

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-21-11

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES)	
ASSOCIATION,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
BAKER SCHOOL DISTRICT 5J,)	AND ORDER
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued on December 14, 2011 by Administrative Law Judge (ALJ) Wendy L. Greenwald, following a hearing on August 26, 2011, in Salem, Oregon. The record closed on October 11, 2011, following receipt of the parties' post-hearing briefs.

Julie Falender, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Dan Van Thiel, Attorney at Law, Baker City, Oregon, represented Respondent.

On April 20, 2011, the Oregon School Employees Association (OSEA) filed this unfair labor practice complaint against Baker School District 5J (District). The complaint, as amended on June 28, 2011, alleges that the District misled OSEA into cancelling its organizing efforts regarding the District's proposal to prorate insurance benefit contributions for part-time employees in violation of ORS 243.672(1)(a), (b), and (e); and implemented its final offer contrary to the requirements of ORS 243.712 (2)(b), (c), and (d) in violation of ORS 243.672(1)(e).

The District filed a timely answer to the complaint.

The issues are:

1) On or about February 28, 2011, did District school board members mislead OSEA into cancelling its organizing efforts by communicating that the District intended to drop its proposal to prorate the District's insurance contribution? If so, did this conduct constitute bad-faith bargaining in violation of ORS 243.672(1)(e)?

2) Did District school board members communicate to OSEA representatives at the February 28, 2011 meeting that it intended to drop its insurance proposal? If so, did these communications interfere with, restrain, or coerce employees in or because of their rights guaranteed under ORS 243.662, in violation of ORS 243.672(1)(a)?

3) Did the District school board members communicate to OSEA representatives at the February 28, 2011 meeting that it intended to drop its insurance proposal? If so, did these communications dominate or interfere with the administration of an employee organization in violation of ORS 243.672(1)(b)?

4) On June 24, 2011, did the District implement its final offer contrary to the requirements of ORS 243.712(2)(b), (c), and (d), in violation of ORS 243.672(1)(e) by: a) labeling its final offer as a "Last Offer;" b) submitting descriptions of its proposals rather than the proposals themselves; c) including its proposal to prorate insurance benefits on October 1, 2011, even though its "Last Offer" was for a contract which expired on July 1, 2011; d) including an inadequate cost summary; e) failing to include the dollar value of the District's health insurance contribution; or f) including a proposal under which bus driver hours were to be determined, which is too vague to implement and, as a result, makes it impossible to implement a definite level a bus driver would be prorated for insurance benefits?

5) If the District violated ORS 243.672(1)(a), (b), or (e), what is the appropriate remedy?

RULINGS

1. At the hearing, the District sought to introduce an audio recording of the February 15, 2011 school board meeting as Exhibit R-1. The parties agreed that the District would have a transcript made and submit it with the audio recording. On September 19, 2011, this Board received the transcript of the school board meeting. In addition, on November 7, 2011, the District submitted the original audio recording of the February 15 meeting after the ALJ notified the parties that the audio recording

submitted at the hearing was incomplete. The transcript and original audio recording of the February 15 school board meeting are admitted into the record as Exhibit R-1.¹

2. At the same time the District submitted the transcript, it sought to introduce a document entitled "NOTES & Thoughts." The District asserted that because the "NOTES & Thoughts" were used by the superintendent and chief financial officer during the February 15 school board meeting, they are a necessary part of an accurate and complete transcript. OSEA objected to the receipt of this document.

The record reflects that the parties' agreement to allow the submission of evidence after the close of the hearing was limited to a transcript of the audio recording of the February 15, 2010 meeting. The document entitled "NOTES & Thoughts" was not included with the audio recording as part of the original Exhibit R-1 and is not part of the transcript of that recording. Therefore, the District is seeking to reopen the record to submit additional evidence after the close of the hearing.

Normally, "a post-hearing motion to supplement the record will not be granted unless the evidence is material to the issues and was unavailable or there was some other good and substantial reason the evidence was not presented at hearing." *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 558, *recons*, 17 PECBR 609, 610 (1998). The document entitled "NOTES & Thoughts," which we have marked as Exhibit R-2, is material to this matter. However, Exhibit R-2 was available at the time of the hearing and the District presented no reason why it could not have been produced at that time. Therefore, we find no reason to vary from our normal practice. Exhibit R-2 will not be received into the record.

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

FINDINGS OF FACT

1. OSEA is the exclusive bargaining representative of certain classified employees at the District, a public employer.

2. OSEA and the District were parties to a collective bargaining agreement which expired on June 30, 2009, but was extended through June 30, 2010. Under Article 13 of that agreement, the District provided all eligible bargaining unit employees, defined as those employees working four or more hours per day, with an identified maximum dollar contribution for payment of medical, dental, vision, and life insurance

¹Unfortunately, numerous portions of the audio recording are inaudible, which is reflected in the transcript. In addition, the transcript identifies most speakers as either "Unidentified Man" or "Unidentified Woman."

premiums. During the 2008-09 contract term, the maximum District contribution was \$922.00 per month. At some point prior to May 2011, the maximum District contribution was increased to \$936.17 per month.

3. During the events relevant to this complaint, OSEA and the District were in negotiations over the terms of a new collective bargaining agreement. During those negotiations, the District proposed to prorate its maximum insurance contribution for bargaining unit employees who worked less than seven and one-half hours per day based on the number of hours worked. The parties had discussed the issue of proration for the last several years. In response, OSEA proposed to maintain the insurance language in the 2008-09 contract for current employees, but to prorate District insurance contributions for new employees.

4. At some point during the parties' negotiations, OSEA bargaining unit members became aware that the District was considering going to a four-day work week to address its budget deficit.

5. The District's proration proposal primarily affected bus drivers and kitchen workers, many of whom were long-term employees. OSEA local officers and other classified employees were concerned about the impact the District's proration proposal would have on these employees. They were also concerned that the impact would be greater if the District decided to implement a four-day work week, because this would further reduce bargaining unit employees' hours. OSEA officers calculated that some employees' entire paychecks might be required to cover the cost of insurance, and other employees might actually have to pay an amount in addition to their salary for insurance coverage. As a result of their concerns, the OSEA local officers requested assistance from OSEA's state office.

6. In late October 2010, the OSEA state office sent its attorney, Michael Tedesco, to assist the OSEA local officers and Field Representative Mary Kay Brant. After discussing the proration issue with local officers and bargaining unit members, Tedesco met with the District's attorney, Dan Van Thiel, and District Chief Financial Officer (CFO) Doug Dalton. They discussed the status of the parties' negotiations, which at the time was limited to an extension of the collective bargaining agreement through June 30, 2011. Tedesco presented OSEA's position that it could not agree to the District's proration proposal and no resolution was reached.

