

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-22-05

(UNFAIR LABOR PRACTICE)

|                              |   |                      |
|------------------------------|---|----------------------|
| BLUE MOUNTAIN FACULTY        | ) |                      |
| ASSOCIATION/OREGON EDUCATION | ) |                      |
| ASSOCIATION/NEA AND          | ) |                      |
| JOHN LAMIMAN,                | ) |                      |
|                              | ) |                      |
| Complainant,                 | ) |                      |
|                              | ) |                      |
| v.                           | ) | RULINGS, FINDINGS OF |
|                              | ) | FACT, CONCLUSIONS    |
|                              | ) | OF LAW AND ORDER     |
| BLUE MOUNTAIN                | ) |                      |
| COMMUNITY COLLEGE,           | ) |                      |
|                              | ) |                      |
| Respondent.                  | ) |                      |
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This Board heard closing argument on March 8, 2006, following a hearing before Administrative Law Judge (ALJ) B. Carlton Grew on July 13, 14, 15, and 19, 2005, in Pendleton and Salem, Oregon. The ALJ issued Recommended Rulings and Findings of Fact on December 19, 2005. Both parties objected and submitted post-hearing briefs on February 13, 2006.

John S. Bishop, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 N.W. Johnson Street, Portland, Oregon 97209, represented Complainant.

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

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On May 2, 2005, the Blue Mountain Faculty Association/Oregon Education Association/NEA (BMFA or Association) filed this unfair labor practice complaint, alleging that the Blue Mountain Community College (BMCC or College)

violated ORS 243.672(1)(a), (b), (e), (f), and (g). The Association sought expedited consideration of its complaint pursuant to OAR 115-35-065(1). On June 7, 2005, this Board bifurcated the complaint into an expedited case, addressed here, and a nonexpedited case assigned the separate case number of 25-05. This Board directed the ALJ to hear the facts of this case and issue proposed rulings and findings of fact only. It directed that the ALJ process UP-25-05 through normal Board procedures.<sup>1</sup>

The ALJ ordered the Association to amend its complaint to reflect the bifurcation order, and the Association filed its amended complaint in this case on June 10, 2005. The Association alleged that the College bargained in bad faith in a variety of ways, and that it unlawfully limited what bargaining unit members could say about the possibility of a strike. It requested, among other things, an order requiring the College to “rescind” the unilateral implementation of its amended final offer and to restore the status quo. The Association also alleged that the College’s conduct warranted imposition of a civil penalty.

On June 30, the College timely filed its answer, admitting and denying certain allegations, and raising affirmative defenses. The ALJ consolidated the cases for hearing which he conducted on July 13, 14, 15, and 19. The parties presented testimony and other evidence, and the evidentiary record closed with the hearing.

The issues are:

1. Did the College request mediation before it had engaged in good faith bargaining for 150 days? If so, did the College violate ORS 243.672(1)(e) or (1)(f)?
2. Did the College submit bargaining proposals in mediation which had not been subjected to the bargaining process? If so, did the College violate ORS 243.672(1)(e)?
3. Did the College submit final offers containing proposals which had not been subjected to the bargaining process? If so, did the College violate ORS 243.672(1)(e)?
4. Did the College violate ORS 243.712(2)(d) by implementing a “final offer” that was not submitted in compliance with ORS 243.712(2)(b) or subjected to the 150 days of good faith bargaining? If so, did the College violate ORS 243.672(1)(f)?

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<sup>1</sup>On the date of this Order, a recommended decision was pending in Case No. UP-25-05.

5. Did the College violate ORS 243.712(2)(b) by not submitting its final offer within seven days of the declaration of impasse, by failing to provide its final offer and cost summary to the Association in a timely manner, or by failing to provide its cost summary at all? If so, did the College violate ORS 243.672(1)(f)?

6. Did the College submit final offers which contained proposals concerning subjects that are permissive for bargaining and which were never subjected to any negotiations? If so, did the College violate ORS 243.672(1)(e)?

7. Did the College misrepresent facts and its position in bargaining to individual faculty members and the Association bargaining team? If so, did the College violate ORS 243.672(1)(e)?

8. Did the College communicate directly with employees represented by the Association about bargaining issues and employment relations, and did such communications interfere with the existence and administration of the Association? If so, did the College violate ORS 243.672(1)(b) and (e)?

9. Did the College threaten faculty members concerning what they could or could not say about bargaining and about the Association's plans for a strike? If so, did the College violate ORS 243.672(1)(a)?

10. Did the College fail to bargain in good faith, and engage in surface bargaining and regressive bargaining, in violation of ORS 243.672(1)(e)?

11. Should the College pay a civil penalty to the Association?

### RULINGS

#### **Motion to strike or defer to arbitration**

The College moved in the alternative either to strike several paragraphs of the amended complaint or else defer them to an arbitrator for fact finding. It also moved to exclude evidence on those matters from the hearing. The allegations concerned the manner in which the parties opened bargaining and their failed attempt to reach a one-year agreement largely preserving the status quo. The ALJ properly denied the motion, noting that, as a factual matter, these events cast a shadow over the entire course of bargaining and provide relevant evidence about the motives and conduct of the parties throughout the bargaining process.

## Motions and objections concerning events prior to the statute of limitations

The College moved to strike allegations regarding events that occurred prior to the 180-day limitations period for filing an unfair labor practice complaint. ORS 243.672(3). It also objected to the introduction of evidence concerning those events.

The Association's amended complaint alleged a number of events which took place prior to the 180-day limitations period. At hearing, the Association offered a substantial amount of evidence regarding the current round of bargaining as well as evidence regarding the prior round of bargaining. Much of this evidence concerned events prior to the limitations period.

Events outside the statute of limitations may be relevant to a bad-faith bargaining charge even though those events are not independently actionable as unfair labor practices. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 n. 14 (1985). The historical context of the bargaining is helpful, and sometimes necessary, to understand the course of bargaining and the evolution of the positions of the parties. The ALJ acted properly within his discretion in denying the motion to strike and admitting this evidence into the record. *Bend Police Association v. City of Bend*, Case Nos. UP-44/48-03, 20 PECBR 611, *order on reconsideration* 20 PECBR 645 (2004).<sup>2</sup>

### Newspaper article

The Association offered into evidence an article from the *East Oregonian* newspaper dated July 12, 2005. The article included several quotations from College President John Turner regarding the upcoming hearing on this complaint. The College objected to the evidence. Turner testified that he did not recall making the quoted statements to the reporter, that some of the statements were inaccurate, and that his last

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<sup>2</sup>In *Bend Police Association v. City of Bend*, Case Nos. UP-44/48-03, 20 PECBR 611, 613, *order on reconsideration* 20 PECBR 645 (2004), this Board stated, “[t]he City offered evidence regarding the major issues in the negotiations that led to the previous CBA. The Association objected to the introduction of evidence of matters outside the negotiations at issue here. The ALJ properly received the evidence. It is relevant insofar as it demonstrates that the same issue which divides the parties here—employee payment for health insurance premiums and costs—was the issue which divided the parties in bargaining for the previous collective bargaining agreement and led to its resolution through interest arbitration.”

conversation with the reporter prior to the article's publication was July 7. At hearing, the ALJ sustained the objection, concluding that the document lacked foundation and was cumulative in that the issue had been adequately explored through testimony. The ALJ reversed himself in his recommended rulings, noting that Turner had weekly contact with the reporter in question, and did not recall, but did not deny making, the quoted remarks. The ALJ's ruling was correct.

### **Motion to Reopen Record**

At oral argument, both parties asked this Board to reopen the record to add the August 2005 arbitration decision by Arbitrator Ronald Bumpass. *See* Findings of Fact 92 and 100. We grant the requests and make the award part of the record.

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

## FINDINGS OF FACT

### **Background**

1. The College is a public employer. The Association is a labor organization and the exclusive representative of a bargaining unit of approximately 300 part-time<sup>3</sup> and 64 full-time College faculty. The parties have had a collective bargaining relationship for approximately 25 years.

2. The College offers classes at its primary campus in Pendleton and at six satellite campuses: Baker City, Hermiston, Milton-Freewater, Eastern Oregon Correctional Institution, Powder River Correctional Facility, and Two Rivers Correctional Facility.<sup>4</sup> The Pendleton campus, by far the largest, employs almost all of the full-time faculty.<sup>5</sup> The Pendleton campus also houses the administrative

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<sup>3</sup>The number of part-time faculty who actually teach in a given semester varies.

<sup>4</sup>Baker City is the only satellite campus which is too far from Pendleton, some 100 miles, to permit an instructor to readily commute there from Pendleton.

<sup>5</sup>A few full-time faculty teach exclusively at the Eastern Oregon Correctional Institution, which is also located in Pendleton.

headquarters of the College. The College also has offices, or centers, in Enterprise, John Day, Boardman, and La Grande.

3. The College is headed by a board of directors who are elected by voters in districts which make up the College's service area. The College has a campus in each board member's district. At the time of hearing, the board of directors was comprised of Lea Mathieu (Ione), Joan Weaver (Baker City), David Gallaher (Pendleton), Kim Puzey (Hermiston), Board Chair Steve Taylor (Pendleton), Rick Currin (Milton-Freewater), and Phillip Houk (Pendleton).

4. In 1999, the parties entered into a collective bargaining agreement which extended through mid-2002. The agreement provided that it would automatically renew for subsequent fiscal years unless either party gave timely notice that it wished to negotiate changes. The parties' 2002-2004 collective bargaining agreement contained the same provision.<sup>6</sup>

5. The parties have a recent history of contentious negotiations. During the negotiations for the 2002-2004 collective bargaining agreement, relations between then-College President Travis Kirkland and the Association were strained nearly to the breaking point. Association members feared that the College wanted to eliminate all full-time faculty positions and replace them with part-time faculty. In August 2003, the faculty nearly went on strike. The College's negotiating team did not include any College board members. However, on the final day of negotiations before the strike, then-College Board Chair Phil Houk and Board Member Steven Taylor attended the negotiations and helped negotiate a settlement.

6. The most divisive issue in the 2002-2004 negotiations was the College's proposal to change the "retrenchment" provision of the contract, which established the order of layoff.<sup>7</sup> The College wanted the power to lay off full-time teachers at the Pendleton campus before laying off part-time teachers at the satellite campuses. The Association was determined to retain the historical order<sup>8</sup> of layoff, which

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<sup>6</sup>The provision is quoted in Finding of Fact 21.

<sup>7</sup>The 2002-2004 collective bargaining agreement's retrenchment language is quoted in Finding of Fact 13.

<sup>8</sup>The order of layoff had remained the same for the parties' entire 25-year relationship.

ensured that full-time faculty would be laid off last. The 2003 crisis was resolved when the College abandoned its proposal to change the retrenchment language.

7. At the start of each fiscal year, the College projects its finances for the year. In recent years, the College projected substantial deficits but ended the year with substantial surpluses. These discrepancies were due in part to uncertainty about the amount of money the state's elected officials would provide to Oregon's community college system. In 2002-2003, College officials predicted a \$2.4 million shortfall, but finished the fiscal year with a \$1.86 million cash carryover. That discrepancy was largely due to an error by the College official or officials responsible for making those projections. Those responsible left the College in 2003. In 2003-2004, the College predicted a fund balance deficit of \$1.2 million, but ended with a balance surplus of \$1.7 million.<sup>9</sup> These discrepancies led Association members to question the reliability of the College's fiscal estimates and the motives which lay behind them.

8. Jan Acsai (pronounced "a-see"), a full-time biology teacher, was the Association president for 2004-2005. She served on two prior bargaining teams before the bargaining at issue here.

9. Tina Martinez, a full-time sociology teacher, was the Association president in 2003-2004. She never participated as a bargaining team member, but she served on committees which developed Association negotiation proposals, and she helped organize Association members to determine and support Association positions in bargaining.

10. The Association bargaining team for the successor to the 2002-2004 collective bargaining agreement was comprised of Acsai, Bob Hillenbrand, Leslie Aflatooni, and Ron Wallace. Acsai, Hillenbrand, and Wallace were full-time faculty at the Pendleton campus. Aflatooni was a full-time faculty member at the Eastern Oregon Correctional Facility in Pendleton. Hillenbrand had been the Association president in 2002-2003.

11. The College bargaining team was comprised of Dan Lange, vice president for instructional advancement and College media spokesperson; Mary

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<sup>9</sup>The College fund balance at the end of the 2004-2005 fiscal year increased to \$1.96 million

Van Etta, human resources specialist; Margaret Saylor, associate vice president; Gayle Lawn-Day, interim executive vice president and provost; College Board Members Lea Mathieu and Joan Weaver; and Sean Banks, a human resource development specialist employed by the Oregon School Boards Association (OSBA). Mike Shea, human resources vice president, was also a member of the bargaining team until he left the College in May 2004.

12. Banks had been employed by OSBA for 2½ years at the time of the hearing. Prior to his human resource position with OSBA, Banks worked as a police officer with multiple assignments. He is a law school graduate.

### **2003 retrenchment**

13. Article 31(D)3 (“Employment Status”/”Retrenchment”) of the 2002-2004 agreement provided:

“If retrenchment becomes necessary, the following order shall be utilized within the department or work unit which retrenchment is to occur:

- “a. Part-time employees
- “b. Temporary employees \* \* \*
- “c. Probationary employees
- “d. Regular Status employees.”

14. In the spring of 2003, the College faced a fiscal crisis. In March 2003, the College laid off seven probationary full-time faculty, but found alternative placements for five of them. In June 2003, the College laid off two regular full-time faculty. In each case, the College declined to lay off part-time or temporary faculty instead. The Association filed grievances over the layoffs and pursued them to arbitration.

## March 2004 retrenchment arbitration award

15. On March 4, 2004, Arbitrator Katrina I. Boedecker issued her award in the Association-College retrenchment grievance. The arbitrator concluded that the College failed to follow the “clear and unambiguous language” of Article 31(D)3 when it laid off two full-time probationary teachers, and two full-time regular teachers, without first laying off all the part-time or temporary teachers in the department or “work unit.” The arbitrator defined “work unit” as the College as a whole, not a particular campus. The arbitrator ordered the College to reinstate the instructors with back pay. After the parties received the award, they began to negotiate over its implementation.

16. College officials were unhappy about the cost of the arbitrator’s remedy. On March 4, 2004, Mike Shea notified the Association that it wanted to meet and confer about a new retrenchment. The conference is the first step in the retrenchment process under the collective bargaining agreement. On March 5, 2004, then-College President Kirkland announced that the College planned to redo the retrenchment in line with the arbitrator’s conclusions. However, the board never formally considered doing so.

17. Also on March 5, then-Provost John Turner e-mailed Association officials and other faculty stating that he planned to discuss measures to deal with the “substantial new faculty salary requirements” resulting from the arbitration award. He mentioned possibilities such as increasing class sizes, eliminating smaller classes taught by full-time faculty unless they were “vital to a degree program,” tearing down walls to increase classroom sizes, raising student fees, adding a night class to the schedule of most full-time faculty members, reducing travel, and centralizing photocopying and equipment purchases.

18. Also in March 2004, an arbitrator rendered a decision in the Association’s favor in a case involving unit member and Association activist Bob Hillenbrand, who contended that he had been reprimanded for challenging College financial projections.

19. The College’s announcement that it intended to redo the retrenchment surprised Association officials because the College budget picture had substantially improved since the initial retrenchment decision. At the beginning of the 2002-2003 fiscal year, then-College President Kirkland projected a \$2.4 million shortfall.

At the end of the 2002-2003 fiscal year, the College reported a cash carry-over of approximately \$1.8 million.

20. On March 5, 9, and 12, Association Attorney John Bishop wrote College Attorney Dori Brattain to remind the College that it had to bargain to restore the laid off employees, change in working conditions, or begin a new retrenchment. Bishop asked the College for relevant financial information.

#### **Notice by Parties of opening collective bargaining for successor contract**

21. The 2002-2004 collective bargaining agreement between the parties was scheduled to expire on June 30, 2004. Article 37 ("Duration") of that agreement provided:

"A. This agreement shall be binding upon the parties as of its execution date, but the terms set forth herein shall not cancel or alter the existing Agreement between the parties, which shall remain in effect until June 30, 2002. This Agreement shall be effective on July 1, 2002 and shall remain in full force and effect until June 30, 2004, and shall be automatically renewed from year to year therefore unless either party shall notify the other in writing prior to April 1, 2004, that it desires to modify this agreement. Such notification shall include the substance of the modification sought. In the event such 'notification' is given, negotiations shall begin not later than April 15, 2004.

"B. In the event either party reopens the contract in a timely manner, as provided above, this Agreement shall continue in full force and effect during the period of negotiations."

22. On March 17, 2004, the Association notified the College that it wished to open the collective bargaining agreement for negotiations pursuant to Article 37. The College did not give the Association notice under Article 37 that it wished to modify the contract.

## College goals for successor collective bargaining agreement

23. On March 25, 2004, Association Attorney Bishop faxed the College a letter about the agenda for a special College board meeting scheduled for that same day. The agenda included discussion of "Budget Issues," "Proposed Suspension of College Programs," and "Resolution Announcing Fiscal and Management Crisis." Bishop asserted that the collective bargaining agreement required the parties to bargain before the College could suspend programs.

24. During budget discussions at the March 2004 board meeting, board members concluded that the financial future of the College looked "bleak." Then-Provost Turner stated his belief that changing the retrenchment provisions of the contract was essential for the College's future financial health.

25. During the executive session on March 25, the College board agreed upon a series of specific goals for contract negotiations and estimated the savings if it met those goals. The board decided to pursue changes in Articles 1 (Recognition); 15 (Calendar); 16 (Salary); 17 (Fringe Benefits); 20 (Workload); 26 (Medical Coverage for Retirees); 31 (Employment Status); 32 (Grievance Procedure); and 37 (Duration) of the contract. The goal for Article 31, which includes the retrenchment provision, stated, "[r]estructure the article to enable the college to layoff as needed. Reduce notice to 90 days and reduce recall to 12 months from 27 months." College officials concluded that modifying the retrenchment provision through collective bargaining was a high budget priority for 2004-2005.

26. The College board members wanted to increase enrollment at the satellite campuses. On several occasions, former President Kirkland expressed his view to the board that the retrenchment language prevented the College from managing the satellite campuses individually. Board members were especially concerned that declining enrollments in Pendleton in a specific academic discipline would force the College to lay off part-time faculty in the satellite campuses first. Although the board members believed this would result in cutting services to the satellite campuses, faculty based in Pendleton often commuted to satellite campuses to teach classes. Association negotiators were frustrated that College representatives did not explain why, under existing retrenchment language, such commuting was not a viable alternative to closing satellite programs in the event of reduced funding.

27. The College wanted to change the retrenchment language to treat each campus as a separate work unit. It believed this would protect faculty at each campus from layoff decisions at other campuses.

#### **Other events in March 2004**

28. Then-Association President Tina Martinez approached then-Provost John Turner at the end of the March board meeting. She believed Turner was likely to become the College president soon, and she wanted Association-College relations to improve. The two agreed to meet on April 6.

29. Turner asked the College board to wait before presenting its bargaining proposal to the Association, because he was hopeful that the contract could be settled quickly without opening some of these contract articles for negotiations.

30. On March 30, 2004, the *East Oregonian* newspaper<sup>10</sup> reported that College officials said the College faced a deficit of \$890,621 in the 2004-2005 budget. The article listed a series of budget balancing options prepared by Gayle Lawn-Day, then-College vice president of business and operations. The options included eliminating theater, music, and human services programs; cutting staff; and closing the Boardman campus.

31. On March 30, 2004, the Association, through then-President Martinez, notified the College board that the Association “intends to open the contract on full and parttime compensation and compensation related issues, insurance and Article 37 [Duration].” The Association stated that it “reserves the right to further respond on other issues” after reviewing the issues that the College proposed to open. Martinez’ letter listed five dates between April 6 and 13 when the Association team was available for bargaining.

32. On March 31, Bishop wrote the College to object to the fact that the Association learned of the College’s proposed cost-cutting measures from the press instead of from the College.

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<sup>10</sup>The *East Oregonian* is widely read in the College community.

## April 2004

33. On April 1, Dori Brattain, the College's attorney, wrote to Bishop about setting dates to begin contract negotiations.

34. At the end of March 2004, College President Kirkland announced that he was resigning effective May 1, 2004. At a special College board of directors meeting on April 5, board members urged then-Provost John Turner to assume the College presidency. Turner took the matter under consideration.

### **Informal discussions between Martinez and Turner; "informal" bargaining**

35. At their April 6 meeting, Turner and Martinez discussed ways the College and the Association might improve their relationship. They talked about "opening a better line of communications" between the College and the Association, resolving some of the pending grievances, and the upcoming contract negotiations. Martinez made a lengthy, heartfelt appeal for the College to be less adversarial in its approach to negotiations. Martinez suggested that the College settle the pending grievances and unfair labor practice proceedings, and not use outside consultants in the upcoming contract negotiations. She also suggested that the College avoid raising the issue of retrenchment because doing so would anger the faculty. Turner suggested that the parties negotiate briefly to arrive at a one-year contract with a wage freeze and few changes from the previous agreement. Martinez stated that the Association had already presented its bargaining proposals and did not want to open the contract for negotiations on any subject besides salary and other compensation. Martinez suggested that Turner himself come to the bargaining table. Martinez and Turner talked for approximately two hours.

