated its subsection (1)(e) good faith bargaining duty by waiting until after the parties ratified their successor collective bargaining agreement before announcing the proposed change to a trimester schedule. The Association argues that the proposed schedule change should have been included in successor negotiations. The Association did not plead this theory in its complaint, and did not address it at the hearing, other than to acknowledge in opening statements that it had failed to properly plead it. Nor did the Association request to amend its complaint or brief the issue in its post-hearing brief. Accordingly, we do not consider this issue in our decision.

The District changed the *status quo* when it adopted a trimester schedule that increased student contact time by approximately 28 minutes per day and teacher class load by three classes per year.

We turn to the next step in our analysis to determine whether the decision to change to a trimester schedule concerned a mandatory subject for bargaining. The Association agrees that the educational calendar is a permissive subject for bargaining. ORS 243.650(7)(e) provides that for school district bargaining, employment relations do not include “the school or educational calendar.” However, student contact time is a mandatory bargaining subject. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Fred Larson*, Case No. C-184-78, 5 PECBR 2889 (1980), *rem’d on other grounds*, 52 Or App 881, 630 P2d 1304, *order on remand*, 6 PECBR 4953 (1981). In addition, “the amount of such work required in a defined period of time concerns workload, a mandatory subject.” *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 137 (2002), *AWOP*, 192 Or App 672, 89 P3d 688 (2004). Therefore, the Association has identified subjects which raise a duty to bargain. According to the Association, the District decided first to increase teacher workload and student contact time and decided second to alter the school calendar. The Association asserts that the District’s decision to change mandatory subjects is inextricably linked to a decision to change permissive subjects and must be bargained. We disagree.

The District faced a number of problems – a significant budget shortfall, higher than usual student failure rates, and increased graduation requirements. The District sought to construct a schedule to address these problems. After studying and evaluating a number of different schedules, the District chose to switch to a trimester schedule. The District’s decision to adopt this schedule concerned a permissive subject for bargaining – the educational calendar. At the same time it changed the educational calendar, the District also changed two mandatory subjects for bargaining – it increased teachers’ workload and the amount of time they had contact with students. We find no inextricable link, however, between these two changes. To the contrary, the District could have altered the student calendar in such a way that would not affect teacher working conditions. For example, the District could have created a trimester system and a seven-period day in which students spend additional periods in study halls supervised by non-licensed staff. At most, the District’s actions regarding the educational calendar, teacher workload, and student contact time were taken simultaneously.

We have consistently held that a change in student contact time is an impact of a school district’s schedule or calendar change, even when these changes are made simultaneously. In *Greater Albany Education Association v. Greater Albany School District No. 8J*, Case No. C-6-80, 5 PECBR 4158 (1980), a school district altered work assignments

for elementary teachers by increasing student contact time and decreasing unassigned (preparation) time. We concluded that assignment of employees was a permissive subject for bargaining, but the District's change in this permissive subject had a "direct impact on conditions of employment. The issues of pupil contact hours and preparation time are mandatory subjects of bargaining. The District, therefore, had the duty to bargain over the impact of its proposed schedule change * * * before implementing the change." *Greater Albany School District*, 4165 - 4166 (footnotes omitted).¹⁰

We reached a similar conclusion in *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986). There, the District decided to increase the number of student contact hours for students in grades 4 to 6 by increasing the length of the school day. The union demanded to bargain over the decision to increase student contact time and the impact of the decision. The parties bargained but were unable to reach agreement by the start of the school year. The District implemented the new schedule. We held that the District had the right to make "the educational policy decision" to change student schedules without bargaining. However, the District was "required by the PECBA to bargain in good faith, prior to implementation of the decision, over the effects of that decision on conditions of employment." *Id.* at 9191 (footnote omitted).