7. In approximately November 2010, the OSEA state office assigned Organizer Jedd Rivera to work with Representative Brant to develop an organizing campaign around the District's proration proposal. The goal of the campaign was to educate bargaining unit employees and the community on the impact proration would have on bargaining unit employees. As part of the organizing campaign, employees wrote

letters to the editor for the local newspaper; wore black armbands on Tuesdays as a sign of mourning for lost benefits; wore no-proration buttons; circulated a no-proration petition among bargaining unit members and the community; attended and spoke at school board meetings; and held membership organization meetings.

8. In late November, the District requested that ERB assign a mediator in the parties' bargaining dispute. On December 23, 2010, ERB notified the parties that their first mediation session was scheduled for February 18, 2011.

9. On February 3, 2011, OSEA local officers notified bargaining unit members that they would be speaking about the proration issue at the District's February 15 school board meeting and asked that they attend and show their support.

10. The District was facing a significant budget deficit. Since June 2010, Superintendent Walt Wegener and CFO Dalton had met with a community task force, other community members, and District staff regarding proposed budget cuts. During these meetings, Wegener and Dalton used Excel spread sheets, which included proration in some form as one of the proposed budget cuts. As a result of these meetings, the community task force and a group of District administrators each developed a list of prioritized budget cuts. Wegener, Dalton, and Executive Secretary Norma Nemec then worked from the community task force and administrator lists to develop a third list of prioritized budget cuts, referred to as the executive cabinet list.

11. A District school board meeting was held on February 15, 2011.² District representatives at the meeting included Board Chair Damien Yervasi; Board Members Lynne Burroughs, Ginger Savage, Andrew Bryan, and Rusty Munn; Superintendent Wegener; CFO Dalton; and Executive Secretary Nemec. Approximately ten OSEA officers and members attended the meeting, including President Cindy Johansen, Vice President Ruth Woodworth, Treasurer Janet Baker, Ma'Lena Wirth, and Karen Emmons. OSEA Representative Brant was also present. The OSEA attendees wore their no-proration buttons.

12. During the meeting's initial public comment period, OSEA Vice President Woodworth presented to the school board copies of petitions signed by community members in support of no proration for OSEA members. Next, OSEA Treasurer Baker encouraged the board to consider the reasons Redmond School District, which had been on a four-day work week, had decided to return to a five-day work week. President Johansen then spoke about the impact that the District's proration proposal would have on classified employees' wages and how the implementation of a four-day work week

²All subsequent events occurred in 2011 unless otherwise specified.

would further reduce their hours and raise the cost of their insurance. Johansen walked the board through the specific impact on an employee in a Cook I position and asked the board to consider other ways of balancing the budget that affected employees equally, such as unpaid holidays or fewer personal days. After Johansen's presentation, Woodworth provided the board with ideas for budget cuts that classified employees had presented to OSEA.

13. After a number of other matters were addressed at the meeting, Superintendent Wegener and CFO Dalton made a power point presentation about the District's funding levels and reviewed the three prioritized lists of budget cuts. The purpose of Wegener's and Dalton's presentation was to provide the school board with sufficient information to allow it to adopt one of the lists as its proposed budget cuts. The presentation covered a variety of topics, including the possibility of a local option tax to generate more revenue, going to a four-day work week, eliminating the insurance opt-out payment, approximately \$900,000 in proposed staff reductions, and various salary reductions. While reviewing the proposed budget cuts, Wegener mentioned a number of times that certain cuts were subject to negotiations with the District's unions.

14. During his presentation, Wegener explained that the projected \$1 million in savings associated with a four-day work week was based on a decrease in employee salary costs from furloughs on Fridays. He stated that these issues needed to be negotiated and the unions would have to cooperate. He also said that the District was going to look at cross-classification opportunities for classified employees so that an employee might work more hours during the week even though their hours were cut on Friday, but that this also was a negotiated item. Neither Wegener nor Dalton mentioned the classified employee proration issue during their presentation, and no one asked them any questions about proration. The power point presentation also included no reference to proration. The Excel spreadsheets for the three prioritized budget cut lists were posted on the wall during the meeting. Proration was included on all of the spreadsheets as one of the top priority budget cuts, but it was incorporated within the cuts related to negotiations.³

15. After Wegener and Dalton concluded their presentation, the District school board asked questions and discussed the various proposed budget cuts. A significant focus of their discussion was on the issues related to a four-day work week and the

³Although District witnesses testified that proration was included on the spreadsheets, there is no evidence that the term "proration" was actually used. Superintendent Wegener testified that the savings from proration of classified employee insurance contributions was incorporated under the budget cuts related to negotiated items. CFO Dalton also testified that the reference to proration may have appeared in a different form in the three spreadsheets.

impact that the proposed salary cuts and staff reductions would have on the District, its staff, and the students. During this discussion, the following conversation occurred:

“Unidentified Man: Is it possible to discuss more about some of the, the, uh, logic that went behind some of this to, um, allay some fears?

“Unidentified Man: Uh, allaying fears may be difficult. I, I think we’re facing a very genuine and very painful process. I’d certainly be willing to discuss logic.

“Unidentified Man: Um. I don’t know how far we can go on some of this stuff because we may be in negotiations, but. . .

“* * * * *

“Unidentified Man: Okay. [laughter] Alright. We discussed [inaudible] and, and we as a board believe that, that, it’s, it’s, it’s inappropriate to, to, um, to use things like proration. It would be unethical and unfair to cut people and from the way that, that I’m hearing the fears. So we [inaudible] cross. . .

“Unidentified Man: I, I thought it. . .

“Unidentified Man: [inaudible]

“Unidentified Man: [inaudible]

“[Rusty Munn]:⁴ Cross classification. In other words, you know, if somebody’s cut back to four hours, give that person an opportunity to pick up four hours someplace else in another task so that, we’re trying to be fair and equitable. But is that not possible? [inaudible]

“Unidentified Man: [inaudible]

“Unidentified Man: [inaudible]

⁴Although a speaker was not identified in the transcript, District Board Member Munn testified that he had a conversation with Organizer Brant during the February 12 meeting about the possibility of using cross classification to increase employees’ hours and lessen the impact of proration. Therefore, we find that the unidentified man making this statement is Munn.