36. Martinez told Turner she believed that the parties could reach agreement quickly if they sat down and simply talked, with only a few essential issues on the table. Turner took this to be an offer to informally negotiate a short-term contract covering a minimum of issues.

37. On April 12, Shea e-mailed a response to Martinez' March 30 letter which opened bargaining. The parties agreed to meet on April 13, 2004.

38. The parties' bargaining teams met on April 13. Banks assisted the College. Banks said he was not sure whether he would be the spokesperson for the College bargaining team. Turner and Martinez were not present. The parties agreed on two ground rules for the negotiations: (1) the parties would exchange initial bargaining proposals by 3:00 p.m. on May 12, 2004; and (2) each side would reject or ratify a contract tentatively agreed to in its entirety. College team members told the Association team that the College had not yet decided what proposals to offer.

## **May 2004**

39. Turner decided to accept the College presidency, and was appointed interim president by the College board on May 1. He immediately set up meetings with Association officers to work towards settlement of the outstanding grievances and unfair labor practice claims.

40. On May 12, 2004, the Association delivered its bargaining proposal to the College. The Association proposed changes to Articles 16, 17, 25, 26, and 37, summarized as follows:

16 (Salary): 3 percent wage increase for each of the three years of the contract, increase part-time faculty wages, increase longevity bonuses, create ten paid department chairs; increase professional incentive fund from \$31,400 for the duration of the contract to \$32,000 in 2004-2005, \$33,000 in 2005-2006, and \$34,000 in 2006-2007;

17 (Fringe Benefits): increase the College's annual insurance contribution of \$735.29 in academic year 2003-2004 at the same rate as the premiums increase;

25 (Sick Leave): remove five-day limit for use of sick leave for family illness;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$882; and

37 (Duration): three-year contract, with automatic renewal, proposed changes not required with the notice of reopening.

The Association presented its proposal in a format that included the prior contract language with proposed deletions struck out and proposed additions underlined.

41. Also on May 12, the College delivered two bargaining proposals to the Association, one via e-mail and one in a paper copy. The proposals were different. On paper, the College proposed to modify Articles:

16 (Salary): no overall pay increase but keep step increases;

17 (Fringe Benefits): keep \$735 cap on employee premiums;

20 (Workload): add one evening or weekend class for a total of two maximum, and require each faculty member to advise 20 students;

37 (Duration): one-year agreement; and

Add a new addendum providing for a \$15,000 “buyout” to full-time faculty members who agreed to resign or retire between May 17, 2004 and June 30, 2004.

42. The College’s e-mail tracked the proposals approved by the College board in March (*see* Finding of Fact 25). It included more changes than the paper proposal. In addition to the articles in the paper proposal, the e-mailed version also proposed changes in Articles 1, 15, 26, 31, and 32. Shea told the Association that the e-mailed version was erroneous.

43. Turner received the Association’s first proposal on May 12. Based on his conversation with Martinez, Turner had expected a simple proposal for a one-year contract, with no salary increase but a decrease in the length of the academic year from 180 to 175 days.

44. On May 13, Turner met with Martinez and Acsai. He expressed his surprise that “instead of a modest one year proposal, that we had received a three-year proposal with significant demands for pay and benefits increases.”

45. Martinez told Turner that the parties were close and she still believed they could resolve the matter quickly. She urged Turner to participate at the bargaining table but Turner was reluctant. He had just become interim President of the College and he wanted a “buffer” between the President’s office and formal negotiations. Turner eventually agreed to meet on May 18, but he believed it would be an informal exchange of ideas rather than a formal bargaining session.

46. On May 15, Human Resources Vice President Shea, the only member of the College’s upper management with significant experience in collective bargaining, left the College to take another job. Partly because of this loss, the College decided to formally add Banks to its bargaining team.

47. On Monday May 17, Turner sent Martinez an e-mail regarding “Bargaining session on Wed.” The e-mail stated:

“Tina-

“Just to let you know, we are trying to set up a bargaining session on Wed at 4pm.

“As you requested, I will take part in this session as part of the administration’s team.<sup>11</sup> We will not have Sean Banks with us on Wed.

“Lea Mathieu and Joan Weaver (Board members) will also be there as members of the administration’s team.

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<sup>11</sup>Turner testified that Martinez had urged him to sit as part of the College negotiating team, and that he had repeatedly stated he wouldn’t do that. Asked to explain the contradiction between that testimony and his May 17 e-mail (which Turner did not recall sending, and whose timing and content was inconsistent with his recollection), Turner stated, “I can’t ” We conclude that Turner’s recollection of events was not completely reliable

“We can exchange ideas and hopefully perhaps even reach an agreement.

“John

“CC: Mary VanEtta; Ron Wallace”

48. When Turner’s secretary learned that Acsai had class until 5:00 p.m. on May 19, the parties set the meeting for Tuesday, May 18. Turner, Lange, Saylor, Lawn-Day, and Van Etta attended the meeting on behalf of the College. Mathieu and Weaver, the board members on the College bargaining team, were not present. The Association bargaining team (then-President-elect Acsai, Hillenbrand, Aflatooni, and Ron Wallace) attended on behalf of the Association. Martinez did not attend the meeting.

49. Turner started the May 18 meeting by saying that it was intended to be an informal exchange of ideas, not a bargaining session. Turner presented a one-page document to Association representatives titled “INFORMAL EXCHANGE OF IDEAS WITH BMFA,” which stated that the document was “NOT A PROPOSAL,” but “MERELY AN EXPLANATION OF THE COLLEGE’S IDEAS OF WHERE THE NEGOTIATIONS MIGHT GO.” (Emphasis in original.) The document stated that “TIME IS OF THE ESSENCE. WE WOULD LIKE TO WRAP UP NEGOTIATIONS IN THE NEXT WEEK.” (Emphasis in original.)

50. The document continued:

“PREVIOUS INFORMAL DISCUSSIONS AND EXCHANGES OF IDEAS LEAD US TO BELIEVE (HYPOTHETICALLY) THAT THE FOLLOWING CONTRACT CHANGES MIGHT BE ACCEPTABLE TO BOTH SIDES:

“a. ONE YEAR CONTRACT

“b. NORMAL STEP RAISES

“c. NO PAY RAISES

- “d. 175 DAY CALENDAR (BEGINNING IN THE 04-05 AY [Academic Year])
- “e. DEPARTMENT STRUCTURE REMAINS THE SAME; SERVICE AS A DEPT HEAD IS COMPLETELY VOLUNTARY; DEPT HEADS WILL BE CHOSEN BY THEIR DEPARTMENTS; DUTIES AND PAYMENT OF THE DEPARTMENT HEADS WOULD BE WORKED OUT SEPARATELY IN LINE WITH ARTICLE 20 (c) ‘NON-INSTRUCTIONAL WORKLOAD’. (BMFA RECOGNIZES THAT THE COLLEGE’S ABILITY TO PAY DEPT HEADS WILL BE LIMITED)
- “f. THE ADMINISTRATION MAY USE A ONE-TIME \$15,000.00 ‘BUY OUT’ OFFER TO ANY FACULTY MEMBER WITH MORE THAN THREE (3) YEARS OF SERVICE. THE OPPORTUNITY TO MAKE AND ACCEPT THIS OFFER WOULD EXPIRE BY 15 JULY 2004.)”<sup>12</sup>

51. The Association bargaining team members were taken aback because they expected a formal bargaining session. Turner’s presentation was followed by a long, awkward silence. Acsai doodled in her notebook. Association Team Member Hillenbrand eventually stated that the College’s past two years of illegal dealings with the faculty made the Association hesitant to deal with the College on such an *ad hoc*, informal basis. Association Team Member Wallace said that he thought a three-year agreement would benefit both sides. The Association team said they wanted to resolve contract modifications quickly, but wanted to do this through the formal statutory bargaining process.

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<sup>12</sup>From the College’s perspective, the buyout provision would only save funds if it was implemented before the start of the fall 2004 semester.

52. Turner was surprised and disappointed by the response of the Association team. Believing that the Association was not interested in what he had understood as the premise of the meeting, he left shortly thereafter, leaving the College bargaining team to finish the meeting.

53. The Association did not offer a counterproposal and the parties reached no agreements at this meeting. As the meeting ended, the Association team offered several dates for a bargaining session. The College team declined to set the next meeting at that time.

54. In May 2004, Turner prepared the executive summary for a College report related to the accreditation process. Turner wrote, regarding collective bargaining issues:

“In spite of my optimism for the long range health and future of [the College], the harsh reality is that collective bargaining remains a strong, divisive force that cannot be ignored. As of the writing of this document, the College has just finished putting together its budget for Fiscal Year 2004-2005. This budget is austere and cuts have been necessary in areas such as travel, materials, supplies, and contracted services. In spite of lean financial times, the faculty union has entered collective bargaining with demands for significant increases in pay and benefits which the College is not presently prepared to grant. This will lead to a lengthy, and I suspect acrimonious, bargaining period which may very well be on-going during the accreditation team’s visit in October of 2004. I predict that relations between the College and the union leadership will remain strained during the visit as a direct result of collective bargaining.”

### **June 2004 bargaining**

55. The parties set a formal bargaining session for June 4, 2004.

56. The College board gave substantial discretion to its negotiating team. The board members on the College negotiating team, Mathieu and Weaver, were in their

first term as board members and had not been on a negotiating team before. They designated Banks to speak for the College team in bargaining discussions with the Association team. The College team also agreed among themselves that, when the Association asked questions about College proposals and positions, the team would caucus to discuss the answers, and Banks would then present their answers to the Association team.

57. At the June 4 bargaining session, the Association team began by spending 30 to 45 minutes summarizing the rationale for its proposed modifications. Banks then summarized the College's proposals, without explaining the College's rationales for the proposals. His presentation lasted approximately ten minutes. The College bargaining team spoke only through Banks and would not respond to questions from the Association without first caucusing for lengthy periods.

58. The Association team members asserted that the College had a history of crying wolf during bargaining over anticipated budget shortfalls, but then finishing the fiscal year with a substantial surplus. After the College's second caucus, the Association bargaining team asked Banks if the College had a counterproposal to the Association's proposals. Banks responded that the College was not persuaded by the Association team's comments, and that the College didn't have a lot of leeway on financial issues. Banks stated that the College would not change its proposals at the next scheduled bargaining session (June 7), "in a month," or in "150 days." Banks stated that there was room to move the College's numbers around within the "pie," but that the size of the pie would not change.<sup>13</sup>

59. The Association team members reacted to Banks' comments with outrage. They believed the College presented a "take it or leave it" proposal and clearly refused to negotiate, in violation of the Public Employee Collective Bargaining Act (PECBA). Banks replied that the College "could have low-balled" the Association. He stated that the College expected a counterproposal from the Association. It is apparent that, at least from this point forward, the members of the Association team and Banks loathed each other.

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<sup>13</sup>The College's position was that the amount of money the College proposal represented, or its "value," would not be changed, although the College was amenable to changing the allocation of funds between items in the proposal. The College team did not, however, offer or provide any information to the Association about the costs of its package or its components.

60. Banks and the College team decided they would not agree to dates for future meetings at any given meeting, and would generally refuse to schedule more than one meeting at a time.<sup>14</sup> In addition, unlike members of the Association team who all worked in Pendleton, the members of the College team lived and worked in communities some distance from Pendleton and from each other, so it was harder for them to attend meetings in Pendleton or with each other. Mathieu taught high school and lived in Ione, 74 miles from Pendleton; Weaver lived in Baker City, 100 miles from Pendleton; and Banks' office was in Salem. Association team members were continually frustrated by the difficulty in scheduling bargaining meetings and viewed it as further evidence that the College was not negotiating in good faith.

61. The parties' next formal bargaining session occurred three days later on June 7, 2004. Acsai began the meeting by making a formal statement. She said the Association believed the College committed an unfair labor practice when it said it would not change its proposals in the next 150 days. She stated that the College set a contentious and hostile tone at the previous bargaining session and urged the College to refrain from bargaining directly with individual members. She questioned the College's claims of financial hardship and asked the College to justify its claims of revenue shortfalls.

62. The Association then presented a counterproposal to the College's May 18 proposal to modify Article 20 (Workload). The Association counterproposal stated that faculty need not teach more than one class per term at "alternative" times, and it added restrictions on travel and on scheduling classes after the alternative-timed class. The College bargaining team caucused for 45 minutes to an hour. Banks then asked Acsai about the Association's allegations of bad faith. Acsai responded that her team had not been able to consult with Association attorneys and were not offering a legal opinion, but they understood that the College's take-it-or-leave-it offer was bad-faith bargaining. Banks stated that if the Association believed the College was engaged in bad-faith bargaining, then the College would not try to bargain with the Association, and the bargaining session ended. The entire session, including the College's caucus, lasted approximately one and one-half hours.

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<sup>14</sup>In his testimony, Banks cited the Association team's hostility and anger as the reason for this approach. It was also a strategic decision on Banks' part.

63. On June 10, Acsai faxed a letter to Banks. She wrote that (1) after consulting with counsel, the Association believed the College was bargaining in bad faith; (2) the College failed to provide any evidence of its asserted financial difficulty; and (3) the Association wished to continue to negotiate, and asked for dates the College team was available.

64. On June 10, at the same time Acsai was faxing her letter to Banks, Banks faxed a letter to her. Banks referred to the Martinez-Turner conversations and the May 18, 2004 bargaining session. He stated that the College had asked for the financial information sought by the Association, and asked that the Association provide financial information about its proposals. Finally, Banks characterized the College's initial proposal on May 12 as a "significant concession" and stated that the College was willing to look at creative solutions to reach a settlement. Banks asked Acsai to contact him or Human Resources Specialist Mary Van Etta to set up a bargaining session in June.

#### **Mid-June 2004 through mid-September 2004: Interruption in bargaining**

65. On June 14, 2004, Acsai responded to Banks' June 10 letter. She disagreed with Banks' characterization of the meeting with Turner, and other matters. Acsai stated that during the June 4 bargaining the Association offered Banks the financial information he now sought, but he stated he did not want it at that time. Acsai also referred Banks to College financial statements and budgets, noting that the College's versions were likely more updated than the Association's. She stated that the College failed to offer any evidence to substantiate its alleged fiscal difficulties, and that "statements made by the Administration about financial crises over the last few years have been shown to be untrue."

66. Acsai concluded her letter as follows:

"Regardless of the [sic] whether the Association considers the College to be bargaining in bad faith, the College remains obligated under the PECBA to continue to bargain with the Association. *We are not available to meet until July 5. The month of August at this point is not clear, as some of the team members have made plans.* Please supply some dates in July when your group might be available. *I will be difficult to contact for the next two weeks, so please relay any possible responses through*

*Mary Van Etta, as she can contact me at my home.*" (Emphasis added.)

67. The week of June 14 was the last day of finals week. The faculty began their summer vacation the following week. Several members of the Association bargaining team had plans for that time, and Acsai herself planned to be "pretty occupied." College bargaining team member Weaver expected to negotiate all summer and didn't make summer plans for that reason.

68. On June 25, Banks left a message on Acsai's home phone. When Acsai played the message, it was hard to hear, as if Banks was on a cell phone fading in and out.

69. On June 30, Banks wrote Acsai, stating that the College could not meet on July 5. He stated, "I request that we set a bargaining session for *either* August 4, 2004, *or* August 17, 2004." (Emphasis added.)

70. On June 31, 2004, the College ended the 2003-2004 fiscal year with a \$1.7 million cash carryover.

### **July-August 2004 events**

71. Acsai returned Bank's call on July 5, 6, or 7, was connected to his voice mail, and left a message.

72. Shortly thereafter, Banks returned Acsai's call, calling her at home. Banks told Acsai that he sent her a letter at the College, and she had not responded. Acsai told Banks that she did not work in the summer and would not receive a letter sent to her at the College unless Banks notified her so she could go pick it up.<sup>15</sup> Banks told Acsai that he'd offered the Association two dates in July, but did not recall what they were

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<sup>15</sup>The College does not deliver mail to faculty. During the academic year, the secretary picks up the mail from the central mail room and distributes it to faculty mail boxes. The secretary does not work in the summer so the faculty does not get mail during the summer unless they retrieve it themselves. Acsai told Banks that in the summer he should either send mail to her home or, if he sends mail to the College, call her at home to let her know so she can go pick it up.

73. On July 7, Banks wrote Acsai at her work address, offering to meet to bargain on August 4 or 17.

74. On July 15, Banks sent a letter to Acsai's work address stating that the August 4 date was no longer available. On July 29, Banks sent another letter to Acsai's work address.

75. On August 2, Banks sent a letter to Acsai's work address stating that the College was available to bargain with the Association on September 13, October 6, "and" October 13, 2004.<sup>16</sup>

### September 2004 events

76. On September 1, 2004, Acsai attended a College board meeting. Consistent with board practice, she gave a report on behalf of the Association. Acsai discussed the implementation of the retrenchment arbitration award and the bargaining to date. She told the board that the Association viewed Banks' "150 days" comment (*see* Finding of Fact 58) as bad-faith bargaining, and discussed her lack of contact with Banks to set dates for further bargaining. At the time of her remarks, Acsai was unaware of the mail Banks had sent to her office address.

77. Although Acsai returned to the College for preservice work in early September, she had no access to her mail. She first had access to her mail on Tuesday, September 7, 2004, and on that date she received Banks' letters. Acsai immediately contacted the members of the Association team and notified the College that they would be available to bargain on September 13. The College agreed.

78. On Tuesday, September 7, Martinez called Board Chair Taylor and asked to speak with him prior to the next negotiation session. Martinez believed that Banks was impeding the negotiations, and that perhaps she could convince Taylor to get involved in the negotiations. Taylor told her that he would be working at the Pendleton Round-Up the next day and suggested Martinez stop by.

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<sup>16</sup>Banks did not tell Acsai that he sent these letters to Acsai's work address, so she did not know to pick them up.

79. Around 9 a.m. on Wednesday, September 8, Acsai, Martinez, and Radke found Taylor at the Round-Up and said they wanted to talk to him about the negotiations.

80. The Association members complained to Taylor that Banks was running the College side of the negotiations and was notorious for his negotiation style. They asked Taylor to attend the negotiations. Taylor refused, saying that he was not on the College negotiation team.

81. In addition to his September 8 discussion, Taylor received several phone calls from faculty between March and August, including calls from Hillenbrand and Martinez. Taylor said little more than to suggest they make a bargaining proposal

### **September 13, 2004 bargaining session**

82. At the parties' September 13, 2004 bargaining session, Banks began by asking if the Association had a counterproposal. Acsai responded that the Association presented a counterproposal at the last bargaining session, and asked if the College had a counterproposal. The College caucused for close to two hours, and emerged with a package proposal that included modifications to the retrenchment provisions and other new changes. The College had prepared an outline of this proposal before the meeting, but added details and produced the document, after some technical difficulties, during their caucus.

83. The College's September 13 proposal would change the following Articles:

Article 1 (Recognition): change the definition of full-time work from a minimum of 12 to a minimum of 13 instructional units in two terms in an academic year; change the maximum number of instructional units for part-time work from 12 to 13;

Article 15 (Calendar): set the working year at 180 days, except 230 days for instructors at the prisons, as set by the College's contract with the state Department of Corrections;

Article 16 (Salary): salary increases for 2005-2006 (.5 percent) and 2006-2007 (1 percent) for full-time instructors, and 1 percent in 2006-2007 for part-time instructors; added an option for the College to pay teachers pro-rata per student rather than canceling small classes;

Article 17 (Fringe Benefits): raise the College's medical insurance contributions beginning each academic year from \$735.29 to \$750 for 2004-2005, \$775 for 2005-2006, and \$800 for 2006-2007;

Article 20 (Workload): raise limit on full-time faculty instructional units from 45 to 48; raise the limit for part-time faculty; raise maximum number of assigned evening or weekend classes for full-time faculty to two; require each faculty member to advise 20 students; raise limit on full-time faculty instructional units from 45 to 48; raise the limit for part-time faculty; and add an option for the College to pay teachers pro-rata per student rather than canceling small classes;

Article 26 (Medical Coverage for Retirees): end the program for those who retire after September 1, 2006, but retain benefits for those who retire prior to that date; retain the \$450 per month medical insurance premium cap;

Article 31 (Employment Status): state that part-time faculty are not regular status employees for retrenchment purposes, and that the contracts of part-time employees expire at the end of each term; retrench only within work units, which are defined to be Pendleton, Hermiston, Milton-Freewater, Baker County, Morrow County, Powder River Correctional Facility, Two Rivers Correctional Facility, and Eastern Oregon Correctional Facility; reduce notice of layoff from 120 to 60 days, 90 to 30 days, and 60 to 30 days depending on the time of year and reason for the retrenchment; and

37 (Duration): three-year contract term.