In subsequent cases, we continued to analyze a change in student contact as an impact of a decision to change student schedules, even when these changes occurred at the same time. In *Salem Education Association v. Salem-Keizer School District 24J*, Case No. UP-132-93, 15 PECBR 302 (1994), we held that the school district violated subsection (1)(e) when it refused to bargain before implementing a new classroom schedule that increased teachers' student contact time. In *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94, 16 PECBR 231, 236, *supplemental order*, 16 PECBR 295 (1995), we concluded that a school district violated its good faith bargaining duty when it refused to bargain and implemented changes in student bell schedules, substantially changing student contact time at two elementary schools.

Consistent with these cases, we hold that the District was not required to bargain about its decision to change the school calendar before it decided to do so. It was, however, obligated to bargain about the mandatory impacts of that decision before it implemented the new trimester system. We now must determine whether the District bargained to completion over the impacts. When an employer is obligated to bargain over the mandatory impacts of a change, the parties must either reach an agreement or

¹⁰As a result of the implementation of the schedule change, teachers experienced a 50 minute per day increase in student contact time.

complete the PECBA dispute resolution process before implementing the change. *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5655, *recons*, 7 PECBR 5664 (1983). Since the District changed to a trimester schedule during the term of the parties' collective bargaining agreement, ORS 243.698 controls the applicable dispute resolution process. Under ORS 243.698, once the employer has provided notice of anticipated changes and the union has demanded to bargain those changes, the employer must negotiate with the union in good faith for 90 days from the date of the employer's notice.

The District notified the Association of its intent to change to a trimester schedule almost nine months prior to the date on which the schedule would take effect. While the District took certain actions during the bargaining period to prepare for the future implementation of the trimester schedule, these actions involved minor explorations of implementation issues. The District took no significant steps in implementing the new schedule. At the time the Association demanded bargaining, most implementation items were put on hold until bargaining was completed. The District also affirmatively pursued bargaining with the Association. It invested time and resources in evaluating the Association's proposal and "supposal." The evidence is clear that the District itself was somewhat divided regarding the decision to go to a trimester schedule and was interested in an alternative, if one could be found, that met the District's service goals. The District even agreed to the Association's request to extend the bargaining process beyond the required 90 days. While the parties did not reach agreement, the District bargained to completion under ORS 243.698 before it implemented the trimester system.

In concluding that the bargaining implications of a decision to change the *status quo* must be considered separately from the impacts of that decision, we are mindful of the need to interpret the definition of "employment relations" in ORS 243.650(e) in a manner that best effectuates the legislature's intent. *See State v. Gaines*, 346 Or 160, 206 P3d 1092 (2009), citing *PGE v. Bureau of Labor and Industries* 317 Or 606, 610-611, 859 P2d 1143 (1993) (the goal of statutory interpretation is to determine the intent of the legislature; the process begins with an analysis of the text and context of the statutory language). By specifying that the school or educational calendar is a permissive bargaining topic, the legislature clearly intended that an employer not be obligated to negotiate about this subject. Were we to conclude that the District must negotiate its decision to adopt the trimester system, this statutory definition would have no meaning. Accordingly, we will dismiss this portion of the complaint.

ORS 243.672(1)(f) allegation

ORS 243.672(1)(f) provides that it is an unfair labor practice for an employer to “[R]efuse or fail to comply with any provision of ORS 243.650 to 243.782.” The Association alleges that the District did not comply with its obligation under ORS 243.698(2) to “notify the exclusive representative in writing of anticipated changes that impose a duty to bargain.” For the reasons discussed above, the District met its obligation to provide notice under this statute. We will dismiss this portion of the complaint.

ORDER

The complaint is dismissed.

DATED this 29th day of March, 2010.

*Paul B. Gamson, Chair


Vickie Cowan, Board Member


Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson, dissenting

The District school board voted to require its teachers to spend an additional 28 minutes per day in the classroom.¹¹ After it made the decision, it then began negotiations

¹¹The amount of extra classroom time is significant. It adds nearly 2½ hours per week, or an additional eight-hour workday every 3.2 weeks. The school board vote did not include any extra pay or benefits to compensate the teachers for the added workload.

with the teachers about the increased workload. The majority finds no violation. I respectfully disagree. In my view, the law requires the District to bargain *before* it decides to increase the teachers' workload.