[Mary Kay Brant]:⁵ I actually don't believe that's true. I don't think we are negotiating on that subject because we already have positions that exist like that, that go from, we have people who are working in several different [inaudible]

[Unidentified Man]: Can we get a signed TA from you right now? [laughter]

[Unidentified Woman]: Haines has always been that way. Haines and Keating are, always worked that way and so, so I don't think we're, nobody has ever asked us [inaudible]⁶

[Unidentified Man]: It is something that has been discussed because of the issue of equity. We don't want to be unfair to [inaudible] staff and, and we're aware that things happen in private industry where savings are made in that way. That's not ever what we intend [inaudible]

[Wegener, turning to look at Johansen]:⁷ And I would say [inaudible] I apologize for butting in, if I just did. But there's nowhere in that whole list where it says 'savings by prorating.'

[Unidentified Man]: Right. [inaudible]

[Unidentified Man]: I understand, um, but [inaudible] is a legitimate fear.

[Unidentified Man]: Yeah, I understand.

⁵Since Munn testified that he discussed cross classifications with Organizer Brant during this meeting, we find that the speaker here was Brant. Brant did not testify at the hearing.

⁶Haines and Keating are two District schools.

⁷While the transcript shows the speaker as an unidentified man, we find that this statement was likely made by Wegener. OSEA's witnesses all testified that Wegener made a statement about proration no longer being on the budget cut list. Although their recollections of what Wegener said were not identical, they were very similar to this statement. We recognize that neither Wegener nor Dalton, who sat near Wegener, recalled Wegener making this statement. Wegener also testified that he would not have made such a statement since proration was the subject of negotiations. In addition, the e-mails sent by Representative Brant and Vice President Woodworth right after the February 15 meeting indicated that it was the school board members who made this statement. However, we need not address this conflict because it was clear that such a statement was made by a District representative and whether the statement was made by the superintendent or a board member is not critical to our decision.

“Unidentified Man: Sure.

“Unidentified Man: This is an opportunity to just talk and I’m not a negotiator but I don’t mind telling people what I’m thinking.

“Unidentified Man: We’re trying to be honest [inaudible].”

16. Near the end of the February 15 board meeting, the board voted to adopt the executive cabinet’s list as its proposed budget cuts. The board members then discussed presenting the proposed cut list to the public, along with the message that they were considering a four-day work week, a local option tax, and a number of negotiated items in dealing with the current financial crisis. They also talked about how the proposed budget cuts they had adopted would be considered as part of the District’s budget committee process. The budget cut presentation and related discussion lasted approximately two hours.

17. After the February 15 meeting, Board Member Munn spoke with some OSEA representatives, including Representative Brant and Treasurer Baker. Munn told them he had listened to their concerns and reassured them that the Board would never use proration as the first step in taking away all benefits for all employees.

18. Board Member Bryan joined Munn, Brant, and Baker, who were talking about proration in general. Bryan had not been involved in the negotiations with OSEA. During the board meeting, Bryan realized that the real issue everyone at the District faced was not proration, but the significant number of people losing their employment. Bryan told Brant and Baker that maybe it was time to take off their buttons over the proration issue.⁸ The group’s conversation then focused on whether people were going to remain employed.

19. On February 16, OSEA President Johansen sent OSEA Organizer Rivera an e-mail which stated:

“The meeting last night ran very long, 10:00. :(There was lots of discussion and the classified people stepped up with good presentations and great questions. Ruth [Woodworth] presented the signature pages, Janet [Baker] spoke on the 4 day week - no one was really interested in our information on that, and I did an information talk on proration using Cook I example. Christie got up as a tax payer requesting information on

⁸The District argued in its post-hearing brief that neither Board members Munn nor Bryan made a statement about OSEA members removing their no-proration buttons. However, during his testimony, Bryan admitted that he made this statement.

the tax Levy - that had a different light to it than we've seen and I was pleased to hear it. Mike Downing got up and spoke to the cut in income for him alone if we prorate and cut a day - not planned and he said some things that raised our concern, but he spoke up. All in all it was informational. Looks like they have taken proration off the board for now. This whole upset is not over so we'll see how it goes."

20. That day, ERB notified OSEA and the District that it needed to reschedule the parties' February 18 mediation session due to the mediator's illness.

21. Later that day, OSEA Representative Brant sent a fax to Rivera in which the regarding line stated: "Re: Cuts in Baker **NO PRORATION.**" Brant told Rivera that

"Jedd you are wonderful and these folks did an amazing job at your lead!!!! You would have been so proud of them last night and the Board burst out with did you notice pro ration is no longer on the cut list? Yeah you yeah Baker will send dates for new mediation as soon as Michael sends them to me."

22. On February 17, OSEA Vice President Woodworth responded to an e-mail from another District employee raising concerns about a four-day work week. As part of her response, Woodworth told the employee that "[a]t this week's school board meeting, board members stated that proration of classified employee benefits is currently **NOT** on the budget cut list they voted to adopt. Good news for us!" (Emphasis in original.)

23. After the February 15 board meeting, OSEA stopped its organizational campaign around the proration issue, including cancelling plans to put an advertisement in the newspaper and to hold informational picketing. In addition, employees stopped writing letters to the editor and wearing black arm bands on Tuesdays. Organizer Rivera also stopped providing the local OSEA chapter with assistance. OSEA continued with their campaign against the four-day work week.

24. On February 25, ERB notified the parties that their mediation session was rescheduled for April 6.

25. The notes of the February 28 OSEA building representative meeting reflect that someone reported "[m]anagement is still talking about a 4 day week and proration has been taken off the table at this time."

26. When OSEA Attorney Tedesco returned from vacation at the end of February, Representative Brant informed him that the District had announced at their board meeting that proration was off the table. She told him that her first clue that the

District's position had changed was when the power point presentation on budget cuts did not mention proration. Then later, District representatives communicated to the OSEA bargaining members that they could take their buttons off. Tedesco took no action at this time because he assumed that the parties could resolve their dispute without him.

27. Around the first week in March, Tedesco checked with Brant about the parties' bargaining status. Brant told Tedesco that nothing had happened. Tedesco then left a telephone message for Attorney Van Thiel about what he had been told and asking if the parties could resolve their bargaining without going to mediation. Van Thiel responded to Tedesco that he would need to check with the District. On March 22, Van Thiel notified Tedesco that there was a misunderstanding, and CFO Dalton had told him

“what has been indicated to the classified staff is that during a 4-day student week, the School District expects that most of the classified workers shall receive full-time benefits because they will put in enough hours to achieve that goal. The District, however, is not backing off of the proposal of prorated benefits.”