This proposal differed from the College's only other written proposals, a formal proposal dated May 12 and an informal proposal on May 18. The College dropped its earlier proposal for a \$15,000 buyout, and for the first time, it proposed changes to Articles 1 (Recognition), 15 (Calendar), 26 (Medical Coverage For Retirees), and 31 (Retrenchment). It also made substantial changes to its earlier proposals on Articles 16 (Salary), 17(Fringe Benefits), 20 (Workload), and 37 (Duration).

84. Association Bargaining Team Member Aflatooni, who taught in the prisons, was particularly disturbed by the College's proposal to increase the prison faculty's work year from 180 to 230 days. The College believed that its proposal in Article 16 to increase the prison faculty's work year was in lieu of salary, an issue opened by the Association.

85. The Association bargaining team members were surprised by what they perceived as the draconian nature of the College proposals. The Association team was particularly distressed by the College's new retrenchment proposal, which would remove part-time employees from the order of retrenchment, reduce the notification time for layoff, and designate each local campus as a work unit from which layoffs would be made instead of the College as a whole.

86. Banks reviewed the College's proposal with the Association team, who had a variety of questions about it, but did not agree that it was appropriate for bargaining. Banks simply wrote down the questions and stated that the College team would address them in caucus and Banks would deliver the College's answers.

87. After the College's bargaining team returned from their caucus, Banks first asked the Association team whether they had a counterproposal. Expecting to discuss the College proposal further after their questions had been answered, the Association team said no. Banks then said that the parties were not making any progress in bargaining and that "we should mutually agree to go to mediation."<sup>17</sup>

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<sup>17</sup>College Board Member Mathieu viewed mediation as a useful tool, not simply a step in the PECBA bargaining process. She thought it would be helpful in moving the negotiations forward.

88. The Association team caucused briefly, and returned to the table to state that they believed that the parties had hardly bargained at all, and saw no reason to go to mediation before serious bargaining had taken place.

89. The parties agreed to meet again and set “September 27<sup>th</sup> or 30<sup>th</sup>, or October 7<sup>th</sup>” as tentative dates.<sup>18</sup>

### **September 27, 2004 bargaining session**

90. The parties next met on September 27, with Ron Wallace as the primary spokesperson for the Association. At the beginning of the session, the Association presented the College with a counterproposal.

91. The Association’s September 27 proposal addressed the following articles:

1 (Recognition): “[n]ot on the table”

15 (Calendar): “[n]ot on the table”

16 (Salary): would change salary index increases to 2.5 percent in the first year, and use a formula based on the Consumer Price Index (CPI) for the following years with a 1.5 percent minimum and 4 percent maximum wage increase; increase the longevity top-step bonus, but abandon separate longevity step increases; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to accept reduced pay rate; reassert the part-time salary schedule in their original proposal; and reduce the professional incentive fund to \$30,000 for all three years of the contract;

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<sup>18</sup>The Association negotiating team believed that the College was offering to meet to bargain on *all three days*, but the College actually offered to meet on only *one* of the three days. This type of misunderstanding was endemic to the College-Association relationship.

17 (Fringe Benefits): increase College insurance contribution from a base rate of \$735 per month to \$790 per month for academic year one of the contract, and increase the monthly rate at the same rate as premium increases in years two and three; or “[r]eturn to the 92%/8% split”

20 (Workload): reduce the full-time faculty workload to 42, from 45; set out a formula for prorated reimbursement formulae for classes with enrollments of less than ten, with faculty not required to accept the reduced pay rate; department agreement sets upper limit on class size; only one night or weekend class may be required of faculty; department chairs as in original proposal; enter memorandum of agreement to find ways to encourage more faculty to agree to advise students;

25 (Sick Leave): remove five-day limit for use of sick leave for family illness;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$790;

31 (Employment Status): “[n]ot on the table”; and

37 (Duration): make all financial elements retroactive to September 1, 2004; retain the prior contract carryover clause.

92. The Association team asked the College to drop its proposed changes to Articles 1, 15, and 31 (Recognition, Calendar, and Retrenchment). The Association argued that the proposals were regressive bargaining in violation of the PECBA and were submitted in violation of Article 37 of the 2002-2004 collective bargaining agreement.<sup>19</sup>

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<sup>19</sup>The Association apparently believed that the following language from the 2002-2004 collective bargaining agreement barred either party from opening Articles 1, 15 and 31 because they were not listed in a bargaining notification: “[the contract] shall be automatically renewed from year to year therefore unless either party shall notify the other in writing prior to April 1, 2004, that it desires to modify this agreement. *Such notification shall include the substance of the*

It also asked to talk at the table directly with the board members on the College team instead of talking to them through Banks. The board team caucused, returned, and through Banks, denied the Association's requests.

93. The Association team viewed Banks as an impediment to bargaining and believed that Banks was steering the board's responses to Association proposals. The Association team believed that without Banks, the College's approach to bargaining would be more collegial and its proposals more sympathetic to Association concerns. In fact, the board members on the College negotiating team supported the proposals and bargaining strategies Banks used. The board was in complete support of its negotiating team.

94. Banks stated that the College would not take Articles 1, 15, and 31 (Recognition, Calendar, and Retrenchment) off the table, and that he would remain as the College's spokesperson in negotiations. Banks asked the Association team to explain why they opposed changes to the Articles. Acsai responded that the Association believed the College's proposal constituted regressive bargaining.<sup>20</sup> The Association team presented the rest of its counterproposal, and the College team caucused.

95. The Association thereafter summarized its counterproposal. It also asked that the bargaining teams meet to discuss candidly the rationale behind each of their respective proposals. Banks refused the Association's request on behalf of the College stating that he alone would act as its spokesperson. Banks accused the Association of refusing to bargain because it did not offer any counterproposals to the College's proposals to modify Articles 1, 15 and 31. The Association stated that it continued to believe the College's addition of these new proposals was improper. Banks called a caucus and the College bargaining team was gone for more than an hour. It came back with a simple, handwritten proposal stating:

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*modification sought.*" (Emphasis added.) An arbitrator rejected the Association's position. (See Finding of Fact 100.)

<sup>20</sup>The Association responded "not on the table" to the College's proposals to change Articles 1, 15 and 31. When challenged by Banks, the Association team changed its response to "no."

“1. College package proposal of 9/13/2004 with the following:

“178 day calendar

“P/T salary schedule forthcoming

“Dept. Chairs language forthcoming.”

96. The Association caucused and then announced its rejection of the proposal. Banks responded that the parties were not making progress in bargaining and the College team did not want to schedule another day for bargaining because the 150th day in the bargaining process was nearly upon them. Banks stated that the College preferred to go to mediation. Banks declined to set another bargaining session and rejected the Association’s offer to meet on October 7.

97. On September 28, 2004, Bishop wrote Banks that the Association believed the College was violating the PECBA. Bishop said the College refused to meet again with the Association and reneged on its offer to bargain on October 7. Bishop asserted that the College’s bad faith was responsible for any lack of progress in negotiations. He also asserted that the College’s expressed desire to enter mediation before the end of the 150-day statutory bargaining period constituted bad-faith bargaining.

98. On September 30, Banks responded to Bishop. Banks reiterated his statement in bargaining on September 27 that “the college is out of fresh ideas and therefore intends to request mediation when the statutory 150 day bargaining period expires.” Banks also stated that the “college has offered to meet and bargain again if the association has new ideas or new proposals so the time is beneficial and productive for both teams.”

99. On October 1, Bishop wrote back to Banks. Bishop repeated that under the PECBA, the College could not unilaterally terminate bargaining prior to the 150th day of negotiations to request mediation. He noted that Banks said the College was willing to meet to bargain, but he had not offered any further meeting dates. Bishop asked Banks for meeting dates. Bishop also asked the College to respond to the Association’s latest proposals. He said that unless the College provided dates it was

available for bargaining, the Association would “assume that the College is continuing in its premature termination of bargaining.”

100. On October 1, 2004, the Association filed a grievance over the College’s proposed changes to Articles 1, 15 and 31. The Association asserted that Article 37 of the 2002-2004 collective bargaining agreement required the College to give notice of all the contract articles it wished to open for bargaining in its first proposal. It argued that the College’s failure to give appropriate notice meant that Articles 1, 15, and 31 were not properly on the table. The parties submitted this dispute to an arbitrator. In August 2005, the arbitrator concluded that the College’s proposals did not violate the contract.

101. On October 4, 2004, Banks responded to Bishop. Banks stated that Bishop apparently misunderstood the bargaining history between the parties and denied that the College was engaged in bad-faith bargaining. He noted that the text of the Association’s last offer contained the words “not on the table” next to changes in three articles proposed by the College. When the College challenged that language as a refusal to bargain, Banks wrote, the Association changed its responses to “no.” Banks stated that “[i]t is the intent of the College to request mediation after the 150-day period expires later this week, assuming no settlement has been reached before that time.” Banks concluded:

“While the College continues to take advantage of the statutory measures provided to move the teams toward settlement, we also, as previously expressed to you, are willing to consider meeting again. We are also amenable to bargaining through correspondence. \* \* \* If your team has a counter offer, please send that to me. It is important that both parties continue to make movement towards settlement. Due to the state conciliator’s schedule, it may be several weeks before we are able to set a mediation date. Thus, if we are unable to reach a settlement prior to requesting mediation, the College bargaining team would consider scheduling a time to meet and bargain after requesting mediation but prior to the actual mediation date.”

Banks did not offer any dates for another meeting with the Association.

102. On October 5, 2004, Bishop wrote to Banks that absent an offer of “specific dates” the College was available for bargaining, the Association would “assume that the College is continuing in its premature termination of bargaining.” Bishop wrote:

“\* \* \* I understand the Association to be ready, willing and able to meet with the College \* \* \* if the College would simply suggest dates when more bargaining could occur. The Association does not wish to bargain ‘through correspondence,’ as you suggest. \* \* \*

“Please notify me and the Association’s bargaining representatives if the College is willing to resume bargaining, and, if so, on which dates and at what time.”

103. On October 6, 2004, Martinez and Association President Acsai spoke at the College board meeting. They stated that the College was bargaining in bad faith and was rushing to mediation. Other faculty and their supporters urged the College board to remove Banks from the negotiations. A large number of faculty members and the local media attended this board meeting. After emotional public discussion, Board Member and College Bargaining Team Member Mathieu suggested to Acsai that after the board meeting, the parties could set a new date for negotiations. The parties agreed to a bargaining session on October 11, 2004.

104. The College bargaining team believed Banks was becoming a scapegoat for the College’s bargaining positions and strategy. Accordingly, the College team designated Mathieu to be its spokesperson at the October 11 bargaining session.

### **October 11, 2004 bargaining session**

105. At the October 11, 2004 bargaining session, the parties discussed their previous proposals and exchanged informal proposals. The College indicated it was “receptive to the idea of re-establishing Department Chairs” and to compensating them through release time equal to three instructional unit credits (IUC) or, where release time was impractical, \$2000 cash reimbursement per quarter.

106. The Association believed that the parties were close to agreement on some issues, including sick leave, and asked the College to enter a tentative agreement

on those issues. Banks asked for a caucus, and when the College team returned, they stated that the College did not wish to enter a tentative agreement.

107. Throughout negotiations, the College adhered to a strategy of not entering tentative agreements on individual articles until they had a complete agreement on an entire contract.

108. At the close of the October 11 meeting, the Association asked for additional bargaining dates. The College team expressed reluctance to meet again prior to mediation.

109. On October 14, Mathieu responded to an e-mailed inquiry from fellow Board Member Kim Puzey, who was particularly interested in the retrenchment issue. Mathieu sent her response to the entire board. Mathieu wrote:

“\* \* \* [The Association] seemed quite open to the articulation of branch campuses as separate work units - but that whole issue is in, of course, a disputed article. They also seemed to understand the desire to omit part-time employees from the 27-month recall, but that’s an issue that requires further fine-tuning. Bob [Hillenbrand of the Association bargaining team] wanted to say that our proposals to Article 31 were a blatant attempt to replace full-time faculty with part-time faculty - but he didn’t answer when I asked where that interpretation came from.<sup>21</sup> If article 31 is allowed - and that may be up to the ERB [Employment Relations Board] - then I think at least the protection of branch instructors from mandatory retrenchment is a real possibility. \* \* \*”

110. Sometime between October 11 and October 27, the College negotiating team held a lengthy meeting to consider how far the College could go to

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<sup>21</sup>Mathieu was looking for an answer grounded in the language of the College’s proposal; Hillenbrand answered her in terms of what the changes in that language suggested about the College’s intentions.

address the Association's concerns. The meeting included "a lot of number crunching." The meeting resulted in a new College proposal.

111. On October 27, College Human Resource Specialist Van Etta mailed the new proposal to Acsai. It included the College's prior proposed changes to Articles 1, 15, and 31, and specific language regarding department chairs and part-time salaries. Van Etta's cover letter asked the Association to mail a response to the proposal by November 3, 2004.<sup>22</sup>

112. The College's October 27 proposal included the following articles:

Article 1 (Recognition): changing the minimum instructional units required for full-time status from 12 to 13;

15 (Calendar): reducing the work year from 180 to 178 contract days;

16 (Salary): increased the payment for each step slightly, and then increasing that amount 0 percent in 2004-2005, .5 percent in 2005-2006, and 1 percent in 2006-2007; freezing the rate of part-time salaries throughout the new contract;

17 (Fringe Benefits): increase the monthly College insurance contribution from a base rate of \$735.49 per month to \$750 per month for fiscal year one of the contract, \$775 for fiscal year two, and \$800 for fiscal year three;

20 (Workload): raise the full-time faculty workload to 48 instructional unit credit hours, from 45; raise the maximum workload for part-time faculty to 13 from 12; incorporate the College's October 11 informal proposal regarding department chairs, compensating them at three instructional unit credits or \$2000; add one evening or

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<sup>22</sup>The College team selected this date in response to what they believed was a history of Association letters that demanded responses by prompt deadlines.

weekend class for a total of two maximum, permit pro-rata payments for low enrollment classes; and give the College the discretion to assign each faculty member to advise 20 students;

25 (Sick Leave): increase limit for use of accumulated sick leave for family illness from 5 days to 60;

26 (Medical Coverage for Retirees): end this coverage for employees who retire on or after September 1, 2006;

31 (Employment Status): “[p]art-time employees do not meet the criteria of regular status employees for retrenchment purposes” (emphasis omitted); state that retrenchment does not pertain to part-time employees; provide that part-time employee contracts automatically expire at the end of the term stated in the contract; retrench only within work units, which are defined to be Pendleton, Hermiston, Milton-Freewater, Baker County, Morrow County, Powder River Correctional Facility, Two Rivers Correctional Facility, and Eastern Oregon Correctional Facility; reduce notice of layoff from 120 to 60 days, 90 to 30 days, and 60 to 30 days depending on the time of year and reason for the retrenchment; provide that the contract article shall not restrict the College’s rights to assign instructors “inter and intra work unit”; and

37 (Duration): three-year contract term.

### **November 2004 events**

113. On November 1, Acsai responded to the College’s October 27 proposals in a letter to Mathieu and Van Etta. Acsai asked for a face-to-face meeting between the parties to discuss the proposals. She offered times to meet on November 8, 9, 15, 16, and 18.

114. At the November 3, 2004 meeting of the College board of directors, Mathieu notified the board that the College bargaining team would request mediation assistance from the state conciliator because the two sides were still so far apart. Mathieu had been told it would take six to eight weeks to schedule a mediation session. She understood that the parties would continue table bargaining until mediation began

115. On November 4, 2004, the College asked this Board to provide a mediator.

### **November 9, 2004 bargaining session**

116. The parties met at the table on November 9, 2004. The Association began by giving the College counterproposals, including a response to the College's October 27 proposals.

117. The Association's November 9 proposal addressed the following articles:

16 (Salary): change salary index increases to 2.5 percent in the first year, retroactive to July 1, 2004, and a formula based on the College's revenue increases for the following years with a .5 percent minimum in 2005-2006 and 1 percent minimum in 2006-2007; increase the longevity steps; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to accept assignment to the low enrollment class; increase the part-time salary schedule; and increase the professional incentive fund to \$30,000 for each year of the contract (the prior collective bargaining agreement provided for a \$31,400 fund for the life of the contract);

17 (Fringe Benefits): increase College insurance contribution from a base rate of \$735 per month to \$790 per month for academic year one of the contract, and increase the monthly rate at the same rate as premium increases in academic years two and three;

20 (Workload): reduce the full-time faculty workload to 42 instructional units, down from 45, and part-time faculty to 30, down from 33; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to accept reduced pay rate; department agreement sets upper limit on class size; set out comprehensive proposal regarding night or weekend classes and travel time between classes; create seven department chairs, receiving three instructional units of workload credit for that work or \$2000; assign all full-time faculty to the Pendleton campus for the duration of the contract;

25 (Sick Leave): remove five-day limit for use of sick leave for family illness;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$790; and

37 (Duration): three-year contract; retain the prior contract carryover clause without the requirement that notice of reopening include the substance of the changes sought.

The parties made progress towards agreement on department chairs, sick leave, night classes, and the professional incentive fund.

#### **November 22, 2004 bargaining session**

117. On November 22, the parties again met at the table. The Association suggested discussing the issues they were close to resolving at the previous meeting. That discussion occurred—the parties talked extensively about stacked classes, low enrollments, professional incentive funds, department chairs, home centers, mileage, and time. In Mathieu’s view, the discussion was “bogged down in minutiae.” The College team wished to deal with the larger issues that divided the parties, such as salary and benefits.

118. At the end of the November 22 meeting, the parties discussed meeting again before the first mediation session. The Association bargaining team said

it was available during the week of December 6 through 10. The College team agreed to consider meeting if either party had a proposal, but they also needed to meet among themselves before meeting with the Association.

Mathieu summarized this portion of the meeting in a November 22 e-mail to Lange as follows:

“\* \* \* Bob had a little fit (very little, for Bob) about how we never commit to dates (aren’t they the ones that moved mediation back six weeks?!), and Joan pointed out that half of our committee travels distances (Salem, Baker, Ione), whereas they see each other every day. Didn’t matter to him. Also, he complained again about how much they’ve moved and we haven’t at all.... blah blah blah. Sort of shot the camaraderie of the moment.

“Afterwards, Gayle, Sean, Mary, Joan and I met and decided that we’d like to put together a package proposal for the first mediation session - I suppose we could unveil it sooner if they had something tangible to share. I will try this weekend to draft something and send it ‘round. Maybe we could get a lot of work done via e-mail.”

In the end, the College team did not contact the Association with a date for a meeting prior to mediation.

119. Mathieu summarized the positions of the parties in a memo she wrote for the board after November 9. Her memo stated:

**“Summary Comparison of [College] and [Association]  
Contract Proposals as of 11/9/04**

“Prepared for conversation only by Lea Mathieu, [College] Board member; for details and exact language, see recent proposals in their original entirety

“Article 1: Recognition

“[College]: edit IUs [instructional units] for part and full time faculty in accordance with article 20

“[Association]: Argues article should not be opened (but they have also proposed changes to 20)

“Article 15: Calendar

“[College]: Change calendar year to 178 from 180; recognize special calendar year (up to 230 days) for some prison instructors

“[Association]: Argues article should not be opened.

“Article 16: Salary

“[College]: 0% increase for 2004-05; 5% for 2005-06; 1% for 2006-07

“[Association]: 2.5% for 2004-05; linked to increases in college’s actual total general fund revenues for the next two years, with minimums as above

“[College]: For classes below 10 students, the college may offer the instructor the opportunity to teach on a pro-rated basis instead of canceling

“[Association]: Specifies what the pro-rate would be, with a minimum of 70% for 1-7 students

“[College]: A part-time instructor salary scale is proposed ranging from \$16 - 22/hr depending on highest degree and quarters of service. [Note: are some part-time instructors above this now?]. The scale applies only to hourly employees; rate for IUC instructors are not given.

“[Association]: Part-time salary scale ranges from \$16 - \$29.92/hour, with quicker steps. Rates for part-time IUC instructors are given from \$500-\$933.

“[Association]: Also increases step increments

“[Association]: Also decreases professional incentive fund, and limits its availability to full-time faculty

“[College]: No changes in step increments or PIF [Professional Incentive Fund]

“Article 17: Fringe Benefits

“[College]: College will contribute toward employee insurance \$750/month for 2004-05; \$775 for 2005-06; \$800 for 2006-07

“[Association]: College will contribute \$790/month for 2004-05 and the additional rate of increase for future years [ $\$790 \times (1 + r)$ ].

“Article 20: Workload

“[College]: Full-time faculty may teach up to 48 IUs per year, with no more than 17 per term without the instructor’s approval; part-time faculty may teach up to 13 IUs in a term for a total of 33 per year [Current contract: 45/17; 12/33]

“[Association]: Full time faculty may be assigned 42 IUs per year, with no more than 16 per term; part-time may be assigned no more than 10 IUs per term for a total of 30 in an academic year.

“[College]: Department chairs may be full or part time faculty; four departments; two-year appointments; \$2000 or 3 IUs release time, at college’s discretion; general duties listed.

“[Association]: Chairs must be full-time; seven departments; one-year appointments; chair and provost together decide reimbursement of pay or release time; more precise duties are listed.

“[College]: Full-time instructors are limited to two evening and/or weekend courses per term; part-time instructors may be required to teach more than two evening and/or weekend courses per term.