The core statutory issue here is whether the District bargained "in good faith." ORS 243.672(1)(e). The statute does not define good faith. Instead, the legislature provides general policy guidelines. This Board's task is to apply the good-faith standard in a way that best furthers the policies of the PECBA. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228-230, 621 P2d 547 (1980); *Assoc. Of Oregon Corrections Employees v. DOC*, 213 Or App 648, 657, 164 P3d 291 (2007).

One express legislative policy underlying the PECBA is to "encourag[e] practices fundamental to the peaceful adjustment of disputes" over working conditions. ORS 243.656(3). In my view, requiring a party to bargain *before* it makes a final decision is a practice far more likely to lead to a mutual resolution of disputes. If one party has already decided, it reduces the potential for trade-offs and compromises that would make agreement more likely. Similarly, legislative policy requires parties "to enter into collective negotiations with willingness to resolve * * * disputes relating to employment relations." ORS 243.656(5). Again, entering bargaining with the decision already made does not demonstrate the type of open mind and willingness to bargain required by the statute.

For these reasons, this Board generally requires employers to bargain *before* they decide to change working conditions. *Federation of Oregon Parole and Probation Officers v. Corrections Division, Field Services Section, Robert J. Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5654, *ruling on reconsideration*, 7 PECBR 5664 (1983). I conclude that the District acted in bad faith when it decided to increase the teachers' workload without first bargaining.

The majority rejects this straight-forward analysis and conclusion. Instead, it applies (in my view, inappropriately) one of the few exceptions to the rule that bargaining must occur before the decision. As presented by the majority, this case concerns "impact bargaining."

Impact bargaining is a term of art in labor law. Terms of art can be useful. They serve as shorthand expressions for long or complex ideas. They can save time and ink. So, for example, we can simply say "unilateral change" rather than repeating "an employer's unbargained change in employee working conditions that concerns mandatory subjects for bargaining and that is not permitted by the parties' collective

bargaining agreement.”¹² But terms of art are useful only if the parties have a shared understanding of what the terms mean. If the same term means different things to the parties, misunderstandings and disputes are inevitable. That is what I believe happened here.

The term “impact bargaining” (sometimes also called “effects bargaining”) is commonly used in labor law, but neither the parties nor the majority define it. My understanding of impact bargaining is different from the majority’s. In my view, the impact bargaining exception does not apply here because the District’s decision to adopt a trimester schedule did not require it to increase the teachers’ workload.

The general concept of impact bargaining is not new. This Board recognized it as early as 1976. *International Association of Firefighters, Local 1308 v. City of The Dalles*, Case No. C-25-76, 2 PECBR 759, 769 (1976). We explained the concept more fully in *Federation of Parole and Probation Officers v. Corrections Division*, C-57-82, 7 PECBR 5649, 5654, *ruling on reconsideration*, 7 PECBR 5664 (1983). It involves a change in working conditions where “the subject matter of the decision is permissive for bargaining, but [mandatory subjects] are affected as a result of the change.” In such circumstances, an employer need not bargain about the decision, but it must bargain “over the impact of its decision before the change may lawfully be implemented.” *Id.* In contrast, if the decision concerns a mandatory subject, the employer must bargain over the decision. *Id.* As I see it, the dispositive but unanswered question here is how to distinguish a decision from an impact of a decision. As applied here, the question is whether the increased workload is a decision, or instead whether it is merely an impact of the permissive decision to adopt a trimester schedule.

One might reasonably ask why it matters whether the increased workload is considered a decision or the impact of a decision because, in either event, the District must bargain over it. The difference is the timing of the bargaining. If the increase in student contact time is merely an impact, the employer can make the decision and only needs to bargain before it can *implement* the change; but if it is a decision, the employer needs to bargain “before it can lawfully even make the decision or take any action on the matter.” *Federation of Parole and Probation Officers v. Corrections Division*, 7 PECBR at 5654. In other words, if it is an impact, the District can decide to increase student contact time before it bargains. If it is a decision, the District must wait until after it bargains to make the final decision.