28. The parties met for a mediation session on April 6. During the mediation session, the District told OSEA through the mediator that it had not withdrawn its proration proposal and did not intend to withdraw it.

29. During the April 19 school board meeting, the District voted to declare an impasse in their negotiations with OSEA. During the public comment period, OSEA Vice President Woodworth said,

“[e]arlier in the board meeting, the board declared an Impasse with OSEA, and Mr. Yervasi stated basically over proration of benefits for classified. In your February School Board meeting while Mr. Wegener was presenting those budget cuts for the 2011-2012 school year, prorating benefits was not on that list. He pointedly said that was not on the list. Why is proration the cause of impasse when it was publicly announced that the district would not use proration?”

Wegener then responded, “[i]t is not negotiated yet. Is there more to it than that? It is not negotiated yet. We are not here to negotiate it.”⁹

⁹Wegener testified that at one point during the board's discussion about the proposed budget cuts during the February 15 meeting, he informed the school board that they were not
(continued...)

30. On April 26, the District sent this Board, with a copy to OSEA Attorney Tedesco, a two-page document entitled "Declaration of Impasse, Last Offer and Cost Analysis," which had been prepared by CFO Dalton. Attached to this document was one proposal, entitled "New Article 23 on Health and Safety." The document stated:

"The Baker School District 5J Board of Directors ('District') hereby declares an impasse with regard to the ongoing contract negotiations for the 10-11 contract year with OSEA. The District additionally hereby proposes the following last offer:

- "1. Step movement for all effective July 1, 2010 Step movement will be allowed for all eligible employees for school year 10-11.
- "2. Health and Safety language as proposed by OSEA (attached below).
- "3. Bus Drivers will receive an average of minimum wage and trip time as pay for all time on trips. The District will pay a flat rate of \$11.50 per hour for bus drivers working activity trips to reduce the paperwork involved with tracking standby and drive times. Such rate was partially determined by taking a sample of trips from four months of 09-10 to calculate a flat rate to be used for all activity trips.
- "4. OSEA agrees to prorate benefits for all employees effective October 1st, 2011 as follows: The CAP for those employees working at least .5 but less than full time shall be prorated as follows:

".5 FTE (defined as twenty hours per week) receives 50% of the value of the CAP

".6 FTE (defined as twenty four hours per week) receives 60% of the value of the CAP

".7 FTE (defined as twenty eight hours per week) receives 70% of the value of the CAP

⁹(...continued)

conducting negotiations, after which Board Chair Yervasi immediately terminated the discussion and Board Member Munn said "Thank God for that." (Testimony of Walter Wegener.) However, this exchange is not reflected in the transcript of the February 15 board meeting. Since Wegener's recollection of what he said is similar to what is reflected in the April 19 minutes, he may have been remembering his statement from the April meeting.

“.8 FTE (defined as thirty two hours per week) receives 80% of the value of the CAP

“.9 FTE (defined as thirty six hours per week) receives 90% of the value of the CAP

“FTE of 37.5 hours or more per week (93.75%) shall receive the full value of the CAP

- “a. FTE calculations shall be rounded to the nearest 1/10th.
 - “b. Any hours worked beyond the normal reoccurring job duties (example: extra-duty contracts) shall not increase the base percentage worked for the member. However, Bus Drivers base percentage will be based upon hours worked in the previous year that will include trips. New hire bus drivers will only be able to use their base route for the first year. Such hours will follow PERS calculations for total hours worked divided by the number of weeks in the respective school year. For example, the base percentage for 11-12 will be based upon total PERS hours worked in 10-11 divided by the number of weeks worked in that year (36). Insurance eligibility will be based upon current year hours worked including extra trips.
 - “c. Hours will be based upon a 40 hour week. The District will work with OSEA to define and document the base hours for each position.
 - “d. Opt Out – An employee is eligible to opt out per OEGB rules and regulation may opt out and receive the following:
 - “1. The amount of taxable income equal to the monthly CAP rate, less payroll costs (FICA, PERS and Medicare), will be provided to the employee as taxable income which they may use as they determine, including but not limited to using it for the purchases of a TSA, if the maximum does not exceed the maximum permitted by law.
- “5. Cost Analysis – The benefit to the District of prorating benefits is estimated at being \$50,000 to \$55,000 per fiscal year.

“Unless modified by the above changes, OSEA agrees to move the language and wage scale from the 09-10 contract with the same terms and conditions, for the 10-11 school-year. A new contract will be signed and the Association will provide copies. This Agreement is subject to Baker School District 5J Board approval and OSEA member ratification.”

31. That day, after receiving the District’s “Declaration of Impasse, Last Offer and Cost Analysis,” ERB notified the parties that they had until May 3 to submit their final offers and cost summaries. The notice advised the parties that “each party’s proposed contract language must be titled ‘Final Offer.’”

32. On May 3, OSEA filed its final offer and cost summary, in which it proposed to change the parties’ current agreement by updating the dates on the agreement’s cover, in the salary schedule, and in the insurance article to July 1, 2010 through June 30, 2011; changing the District’s maximum insurance contribution to \$936.17 per month, which is what the District had been paying; adding a new section D to the health and safety article, as agreed by the parties in bargaining; and deleting the prior contract execution date. OSEA’s final offer did not include language regarding an insurance opt out benefit or bus driver trip pay.

33. The District implemented its “Last Offer” on June 24.

CONCLUSIONS OF LAW

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

2. The District did not misrepresent its bargaining position at the February 15 school board meeting in violation of ORS 243.672(1)(a), (b), or (e).

DISCUSSION

The claims in this matter arise out of two distinct factual circumstances during the parties’ bargaining process. First, OSEA alleges that the District misrepresented to bargaining unit members that it had dropped its bargaining proposal for proration of benefits for part-time employees in violation of ORS 243.672(1)(a), (b), and (e). Second, OSEA alleges that the District bargained in bad faith in violation of ORS 243.672(1)(e) by implementing a final offer that did not meet the requirements of ORS 243.712 (2)(b), (c), and (d).