“[Association]: Creates idea of ‘home center’ and specifies when and where instructors may be required to teach. In essence, no teaching schedule should span more than 10 hours/day (including transportation); daily spans shall not exceed 40 hours/week; no more than 2 centers in any one day; no full-time instructor shall be required to work more than two nights per week; no instructor shall be

required to teach both a weekend and a night class; no required travel between Pendleton and Baker in the winter; travel to other centers will be reimbursed.

“[College]: The college may assign each instructor to advise up to 20 students.

“[Association]: Upper class limits will be determined by the department

“Article 25: Sick leave

“[College]: Changes current maximum of 5 days sick leave for family medical needs to 60 days for the serious health condition as defined by FMLA or OFLA, of a member of the employee’s immediate family.

“[Association]: Omits any maximum; accrued sick leave may be used for the illness of a member of the employee’s immediate family.

“Article 26: Medical Coverage for Retirees

“[College]: Proposes sunset clause for current benefit; no longer available for employees who retire on or after September 1, 2006.

“[Association]: Increases benefit from \$450/month to \$790/month, with no sunset clause

“Article 31: Employment Status

“[College]: Articulates that retrenchment language does not apply to part-time employees; delineates work units geographically ([College] Pendleton, [College] Milton-Freewater, etc.) Reduces notice days for retrenchment.

“[Association]: Argues that 31 should not be opened.

“Article 37: Duration

“[College]: Contract in effect on the day it is signed.

“[Association]: Contract retroactive to July 1, 2004”  
(Emphasis in original.)

120. On November 22, this Board notified the parties that it scheduled the first mediation session for January 20, 2005.

### **December 2004 events**

121. At the December 1 College board meeting, Mathieu gave a public report about the status of negotiations at the College board meeting. She stated, in part:

“However, we are still apart on important financial matters such as salary, fringe benefits, and retiree benefits. Considering the state economic forecast, the Board of Directors is in agreement that, as stewards of limited public funds, we *must* be conservative in our financial obligations for at least the near future. Furthermore, the union still will not negotiate articles we feel to be important to a three-year contract.” (Emphasis in original.)

122. In December 2004, Oregon Governor Kulongoski announced his proposed budget for higher education. It would reduce the total amount available for community colleges as well as change the formula for allocating those funds. As a result, College officials calculated that the College would have to cut its budget by approximately 6 percent.

123. College officials were concerned that the funding cuts would disproportionately reduce services provided by the non-Pendleton campuses. A reduction in services could raise retrenchment issues.

124. On January 7, 2005, the parties agreed upon the implementation of the March 2004 arbitrator’s award in the retrenchment grievance.

### **January 20, 2005: first mediation session**

125. On January 20, 2005, the parties met for their first mediation session. They exchanged “supposals.” The supposals were understood to be nonbinding proposals. The College’s supposal, presented to the Association at 5:30 p.m., increased prior College offers on salary and fringe benefits. Instead of eliminating retirement benefits for those employees who retired after a certain date, as in previous College

proposals, the supposal would eliminate the benefit only for those employees hired after ratification of the collective bargaining agreement. The College supposal also addressed retrenchment. It would eliminate the recall rights of part-time faculty and designate each campus as a separate work unit for layoff purposes. This was the first mention of recall rights in this round of negotiations.

126. The College's first January 20 supposal included the following articles:

16 (Salary): increase the payment for each step slightly, and then increase that amount 0 percent in 2004-2005, 1 percent in 2005-2006, and 1 percent in 2006-2007; freeze the rates of part-time salaries throughout the new contract;

17 (Fringe Benefits): increase the monthly College insurance contribution from a base rate of \$735.49 per month to \$775 per month for fiscal year one of the contract, \$800 for fiscal year two, and \$825 for fiscal year three;

26 (Medical Coverage for Retirees): end this coverage for employees who were hired on or after ratification of this agreement; and

31 (Employment Status): “[p]art-time employees do not meet the criteria of regular status for retrenchment purposes” (Emphasis omitted); retrenchment does not pertain to part-time employees; part-time employee contracts automatically expire at the end of the term stated in the notice of assignment, and that recall rights do not apply to them; retrench only within work units, which are defined to be Pendleton, Hermiston, Milton-Freewater, Baker County, Morrow County, Powder River Correctional Facility, Two Rivers Correctional Facility, and Eastern Oregon Correctional Facility; reduce notice of layoff from 120 to 60 days, 90 to 30 days, and 60 to 30 days depending on the time of year and reason for the retrenchment; provide that

the contract article shall not restrict the College's rights to assign instructors "inter and intra work unit."

127. The Association's January 20 supposal addressed the following articles:

16 (Salary): increase salary index 2.5 percent in the first year, retroactive to July 1, 2004, and a formula based on the CPI for the following years with a 1.5 percent minimum and 4 percent maximum in 2005-2006, and a 1.5 percent minimum and 4 percent maximum in 2006-2007; increase the longevity steps; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to teach the low enrollment class; increase the part-time salary schedule; and increase the professional incentive fund to \$32,000 for each year of the contract instead of \$30,000 over the life of the contract;

17 (Fringe Benefits): increase College insurance contribution from a base rate of \$735 per month to \$790 per month for academic year one of the contract, and increase the monthly rate at the same rate as premium increases in academic years two and three;

20 (Workload): reduce the full-time faculty workload to 42 instructional units, down from 45, and part-time faculty to 30, down from 33; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to accept reduced pay rate; department agreement sets upper limit on class size; set out comprehensive proposal regarding night or weekend classes and travel time between classes; create seven department chairs, receiving three instructional units of workload credit for that work or \$1500; assign all full-time faculty to the "present main location of his/her teaching assignment," with new hires to be placed by the College and present faculty to be reassigned with their agreement;

25 (Sick Leave): change five-day limit for use of sick leave for family illness to 60 days;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$790; and

37 (Duration): three-year contract; retain the prior contract carryover clause without the requirement that notice of reopening include the substance of the changes sought.

128. After the Association greeted the College supposal with a firm “no,” at 6:30 p.m. the College presented the supposal to the Association as a formal proposal.

129. The College believed it made a significant financial concession by abandoning its proposal to end retiree benefits for current employees. It also proposed to increase medical insurance premium payments. In exchange, the College wanted the Association to accept its retrenchment language for part-time faculty and to treat each job site as a separate work unit for retrenchment purposes. College negotiators were frustrated that their movement led to no discernable change in the Association team’s approach to bargaining. The Association team believed the College proposals were not significant financial concessions. They also believed that the College medical benefit proposal was unfair because it offered the Association less than the College provided to other College bargaining units and exempt technical workers. Although the College offered monthly benefits that matched those in other units, the proposed amounts were not retroactive to the date the other units began to receive the greater benefits. As a result, the total annual value of the insurance benefits the College offered the Association was less than it provided to its other employees.

130. After the parties exchanged supposals, the mediator asked the Association team if it planned to respond to the College’s retrenchment proposals. The Association team replied that it would not jeopardize the Association’s pending grievance by bargaining on that issue. In her next discussion with the Association team, the mediator said that, unless the Association wished to discuss retrenchment, the session was over. The Association did not want to discuss retrenchment and the January 20 session ended without any agreements. A second mediation session was scheduled for February 3, 2005.

131. On January 24, Turner e-mailed College board members about information he learned at a recent meeting of Oregon community college presidents. Turner wrote that the new funding formula proposed in Salem would cost the College \$750,000 per year, and that PERS increases and other increased costs would push the effective loss to \$1.5 million per year. Turner wrote:

“At this point, I am out of innovative ideas. We will either have to cut people and programs, or the entire institution will have to take a voluntary pay cut. If we decide to go with voluntary cuts, I will give people unpaid leave in the summer to help compensate. We may even shut down the college for a couple of weeks so people can take unpaid leave. \* \* \*”

132. Turner also wrote that he planned to have two “town hall” meetings with College employees that week. Those meetings took place on January 26 and 27, and were open to all College employees. At the meetings, Turner provided information about the latest decisions of the PERS board, the latest state budget proposals, and the negative impact those proposals would have on the College if implemented. Turner responded to questions from employees and listened to their suggestions. At least one employee proposed a pay cut for all employees.

#### **Mathieu’s January 27, 2005 faculty letter**

133. On January 27, College Bargaining Team and Board Member Mathieu mailed a letter to all College faculty members. The letter stated that it was “[f]rom Lea Mathieu for the BMCC Board of Directors.” The letter stated that it contained a “summary of proposed contract changes BMCC has offered BMFA to this point in negotiations.” The letter, in part, purported to quote and summarize the College’s recent proposals. Mathieu’s quotations and summary of the proposed contract contained some language which the College had not previously proposed to the Association. The new language included a proposal to require mandatory training for faculty who were required to advise students, and a representation that part-time faculty would be grandfathered into the new salary schedule so that their wages would not be reduced.

134. Mathieu’s letter, in addition to summarizing the College’s proposal, directed faculty members to an intranet website where they could find “the complete

proposed contract.” This online version used strikeouts to identify proposed deletions and underlining to identify proposed additions to the 2002-2004 collective bargaining agreement. It was the first time the College presented a complete version of its proposed contract. It included a change the College had not presented to the Association before, a provision in Article 29 which altered the calculation of sabbatical leave pay in light of the proposed change in the length of the contract year.

The College’s January 27 intranet proposal also added, to the title of Addendum C, the phrase “Not updated as of this proposal.” Addendum C identifies exempt and technical positions not covered by the collective bargaining agreement, *i.e.*, positions that are excluded from the bargaining unit. The January 27 online proposal contained the same 35 excluded positions in Addendum C as the prior collective bargaining agreement.

The two proposals described in Mathieu’s cover letter which had not been offered to the Association—grandfathering pay for part-time instructors and mandatory training for faculty—were not included in the College’s January 27 intranet posting of its proposal.

From January 27 forward, the College kept an online version of its latest contract offer on the College intranet available to all College employees. College bargaining team member Dan Lange periodically updated the proposal and sent it to other members of his bargaining team to review before it was posted.

### **January 31, 2005 Acsai letter**

135. On January 31, 2005, Acsai sent a letter to all faculty that gave the Association’s response to Mathieu’s faculty letter. Acsai included the following comments:

“The information below is a response to the summary from board member Lea Mathieu.

#### “ARTICLE 1 — RECOGNITION

“The changes proposed increases the exploitation of PartTime faculty. By increasing the workload that defines Full Time means that PT could be expected to work almost

a FT load at low pay and no benefits. The current contract already allows up to 33 IU's in a year for PT (over 73% of a full time load). This is higher than any other community college in Oregon (range is 50 to 60%).

“This article is one subject of the bad faith bargaining grievance filed by the BMFA.

“ARTICLE 15 — CALENDAR

“This article is one subject of the bad faith bargaining grievance [*sic*] filed by the BMFA. If this article had been opened in a timely manner, the BMFA would be in favor of reducing the contract from 180 to 178 days.

“The potential increase from 180 to 230 days for corrections instructors has some serious financial implications. Our research indicates that many PT corrections faculty would lose their jobs because of the finite amount of money in the DOC contract and approximately 200 less students would be served. We presented this information to the College during bargaining. They have not altered their proposal.

“ARTICLE 16 — SALARY

“FULL TIME- **During mediation the College proposed a 1% increase in FT salary for 05/06 which was ½% higher than their Oct. proposal.** A ½% increase is a cost to the College of \$13,380 for all general fund FT salary and payroll benefits for the entire year. This estimate was arrived at by increasing current general fund FT faculty costs by ½%, but does not include step increases or increases in PERS costs. The step increases would cost an additional \$42,071 for the year and would affect 18 of 39 faculty. In making this proposal the College negotiators stated that this offer is a significant movement on their part. Statistically, \$13000 in a budget of \$12 million is insignificant and the statement is insulting. The College states that it cannot afford pay raises. The College has saved \$260,000 between this year and last

year by not replacing faculty and bringing new faculty in at a lower step. In addition, the College has made no attempt to replace D. Rice, an additional savings of \$48,000 for the remainder of the year. Also, the College made the **choice** (it was not legally mandated) to move one million dollars in personnel and program expenses from soft money (back of the book) to the general fund. This does not indicate that the College cannot afford to pay raises; instead it indicates their **unwillingness** to do so.

“In the College summary step increases are listed at 2%. This is incorrect- step increases are 4%.

“PART TIME — Offer is for a raise of \$0.50/hour every four years. The College has deemed this as 'attractive'. [*sic*] No pay schedule for PT that teach credit courses. **They did add the language that adjunct PT will be reimbursed at \$500 per IU during the Jan 20 session.**

“The summary states that the intent is to grandfather in current pay rates so that no pay decreases will result. There is no language that reflects this intent in the College proposal. This is a potential site for abuse.

“\* \* \* \* \*

#### “ARTICLE 17- FRINGE BENEFITS

**“Increased offer of medical benefits by \$25/month over October proposal.** As stated in the College summary this would amount to \$775/month. This figure is what the exempt/ tech and management staff have been receiving since Sept of this year. However, this is not retroactive so while the rest of the College have enjoyed their benefits for the entire year, the faculty would only receive about half the year (or maybe less) with an equivalent amount. The classified staff contract states that their benefit is \$790 for this year and \$835 for next year. The cost to the College of \$775 for the 39 General Fund faculty over our current rate of \$735 for

½ year is \$ 9360. It would cost an additional \$3510 if the rate were \$790/mo [*sic*]

“\* \* \* \* \*

“DEPT CHAIRS- We believe we are close on this issue. \* \* \*

“\* \* \* \* \*

“The wording of the proposal in the summary is different from the proposal given to us by the College in October. It is difficult to respond to those changes since they have not yet been offered to us.

“\* \* \* \* \*

“ADVISING- The wording of the proposal in the summary is different from the proposal given to us by the College in October. It is difficult to respond to those changes since they have not yet been offered to us.

“ARTICLE 25 — SICK LEAVE

“The wording of the proposal in the summary is significantly different from the proposal given to us by the College in October. It is difficult to respond to those changes since they have not yet been offered to us.

“This is an area we believe we are close on settling. We offered a supposal on Jan 20 that is similar to the language in the summary, but have not received an official proposal.

“\* \* \* \* \*

“ARTICLE 3 — RETRENCHMENT

“This article is a subject of the bad faith bargaining grievance filed by the BMFA.

“Removal of PT employees from retrenchment order and loss of recall right has consequences not addressed in the College’s summary. The FT faculty could be laid off before PT faculty.

“Separation of centers as work units from main campus — and ability to assign workload in different work units. The College already has the right to require faculty to teach at the centers, but by separating the work units, FT faculty could be reassigned to several campuses including corrections and by reassignment could be laid off before any PT.

“When asked for examples of problems posed by the current contract that would necessitate these changes, the College could not provide any examples but again related that it might need these changes in the future because of finances or changes in the direction of the College offerings.

“\* \* \* \* \*

“COMMENTS:

“It is interesting that the College chose to pay to mail this inaccurate summary to faculty at a time when we are once again tightening our belt. If the College wished to convey a message to the faculty at large, it could have done so with an e-mail and a link to the contract proposal on the web site.

“In regards to the overall College proposal: Almost every single issue the College has raised in its proposals is in direct response to a grievance filed over the last two years and either won or settled in our favor. Our current contract obviously works well for us in protecting our rights as professional employees. Why would we want to change it?

“Next mediation date is Feb 3, 2005. 15 days of mandatory mediation is over on Feb 4. At that point either side may declare an impasse.” (Emphasis in original.)

### **February 1, 2005 Turner letter**

136. On February 1, 2005, College Interim President Turner e-mailed all faculty members represented by the Association. The e-mail reported on the results of his employee “town hall” meetings regarding the College’s financial prospects. Turner first thanked the participants “for sharing your thoughts and ideas.” He warned that “the College faces a potential shortfall of 2-3 million dollars during the biennium.” He wrote that he talked with meeting participants about increasing local taxes, increasing the number of students, offering incentives to students, making classes available in additional time periods, and “taking a voluntary pay cut in exchange for unpaid leave as a way to save a few positions.” He stated that “[b]ecause this is a union issue, please discuss this amongst yourselves.” He also stated that he would “need to know if this is being considered by the unions as a possible option,” and that “[t]he employees of the two unions will have to come up with a plan to make this work if you want it to happen.” Turner also warned that “we probably won’t be able to find enough good ideas to save the college 2-3 million dollars over the biennium” and that “[s]ome positions that become vacant may not be filled and position cuts will have to be considered as part of the solution.” At least five or six faculty members attended each of Turner’s “town hall” meetings.

### **February 3 mediation session**

137. On February 3, 2005, the parties met for a second mediation session. At 6:30 p.m., the College bargaining team presented the Association team with a complete contract proposal, something it had not done before. Some of the proposed changes were identified in Mathieu’s January 27 letter to faculty and on the College’s recent intranet posting, but had never before been proposed to the Association bargaining team. For example, the College’s February 3 proposal contained the mandatory training language from Mathieu’s January 27 letter and the intranet version of Article 20 (Workload).

The College’s February 3 proposal also added 9 more positions to the existing list of 35 positions excluded from the bargaining unit in Appendix C. The

College had never before proposed changes to Addendum C. Although the College underlined all other proposed new language in its offer, it did not underline the proposed new language in Addendum C. Neither did it discuss the new Addendum C language or otherwise call it to the Association's attention.

138. The College's February 3 proposal included the following articles:

1 (Recognition): change the minimum instructional units required for full-time status from 12 to 13;

15 (Calendar): reduce the work year from 180 to 178 contract days, except that prison faculty's work year was to be set by the College/prison contract, such as 230 days at the Pendleton prison (and change other provisions of the contract which refer to the work year, such as sabbatical leave salary, to 178 days);

16 (Salary): increase the payment for each step slightly, and then increase that amount 0 percent in 2004-2005, 1 percent in 2005-2006, and 1 percent in 2006-2007, with a reopener "if the State allotment to community colleges exceeds \$500 million per annum in 2005-2007" freeze the rate of part-time salaries throughout the new contract; increase the professional incentive fund from \$30,000 to \$32,000 for the life of the contract; provide slight increase in longevity bonus;

17 (Fringe Benefits): increase the monthly College insurance contribution from a base rate of \$735 per month to \$775 per month for fiscal year one of the contract, \$800 for fiscal year two, and \$825 for fiscal year three;

20 (Workload): raise the limit on full-time faculty workload to 48 instructional unit credit hours, from 45; raise the maximum workload for part-time faculty to 13 from 12; provide for four department chairs, who could be full-time or part-time faculty, to be paid with credit for three instructional units or \$1500; add one evening or

weekend class for a total of two maximum, regulate the timing of, and travel for, such classes; permit pro-rata payments for low enrollment classes; and give the College the discretion to assign each faculty member to advise 20 students, for which “[m]andatory training will be held on a regular basis” ;

25 (Sick Leave): increase limit for use of sick leave for family illness from 5 days to 60, including for childbirth or adoption;

26 (Medical Coverage for Retirees): end this coverage for employees who are hired after ratification of this agreement;

31 (Employment Status): “Part-time employees do not meet the criteria of regular status for retrenchment purposes” (emphasis omitted); state that retrenchment does not pertain to part-time employees; provide that part-time employee contracts automatically expire at the end of the term stated in the contract; retrench only within work units, which are defined to be Pendleton, Hermiston, Milton-Freewater, Baker County, Morrow County, Powder River Correctional Facility, Two Rivers Correctional Facility, and Eastern Oregon Correctional Facility; reduce notice of layoff from 120 to 60 days, 90 to 30 days, and 60 to 30 days depending on the time of year and reason for the retrenchment; provide that the contract article shall not restrict the College’s rights to assign instructors “inter and intra work unit”;

37 (Duration): three-year contract term; and

Addendum C (Exempt and Technical Positions): add 9 more job titles to the list of exempt and technical positions, for a total of 44.

139. Also at the February 3 mediation session, the Association bargaining team presented a supposal to the College. As before, the Association did not offer proposals regarding Articles 1, 15, and 31 (Recognition, Calendar, and Retrenchment).

140. The Association's February 3 supposal addressed the following articles:

16 (Salary): salary index increases 1.5 percent in the first year, retroactive to July 1, 2004, 2.5 percent in 2005-2006, and 2.5 percent in 2006-2007; increase the longevity steps; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to teach the low enrollment class; increase the part-time salary schedule at the same rate as the full-time schedule; and increase the professional incentive fund to \$32,000 for the life of the contract instead of 30,000 over the life of the contract;

17 (Fringe Benefits): increase College insurance contribution from a base amount of \$735 per month to \$790 per month for academic year one of the contract, increasing the amount for academic year 2005-2006 to \$860, and the amount for academic year 2006-2007 to \$920;

20 (Workload): reduce the full-time faculty workload to 42 instructional units, from 45, and part-time faculty to 30 from 33; department agreement sets upper limit on class size; set out comprehensive proposal regarding night or weekend classes and travel time between classes; create seven department chairs who receive three instructional units of workload credit for that work or \$1500; assign all full-time faculty to the "present main location of his/her teaching assignment," with new hires to be placed by the College and present faculty to be reassigned only with their agreement;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$500; and

37 (Duration): three-year contract; retain the prior contract carryover clause without the requirement that notice of reopening include the substance of the changes sought.