¹²Even this statement of a basic labor law principle contains terms of art within it. A mandatory subject is one the parties are required to bargain over if either party insists on it. Labor law is riddled with terms of art.

This is not a mere technicality. Whether the employer makes its decision before or after bargaining makes a huge practical difference. If an employer has already formally decided on its course of action, it becomes significantly more difficult to engage in the type of give-and-take in bargaining that might lead to a mutual agreement. See *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 707, 711 (1996) (Order on Reconsideration) (“If one party comes to the table * * * and essentially says ‘no contract except on my terms,’ that leaves the other party with precious little room to bargain.”). As discussed above, it undermines the purposes and policies of the PECBA for a party to enter negotiations with its decision already made. For these reasons, I believe that whenever possible, we should require an employer to bargain before it decides to make a change in a mandatory subject. Impact bargaining, which permits bargaining after the decision is made, should be narrowly limited to those situations where it is unavoidable, *i.e.*, where a permissive decision *necessarily* requires a change in employee working conditions. The cases discussed below provide examples of such circumstances. The type of circumstances that permit impact bargaining do not exist here.

The genesis of the concept of impact bargaining under the PECBA supports the conclusion that it applies only to *necessary* impacts of a permissive decision. As noted earlier, we first recognized and applied the concept in *International Association of Firefighters, Local 1308 v. City of The Dalles*. There, the city adopted a program designed to reorganize and eliminate the existing police and fire departments. This Board recognized that the city had a right to eliminate the departments, but it held that the city was obligated to bargain the impacts of the elimination. 2 PECBR at 769. Eliminating a department necessarily impacts the wages, hours, and working conditions of employees in those departments, and the decision cannot be separated from those impacts.

In adopting the concept of impact bargaining in *International Association of Firefighters, Local 1308*, we relied on private sector precedent, citing *NLRB v. Royal Plating and Polishing Co.*, 350 F2d 191 (3d Cir 1965).¹³ In *Royal Plating*, an employer closed one of its plants because it was losing money. The court held that the decision to close was permissive and the company was not obligated to bargain over it. It further held, however, that the employer was obligated to bargain over the rights of employees whose

¹³In *Elvin v. OPEU*, 313 Or 165, 175 n 7, 832 P2d 36 (1992), the Oregon Supreme Court noted the structural and language similarities between the PECBA and the National Labor Relations Act (NLRA), 29 USC §§ 151-168 (1971). Because of the similarity, we look to cases decided under the NLRA for guidance in interpreting the PECBA, especially cases decided before 1973, the year the PECBA was enacted. 313 Or at 177-178.

working conditions were altered by the decision. Again, an employer cannot close a plant without impacting the working conditions of the employees who worked there. Closing a plant *necessarily* impacts employee working conditions. The decision to close the plant and the impacts of the decision on employees cannot be separated.

In *First Nat'l Maint. Corp. v. NLRB*, 452 US 666 (1981), the US Supreme Court faced a similar issue. The employer there decided to close part of its business for economic reasons. The Court concluded that the employer was not obligated to bargain over that decision. The Court nevertheless recognized that "the effect of the decision may be *necessarily* to terminate employment." *Id.* at 677 (emphasis added). The Court then stated, "[t]here is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work * * *." *Id.* at 677 n 15. The Court thus required impact bargaining over the *necessary* effects of the permissive decision.