Alleged Misrepresentation in Violation of ORS 243.672(1)(a), (b), and (e)

We first address OSEA's assertion that the District violated ORS 243.672(1)(a), (b), and (e) by misleading bargaining unit members into believing it had withdrawn its proration proposal. In support of its claim, OSEA relies on Superintendent Wegener's statement during the February 15 board meeting that proration was not on the list of budget cuts and Board Member Bryan's statement after that meeting that the classified employees could take off their no-proration buttons. In addition, OSEA points to the fact that proration was neither listed as a budget cut in the power point presentation nor mentioned by Superintendent Wegener or CFO Dalton during their review of the proposed budget cuts. OSEA argues that it relied on the District's misrepresentation to its detriment by cancelling its organizing efforts on the proration issue.

1) ORS 243.672(1)(e) Claim

The obligation to bargain in good faith under ORS 243.672(1)(e) requires that claims made during negotiations be honest. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199 (1985). A party violates its obligation to bargain in good faith if it makes deliberate misrepresentations during bargaining on which the other party relies to its detriment. *AFSCME Local 3512 v. Willamalane Park and Recreation District*, Case No. UP-45-89, 12 PECBR 290 (1990); *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 767-768 (2007). See also *Association of Professors: Southern Oregon State College v. Oregon State Board of Higher Education and Southern Oregon State College*, Case No. UP-27-88, 11 PECBR 491, 512 (1989). OSEA has the burden of proving, by a preponderance of the evidence, that the District made a deliberate misrepresentation. OAR 115-035-0042(6); *Hood River County Law Enforcement Association v. Hood River County*, Case No. UP-29-97, 17 PECBR 827, 835 (1998). We conclude that OSEA failed to carry its burden of proof.

There is no doubt that OSEA representatives believed, based on the events at the February 15 school board meeting, that the District would no longer be pursuing its proration proposal at the bargaining table. OSEA witnesses testified consistently and credibly about what they heard and observed at the February 15 meeting. Their communications and actions immediately after the meeting were also consistent with their understanding and reflect that they relied on the District's communications at the February 15 meeting to cancel their organizing campaign.

Yet, regardless of what the OSEA representatives believed, OSEA failed to prove that the District deliberately misrepresented its bargaining position. First, although OSEA argues that the District misrepresented that it was dropping its proration bargaining proposal, the two statements OSEA representatives relied on were neither

made in a bargaining context nor included any direct reference to the District's bargaining position. Instead, the first statement was made during a very lengthy school board meeting about proposed budget cuts. The second statement was made by a single board member during an informal conversation after the board meeting. Furthermore, the school board never directly addressed nor took an official position on the District's proration bargaining proposal during the February 15 meeting. The vote taken by the school board was to adopt a list of proposed budget cuts, which were not even final, but were subject to additional community meetings and the budget committee process. Therefore, OSEA representatives were never told, but only assumed from the comments about the proposed budget cuts, that the District was taking its proration bargaining proposal off the table.

Second, OSEA did not prove that the superintendent's statement was a deliberate misrepresentation. The statement relied on was "there's nowhere in that whole list where it says 'savings by prorating.'" While the statement could be interpreted to refer to the budget as a whole, this ignores the context in which the statement was made. The statement was made during a discussion about the impact of the four-day work week on classified employees. President Johansen had earlier raised a concern that a four-day work week would further decrease employees' hours and increase the cost of their insurance. During the discussion in which the statement was made, a District representative indicated that the board felt it inappropriate to use proration to cut employees in this context. In addition, Board Member Munn and OSEA Representative Brant explored the use of cross classification to address this concern. As CFO Dalton explained approximately a month after the February 15 meeting, the District was indicating to employees that it expected most classified employees to receive full-time benefits in spite of the four-day work week. In this context, the superintendent's reference to the "whole list" likely referred to savings from proration in relation to the four-day work week and did not constitute a deliberate misrepresentation.

The second statement also was not a deliberate misrepresentation. Board Member Bryan told OSEA members after the meeting that it was time to take off their no-proration buttons. We find credible Bryan's explanation that the only intent of his comment was to convey to OSEA representatives that they needed to shift their focus to the issue of job loss. The discussions during the board meeting showed that the projected staff reductions were significant. Bryan also admitted against his own interest that he had made the button statement and testified favorably about the credibility of the OSEA witnesses. Bryan was not a member of the District's bargaining team and there is no evidence that OSEA representatives had previously dealt with him regarding bargaining matters. Again, OSEA members assumed that the District's bargaining position had changed based on his statement.

We also note that, at the time the two statements were made, the parties' mediation session was still scheduled to be held three days later. Therefore, the District would have had little to gain by misrepresenting its position on the proration issue during the February 15 meeting. It is unfortunate that the mediation session was rescheduled and that OSEA representatives relied on the assumptions they had reached at the budget meeting without attempting to confirm that the District had withdrawn its proration proposal before suspending the organizing campaign. However, OSEA did not prove that the District deliberately misrepresented its bargaining position in violation of ORS 243.672(1)(e).

2) ORS 243.672 (1)(a) Claim

OSEA also alleged that the District interfered with employees' protected rights under ORS 243.662 in violation of ORS 243.672(1)(a) because it stopped its organizing efforts against the District's no-proration proposal as a result of the statements at the February 15 meeting. Under ORS 243.672(1)(a), it is unlawful for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 guarantees employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.672(1)(a) includes two distinct prohibitions: (1) restraint, interference, or coercion "because of" the exercise of rights guaranteed by ORS 243.662; and (2) restraint, interference, or coercion "in" the exercise of rights guaranteed by ORS 243.662. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). The Association is alleging a violation of the "in" prong of subsection (1)(a).

In analyzing an alleged "in" violation, our focus is on the consequences of the employer's actions. *Portland Assn. Teachers*, 171 Or App at 623. We seek to determine if, when viewed objectively, the natural and probable effect of the employer's conduct would tend to chill employees in the exercise of their protected rights. *Id.* at 624; *AFSCME Council 75 v. Josephine County*, 234 Or App 553, 559-560, 228 P3d 673 (2010); *Wy'East Education Assoc. v. Oregon Trail School*, 244 Or App 194, 208 (2011); *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 40, 259 P3d 932 (2011).¹⁰ Neither the employers' motive nor the extent to which employees are actually interfered

¹⁰Some of our older cases adopt a different and more stringent test: certain types of employer statements violate the "in the exercise" prong only if they "inevitably" have the effect of interfering with protected activity. *See, e.g., Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993). This test makes it more difficult to prove an "in the exercise" claim than the Court of Appeals test, and we therefore disavow it.

with, restrained, or coerced are relevant to our determination. *Oregon Public Employees Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988).

An independent “in” violation, which is what OSEA has alleged here, typically arises out of an employer’s direct threat of reprisal for an employee’s exercise of protected activity.¹¹ *Malheur County*, 10 PECBR at 521.