141. At 9:45 p.m. on February 3, the College responded with another package proposal, which was almost identical to its previous offer that day. It differed from its previous proposal in articles:

20 (Workload): eliminate regulation of employee travel regarding night or weekend travel, but retain timing restrictions; and

31 (Retrenchment): end recall rights for part-time employees.

142. The parties reached no agreements during the February 3 mediation session. The parties agreed to meet again for mediation on March 14, 2005. The mediator stated that if either side declared impasse, she would require an additional mediation session after March 14.

#### **February 4 *East Oregonian* article**

143. On February 4, 2005, the *East Oregonian* newspaper reported that talks between the parties had “stalled.” The article was based on a brief conversation between Dan Lange, who was a College bargaining team member and the College’s media spokesperson, and a reporter who wasn’t normally assigned to report on the College. The newspaper quoted from a written release prepared by Lange, which called the College’s proposals “both fair and responsible.” The paper went on to report: “Lange said that layoffs with the budget shortfall are inevitable and choosing who has to be laid off can be a difficult decision. However, the college believes the first to go should be all part-time positions over any probationary full-time positions.” The paper also quoted Lange as saying, “[w]e have to layoff all the part-time people before we can let go of a full-time person.”

144. Lange saw the article online on the afternoon of February 4, and was very concerned about the article’s impact on bargaining. Lange believed the reporter had misunderstood him. Lange was particularly concerned that the paper quoted him to state

that layoffs were “inevitable.” Lange contacted the *East Oregonian*’s publisher, who agreed to publish whatever clarification Lange chose to write.

145. Also on February 4, Lange wrote a memo to the faculty and staff stating in part:

“The [newspaper] article \* \* \* contained statements that were an egregious [sic] abomination of the information I gave to the reporter. At no time did I assert that ‘layoffs with the budget shortfall are inevitable.’ \* \* \*

“\* \* \* \* \*

“I did not say we were doing everything we can to cooperate. Of course that would have been out of kilter with the nature of this type of negotiation.

“I did not talk about the faculty team’s feelings. That would have been an insult. What I said was that the union’s job is to protect positions and their team is doing everything they can to accomplish this and that we wouldn’t expect anything less. That is why these negotiations take time.

“I certainly did not say who should be ‘the first to go.’ \* \* \*”

146. On February 5, 2005, the *East Oregonian* published Lange’s “clarification.” In the piece, Lange stated that his comments to the reporter had reflected his attempt “to explain how layoffs would occur if current retrenchment rules were applied to a layoff situation.” He also said that it was “premature to speak of inevitable layoffs or to conjecture how the college would handle a budget shortfall situation.”

147. On February 7, 2005, the College wrote the state conciliator that the parties had reached impasse in their negotiations. The state conciliator notified the College and the Association that they had until February 14, 2005, to file their final offers and cost summaries. The conciliator’s letter also stated, “[a] copy of the final offer

and a cost summary must also be submitted to the other party on the same day it is submitted to [this Board].”<sup>23</sup>

### **Student/faculty/administration conversations regarding possible faculty strike (January and February 2005)**

148. In early 2005, some students began to express concern that the Association might strike. Some asked faculty and staff about the effect of a strike on the students. Interim Provost/Executive Vice President Lawn-Day received several student complaints that faculty were talking during class time about a possible strike. She received the complaints from three to four students directly; from Tammy Parker, scheduler for the Office of Instruction, who passed along similar complaints from students; and from two faculty who called because they felt compelled to devote class time to address student fears.

149. Acsai routinely discussed bargaining issues with curious students outside her classes, but did not discuss them during classes. She did not tell any student that the Association was going to strike.

150. On February 8, 2005, Banks mailed and faxed a letter to Acsai. The letter stated, in part:

“It has come to the attention of the College from some of your students that during class you asserted that the Association is determined to strike. The College is disappointed that you would allow relationships at the table to spill over into classroom instruction. The College remains hopeful that both parties can proceed in a manner that separates the emotion of the bargaining table from the mission of instruction. A shared priority of both parties should be the present and future well-being and success of the students.”

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<sup>23</sup>OAR 115-40-000(1)(d) states in part, “[e]ach party shall submit a copy of the final offer and cost summary to the other party on the same day it is submitted to the mediator.”

The letter also stated that strike threats appeared to be evidence of bad-faith bargaining. The letter concluded, “[s]ettlement is the goal of the College. To that end, we have third and fourth mediation dates set.”

151. On February 9, 2005, College Interim Provost/Executive Vice President Gayle Lawn-Day e-mailed all College faculty and staff regarding “Contract Discussion Issues.” The body of the e-mail stated:

“There have been a number of student complaints and concerns that faculty have been discussing the prospects of a strike with students during class time. There are two problems with this. First, it is not permitted under the Academic Freedom administrative procedure,<sup>24</sup> because threats of an internal strike do not and should not have any pertinence to the curriculum. Second, it is premature to speculate on the course of negotiations between now and when a strike could be called. Within seven days of declaring an impasse, each party is required to submit its final offer and cost summary in writing to the state mediator. The offer and cost summary are published by the mediator. Parties then have a 30-day cooling-off period. Beyond that time, all or part of the contract could be implemented by the college, which could precipitate, but doesn’t force a strike vote.

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<sup>24</sup>The College’s administrative rule regarding academic freedom states, in part:

“\* \* \* Within the framework of the orderly processes of our democratic constitutional society, the faculty of Blue Mountain Community College will have freedom to consider all issues, which will contribute to the development of its students. The criteria to be followed in selecting issues for study will be:

- “1) The issue must contribute to the prescribed course curriculum, and to the general educational program of the College. Academic freedom does not extend to ad hoc changes in the curriculum by the instructor.”

“Remember that negotiations continue and that proposals will be exchanged in the mediation process. As the negotiation teams wrestle through the issues, our challenge is to work more closely - to understand disparate perspectives more clearly - rather than draw apart. Please assure students that a strike is not a foregone conclusion. The college remains hopeful for a fair contract settlement and is committed to providing the best possible education to our students.”

152. After sending the February 9 e-mail, Lawn-Day did not receive any further complaints. The College did not impose any discipline as a result of the complaints.

#### **Association final offer and cost summary (February 14, 2005)**

153. On February 14, 2005, the Association submitted its final offer and cost summary to the state conciliator, and sent a copy to Banks.

154. The Association’s final offer was substantially the same as its last offer and supposal. The modified articles included:

16 (Salary): increase salary index 1.5 percent in the first year, retroactive to July 1, 2004, 2.5 percent in 2005-2006, and 2.5 percent in 2006-2007; increase longevity bonus; set out a formula for prorated reimbursement for classes with enrollments of less than ten, with faculty not required to teach the low enrollment class; increase the part-time salary schedule at the same rate as the full-time schedule; and increase the professional incentive fund to \$32,000 for the life of the contract instead of \$31,400 over the life of the contract;

17 (Fringe Benefits): increase College insurance contribution from a base amount of \$735 per month to \$790 per month for academic year one of the contract, increasing the amount for academic year 2005-2006 to \$860, and for academic year 2006-2007 to \$920;

20 (Workload): reduce the full-time faculty workload to 42 instructional units, from 45, and part-time faculty to 30 from 33; department agreement sets upper limit on class size; set out comprehensive proposal regarding night or weekend classes and travel time between classes; create seven department chairs, receiving three instructional units of workload credit for that work or \$1500; assign all full-time faculty to the "present main location of his/her teaching assignment," with new hires to be placed by the College and present faculty to be reassigned only with their agreement; final offer adds provision permitting up to three low enrollment classes to be combined to form the equivalent of one class.

25 (Sick Leave): change five-day limit for use of sick leave for family illness to 60 days, to include childbirth and adoption;

26 (Medical Coverage for Retirees): increase the \$450 cap on retiree medical premium payments to \$500; and

37 (Duration): three-year contract; retain the prior contract carryover clause, this time including the requirement that notice of reopening include the substance of the changes sought.

### **College final offer and cost summary (February 14 and 17, 2005)**

155. Also on February 14, the College submitted its cost summary to the state conciliator. The cost summary contained a brief description of the College's position on disputed issues, but it did not include the text of the College's proposals. The College sent its cost summary to Doc Dengenis, the OEA UniServ consultant responsible for advising the Association. The College did not send its final offer to the state conciliator, Dengenis or the Association because of unclear communication between Banks, who was on the road representing another client, and College administrative staff. The College's Van Etta understood that the College was to send only the cost summary.

156. Later on February 14, 2005, Acsai learned that Dengenis had not received the College's final offer. Acsai went to Van Etta's office to request copies. Van Etta gave Acsai a copy of the cost summary and stated that this was all she had. After pointed questioning by Acsai, it became clear that Van Etta was not certain which documents the College was required to provide to the Association.

157. After Acsai left, Van Etta called Banks, upset and confused. On February 16, Banks sent a letter to Acsai which said that all discussions related to negotiations should be directed to him.

158. On February 17, 2005, the College submitted its final offer to the state conciliator and faxed a copy to OEA UniServ Consultant Dengenis. It did not provide Acsai with a copy of the final offer.

159. The College's February 17 final offer was identical to its last February 3 (9:45 p.m.) offer, except that an apparent typographical error resurfaced in Article 20 (Workload) regarding compensation for department chairs (department chairs to be paid with three instructional units of release time or "two thousand dollars (\$1,500) [*sic*].")<sup>25</sup> The final offer contained the same nine additional positions in Addendum C to be excluded from the bargaining unit. As in its February 3 proposal, the College's final offer struck through language it proposed to delete from the prior contract and underlined language it proposed to add. And as in its February 3 proposal, the College's final offer did not underline the positions it proposed to add to Addendum C.

#### **Board Chair Taylor's letter to faculty (February 23, 2005)**

160. On February 23, 2005, College Board Chair Taylor sent a letter to all College faculty. The letter was Taylor's idea. Lange and officials of the OSBA reviewed a draft of the letter. Taylor was a member of the Pendleton city council and an owner of a small business. He decided to write the letter after receiving questions from faculty and people in the community asking whether the College was targeting full-time faculty in bargaining. The letter directed faculty to the intranet website where they could review the College bargaining team's final offer.

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<sup>25</sup>The College used the \$1500 figure in its cost summary calculation.

161. Taylor's letter cited a "poor state funding situation" as justification for the College's position. At that time, the Governor's proposed budget was before the legislature, the state economic outlook remained uncertain, and the legislature was considering proposals to change funding calculations in a way that would reduce College funding. Taylor's letter summarized only those changes in the College's final offer which would improve terms and conditions of employment for bargaining unit members. It did not summarize those College proposals which the Association believed would be detrimental to bargaining unit members.

162. Taylor's February 23 letter summarized the prior contract's retrenchment provision as follows: "Under the current contract, the administration must either cut entire programs or layoff (a.k.a 'retrench' in the contract) all part-time instructors in a discipline before any full-time positions can be cut."<sup>26</sup> Taylor described these as "poor options" and wrote that the College's final offer would provide "full-time job security, but not at the expense of distant operations and the long-term fiscal stability of BMCC." Taylor stated that the College proposed that its "main campus and centers (Hermiston, Baker, and et. al. [*sic*]) become separate work units so only part-time instructors in a discipline within their work unit will be cut before any full-time positions." (Emphasis omitted.)

163. During a February 24, 2005 teleconference meeting, the College board of directors authorized "the College negotiating committee [*sic*] to implement all, or part, of the college's final contract proposal to the Faculty Association any time after March 14, 2005, if an agreement has not been reached with the Faculty Association by that date." This issue was not on the board's published agenda for the meeting; it was added through board approval of a motion by Mathieu at the start of the meeting. The board did not intend to revisit the implementation question, leaving the issues of whether and when to implement to the discretion of the negotiating team.

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<sup>26</sup>Taylor's letter was somewhat misleading because it implied that programs in College centers besides Pendleton must be shut down when their part-time faculty were laid off. In fact, with the exception of the faraway Baker City center, such programs could be retained through the assignment of a portion of a full-time faculty member's time. In the past, a number of full-time Pendleton faculty had taught classes in the other centers. The College proposed to end this practice through contract language, stating that full-time faculty would be assigned to one work center

## March 8, 2005 mediation session

164. On March 8, the parties met for their third mediation session. The College proposals focused on the retrenchment issue. It offered the Association some modest financial incentives to agree to its retrenchment terms, such as an increase in medical insurance payments. The Association adhered to its position that it would not respond to retrenchment proposals because of its pending grievance.

165. The College's first mediation proposal on March 8 addressed only retrenchment. It adhered to its previous proposal with these changes: it put part-time employees back into the order of retrenchment; and it removed part-time employees from the notice of layoff provisions, while retaining the language of its earlier proposals which did not provide part-time employees with recall rights.

166. In response to the College's retrenchment proposal, the Association sent the College a supposal. It agreed to four of the College's February 3 proposals, but otherwise adhered to the rest of the Association's final offer. The Association agreed to the College's February 3 offer regarding Article 25 (Sick Leave). It also agreed to three portions of the College's February 16 offer regarding Article 16 (Salary), namely the professional incentive fund, low enrollment classes, and longevity bonus steps for employees who were at the top of the salary schedule. The Association negotiators chose to address only these nonretrenchment issues upon which the parties had nearly reached agreement in the hope that an actual agreement on these lesser issues would move the process forward.

167. College negotiating team members viewed the Association supposal as yet another evasion of the major issues that divided the parties. On March 8, at approximately 7:30 p.m., the College sent a proposal to the Association through the mediator with a 9:30 p.m. expiration time. The College changed its prior proposals on Article 31 (Retrenchment) and Article 17 (Fringe Benefits).

168. Regarding retrenchment, the College's 7:30 proposal would delay until July 1, 2006 the portion of its proposal to increase the number of work units, thus delaying the increase in probability that full-time faculty would be laid off. On medical benefits, the College proposed to raise its monthly contribution to medical insurance premiums from the present \$735.49 to \$790 in fiscal year 2004-2005, \$835 in fiscal year 2005-2006, and \$875 in fiscal year 2006-2007.

169. The Association asked, through the mediator, why the College was willing to wait two years for the authority to lay off full-time faculty before part-time faculty when its justification for the proposed change was to respond to a current fiscal crisis. The Association team received no answer to this question.

170. At 8:30 p.m., the Association responded with a proposal that would raise the College's monthly contribution to medical insurance premiums to \$790 in academic year 2004-2005 (including retroactive payments to reach an aggregate amount of \$9480 per employee), \$835 in 2005-2006, and \$890 in 2006-2007. The proposal was a concession compared to the Association's final offer, but it was still higher than the College's proposal.

171. A short while after the Association submitted its proposal, the mediator returned to tell the Association team that the College "does not have any more proposals for you." The mediation session ended without any agreements.

### **Press release and letter to faculty from Lange, March 8-9, 2005**

172. After the March 8 mediation session, College Bargaining Team Member and Media Spokesperson Lange wrote a press release. He stated:

\*\*\* The main item in dispute concerns layoffs \*\*\*.

"The board proposed new language that was specifically designed to address the faculty's fears that full-time instructors could be laid off before part-time instructors. The new language specifically states that, within work units, part-time instructors would be the first to be laid off. In an effort to protect BMCC classes offered by part-time faculty at locations other than the Pendleton campus, the board is proposing to divide Pendleton, Hermiston, Milton-Freewater and Baker centers into separate work units."

173. On March 9, 2005, Lange walked through the Pendleton campus handing out a letter to faculty from him as "BMCC Negotiating Team Spokesperson." Lange also left copies at the receptionist's desk in his work area for faculty to pick up and read. Lange's March 9 letter addressed the March 8, 2005 mediation session.

Lange's letter repeated the language from his press release above. The letter also directed the faculty to a website to find the "latest College proposal in its entirety."

174 On March 10, after learning that some faculty perceived his method of letter distribution as selective, Lange sent an e-mail containing the text of the letter to all full-time faculty members of the bargaining unit. He stated, in part:

"I passed out a 'negotiations update' letter to a few faculty members yesterday, encouraging them to freely route it along to colleagues. Since this is a very unscientific way to get the information out, I would also like to offer that this letter is available from Shannon in the Office of Instruction \* \* \*"

"Though it is addressed to faculty members, it is generally no different from the information found by clicking 'Contract Negotiation Information' link on the BMCC website."

175 On March 11, 2004, the *East Oregonian* published an article written by College Board Chair Taylor. The article identified "the board's proposed layoff procedure" as "[t]he major unresolved issue" in bargaining. Taylor asserted that the "existing contract requires the college to treat the Pendleton campus and the centers in Baker County, Hermiston, Milton-Freewater and Morrow County as a single work unit." He also asserted that if layoffs became necessary,

"\* \* \* the current contract requires the college to lay off all part-time instructors in a program, or discipline, at all the centers before laying off a full-time instructor in the same discipline at the Pendleton campus regardless of whether demographic or enrollment trends indicate that the program is needed in any of those communities [<sup>27</sup>] We have proposed that the centers be considered as separate work units."

"The board's proposed language would not change the current layoff process that protects full-time faculty members

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<sup>27</sup>See footnote 26.

by requiring that part-time faculty in a discipline within a work unit would be laid off first.”

### **March 14 mediation session**

176. On March 14, the parties met for another mediation session. After a couple of hours, the College sent a proposal to the Association. It adhered to its March 8, 7:30 p.m. proposal, except that it offered to increase the number of department chairs from four to five (while compensating them with three instruction unit credits or “a stipend of two thousand dollars (\$1,500)) [*sic*].”<sup>28</sup> In response, the Association offered to simply remove department chairs altogether. The College responded by accepting the Association’s previous offer on this issue and the Association agreed.

177. The College presented its last offer at close to 10 p.m., a comprehensive contract proposal which repeated its March 8, 7:30 p.m. position on retrenchment and medical benefits, but added the agreed-upon language regarding department chairs. Both negotiating teams were tired and wanted to end the session. The Association inquired whether the College wished to meet again; the College responded that it did not.

### **College’s amended final offer (March 16, 2005)**

178. On March 16, 2005, the College submitted an “Amended Final Offer” to the state conciliator. The College chose not to submit a cost summary with the amended final offer. The College identified three ways its amended final offer differed from its final offer: (1) it delayed the effective date of the work unit changes in its retrenchment proposal until July 1, 2006; (2) it raised the College’s monthly contribution to medical insurance premiums to \$790 in fiscal year 2004-2005, \$835 in 2005-2006, and \$875 in 2006-2007; and (3) it increased the number of department chairs to seven, each compensated at \$1500 per quarter. College officials believed that these three changes would have a minimal financial impact on the cost of the offer. College representatives did not calculate the financial effect of the changes.

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<sup>28</sup>The Association originally sought ten department chairs, but later reduced the number to seven and reduced the compensation it sought for the position from \$2000 to \$1500.

179. The College's amended final offer cost more than its final offer. The additional department chair positions increased the cost by \$31,500 for the duration of the contract. The higher medical insurance benefits increased the cost by \$96,000 for the term of the contract.

180. In addition to the three changes identified by the College, its March 16 amended final offer differed from its February 17 final offer in another way. Addendum C of the amended final offer added seven more positions to be excluded from the bargaining unit, for a total of 51.<sup>29</sup> The College never discussed any proposed changes to Addendum C with the Association. The College did not underline the new language in Addendum C to show it was new.

Banks was responsible for insuring that the College's final offer was accurate. He went through it with a number of people from the College to make sure it was accurate. Banks did not recall discussing Addendum C with other members of the College bargaining team, and he did not know why Addendum C in the amended final offer differed from the one in the previous contract or its previous proposals. Although several other College bargaining team members testified at hearing, none addressed Addendum C or attempted to explain how the changes got into the proposals.

### **College implementation of amended final offer**

181. On March 21, 2005, Banks wrote to OEA UniServ Consultant Doc Dengenis to notify him that the College planned to implement its amended final offer effective March 28, 2005.

182. Also on March 21, 2005, the College sent a letter directly to each faculty member stating that it would implement its "entire Amended Final Offer on March 28, 2005, so that you will receive the increased insurance benefit in your March paycheck." The letter described how implementation of the amended final offer would affect the faculty member's salary for the next three years, and other important features of the offer.

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<sup>29</sup>Addendum C to the 2002-2004 collective bargaining agreement excluded 35 positions. The College's February 3 mediation proposal and its February 17 final offer added 9 more exclusions, for a total of 44. The College's amended final offer added seven more exclusions, for a total of 51. Cumulatively, the College proposed in its amended final offer to exclude 16 additional positions from the bargaining unit.

183. College Board Chair Taylor viewed implementation as a response to negotiations which he believed had reached a stalemate. Both Taylor and Banks believed the stalemate was due to the Association's refusal to discuss retrenchment.

184. On March 22, Banks wrote the Association to state that it remained "willing to seek an agreement through mediation," and that it had contacted the mediator with potential dates.

185. On March 28, 2005, 12 days after submitting its amended final offer to the state conciliator, the College unilaterally implemented its amended final offer.