We adopted the *First National Maintenance* standards in *Oregon State Employees Association v. Department of Human Resources, Adult and Family Services Division, Keith Putman, Administrator*, Case No. C-194-80, 6 PECBR 4658, 4666 (1981). We applied those standards in *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, *order on reconsideration* 20 PECBR 388 (2003). In *Vale*, the city decided to close its police department. We concluded that this was analogous to the partial closure in *First National Maintenance*, so the employer was not obligated to bargain over that decision. We further held, however, that the employer violated its duty to bargain the impacts of the decision to close. We observed that "the closure had significantly changed bargaining unit members' wages, hours, and working conditions, because they all lost their jobs." 20 PECBR at 357. So once more, the mandatory impacts (*i.e.*, job loss) *necessarily* resulted from the permissive decision to close the police department.

Our most recent decision concerning impact bargaining is *Portland Fire Fighters' Association, Local 43 v. City of Portland*, Case No. UP-14-07, 23 PECBR 43 (2009), *appeal pending*. There, the city implemented a light duty program designed to get employees on disability leave back to work in jobs they could perform. We concluded that the program itself concerned assignment of duties, a permissive subject for bargaining. We further concluded, however, that the program had bargainable impacts on various mandatory subjects such as salary, workload, promotional opportunities, and job security. *Id.* at 72. As in the other cases, the impacts cannot be separated from the decision. Assigning employees on disability leave to newly-created positions necessarily raises such issues as how much they will be paid and how much work they need to perform to earn the pay.

It is thus my view, based on the purposes and policies of the PECBA and the case law interpreting it, that the impact bargaining exception applies only when a permissive decision cannot be separated from its impacts on mandatory subjects. There is no such inseparable link here. As explained more fully below, the District's permissive decision

to implement a trimester schedule did not require it to increase student contact time.¹⁴ That is, it could have adopted a trimester schedule without increasing student contact time. The increased student contact time is instead the result of a separate decision.

The majority apparently agrees with me on this point. It expressly finds no “inextricable link” between implementing a trimester system and increasing student contact time for teachers. As the majority correctly observes, the District could have implemented a trimester system without increasing student contact time by, for example, assigning students to additional class periods in a study hall supervised by non-licensed staff. It chose not to. I would add another possibility. The District could have hired more teachers to cover the additional class time, thereby implementing the trimester schedule without increasing student contact time. Again, it chose not to. The District thus had several ways to adopt the trimester schedule without changing teachers’ working conditions. In my view, the District was required to bargain before it rejected those options and instead chose to increase the teachers’ workload.

Given that my colleagues determined that the increase in student contact time was due to a separate decision by the school board, and was not a necessary result of a trimester schedule, I cannot discern how they could then conclude that the increase was not a decision at all, but merely an impact. I know of no sense, semantic or otherwise, in which a decision is not a decision.¹⁵

The record is clear that the District did not bargain until *after* it voted to increase student contact time. At the November 19, 2007 school board meeting, a motion to

¹⁴Two additional terms of art are crucial to understanding this dispute. The “student instructional day” is the amount of time *students* must spend in class. *Gresham Tchrs. v. Gresham Gr. Sch.*, 52 Or App 881, 888, 630 P2d 1304 (1981). It is permissive. *Id.* “Student contact time” is the amount of time a *teacher* is required to spend with students during the instructional day. *Id.* Student contact time is mandatory for bargaining. *Id.* In other words, the District need not bargain over the amount of time students are in class (*i.e.*, the trimester schedule), but it must bargain over the amount of time any individual teacher must spend with the students during the day (*i.e.*, student contact time).

¹⁵“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Lewis Carroll, *Through the Looking Glass* ch. 6 (1872).

make the decision tentative or conditional died for lack of a second. (Finding of Fact 18.) Shortly thereafter, the District notified the Association that the school board “approved a change” that included a 28 minute-per-day increase in student contact time. (Finding of Fact 20.) Only a motion by a school board member would permit the school board to reconsider its decision. (Finding of Fact 32.) The parties did not begin bargaining until February 6, 2008, long after the school board made the decision. (Finding of Fact 29.)