An independent “in the exercise” violation may also occur when the employer’s statements are not directly threatening or coercive, but have the natural and probable effect of chilling employees’ exercise of protected rights. In addition, an employer could violate the “in” prong of subsection (1)(a) by presenting an entirely lawful act in a way that leads other employees to believe the act was unlawfully based on protected activity. *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316, 331 n 13 (2009).¹²

We do not find, when viewed objectively, that the natural and probable effect of the District’s conduct would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under ORS 243.662. Here, the District did not make any threats, direct or implied, regarding employees’ exercise of protected activity. Instead, OSEA suspended its organizing activities because OSEA representatives assumed, based on comments District representatives made about budget cuts at a board meeting, that the District no longer intended to pursue its proration proposal. Unfortunately, their understanding was incorrect. Under these circumstances, the District did not interfere with, restrain, or coerce employees in the exercise of their protected rights in violation of ORS 243.672(1)(a).

¹¹“In” violations fall into two general categories. *Malheur County*, 10 PECBR at 521. First, there are the claims that derive from a “because of” violation. In these cases, if we conclude that the employer took an unlawful action because of an employee’s protected activities, we also find that the natural and probable effect of the employer’s unlawful act would be to chill other employees’ exercise of their protected rights. *Polk County Deputy Sheriff’s Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 79 (1995). Second are the independent “in” claims, which generally are based on an employer’s threats of reprisal, coercive statements, or threatening actions.

¹²The example we gave in *Ridgeline Montessori Public Charter School* was an employer who discharged a union activist for stealing, but warned “other employees that ‘this is what happens when you support the union.’” 23 PECBR at 331 n 13.

3) ORS 243.672 (1)(b) Claim

The District also did not violate ORS 243.672(1)(b). Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” To establish a violation of subsection (1)(b), a complainant must prove “‘actual’ domination, interference, or assistance that has a ‘direct effect’ on a labor organization.” *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 608 (2004).

Here, OSEA asserts that the District violated subsection (1)(b) because OSEA representatives made decisions about their bargaining process based on statements they heard at the school board meeting. However, the evidence shows that the decision to suspend the bargaining campaign was made by OSEA’s official representatives based on a misunderstanding which arose out of comments by District representatives at a school board meeting. It is unfortunate that OSEA representatives made their decision without first confirming with the District’s bargaining team that it intended to withdraw its proration proposal. However, OSEA did not prove that the District interfered with the administration of OSEA in violation of ORS 243.672(1)(b).

Final Offer Implementation Issues

3. The District bargained in bad faith in violation of ORS 243.672(1)(e) when it implemented its final offer.

OSEA alleges that the District’s implementation of its final offer violates ORS 243.672(1)(e) because the final offer did not meet the requirements of ORS 243.712(2)(b), (c), and (d). That statute requires each party to submit its written final offer and cost summary to the mediator within seven days of the declaration of impasse. The mediator then makes public the parties’ final offers, any proposed contract language, and cost summaries on the issues. If the parties have not reached an agreement within 30 days of the publication of the final offers, “the public employer may implement all or part of its final offer, and the public employees have the right to strike.” ORS 243.712(2)(d).

The purpose of the final offer and cost summary requirement under ORS 243.712(2)(b) is “to provide a basis for reasoned public debate on the merits of the proposals.” *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No UP-80-95, 16 PECBR 559, 590, *recons*, 16 PECBR 707 (1996). As we explained in *Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96, 16 PECBR 422, 424 (1996), the final offer is equivalent to the list of issues that was made public by the mediator under the former ORS 243.712(2)(b), the basic

purpose of which was “to allow the public to be apprised of the issues in dispute. This offers an opportunity for public pressure to be brought on the parties to modify their positions and to reach an agreement.” *Id.* (quoting *City of Portland v. PPCOA*, Case Nos. UP-19-90 and UP-26-90, 12 PECBR 424, 461 (1990)).

OSEA alleges that the District’s final offer was deficient because (1) it was entitled “Last Offer” rather than “Final Offer” as required by ORS 243.712(2)(b); (2) the District submitted descriptions rather than actual contract language with its final offer as required under OAR 115-040-0000(1)(d); (3) the final offer stated that the proration of benefits will be effective on October 1, 2011, even though the term of the contract expired on June 30, 2011; (4) the District’s proposal for the determination of bus drivers’ base hours was both vague and contingent on an agreement with OSEA, which made it impossible to implement a definite level of benefits; (5) the District’s cost summary did not include a summary of costs related to insurance for full-time employees or the amount of the District’s health insurance contribution, and did not address other economic proposals included in the District’s final offer; and (6) the cost summary does not state how the District’s cost estimate was calculated as required by OAR 115-040-0000(1)(e).

Several of OSEA’s objections to the District’s final offer raise issues regarding the form of the final offer rather than its substance, which in themselves do not constitute bad faith bargaining. This includes the claim that the District implemented a final offer that was labeled as a “Last Offer” rather than a “Final Offer.” ORS 243.712(2)(b) does require that a parties’ proposed contract language be labeled as a “Final Offer” and the District clearly failed to do this. However, there is no evidence that it did so in bad faith. Nor was there evidence that the mislabeling somehow caused the mediator not to publish the District’s final offer, or interfered with the public’s ability to debate the merits of the District’s position. Therefore, the District’s mislabeling of its final offer did not violate ORS 243.672(1)(e).¹³

OSEA also alleges that the District violated ORS 243.672(1)(e) by failing to include contract language in its final offer which could be lawfully implemented. OSEA argues that the District only included descriptions of possible proposals, which did not

¹³The District’s failure to label its proposed contract language as a “Final Offer” likely violated ORS 243.672(1)(f), which makes it an unfair labor practice for an employer to “[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782.” However, we do not address such a claim because OSEA did not allege a subsection (1)(f) violation. We also note that in a prior case where we found a technical violation of subsection (1)(f) alone with no evidence of an impact on the bargaining process, we limited our remedy to a cease and desist order. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 764 (2007).

meet the requirements of OAR 115-040-0000(1)(d). ORS 243.712(2)(b) specifies that a final offer should include “any proposed contract language and each party’s cost summary dealing with those issues, on which the parties have failed to reach agreement.” The expectation that a party include proposed contract language is also set forth in ORS 243.650(11), which defines a final offer as “the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse.” Finally, this Board has reiterated the parties’ obligation to include proposed contract language under OAR 115-040-0000(1)(d) (“[e]ach party’s proposed contract language shall be titled ‘Final Offer.’”).