#### **May 25, 2005 post-implementation mediation**

186. The parties met again with the mediator on May 25. The mediator prompted the Association to present a proposal, and the Association renewed a verbal proposal it made on March 8. The College quickly rejected the proposal, and offered the Association the implemented proposal plus a 1 percent raise for part-time faculty for the 2005-2006 fiscal year. The Association rejected the proposal, and the mediation ended.

#### **June 30, 2005, end of 2004-2005 fiscal year**

187. The College ended its 2004-2005 fiscal year on June 30, 2005, with a cash carryover of \$1.96 million.

188. The College board intends to keep a million dollar cash carryover. Taylor believes that "[a]nything less than that is not responsible, because that million dollars is what pays the bills until mid September." Taylor expects the cash carryover for 2005-2006 to be more than \$1.5 million, due in part to savings from reduced insurance payments, bonding its unfunded PERS liability, and not filling a vacant human resources position.

#### **Pendleton city planner position**

189. Mike Muller, a member of the Association bargaining unit, teaches full-time at the College's Pendleton campus. Much of his academic work is related to public planning issues. In December 2004, he applied for a position as the City of

Pendleton director of planning. He did not get the position, but the city approached him about performing planning services while continuing to teach at the College.

190. Muller, city officials, and College Vice President/Interim Provost Gayle Lawn-Day met to discuss the issue. The parties arrived at a proposal to retain Muller as a full-time College faculty member with full-time pay and benefits, but to assign Muller to spend one-half of his work time in the city's planning department. The city would reimburse the College for one-half of Muller's salary and benefits, and it would facilitate placement of qualified College students in a work experience program with the city. The College would schedule adjunct instructors to fill in for the classes Muller was unable to teach because of his work for the city.

191. The College supported the proposal because it would provide experience and professional development for Muller, and would increase opportunities for students in the planning field to perform hands-on work thereby increasing employment options for the College's graduates.

192. At Lawn-Day's suggestion, Muller called and e-mailed Association President Acsai to inform her of the proposal. This was the first notice to the Association on the issue. Muller's e-mail described the proposal and mentioned his meeting with the College and city officials. He concluded:

"I am excited about pursuing this opportunity and look forward to working with the City, School and Faculty Association to iron out the details. Any suggestions and/or ideas you have related to how to best approach this idea would be greatly appreciated."

193. Acsai did not respond to Muller's communication except to say she did not then have time to talk.

194. On April 21, 2005, the College and the city entered an intergovernmental service agreement to provide Muller's services half time to the city, beginning on September 6, 2005. Under the terms of the agreement, Muller remained a full-time employee of the College. The College would compensate him like any other full-time faculty member and the city would reimburse the College for half of Muller's cost as an employee. Aside from Muller's e-mail to Acsai, as of the date of hearing, no

one from the College informed the Association of the arrangement with the city. Lawn-Day understood Muller would contact the Association.

195. Article 20 C.1 of the 2002—2004 collective bargaining agreement provides:

“C. Non-Instructional Workload:

“1. Other non-teaching [instructional unit credits] may be assigned by the [Vice-President/Provost] with the agreement of the faculty member. This assignment must be documented as a part of workload and provided to the Faculty Association and the Human Resources Department.”

196. Pursuant to this article, the College provides workload documentation to the Association in “NOAs.”<sup>30</sup> The NOA that would reflect Muller’s new workload would cover the fall; the fall NOA’s had not yet been issued as of the date of hearing.

### CONCLUSIONS OF LAW

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

#### Introduction

The Public Employee Collective Bargaining Act (PECBA) establishes a multi-step bargaining process for public employers and their employees. The steps are “progressively onerous” and are designed to help the parties narrow and resolve the issues that separate them. *Roseburg Education Association v. Roseburg School District No. 4*, Case No UP-26-85, 8 PECBR 7938, 7956 (1985). The parties must first bargain at the table for at least 150 days; if table bargaining fails to produce an agreement, the parties

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<sup>30</sup>The record does not reveal the name of the form for which “NOA” (possibly Notice of Appointment or Notice of Assignment) is an acronym.

then bargain for at least 15 days with the assistance of a mediator; if mediation fails to produce an agreement, each party submits its final offer and cost summary to the mediator, who makes the submissions public; the parties then have a 30-day cooling-off period; if the parties fail to reach agreement during the cooling-off period, they may engage in self-help—the employer may implement its final offer and the employees may strike.<sup>31</sup> ORS 243.712.

Here, the College implemented some of its proposals. The College's implementation is lawful only if it first completed each step of the statutory bargaining process in good faith *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8202-203 (1985). The Association alleges that the College committed various unfair labor practices at each stage of the bargaining process which render the College's implementation unlawful. Our task is to decide if the College committed the violations as alleged, and if so, whether those violations individually or collectively render the implementation unlawful.

As discussed below, the College committed several unfair labor practices which render its implementation unlawful.

## **2. The College lawfully requested mediation after the parties completed 150 days of good-faith bargaining.**

The Association asserts that the College committed an unfair labor practice<sup>32</sup> when it requested mediation before it engaged in 150 days of good-faith bargaining. We must first decide whether a premature request for mediation would violate the PECBA. If it would, we must then decide whether the College made such a request.

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<sup>31</sup>The recited procedures apply to employees, like the College faculty here, who are permitted to strike. Different procedures, most notably at the self-help stage, apply to employees who are prohibited by law from striking. *See* ORS 243.742 to 243.756.

<sup>32</sup>The Association alleges that the College violated ORS 243.672(1)(e) and (f). Subsection (1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” Subsection (1)(f) makes it an unfair labor practice for a public employer to “[r]efuse or fail to comply with any provision of” the PECBA.

A. A Premature Request For Mediation Would Violate The PECBA.

As a preliminary consideration, we must determine as a matter of law whether the Association would be entitled to relief if it proved its allegation. That is, we must decide if a request for mediation prior to the conclusion of table bargaining violates the PECBA. Our cases indicate it does not. In *Washington County v. Washington County Police Officers Association*, Case No. C-34/36/70/74-80, 5 PECBR 4411, 4419 (1981), we held that a premature request for mediation does not violate the duty to bargain in good faith. See also *Cascade Bargaining Council v. Jefferson School District No. 509J*, Case No. UP-32-90, 12 PECBR 781, 786, *on reconsideration*, 12 PECBR 870 (1991) (a premature request for mediation does not violate ORS 243.672(1)(e) or (f)); *Portland Association of Teachers v. Portland School District No. 1J*, Case No. UP-35/36-94, 15 PECBR 692, 721 (1995) (same).

These cases, however, all preceded the 1995 enactment of SB 750. That bill significantly amended the PECBA. As explained below, we conclude that the 1995 amendments prohibit a premature request for mediation.

The cited cases were all decided under *former* ORS 243.712(1) which stated in pertinent part:

“If after a reasonable period of negotiations \* \* \* no agreement has been signed, either or both of the parties shall notify the board of the status of negotiations. \* \* \* Upon receipt of such notification the board shall assign a mediator upon request of either party or upon its own motion.”

This statute identified the circumstance in which mediation was *required*.<sup>33</sup> Our cases properly recognized that the statute did not prohibit or otherwise regulate earlier requests for mediation. As a consequence, we concluded that a premature request for mediation did not violate the law.

In 1995, the legislature amended ORS 243.712(1). It now states in pertinent part:

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<sup>33</sup>The statute uses the word “shall.” “Shall” is mandatory. *State ex rel Upham v. McElligott*, 326 Or 547, 555, 956 P2d 179 (1998).

“\* \* \* If after a 150-calendar-day period of good faith negotiations over the terms and conditions of an agreement \* \* \* no agreement has been signed, either or both of the parties may notify the Employment Relations Board of the status of negotiations and the need for assignment of a mediator. \* \* \* The parties may agree to request a mediator before the end of the 150-day period. Upon receipt of such notification, the board shall appoint a mediator and shall notify the parties of the appointment. \* \* \*”

We interpret the meaning of this statute using the familiar framework of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P3d 1143 (1993). We first consider the text of the statute in context. *Id.* at 610-11. We give words their “plain, natural and ordinary meaning” *Id.* at 611. If the legislature’s intent is clear from the text and context, that is the end of the inquiry. *Id.*

We begin by observing that ORS 243.712(1) describes when a party “may” notify this Board of the need for a mediator. “[T]he word ‘may’ ordinarily denotes permission or the authority to do something. *See Webster’s Third New Int’l Dictionary* 1396 (unabridged ed 2002) (defining the word ‘may’ as meaning, in part, to ‘have permission to \* \* \*: have liberty to’).” *Nibler v. ODOT*, 338 Or 19, 26-27, 105 P3d 360 (2005). Applying that definition, ORS 243.712(1) authorizes or permits a party to request mediation “after a 150-calendar-day period of good faith negotiations.”

The limited nature of this authority is highlighted by the single statutory exception that permits an earlier request: “The parties may agree to request a mediator before the end of the 150-day period.” The inclusion of this lone exception in the statute indicates the legislature intended mutual agreement to be the *only* exception to the 150-day rule. *Larsen v. Bd. of Parole*, 206 Or App 353, 360, 138 P3d 16 (2006) (“Given that the legislature took the trouble to express those two exceptions [in ORS 163.105(3)], it is reasonable to infer it intended no others.”); *see also Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382, 8 P3d 200 (2000), *adhered to on reconsideration* 331 Or 595,

18 P3d 1096 (2001) (the statutory expression of three circumstances in which a defense may be asserted demonstrates a legislative intent to limit assertion of that defense to only those three circumstances.)

The text of the statute demonstrates that the legislature intended agreement of the parties to be the only circumstance in which a request for mediation is authorized prior to completion of 150 days of table bargaining. We hold that it would violate ORS 243.712(1) to request mediation before the end of 150 days of good-faith table bargaining unless the parties agree to an earlier request.

B. The College Did Not Make A Premature Request For Mediation.

Having determined that a premature request for mediation would violate the PECBA, we must next decide whether the Association proved the College made such a request. Under ORS 243.712(1), the parties must engage in at least 150 calendar days of table bargaining before requesting mediation unless the parties agree to an earlier request, and any time during which a party bargained in bad faith will not be counted towards the 150-day period. We must first decide whether the College requested mediation without the Association's agreement prior to the completion of 150 calendar days of table bargaining.<sup>34</sup> If so, it violated ORS 243.712(1). If more than 150 calendar days passed, we must then decide whether some of those days should not be counted because the College bargained in bad faith at the table.

a. The College Completed More Than 150 Calendar Days of Table Bargaining Before It Requested Mediation.

We begin with a simple formula. We first determine when bargaining commenced; we next determine when the College requested mediation; and we then calculate whether more than 150 calendar days<sup>35</sup> elapsed between those two dates.

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<sup>34</sup>The Association did not agree to the College's mediation request so that is not a factor in our analysis

<sup>35</sup>Under ORS 243.712(1), a party may request mediation "after" 150 days of table bargaining. A request on the 150<sup>th</sup> day would be premature.

Negotiations begin “when the parties meet for the first bargaining session and each party has received the other party’s initial proposal.” ORS 243.712(1). The statute thus establishes two conditions for the start of the 150-day period. First, the parties must meet for their first bargaining session. Second, each party must receive the other’s initial bargaining proposal. *Cascade Bargaining Council v. Jefferson County School District No. 509J*, Case No. UP-12-00, 19 PECBR 12, 19 (2001). The exchange of proposals need not be simultaneous. *Id.*

The parties exchanged proposals on May 12, 2004. They first met on May 18<sup>36</sup> The parties met both statutory conditions as of May 18, so the 150-day period commenced on that date.

The Association asserts that the College ended table bargaining as early as September 27. At the end of a bargaining session on that date, Sean Banks, the College’s bargaining spokesperson, said that the parties were not making progress and he preferred to go to mediation. He refused at that time to schedule another bargaining session, and several days later, he confirmed in writing that the College intended to request mediation as soon as the 150 days ended. In fact, the parties met again at the bargaining table on October 11, and the College did not request mediation until November 4. By statute, the relevant event is the actual request for mediation, not the mere statement of intent to request mediation.

The College’s November 4 mediation request was more than 150 calendar days after the May 18 commencement of bargaining.

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<sup>36</sup>Both parties asserted that the first bargaining session did not occur until June 4. That was the date of their first “formal” session. The parties met for what they termed an “informal” session on May 18. The statute does not distinguish between formal and informal bargaining sessions. We will look at the substance rather than the label. On May 18, both bargaining teams were present; the parties had already exchanged proposals; the parties discussed employment relations; and the purpose of the meeting was to seek agreement on a successor to the labor contract that was about to expire. In these circumstances, we consider May 18 the parties’ first bargaining session.

b. The College Did Not Act In Bad Faith At the Table.

The Association correctly observes that the 150-day calculation is not solely a question of time elapsed on a calendar. It cites the portion of ORS 243.712(1) which states: “Any period of time in which the public employer or labor organization has been found by the Employment Relations Board to have failed to bargain in good faith shall not be counted as part of the 150-day period.” According to the Association, the College failed to act in good faith at the table. It argues that when those days are subtracted, as required by statute, the College’s request for mediation occurred before the conclusion of 150 days.

Specifically, the Association accuses the College of surface bargaining during the 150 days. Surface bargaining violates the obligation to act in good faith. In surface bargaining cases, we examine the totality of the conduct to determine whether a party demonstrated a sincere willingness to bargain towards agreement, or whether it merely went through the motions of bargaining. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 (1985).

At the outset, we note that the Association asks us to look only at the College’s words and actions during table bargaining rather than at the entire course of negotiations.<sup>37</sup> It will be a rare case when we find surface bargaining based solely on conduct at the bargaining table. This is not one of those rare cases.

Over the years, our caselaw has identified a number of factors we consider in surface bargaining cases. Among those factors are: (1) whether a party engaged in dilatory tactics; (2) the content of a party’s proposal; (3) the behavior of the party’s negotiator; (4) the nature and number of concessions; (5) whether the party explained its bargaining position; and (6) the course of negotiations. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 393 (2006).

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<sup>37</sup>The Association also alleges that the College engaged in surface bargaining based on the entire course of negotiations. We discuss that allegation separately below, including the College’s conduct at the table. *See* Conclusion of Law 11.

The Association relies on four factors.<sup>38</sup> It first asserts that on June 4, at the parties' first "formal" bargaining session, the College demonstrated a closed mind and an unwillingness to bargain. The College spokesperson said the College proposal was all the Association would get, and it would not change the proposal "in a month" or in "150 days."

Parties often adhere to their initial proposals in the early stages of negotiations. *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603, 614-15 (1995). Bluff, bluster, and posturing, while not encouraged, are common. The usual "puffery" does not constitute bad-faith bargaining. *Association of Professors: Southern Oregon State College v. Oregon State Board of Higher Education*, Case No. UP-27-88, 11 PECBR 491, 512 n. 17 (1989). We note that despite its comment, the College in fact substantially modified its position later in bargaining. In context, the comment does not constitute evidence of surface bargaining.

The Association next asserts that the College board developed its bargaining position as early as March 2004, but it did not present proposals on a number of those issues until September 13, nearly four months into bargaining. The first-time proposals included elimination of medical benefits for retirees and changes to the retrenchment article.<sup>39</sup> The College knew these were contentious issues.

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<sup>38</sup>Each incident the Association relies on occurred more than 180 days before it filed its original complaint. The 180-day statute of limitations in ORS 243.672(3) would prohibit us from concluding that these incidents themselves constitute an unfair labor practice. Here, however, the Association does not allege that the College's bad faith was itself unlawful; had it done so, the allegation would be untimely. Rather, the Association alleges that the College's unlawful conduct was a premature request for mediation. The College made that request on November 4, 2004, within the statute of limitations. The law requires us to determine whether the College acted in bad faith at the table in order to decide if the request was premature. But if we were to find bad faith, we would use it solely as part of the 150-day calculation, and not as a separate unfair labor practice.

Our concurring colleague reaches a different conclusion. He does so only by assuming the Association is alleging that the surface bargaining itself constitutes an unfair labor practice. Neither the pleadings nor the statute supports this assumption.

<sup>39</sup>The College was not merely silent on these issues in the early days of bargaining. It affirmatively led the Association to believe it would not propose changes on issues such as retiree benefits and retrenchment. When the parties exchanged their initial proposals on May 12, the College sent the Association two separate proposals. One addressed only economic issues and workload. The second additionally included a number of other issues, including retrenchment and

It is troubling that the College waited until day 118 of the 150-day process to introduce these issues into the discussion. A fundamental purpose of the PECBA is to obligate labor and management to negotiate with a willingness to resolve their disputes. ORS 243.656(5). The parties cannot attempt to resolve their disputes unless they first identify what those disputes are. They can identify their disputes only if both sides fully and frankly state their bargaining positions. The College failed to do so. As a result, the parties did not discuss these disputed issues for more than three-fourths of the time allotted by statute to table bargaining. The College's delay in introducing these issues moved bargaining in the wrong direction. It expanded rather than narrowed the issues, and it moved the parties farther from agreement rather than closer.

The College attempts to justify its delay. It asserts it moderated its initial bargaining proposal because the Association led it to believe that the parties could reach a quick settlement with few changes to the prior contract. That may have been a legitimate position at the outset. But at the May 18 "informal" session, it became clear that a quick settlement was unlikely. In fact, at about the same time as the informal session, College President Turner wrote a report which predicted "acrimonious" and "lengthy" negotiations with the faculty. The College nevertheless waited nearly four months to identify its true bargaining goals—goals set by the College's governing body as early as March 25, 2004. It offers no valid justification for the delay. The College's actions are significant evidence of bad faith, but do not by themselves constitute bad faith.

The Association next asserts that the College's proposals, especially those regarding retrenchment, were harsh and predictably unacceptable. Retrenchment has been a divisive issue in recent years. The prior round of negotiations nearly resulted in a faculty strike which was averted at the last minute when the College pulled its retrenchment proposal from the table.

In addition, the College lost a contentious arbitration under the current retrenchment language and had to pay a significant amount in back wages. The College based a number of its proposals on its interpretation of the arbitration award that would require it to close its satellite campuses before it could lay off a full-time faculty member.

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retiree benefits. The College told the Association to ignore the second proposal. This reasonably led the Association to believe these issues would not be on the table, and the next four months of bargaining proceeded on that basis.

The Association argues, with apparent justification, that the College's interpretation of the arbitration award is wrong.

The problem with the Association's argument is that it failed to make it at the bargaining table. Throughout bargaining, the Association steadfastly insisted that the retrenchment issue and several others were not properly on the table. According to the Association, the College failed to follow the contractual procedures for reopening those issues. The Association filed a grievance over the matter and refused to bargain over the issues for fear of undermining its position in the grievance. In August 2005, an arbitrator resolved the matter against the Association and concluded that the issues were properly on the table. By then, the bargaining process was complete, and the Association had refused to discuss the issue throughout.

The Association adopted a strategy of refusing to discuss retrenchment. As a consequence, it never attempted to explain its position to the College. Had it done so, it may have convinced the College to moderate or withdraw its proposal. In these circumstances, we will not entertain the Association's complaint that the College's proposal was unreasonable or harsh.

Last, the Association asserts that during the 150-day period for table bargaining, the College refused to meet until mediation. On September 27, during the 150-day period, the College spokesperson in bargaining said the parties were not making progress and he preferred to proceed to mediation. In fact, the parties met again at the table on October 11, prior to the College's November 4 mediation request. After the mediation request, but prior to the first mediation session, the parties met at the table on November 9 and November 22. This does not constitute evidence of surface bargaining.

The only evidence of surface bargaining is the College's significant delay in presenting its proposals. Although the College's delay is troubling, it does not alone prove surface bargaining. The Association has an especially daunting burden because it asks us to judge the College based solely on its actions at the table rather than viewing those actions in light of all the circumstances during the entire course of bargaining. The Association has not carried that burden.

In summary, we conclude that a premature request for mediation would violate ORS 243.712(1). We further conclude that the College did not make such a

premature request. It engaged in more than 150 calendar days of table bargaining before it requested mediation, and it did not act in bad faith, so all of those days count towards the total.

We will dismiss this claim.

**3. The College violated ORS 243.672(1)(e) by introducing proposals in mediation concerning new issues.**

**4. The College violated ORS 243.672(1)(e) by including proposals in its final offer concerning new issues.**

**5. The College violated ORS 243.672(1)(e) by implementing proposals concerning new issues.**

The Association asserts that the College bargained in bad faith, a violation of ORS 243.672(1)(e), when it pursued proposals on “new” issues in mediation, *i.e.*, proposals on issues that were not raised in earlier stages of bargaining. Similarly, it asserts that the College acted in bad faith when it included proposals on new issues in its final offer, and again when it implemented proposals on new issues. We consider these three claims together.

The PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and self help. The goal is a negotiated agreement. A new issue injected late in the bargaining process frustrates the statutory purpose. It skips one or more of the statutory steps on the new issue, and it expands rather than narrows the scope of the parties’ bargaining dispute, thereby making agreement less likely.