Because the increase in student contact time involved a separate decision, the District was obligated to bargain *before* it made the decision. *Federation of Parole and Probation Officers v. Corrections Division*, 7 PECBR at 5654. *See also Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 126 (2002), *AWOP 192 Or App 672* (2004) (“a cause of action against an employer for a unilateral change will arise when an employer *decides* to make the change unilaterally.” (Emphasis in original.)) I would hold that the District’s failure to bargain before it decided to increase student contact time violates the duty to bargain in good faith under ORS 243.672(1)(e).

The majority cites four cases where we discussed student contact time as an impact of a permissive decision. The majority’s reliance on these cases is flawed for two reasons. First, a subject is not inherently either a decision or an impact. It depends entirely on the context. In some circumstances, a student contact time increase may be a decision; in others it may be an impact. None of the cited cases concerned facts like these, so the characterization of student contact time as an impact in those cases is not controlling here. The majority offers no independent analysis here of why these particular facts make student contact time a mere impact rather than a separate decision.

Second, our characterization of student contact time as an impact in those cases was mere *dictum*; that is, it was not essential to the decision and therefore is not controlling authority.¹⁶ In each of the cited cases, the employer refused to bargain at all.¹⁷ It was thus unnecessary for us to determine whether the employers should have

¹⁶Dictum is an abbreviation for “*obiter dictum*,” which in Latin means “something said in passing.” Black’s Law Dictionary 1100 (7th ed 1999). Dictum is not controlling authority and lacks precedential effect. *See Safeway Stores v. State Bd. Of Agriculture*, 198 Or 43, 81, 255 P2d 564 (1953) (dictum is “not within the doctrine of stare decisis.”).

¹⁷In *Greater Albany Education Association v. Greater Albany School District*, Case No. C-6-80, 5 PECBR 4158 (1980); *Salem Education Association v. Salem-Keizer School District*, Case No.

(...continued)

(...continued)

UP-132-93, 15 PECBR 302 (1994); and *Cascade Bargaining Council v. Crook County School District*,

engaged in decision bargaining (bargaining *before* they decided) or impact bargaining (bargaining *after* they decided). The employers refused to engage in any type of bargaining. This is the first time the question of decision versus impact has been squarely presented. We should analyze the issue rather than rely on cases that do not directly decide it.

The District decided to increase teachers' workload without first bargaining to completion. In my view, the District's conduct is repugnant to the purposes and policies of the PECBA.¹⁸ I would find the District guilty of violating its duty to bargain in good faith, as required by ORS 243.672(1)(e), and I would order an appropriate remedy. *East County Bargaining v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9196-9198 (1986) (discussing appropriate remedy for an unlawful increase in student contact time). I respectfully dissent from my colleagues' conclusion to the contrary.



Paul B. Gamson

Case No. UP-83-94, 16 PECBR 231, *supplemental order*, 16 PECBR 295 (1995), each of the employers refused to bargain at all before changing student contact time. In *East County Bargaining v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184 (1986), the employer bargained for a brief time but implemented the increased student contact time before completing the bargaining process. Implementing a change before bargaining is complete is the equivalent of refusing to bargain at all. *NLRB v. Katz*, 369 US 736, 743 (1962); *Federation of Parole and Probation Officers v. Corrections Division*, 7 PECBR at 5655.

¹⁸Above, I discuss at length the policy considerations which led me to conclude that bargaining must occur before the decision is made. To the limited extent the majority considers the policies of the PECBA, it relies solely on a legislative intent to make the educational calendar a permissive subject for bargaining. It states: "Were we to conclude that the District must negotiate its decision to adopt the trimester system, this statutory definition would have no meaning. Accordingly, we will dismiss this portion of the complaint."

Of course, my colleagues are correct that we can't require bargaining over a permissive subject. That is a tautology. But I am baffled by the majority's conclusion that this requires dismissal of the complaint. The legislative decision to make the school calendar permissive for bargaining is not inconsistent with the policy that requires bargaining over a mandatory subject before a decision is made to change it. On the facts here, the policies can coexist. The District could implement a trimester schedule without increasing the teachers' workload. It should bargain before it decides to increase the workload.