Neither the statutes nor rules dictate that parties use a specific format in preparing their final offers. Here, the District included language setting forth how it intended to address the issues of salary step movement, bus driver trip pay, and insurance contribution proration in its two-page final offer, and attached a proposal for Health and Safety contract language. In addition, the District’s final offer stated that all other contract language remained as existed in the 2009-10 contract. There is no evidence from which we can conclude that the language set out in the District’s final offer is not, in fact, the District’s proposed contract language. OSEA has also failed to explain why the language set out in the District’s two-page document does not satisfy the requirement for contract language. Therefore, the District did not fail to include proposed contract language in its final offer in violation of ORS 243.672(1)(e).

OSEA next objects that the District’s final offer violates ORS 243.672(1)(e) because it provides for the implementation of its proration proposal outside of the term of the contract on which the parties are bargaining. OSEA does not claim that the District’s proposal is either a new proposal or a permissive subject of bargaining, neither of which could lawfully be included in a final offer. *Rogue Valley Transportation District*, 16 PECBR at 581-82 and 588. It also cites no legal authority in support of its claim that such a proposal is unlawful.

The effective date of the District’s proration proposal is not unlawful. The proposal addresses employees’ health insurance benefits, which is a mandatory subject of bargaining. ORS 243.650(7)(a). Proposals that address the term of a contract or the time frame a provision will be in effect are also mandatory subjects of bargaining. *Association of Oregon Corrections Employees v. Department of Corrections*, Case Nos. UP-25/35-04, 21 PECBR 139, 154 n 4, (2005), *aff’d*, 213 Or App 648, 164 P3d 291 (2007), *rev den*, 343 Or 363, 169 P3d 1268 (2007) (wage freeze which continued beyond the term of the contract was mandatory); *Association of Oregon Corrections Employees v. Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 859-60, (1993), *AWOP*, 133 Or App 602, 892 P2d 1030 (1995), *rev den*, 321 Or 268, 895 P2d 1362 (1995) (proposal providing that the parties’ agreement would remain in force after the expiration of the contract while the parties were in negotiations was

mandatory for bargaining). Such proposals “have an obvious and substantial effect on ‘wages, hours, and other terms and conditions of employment’”, and address the important public policy of establishing stability in labor relations between public employers and the unions representing public employees. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 21 PECBR at 154 and 154 n 4. Therefore, the District’s proration proposal did not violate ORS 243.672(1)(e).

OSEA also alleges that the District violated ORS 243.672(1)(e) by including proposals in its final offer that were too vague to implement. OSEA argues that the District’s proposal regarding the determination of base hours for bus drivers is both vague and contingent on an agreement with OSEA, which makes it impossible to implement a definite level of benefits. In addition, OSEA points out that since the District failed to include a dollar value for health insurance contributions in its proration proposal, it is impossible to determine how much the District will actually contribute toward health insurance.

Here, the parties had been bargaining over the issue of proration of insurance contributions for at least six months prior to the District’s submission of its final offer. While OSEA argues that the proposal regarding bus driver base hours is too vague to implement, it does not argue that it had not previously had the opportunity to bargain over this language or that the District had not explained during bargaining how it intended the process to work. In addition, it is not disputed that the District had been paying a maximum insurance contribution of \$936.17 per month prior to the final offer process. There is also no evidence that the amount of the District’s future contribution was at issue in bargaining. The fact that the District’s proposals might be insufficiently clear or incomplete is certainly a basis for OSEA to challenge the District’s position with the public. However, we do not find that the inclusion of these proposals in the District’s final offer constitutes bad faith bargaining in violation of ORS 243.672(1)(e).

We also note that the issue of whether the District’s proration proposal was too vague to implement had not really ripened at the time the complaint in this matter was filed. The District implemented its final offer on June 24, 2011; OSEA filed its amended complaint raising the issues related to the District’s final offer on June 28; and the hearing was held on August 26, 2011. However, the effective date of the District’s proration proposal was October 1, 2011. As a result, there is no evidence in the record from which we could conclude that the proposal had been implemented in a manner not reflected in the District’s final offer, and that issue is not before us in this case.

OSEA’s final objections are directed at the District’s cost summary. It asserts that the cost summary does not meet the requirements of OAR 115-040-0000(1)(d) because the District did not include a summary of costs related to insurance for full-time employees, address all economic proposal included in its final offer, or state how its cost

estimate was calculated as required by OAR 115-040-0000(1)(e). As a result, OSEA argues that the District included insufficient information in its cost summary to provide a basis for reasoned public debate on the merits of its proposals or to support implementation of its offer in violation of ORS 243.672(1)(e). We agree.

The submission of a cost summary with the final offer is required to satisfy the duty to bargain in good faith under ORS 243.672(1)(e). *Blue Mountain Faculty Association/Oregon Education Association/NEA v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 764 (2007). A final offer that has been implemented without a cost summary hinders the public debate on the merits of the final offer and results in the implementation of a final offer that has not been first been through the crucible of the entire Public Employees Collective Bargaining Act (PECBA) collective bargaining process. *Blue Mountain Community College*, 21 PECBR at 764 (citing *Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938, 7956-57 (1985)). However, a cost summary is not required to be “as detailed as an accountant’s work product,” and “[a]bsent evidence of a deliberate effort to misrepresent, * * *, submission of an inaccurate cost summary is not a violation of a party’s duty to bargain in good faith.” *Rogue Valley Transportation District*, 16 PECBR at 589.

The District’s cost summary constituted solely of the statement “[t]he benefit to the District of prorating benefits is estimated at being \$50,000 to \$55, 000 per fiscal year.” (Exh. C-18 at 2.) Yet, its final offer also included proposals for bus driver trip rates and an insurance opt out benefit. These were proposals which the cost summary did not address and over which the parties had not reached agreement. Unlike the circumstances in *Rogue Valley Transportation District*, this is not a situation in which a party merely based its cost summary on inaccurate assumptions. Here, similar to the employer in *Blue Mountain Community College*, the District implemented issues which had not been included in the cost summary at all and, as a result, had not been through the crucible of the bargaining process.

In addition, the District failed to provide any information about how it had calculated its savings, contrary to its requirement to do so under OAR 115-040-0000(1)(e). This Board adopted OAR 115-040-0000(1)(e) in order to provide the parties with some guidelines on cost summaries. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98, 18 PECBR 109, 118 n 8, *recons*, 18 PECBR 199 (1999).¹⁴ That rule provides that

¹⁴We did not apply OAR 115-040-0000(1)(e) to the facts of the *Jefferson County* case because it had not been adopted at the time of the events that were the basis of that dispute.