In *Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85, 8 PECBR 7938 (1985), this Board concluded that an employer bargained in bad faith when it implemented proposals on issues it had not first taken through the entire PECBA dispute resolution process. We explained:

“\* \* \* Under the PECBA, a party cannot fulfill its bargaining duty concerning any individual issue—where no

agreement is reached—unless that issue has been the subject of negotiations, mediation and factfinding<sup>40</sup>. The scope of post-impasse implementation must be limited, therefore, to those matters that have been subjected to the crucible of the PECBA’s dispute resolution process, if that process is to have any efficacy. In other words, a bargaining proposal concerning a new issue—no matter that the proposal concerns ‘employment relations’ as defined by ORS 243.650(7)—cannot be a strike issue for a union or a unilateral change issue for an employer.” 8 PECBR at 7956-57.

*Roseburg* prohibits new issues in the end-game of the bargaining process. Eleven years later, in *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 581-83 (1996), we held that an employer acted in bad faith when it submitted proposals on new issues earlier in the process, in the final offer required under ORS 243.712(2)(b).

Existing law thus clearly prohibits new issues in a final offer or implementation. The Association also asserts the College committed a violation even earlier in the process, *i.e.*, in mediation. Our caselaw is slightly less clear on the legality of introducing new issues in mediation.

In *City of Portland v. Portland Police Commanding Officers Association*, Case No. UP-16-95, 16 PECBR 43 (1995), the union made proposals on two new issues late in the mediation process. The predominant issue before this Board was whether the two proposals were prohibited or mandatory subjects for bargaining. This Board held both to be mandatory. In passing, this Board also observed that the union’s pursuit of such “unbargained proposals in mediation” would “ordinarily” constitute bad faith.

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<sup>40</sup>The version of the statute in place at the time of the *Roseburg* decision in 1985 required the parties to submit their dispute to a factfinder if mediation was unsuccessful. Under the 1995 amendments to the PECBA, factfinding is available if both parties agree, but it is no longer a mandatory step in the process. ORS 243.712(2)(c). Although some of the specifics of the bargaining process are now somewhat different than in 1985, the general multi-step structure of the process continues, and the general principle from *Roseburg* still applies. Absent agreement, a party fulfills its bargaining obligation on an issue only if it takes that issue through all of the steps in the PECBA process.

16 PECBR at 51. This observation is, however, mere *dictum* because the complaint did not allege, and this Board did not find, a violation on this basis. In an order on reconsideration and clarification, we held that the proposals were submitted too late in the process to raise a duty to bargain, and that the proposals therefore were not ripe for interest arbitration. 16 PECBR 90, 92 (order on reconsideration).

We are now squarely presented with the question and hold that, as a general rule, a party acts in bad faith by introducing new issues in mediation.<sup>41</sup> An underlying purpose of the PECBA is to “encourag[e] practices fundamental to the peaceful adjustment of [labor] disputes \* \* \*.” ORS 243 656(3). Towards that end, the statutory process is comprised of a series of steps to be conducted in a specified order and designed to help the parties resolve their disputes. The first step requires at least 150 days of table bargaining; if there is no agreement, the parties then proceed to mediation. If a party waits until mediation to raise an issue, it eliminates table bargaining as a tool to resolve a dispute over that issue. This is repugnant to the statute and the policies underlying it. An issue raised for the first time in mediation has not been “subjected to the crucible of the PECBA’s dispute resolution process,” and it therefore cannot be pursued in mediation.

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<sup>41</sup>The College generally observes that mediation is a “continuation” of the bargaining process, citing *Oregon City School District No. 62 v. Oregon City Education Association*, Case No. C-179-79, 5 PECBR 4246, 4256 (1981). From this, it argues that an issue raised for the first time in mediation has been through the “bargaining process.” The College reads too much into our statement in *Oregon City School District No. 62*. An issue raised in mediation for the first time bypasses table bargaining and thus has been through only part of the bargaining process. Further, the College’s argument proves too much. It would allow a party to raise all of its issues for the first time in mediation, thereby making table bargaining superfluous. We may not omit a step that the legislature has seen fit to include in the bargaining process. ORS 174.010 (a judge may not construe a statute to omit what the legislature has inserted); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (same).

This rule has an important caveat:<sup>42</sup> we encourage creative solutions to bargaining disputes in mediation. Indeed, one reason mediation is so successful<sup>43</sup> is that this agency's mediators bring a skilled, knowledgeable, and creative approach to resolving the parties' dispute. We do not intend to hinder or stifle the exploration of creative solutions in mediation. Thus, merely offering a proposal on a new issue is not unlawful so long as the proposal is responsive to an issue properly in mediation and tends to narrow or resolve the dispute over that issue.<sup>44</sup> But a proposal in mediation on a new issue that is not responsive to an existing dispute and that tends to expand rather than narrow the differences separating the parties constitutes bad-faith bargaining.

We turn next to the definition of a "new issue." In *Roseburg Education Association*, 8 PECBR at 7957 n. 8, we described "issue" in this context to mean "a general subject matter of bargaining." We then stated that an issue is "new" unless it is "reasonably comprehended within" or "logically evolve[s] from the prior discussions or bargaining positions \* \* \*." *Id.*

Subsequent cases exemplify how we have applied this standard. In *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, *adhered to on reconsideration* 12 PECBR 646 (1990), the employer would not agree to the union's proposal to make the salary provisions of the new contract retroactive. After table bargaining failed to produce agreement, the union sent a submission to the state conciliator which, for the first time, proposed a one-time

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<sup>42</sup>Contrary to our concurring colleague who characterizes the caveat as "dicta," we view it as necessary to our decision. The prohibition on new issues in mediation is a legal question of first impression. We must determine the scope of the prohibition before we can apply it to the facts. The caveat helps describe the scope of the prohibition.

<sup>43</sup>In a six-year period from 2001 through 2006, mediation resolved 94 percent of its cases involving strike-permitted bargaining units before the parties resorted to self help.

<sup>44</sup>For example, suppose the only issue separating the parties is the amount of a pay increase. The employer says it cannot afford the amount the union requests. In mediation, a party (it does not matter which one) proposes that in lieu of some or all of the raise, the employer will grant an additional paid leave day. Paid leave is a new issue to the negotiations, but merely making this proposal is not unlawful because it is responsive to an issue properly in mediation (a pay increase) and it tends to narrow the dispute between the parties. Of course, if the proposal does not settle the issue, the party may not include it in the final offer. *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 581-83 (1996) (a party may not include a proposal on a new issue in its final offer).

\$15,000 signing bonus for each bargaining unit member. The union explained that the bonus was in lieu of retroactive salary plus interest. This Board applied the “logically evolved” and “reasonably comprehended” standard and concluded the proposal was new. The bonus did not purport to reflect the dollar value of the retroactive pay it would replace, and the inclusion of interest injected a new issue because the union had not sought interest in its earlier proposals for retroactive pay.

In *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-65-92, 14 PECBR 25 (1992), the employer proposed at the table and throughout mediation to continue the current insurance programs with the benefit levels and costs to be set by an insurance committee. The employer’s proposal at interest arbitration for the first time contained specific dollar amounts the employer would contribute to the cost of insurance, and it included a provision requiring the employees to share equally in any increase in insurance costs. This Board applied the “logically evolved” standard and concluded the union could not have reasonably anticipated the employer’s latest proposal based on its earlier proposals. This Board ordered the employer to cease and desist from pursuing its new insurance proposal

With these principles in mind, we turn to the College’s proposals. The issue is whether its proposals logically evolved from or were reasonably comprehended within its prior bargaining positions.

#### I. Mediation

The Association alleges that the College introduced three “new” proposals in mediation. The first involves recall rights for laid off employees. The expiring contract contained a detailed retrenchment (layoff) procedure that covered all bargaining unit members. At the table, the College proposed to add language that “[r]etrenchment does not pertain to part-time employees.” It did not propose changes to the recall language which provided recall rights for 27 months “in inverse order of being laid off.” Then, in mediation, the College proposed language for the first time that excluded part-time employees from the recall provision. The issue is whether the College’s recall proposal in mediation logically evolved from or was reasonably comprehended in the retrenchment proposal it pursued at the table. We conclude it was not.

Layoff and recall, although related, involve separate issues. In a layoff, the workforce gets smaller and the question is who should leave. In a recall, the workforce

stays the same size (as when someone is replaced) or gets larger and the question is who gets hired.

The College argues that the proposal to exclude part-time employees from the layoff provision *necessarily* required their exclusion from the recall provision. We disagree. The College fails to explain why it would bother to write new recall language if, as it asserts, the existing layoff proposal already covered the issue.

More importantly, it does not follow that excluding part-time employees from the layoff provision necessarily also excludes them from recall rights. Clearly, the College did not intend its proposal to prevent it from laying off part-time employees. On its face, the proposal means only that part-time employees would not be subject to the contractual procedures and order of layoff, but they might nonetheless be laid off. *See Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 32 (2005) (deeming it a layoff when the employer terminated an employee to reduce staff for financial reasons and not for a reason personal to the employee). Contrary to the College's argument, it is not logically inconsistent to provide recall rights to these laid off employees even though their layoffs were not governed by the contract. In other words, the College is wrong in asserting that the exclusion from layoff provisions necessarily, or even reasonably, comprehended an exclusion from recall rights.

In addition, the College's justification of its need to change the layoff language does not apply to recall. The College asserted that unless it excluded part-time employees from the layoff provisions, it might be forced to close some of its satellite campuses. The College has never asserted that it also needs to eliminate recall rights for part-time employees in order to keep the satellite campuses open. The fact that the proposals did not seek to accomplish the same general purpose is further evidence that the recall proposal concerned a different issue that was not reasonably comprehended in the layoff proposal.

The College's recall proposal did not logically evolve from, and was not reasonably comprehended in, its retrenchment proposal. The recall proposal was not a fresh approach to an existing dispute; rather, it expanded the issues in dispute between the parties and moved them even further from agreement. The College's recall proposal in mediation concerns a new subject that was not taken through table bargaining. For that reason, it violates ORS 243 672(1)(e)

The second allegedly new issue in mediation involves the College's proposal to change contract Addendum C. Addendum C is a list of "exempt technical" employees who are expressly excluded from the bargaining unit. The College did not propose any changes to the list during table bargaining. At the mediation session on February 3, 2005, nearly nine months into bargaining, the College made a written proposal to add 9 more positions to the existing list of 35 positions excluded from the bargaining unit in Addendum C.

The composition of the bargaining unit is a new issue to negotiations. The College does not assert that the proposal logically evolved from or was reasonably comprehended by its earlier proposals. It clearly was not. The College candidly describes the proposal as "troubling." The College's only defense is that it does not know how the changes to Addendum C got into its proposal. Making a proposal on a new issue late in the negotiations process is a *per se* violation of the duty to bargain in good faith. *Portland Police Commanding Officers Association*, 12 PECBR at 465. As such, the College's motives or its intentions are irrelevant. *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 583 (1996). The College is responsible for the contents of its proposal.

The College's proposal on Addendum C would change the composition of the bargaining unit. It raises a new issue in mediation and therefore constitutes bad-faith bargaining.

The third allegedly new issue in mediation involves the College's proposal to train faculty members to advise students. At the table, the College proposed language that allowed it to assign each instructor to advise up to 20 students. In mediation, the College added language that "[m]andatory training will be held on a regular basis." The parties agree that the proposed training relates to the student advisories.

In the context of these negotiations, we conclude that the training proposal was new. The Association understood that the College proposed to increase the instructors' workload by requiring them to advise students. But based on that proposal, the Association could not have reasonably anticipated that the College intended to further increase the instructors' workload by mandating training. The added workload of training did not logically evolve from, and was not reasonably comprehended within, the College's student advisory proposal.

The College's training proposal is a good example of how new issues in mediation can disrupt the bargaining process. Full-time instructors in the bargaining unit earn a fixed annual salary. The parties negotiate the amount of the salary with a basic understanding of how much work the instructors must do to earn the salary. The College's training proposal would increase the instructors' workload. Thus, it not only added a new issue to the parties' dispute, but it also undermined any progress the parties may have made on issues such as salary because it changed some of the underlying assumptions about workload that formed the basis for their bargaining positions.

The College's training proposal was a new issue in mediation that moved the parties farther from agreement rather than closer. The College's pursuit of that proposal violated ORS 243.672(1)(e).

## 2. Final Offer

A final offer is the proposed contract language and cost summary that each party must submit to the mediator within seven days of the declaration of impasse in mediation. ORS 243.650(11) and ORS 243.712(2)(b). The Association alleges the College submitted proposals on new issues in its final offer.

The College's final offer included its proposals on recall rights, changes to Addendum C, and mandatory training. We have already determined that these are new issues. Including them in the final offer constitutes bad-faith bargaining, a violation of ORS 243.672(1)(e).

In addition, the College submitted an "Amended Final Offer" on March 14, 2005, about a month after its original final offer.<sup>45</sup> According to the Association, the amended offer contains yet more new issues.

The first concerns the status of part-time employees. The contract states that an employee whose contract is renewed for a fifth year attains the status of a "regular employee." At the bargaining table, the College proposed to add the sentence "[p]art-time employees do not meet the criteria of regular status for retrenchment purposes." Then, in its amended final offer, the College proposed removing the phrase

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<sup>45</sup>The Association does not question the legality of submitting an amended final offer, and we therefore do not decide the issue.

“for retrenchment purposes” so that part-time employees would not attain regular status for any purpose. The Association asserts this proposal concerns a new issue. We agree.

The College’s initial proposal at the table concerned only the retrenchment rights of part-time employees. The proposal in the amended final offer has a much broader impact. For example, the labor agreement states that the College may not non-renew the contract of a regular employee. A regular employee may be terminated only for “just cause.” Under the College’s proposal, it could choose to non-renew the contract of a part-time employee of more than five years without just cause.

The College argues that the change was “contemplated” in the initial offer. We disagree. The initial offer involved retrenchment, a separation from employment for reasons that are not personal to the employee, such as declining enrollment, insufficient funds, etc. The proposal in the amended final offer would also remove just cause protection from termination for personal reasons. Under the College’s proposal, it could instead simply non-renew the employee’s contract without the need to prove cause.

The College also argues that the proposal it made in its amended final offer is not new because it merely modified the wording of a proposal it made at the table. That is not the test of whether a proposal is new. We look at the substance of the proposal and ask whether it logically evolved from or was reasonably comprehended within the prior proposal. As described above, regular status for purposes of layoff is not the same issue as regular status for other purposes. The proposal did not logically evolve from and was not reasonably comprehended within its earlier proposals. For that reason, it violates ORS 243.672(1)(e).

The College’s amended final offer also proposed new language that would exclude part-time employees from the contract provisions that required the College to give notice to bargaining unit employees prior to a retrenchment. The College argues that this language was reasonably comprehended in its proposal at the table that “[r]etrenchment does not pertain to part-time employees.” We agree. The College’s initial proposal to remove part-time employees from retrenchment includes removing them from retrenchment procedures such as notice. Its later offer which makes the notice exclusion explicit is not a proposal on a new issue, and the College was entitled to pursue it in its final offer.

### 3. Implementation

The College implemented the proposals in its amended final offer, including its proposals on recall rights, changes to Addendum C, mandatory training, and the status of part-time employees. We have already determined that these proposals concern new issues. The College violated ORS 243.672(1)(e) by implementing them.

**6. The College violated ORS 243.672(1)(f) by submitting its final offer three days later than required by statute and by failing to submit a cost summary with its amended final offer. The College violated ORS 243.672(1)(e) when it implemented its amended final offer for which it did not submit a cost summary.**

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to fail to comply with any provision of the PECBA. One provision of the PECBA establishes the final offer process. It states:

“Within seven days of the declaration of impasse, each party shall submit to the mediator in writing the final offer of the party, including a cost summary of the offer. Upon receipt of the final offer, the mediator shall make public the final offers, including any proposed contract language and each party’s cost summary dealing with those issues, on which the parties have failed to reach agreement. Each party’s proposed contract language shall be titled ‘Final Offer.’” ORS 243.712(2)(b).

The Association alleges the College violated this statute in two ways. First, it alleges the College’s final offer was three days late. The College admits its final offer was late but asserts it was unintentional. That is not a defense. A late final offer violates ORS 243.712(2)(b) even if the violation was unintentional. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98, 18 PECBR 109, 118-19 n. 9 (1999).

The College also points out that the purpose of the final offer is to form the basis for a public debate about the parties’ positions. It argues that the three-day delay in submitting its final offer did not undermine this purpose in any substantial way. That does not excuse the College’s violation of the statutory requirement to submit a final

offer within seven days of the declaration of impasse. It does, however, have an impact on the remedy. The College corrected its violation in three days. The Association does not allege, and we do not find, that the College's violation had any negative impact on the parties or the bargaining process. Our remedy for this violation will be limited to an order that the College cease and desist from submitting a late final offer.

The Association also asserts that the College's amended final offer violated subsection (1)(f) because it did not include the cost summary required by ORS 243.712(2)(b). As a preliminary matter, we note that the Association does not question the lawfulness of an amended final offer, and we therefore do not decide the issue. For purposes of this Order, we assume, as did the parties, that the statute permits an amended final offer, and we consider the merits of the Association's claim. We also assume that the requirements and policies that govern a final offer also apply to an amended final offer.

The College concedes it did not include a cost summary in its amended final offer. It also acknowledges that the cost of its amended final offer is about \$96,000 different from the cost of its original final offer. The College argues that it included a formula the Association could use to compute the cost of the amended final offer. That is not what the statute requires. A party must submit "a cost summary of the offer." ORS 243.712(2)(b). A formula from which a cost summary might be derived does not satisfy the plain language of the statute. The College's failure to include a cost summary violates ORS 243.672(1)(f).

In addition, the College implemented its amended final offer. The Association asserts the implementation is unlawful. We agree. Submission of a cost summary is part of the final offer process. ORS 243.712(2)(b); ORS 243.650(11) ("[f]inal offer' means the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse"). The College's failure to submit a cost summary for its amended final offer means it did not complete the statutory final offer process. The absence of a cost summary hindered the public debate on the merits of the College's proposal. The College violated ORS 243.672(1)(e) when it implemented an offer that had not first been through the crucible of the entire PECBA process. *Roseburg Education Association*, 8 PECBR at 7956-57.

**7. The College violated ORS 243.672(1)(e) by including Addendum C, a permissive proposal, in its final offer and its amended final offer.**

The final offer required by ORS 243.712(2)(b) may not include permissive proposals over the other party's objection. *Amalgamated Transit Union*, 16 PECBR at 588. The Association alleges that the College's final offer unlawfully included a proposal in Addendum C concerning the composition of the bargaining unit, a permissive subject for bargaining.

As described earlier, Addendum C to the expired contract contains a list of 35 positions excluded from the bargaining unit. The College's February 3, 2005 offer in mediation, and its February 17 final offer, added 9 more positions to the list, for a total of 44 exclusions. Its amended final offer added 7 more exclusions to the list, for a total of 51. In all, the College's amended final offer proposed 16 new exclusions from the bargaining unit.

The College thus proposed in both its final offer and its amended final offer to change the composition of the Association bargaining unit. As the College concedes, a proposal to change the composition of a bargaining unit concerns a permissive subject for bargaining. *Oregon Trail School District No. 46 v. East Education Association*, Case No. DR-01-05, 21 PECBR 157, 167 (2005); *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97, 17 PECBR 892, 899 (1999); *Oregon AFSCME, Council 75 v. Clackamas County*, Case No. UP-80-86, 9 PECBR 9298, 9300-301(1987).

In its defense, the College correctly notes that the Association never objected to the College's proposals on Addendum C. As a general rule, it is not unlawful for a party to make a proposal that concerns a permissive subject for bargaining. A party acts unlawfully only when it makes such a proposal a condition of agreement over the other party's objection. *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9486 (1987). A party that fails to make an adequate and timely objection waives its right to challenge the other party's pursuit of an allegedly permissive proposal.

Under normal circumstances, we would dismiss the Association's claim because it failed to object to the College's proposals to change Addendum C. The obligation to object, however, presupposes that the Association had fair notice of the proposals and an opportunity to object to them. The unusual facts of this case lead us to conclude that the Association did not have fair notice and opportunity, so it was excused from the requirement to object.

From February 3 forward, the College presented full contract proposals in a format that underlined language it proposed to add to the expired agreement and struck through language it proposed to delete. It adhered to this format in all but Addendum C. In Addendum C, the College did not underline the new language it proposed to add. Neither did the College tell the Association it was proposing to add language. Thus, when the Association looked at the College's proposals, it would not realize there were changes to Addendum C.<sup>46</sup>

A party is required to reveal and explain its bargaining positions, and its explanations must be honest. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199-8200 (1985). The College did not candidly reveal its position on Addendum C. To the contrary, the absence of any underlined or struck language in Addendum C misled the Association to believe the College was not proposing to change it.

We reject the College's argument that the onus was on the Association to compare each offer to the prior one and determine for itself what was different. Good faith requires the party making a proposal to reveal its position to the other side, whether in discussions, by use of a format that highlights it, or through other reasonable means. The Association was entitled to expect full and honest disclosure from the College. The College's failure to adequately notify the Association that it proposed changes to Addendum C deprived the Association of an opportunity to object.