“[a] party’s cost summary shall separately list each disputed contract proposal in its final offer that is reasonably anticipated to impact the public employer’s budget. For the first year of the proposed contract, the cost summary shall show the estimated cost difference between each of the party’s proposals and the employer’s current budget in the area(s) affected by the proposals. For subsequent proposed contract years, the cost summary shall show the estimated increase in costs that would be incurred by the employer for each such proposal over the costs projected for the prior year of the proposed contract. The cost summary also must show the estimated total cost differences for all disputed proposals. The cost summary must include an explanation of how the estimated costs for each proposal were calculated.”

After adopting OAR 115-040-0000(1)(e), we explained that prior to the adoption of that rule

“our position [was] generally that submission of an inaccurate cost summary is not an unfair labor practice absent some other indicia of bad faith. A party is obliged by ORS 243.712(2)(b) to submit a cost summary and obliged by ORS 243.672(1)(e) or (2)(b) to do so in good faith. But our determination about whether the party has complied with its obligations will not ordinarily be based solely on the terms of the cost summary itself, but rather on the totality of the party’s conduct with respect to those obligations.” *Jefferson County*, 18 PECBR at 201.

We further stated:

“We agree that submission of cost summaries together with final offers is an important part of bringing the public into the dispute resolution process. To that end, this Board has adopted a rule concerning what a party must do to satisfy its cost summary obligation. * * *

“Even with our rule, we anticipate that disputes will arise about cost summaries. The reasons for that are inherent in the process of formulating costs. As a practical matter, it is not possible to effectively control or dictate the assumptions the parties will make in preparing their cost summaries. We have endeavored, with the input of labor and management, to craft a rule that narrows these potential areas of dispute and increases the probability that the parties’ respective summaries will provide meaningful information * * *.

“Nonetheless, it is virtually inevitable that parties will craft their summaries based on assumptions that cast their proposals in the best possible light within the confines of the rule. Such conduct is little different than the public posturing and puffery that has always been and likely will always be part of the bargaining process. The final offer/cost summary stage is the parties’ opportunity to make their case to the community at large. That public marketplace is the proper arena to debate issues about faulty or inaccurate assumptions, * * *.” *Id.* at 201-02.

Here, the District did not comply with the requirements of OAR 115-040-0000(1)(e) at all. The issue is not that it included incorrect or inaccurate assumptions in its cost analysis. The issue is that it failed to include any information about how it had calculated its savings from the proration proposal. This lack of information, in combination with the District’s failure to include a cost summary of the other economic issues in its final offer, hindered the public debate on the merits of the District’s proposal. Since the District implemented its final offer without first allowing a real opportunity for public debate, it violated its duty to bargain in good faith. For these reasons, the District’s implementation of its final offer violated ORS 243.672(1)(e).

Remedy

Since we have found that the District violated ORS 243.672(1)(e), pursuant to ORS 243.676(2)(b) we must order the District to cease and desist from violating ORS 243.672(1)(e). In addition, ORS 243.676(2)(c) requires that we “[t]ake such affirmative action * * * as necessary to effectuate the purposes of” the PECBA. Ordinarily, we order an employer who has engaged in an unlawful implementation in violation of ORS 243.672(1)(e) to return everything to the *status quo* as it existed prior to the date of the implementation. *McKenzie School District #68*, 8 PECBR at 8203. *See also see Blue Mountain Community College*, 21 PECBR at 780-81. Such a remedy is appropriate in this case. We will order the District to return working conditions to the pre-implementation *status quo* and make the bargaining unit members whole for any losses suffered due to the unlawful implementation.¹⁵

¹⁵In some cases, we have ordered that the *status quo* be restored only on those issues requested by the union so as to not harm the employees. *Blue Mountain Community College*, 21 PECBR at 781; *McKenzie School District #68*, 8 PECBR at 8203. However, in those cases, there was a longer passage of time between this Board’s decision and the implementation. Here, OSEA did not request such a remedy and the time between implementation and this Board’s order was considerably less. Therefore, we order the *status quo* restored in its entirety.

In such cases, we also normally order parties to resume bargaining at the step where the first violation occurred. *McKenzie School District #68*, 8 PECBR at 8203. Here, the violation occurred when the District submitted its final offer. Therefore, the final offer submitted by the District on April 26, 2011, is rescinded. We will order the District to return to bargaining at a point just prior to the submission of its final offer. Any revised final offer the District submits must contain a cost summary. The cost summary must include a separate cost estimate for all unresolved District proposals that will impact the District's budget, and an explanation of how it calculated the cost estimates.

We will not order the District to post a notice of its wrongdoing. We generally order such a posting if we determine a party's violation of the PECBA was: (1) "calculated or flagrant;" (2) part of a "continuing course of illegal conduct;" (3) committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit members; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002).

Here, the District's actions were neither calculated nor flagrant, nor part of a continuing course of illegal conduct. The District's unlawful actions did not involve a significant number of its personnel, and did not involve a strike, lockout, or discharge. Although the District's implemented final offer would require some bargaining unit members to pay out-of-pocket costs for their health insurance premiums, there was no evidence that it would adversely affect a significant number of bargaining unit members. Therefore, the District's violation of the law does not meet the criteria for posting a notice of its wrongdoing, and we will not order such a remedy.

ORDER

1. The District will cease and desist from violating ORS 243.672(1)(e).
2. The District will rescind the June 24, 2011 implementation of its final offer and restore the *status quo* as of the date of implementation. It will also make all bargaining unit employees whole for any lost wages, benefits, and out-of-pocket costs, including medical insurance premium contributions or medical expenses which employees incurred as a result of the District's implementation of its final offer.

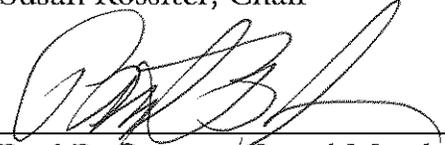
3. The District will return to bargaining at a point just prior to submission of final offers, and any revised final offer it submits to the mediator shall include a separate cost summary on all issues on which the parties have not reached agreement that are reasonably anticipated to impact its budget, with an explanation of how it calculated the estimated costs for each proposal.

4. The other allegations in the complaint are dismissed.

DATED this 13 day of June 2012.



Susan Rossiter, Chair



Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.