We accept the Association's assertion that it would have objected if it knew about the proposal. The law is well-established that a proposal to change the composition of the bargaining unit is permissive. Further, a proposal to reduce the size of the bargaining unit is not an issue the Association, or any union, would likely ignore. Under these circumstances, we conclude that the Association was excused from objecting to the College's proposals to change Addendum C. The College violated ORS

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<sup>46</sup>The proposals the College sent the Association unquestionably included its proposed additions to the language of Addendum C, but as in Poe's "The Purloined Letter," an object can be effectively hidden in plain sight. Unlike every other change the College proposed, the changes to Addendum C were not underlined or struck. The changes were effectively hidden from the Association, buried in 50-page proposals with no markings to highlight them. The parties cannot hope to resolve a bargaining dispute if one side is not even notified that there is a dispute.

234.672(1)(e) by including permissive proposals on Addendum C in its final offer and its amended final offer.<sup>47</sup>

**8. The College did not misrepresent facts or its position in bargaining to individual faculty members and the Association bargaining team.**

The Association next asserts that the College violated ORS 243.672(1)(e) by deliberately misrepresenting certain facts and its bargaining position regarding the College's financial situation and its retrenchment proposal.

The duty to bargain in good faith requires a party to honestly and candidly explain its bargaining position and proposals. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199 (1985). A party violates ORS 243.672(1)(e) if it deliberately misrepresents its bargaining position and its intentions on an issue under negotiations. *Association of Professors: Southern Oregon State*

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<sup>47</sup>The College asserts that it was somehow unaware of, and did not intend, its proposed changes to Addendum C. In a *per se* violation such as this, the College's motives and intentions are irrelevant. *Amalgamated Transit Union*, 16 PECBR at 583. We will, however, consider the issue because the College's intent has some relevance to the Association's request for a civil penalty.

In its brief to this Board, the College calls its proposed changes to Addendum C a "mistake" and "inexplicable." Sean Banks, the College's lead negotiator, testified that he did not recall any team discussion of the changes and that he did not know why the changes were included in the College's proposals. None of the other College team members who testified corroborated Banks' testimony or otherwise addressed the issue. The record indicates that Banks was responsible for the accuracy of the College's final offer, and before submitting it, he went through it with a number of other people to insure it was accurate. Similarly, College bargaining team member Dan Lange was responsible for posting and updating the College's offer on the College's intranet, and he sent copies to other bargaining team members to insure the accuracy of the proposals before they were posted.

The record further shows that the January 27, 2005 posting of the College's offer on the intranet contained the phrase next to the title of Addendum C, "[n]ot updated as of this proposal." This clearly indicates the College intended to propose changes to Addendum C. It subsequently followed through, beginning with its February 3 proposal and in all proposals thereafter. The changes were not the result of a simple typographical error. The evidence indicates the changes were carefully considered, were periodically expanded, and were reviewed for accuracy on several occasions by members of the College bargaining team. On this record, we conclude that the College intended to propose changes to Addendum C and did not call those changes to the Association's attention.

*College v. Oregon State Board of Higher Education*, Case No. UP-27-88, 11 PECBR 491, 512 (1989). The Association has the burden of proving, by a preponderance of the evidence, that the College made a deliberate misrepresentation. *Hood River County Law Enforcement Association v. Hood River County*, Case No. UP-29-97, 17 PECBR 827, 835 (1998). We conclude the Association has failed to carry its burden.

The Association first alleges the College misrepresented its financial situation.<sup>48</sup> At the start of each fiscal year, the College projects its finances for the year. In recent years, the College projected substantial deficits but ended with substantial surpluses. Because of this history, the Association was understandably skeptical when the College claimed financial hardship during negotiations for a contract covering the 2004-2005 academic year. In fact, the College ended the year with a \$1.96 million surplus.

The fact that the College's financial projection turned out to be wrong does not prove it was deliberately false. Facts and understandings can change over time. We examine the circumstances at the time the representation was made rather than in hindsight. For example, in *AFSCME Local 3512 v. Willamalane Park and Recreation District*, Case No. UP-45-89, 12 PECBR 290 (1990), the employer stated at the bargaining table that it did not intend to cut the work hours of two employees. Then, about eight months later, it cut the work hours of those two employees. The union filed an unfair labor practice complaint alleging the employer bargained in bad faith by misrepresenting its position and intentions. The evidence showed that when the employer made the statement, it had considered and rejected the idea of cutting hours. Although the employer later changed its mind, we dismissed the complaint because the employer did not misrepresent its position or intentions at the time it made the statement.

Here, the College's statements of financial concern were not false at the time they were made. State revenue was down, and the Governor's proposed budget for

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<sup>48</sup>The Association points to a series of statements by the College concerning its finances. We do not consider those statements made outside the 180-day statute of limitations. ORS 243.672(3).

Further, the Association in its brief asserts that the College acted unlawfully by refusing to provide the Association the financial information it requested. That theory was not contained in the complaint and we do not consider it.

community colleges would have required the College to reduce its budget by 6 percent. Further, information presented at a meeting of community college presidents indicated that various proposals in the legislature would cost the College about \$1.5 million per year. In light of this information, the Association has not carried its burden of proving that the College's financial claims were deliberately false at the time they were made.

The Association also alleges that the College deliberately misrepresented its position and intentions regarding retrenchment. The College took positions regarding retrenchment that are frankly difficult to reconcile with the contract language, the Boedecker arbitration award, and the parties' practice. We are not convinced, however, that the College knew its positions were wrong and that it intended to deliberately mislead the Association, the faculty, or the public. Our conclusion depends in part on the fact that the Association refused to discuss the retrenchment issue in bargaining. Its refusal eliminated any possibility that through discussion the College could have more clearly articulated its position, or possibly even changed its position, in light of the Association's misgivings. The Association has not proved that the College made deliberate misrepresentations regarding retrenchment.

We will dismiss this claim.

**9. The College violated ORS 243.672(1)(b) and (1)(e) by communicating directly with bargaining unit employees about bargaining issues and employment relations.**

Subsection (1)(e)

The PECBA guarantees public employees the right to bargain collectively with their employer through their chosen representative. ORS 243.656(5) and 243.662. It is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith *with the exclusive representative*." ORS 243.672(1)(e) (emphasis added). An employer violates its bargaining duty when it attempts to negotiate directly with its employees. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8195 (1985).

In *McKenzie School District*, we held that the employer violated subsection (1)(e) when it made a contract proposal directly to bargaining unit members without first submitting the proposal to the union. We described the employer's conduct

as dealing “with the Union through the employees, rather than the employees through the Union.” 8 PECBR at 8196 (quoting *NLRB v. General Electric Co.*, 418 F2d 736, 759 (2d Cir. 1969), *cert. denied* 397 US 965 (1970)).

The College here engaged in similar conduct. On January 27, 2005, Lea Mathieu, a member of the College Board of Directors and a member of the College bargaining team, sent a letter to all College faculty. The letter said it was from “Lea Mathieu for the [College] Board of Directors.” The letter summarized the College’s bargaining proposal and directed faculty to an intranet website where they could find “the complete proposed contract.” Both the intranet posting and the summary contained proposals the College had not previously made to the Association.

We begin with the intranet posting. The College concedes that its intranet posting contained a change it had not previously presented to the Association, a proposal to alter the calculation of pay for sabbatical leave. The College argues that the sabbatical leave proposal is nevertheless lawful because it was a “logical extension” of its earlier proposal on the subject. The College does not cite, and we do not find, any authority that applies a logical extension defense to a direct dealing case such as this. We conclude the College has not stated a legal defense to this charge.

The issue here is whether the College can make its proposal directly to the faculty. The concept of “logical extension” addresses an entirely different issue. As discussed in Conclusions of Law 3, 4 and 5, a party is entitled to make a proposal in the later stages of negotiations so long as it is a logical extension of its prior proposals. The focus is on the proposal’s contents. The dispute here is not about what the College’s sabbatical leave proposal says, but rather who the College says it to. The fact that the College’s proposal may be a logical extension of its prior proposals does not allow it to make the proposal directly to the faculty.

Under the College’s theory, an employer would be obligated to make its initial proposal to the Association, but it could make all of its subsequent proposals directly to the faculty, provided they logically evolved from the initial proposal. It is only a slight exaggeration to say that such a scheme would eliminate the prohibition on direct dealing and would undermine the concept of an exclusive bargaining representative that underlies the prohibition. The College’s defense is repugnant to the core principles of the PECBA, and we therefore reject it.

Under *McKenzie School District*, the College violated subsection (1)(e) by making its sabbatical leave proposal directly to the faculty without first submitting it to the association

In addition, Mathieu's letter to the faculty purported to summarize "proposed contract changes [the College] has offered [the Association] to this point in negotiations." The summary included two proposals—grandfathering pay for current part-time instructors and mandatory training for advisors—which were not included in the intranet posting, and more importantly, had not been previously offered to the Association.

The College concedes it sent the mandatory training proposal directly to the faculty before it submitted it to the Association. The College did not address the part-time instructors pay proposal in its brief or at oral argument. We conclude that the College violated ORS 243.672(1)(e) by making its part-time instructors pay proposal and its mandatory training proposal directly to the faculty without first submitting it to the Association.

The Association also asserts that Interim College President Turner conducted two "town hall" meetings that constituted direct dealing. All College employees were invited to the meetings, and at least several Association bargaining unit members attended. Turner then e-mailed a summary of the meetings to all faculty. According to Turner's summary, he discussed the College's potential budget shortfall and then suggested "taking a voluntary pay cut in exchange for unpaid leave as a way to save a few positions." He noted that "[b]ecause this is a union issue, please discuss this amongst yourselves." He then stated that he would "need to know if this is being considered by the unions as a possible option."

Turner's statements deal with pay, leave time, and job security, all mandatory subjects for bargaining. He suggested a voluntary pay cut and unpaid leave in order to save some jobs, a proposal the College never made to the Association in bargaining. Turner sent the message through the employees that he needed to know if their union was considering this option. Turner's statements deal with the Association through the employees rather than with the employees through their Association. This is precisely the type of direct dealing *McKenzie School District* prohibits

The College asserts there was no violation because it never incorporated any of its ideas from the meetings into proposals. This misses the point. The issue is not whether the College made a formal proposal at the bargaining table concerning these issues. The violation is the discussion itself because the discussion was with bargaining unit members rather than their exclusive representative. Turner's statements violate ORS 243.672(1)(e).

The Association also contends that the College dealt directly with bargaining unit member Mike Muller. Muller taught at the Pendleton campus. Much of his academic work related to public planning. The City of Pendleton suggested that the College assign Muller to spend half of his work time in the City's planning department. In return, the City would reimburse the College for half of Muller's salary and benefits, and the City would agree to facilitate placement of College students in a work experience program with the City.

At the suggestion of a College official, Muller notified the Association of the proposal. He said he wanted it to move forward, asked the Association for ideas, and said he looked forward to working with the Association, the City, and the College to work out the details. No one from the College administration directly notified the Association and the Association took no action. The College and City eventually entered an intergovernmental agreement to implement the arrangement. The Association asserts that the College's dealings with Muller constituted unlawful direct dealing. We disagree.

The parties' expired labor contract permits the College to assign faculty to non-teaching instructional units with the agreement of the faculty member. The provision further states that "[t]his assignment must be documented as a part of workload and provided to the Faculty Association \* \* \*." The practice under this provision is for the College to notify the Association of such assignments in a document called a "NOA." At the time of the hearing, the College had not yet issued NOAs for the academic term when Muller's assignment was to begin.

On its face, this contract provision permits the College to proceed as it did. The College is entitled to deal directly with Muller to obtain his consent. The College does not need to involve the Association in these assignment issues except to provide it notice. We observe that the notice must be of "this assignment," not of a potential assignment. This language indicates that the College did not need to provide notice to

the Association until after it made the assignment.<sup>49</sup> Under these circumstances, the College was permitted by the contract to act as it did. The College's dealings with Muller did not violate ORS 243.672(1)(e).

### Subsection (1)(b)

The Association also alleges that the College's direct dealings with the faculty violate ORS 243.672(1)(b). Subsection (1)(b) makes it 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."

Bypassing the union and dealing directly with bargaining unit members can violate subsection (1)(b). We have explained:

"\* \* \* When a labor organization is chosen by the employees as their exclusive representative, it has the statutory right to represent those employees in dealing with the employer. By bypassing the exclusive representative and dealing directly with the employees on contractual matters, a public employer undermines the exclusive representative's status and impairs the representative's ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999).

As described above, the College sent several proposals directly to the faculty before submitting them to the Association. In addition, the College's interim president made a pay cut proposal directly to the faculty and asked the faculty to let him know if the Association is considering the option. Our cases recognize that this type of direct dealing inevitably undermines the employees' confidence in their exclusive representative. For that reason, the College's direct dealing violates ORS 243.672(1)(b).

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<sup>49</sup>The Association does not assert that the College failed to provide the required notice.

10. The College violated ORS 243.672(1)(a) when it directed faculty members to make a scripted statement to students about the Association's plans to strike.

On February 9, 2005, two days after the College notified the state conciliator that the parties had reached a bargaining impasse, College Interim Provost/Executive Vice President Gayle Lawn-Day e-mailed all College faculty and staff regarding "Contract Discussion Issues." The body of the e-mail stated:

"There have been a number of student complaints and concerns that faculty have been discussing the prospects of a strike with students during class time. There are two problems with this. First, it is not permitted under the Academic Freedom administrative procedure, because threats of an internal strike do not and should not have any pertinence to the curriculum. Second, it is premature to speculate on the course of negotiations between now and when a strike could be called. Within seven days of declaring an impasse, each party is required to submit its final offer and cost summary in writing to the state mediator. The offer and cost summary are published by the mediator. Parties then have a 30-day cooling-off period. Beyond that time, all or part of the contract could be implemented by the college, which could precipitate, but doesn't force a strike vote.

"Remember that negotiations continue and that proposals will be exchanged in the mediation process. As the negotiation teams wrestle through the issues, our challenge is to work more closely - to understand disparate perspectives more clearly - rather than draw apart. *Please assure students that a strike is not a foregone conclusion.* The college remains hopeful for a fair contract settlement and is committed to providing the best possible education to our students." (Emphasis added).

The Association alleges that the College's directive to "assure students that a strike is not a foregone conclusion" violates ORS 243.672(1)(a). We agree.

ORS 243.672(1)(a) makes it an unfair labor practice 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 public 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.”

Subsection (1)(a) contains two separate prohibitions. It prohibits employer actions that interfere with, restrain, or coerce employees “because of” their exercise of protected rights; and it prohibits employer actions that interfere with, restrain, or coerce employees “in the exercise” of protected rights. *Lane County Public Works Association Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 603 (2004).

The Association’s complaint alleges the College violated the “in the exercise” prong of subsection (1)(a). The test for evaluating an alleged violation of the “in the exercise” prong is “whether the natural and probable effect of the employer’s conduct would tend to interfere with employees’ exercise of protected rights.” *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). The question here is whether the College’s directive had such a natural and probable effect.

The controlling authority is *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146 (1999). There, when a group of employees returned to work following a strike, the employer issued a directive which included the following:

“There is to be no discussion about the strike or labor dispute during work time in front of patrons or employees not in the bargaining unit. If a patron or non bargaining unit employee offers a comment or question, the unit member must politely indicate ‘Thanks for your interest, but I really can’t discuss that topic during work time. I know that you understand that I need to spend work time doing my job for Jefferson County citizens.’ A unit member should respond to a statement of ‘Welcome back’ or ‘I’m glad the employees are back at work’ by saying ‘Thanks.’” 18 PECBR at 149.

This Board held that the employer violated ORS 243.672(1)(a) by directing bargaining unit members to give specific responses to questions or comments

from unrepresented employees or the public about the labor dispute. This Board noted that the legality of such employer-scripted speech was a question of first impression. The general rule is that an employer directive banning discussion of strike-related issues in working areas or during working time is presumptively valid; a directive banning such discussion in non-working areas or during non-working time is presumptively invalid.<sup>50</sup> This Board then stated that “[d]irecting employees not to discuss issues related to the labor dispute with the public during working hours is one thing; scripting the employees’ responses is something else again.” 18 PECBR at 153. We held that the employer’s directive violated ORS 243.672(1)(a).

We see no meaningful distinction between *Jefferson County* and this case. The College scripted the employees’ statements to students regarding the labor dispute. As in *Jefferson County*, it is unlawful for the employer to do so, even though the restriction applies only during working hours.

In general, faculty members have a PECBA-protected right to talk with students about the labor dispute. *Elgin Education Association and Gale Wilson v. Elgin School District, No. 23, Case No. UP-44-90, 12 PECBR 708, 719 (1991)*. Employer restrictions on such communications must meet an important business need and must be narrowly tailored so that they do not unduly infringe on the employees’ protected rights. *Service Employees International Union Local 503 v. State of Oregon, Judicial Department, Case No. UP-3-04, 20 PECBR 864, 872 (2005)*; *Jefferson County*, 18 PECBR at 151. The College’s stated concern was the faculty’s use of class time to talk to students about a potential strike. This is a legitimate concern. Work time is for work. The College was entitled to direct faculty members to refrain from discussing the issue during class time. Had the directive stopped there, we would find no violation. But the directive did not stop there. It not only prohibited employees from delivering their own message, it also directed them to deliver the College’s message regarding the labor dispute.

We see at least two difficulties. First, the directive is not narrowly tailored to meet the College’s stated concern about using class time to discuss the potential strike. Requiring the faculty to remain silent fully addresses that concern. The additional requirement to give a scripted response is unnecessary to meet the concern. To the

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<sup>50</sup>The Association conceded at oral argument that the College’s directive applied only to working time. We therefore do not consider whether the directive is overbroad or ambiguous in this regard.

contrary, it mandates faculty use of class time to discuss the potential strike, precisely the conduct the College said it wanted to avoid.

Second, ORS 243.662 guarantees employees the right to participate in the activities of their labor organization. This includes the right to develop and deliver their own message regarding the labor dispute. Requiring the employees to deliver the College's preferred message about the labor dispute plainly interferes with, restrains, and coerces the employees in the exercise of their guaranteed rights.

The College argues there is no violation because it never disciplined anyone for violating the directive. That argument misses the point. When analyzing a claim that an employer interfered with an employee "in the exercise" of a protected right, the extent to which the employee was actually interfered with is not controlling. *OPEU and Termine v. Malheur County*, 10 PECBR at 521. The test is whether the natural and probable effect of the employer's conduct would tend to interfere with, restrain or coerce an employee in the exercise of a right protected by the PECBA. *Id.*; *Service Employees International Union Local 503 v. State of Oregon, Judicial Department*, 20 PECBR at 872. As described above, the employer's directive has this effect.

We conclude that the College's directive to faculty to tell students that "a strike is not a foregone conclusion" violates ORS 243.672(1)(a).

#### **11. The College did not engage in surface bargaining.**

The Association alleges that the College engaged in surface bargaining. In surface bargaining cases, there is no direct evidence that an employer is unwilling to negotiate in good faith. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8196 (1985). Instead, we examine the totality of the circumstances to determine whether the employer demonstrated "a 'willingness' to reach agreement that is the result of good faith negotiations." *Hood River Employees Local Union No. 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-52 (footnote omitted), *compliance order* 16 PECBR 696 (1996), *AWOP* 146 Or App 777, 932 P2d 1216 (1977).

Over the years, we have developed a list of factors we consider in surface bargaining cases. Among the factors are "(1) whether dilatory tactics were used; (2) the content of a party's proposal; (3) the behavior of a party's negotiator; (4) the nature and

number of concessions made; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations.” *Oregon AFSCME Council 75 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 393 (2006).

The Association asserts that a number of those factors are present here. Several of the incidents the Association relies on occurred more than 180 days before the complaint was filed. We may not use such evidence as the basis for concluding that a party committed an unfair labor practice. ORS 243.672(3).<sup>51</sup> Examples of untimely incidents include the Association’s assertion that the College made a retrenchment proposal on September 13 that was predictably unacceptable, and the College’s statement on September 27, 2004, before the completion of 150 days of table bargaining, that it preferred to go to mediation. Because these incidents occurred outside the 180-day statute of limitations, we do not consider them as evidence of surface bargaining.

The Association asserts that the College entered mediation without first reaching any meaningful agreements or making any significant concessions. In *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603 (1995), the parties adhered to their initial bargaining positions throughout table bargaining and mediation. We described their conduct as “the type of hard bargaining that often occurs in the early stages of the parties’ negotiations,”<sup>52</sup> and therefore did not

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<sup>51</sup>The Association filed the complaint on May 2, 2005. Events prior to November 3, 2004 are beyond the 180-day statute of limitations. Evidence of those events may, however, be admitted as background to explain the significance of allegedly unlawful conduct that occurred within the 180-day period. *Oregon School Employees Association v. Port Orford-Langlois School District 2J*, Case No. UP-54-92, 13 PECBR 822, 823 (1992). The Association does not assert that the information is merely background; it relies on the evidence as proof of surface bargaining. We may not consider it for that purpose.

<sup>52</sup>We decided *Hood River School District* under an old version of the PECBA which required the parties to participate in factfinding if they failed to reach agreement in mediation. Our description of table bargaining and mediation as the “early stages” of bargaining occurred in the context of that statutory scheme. The current law—the law under which the College and Association conducted their negotiations—no longer mandates factfinding. We have not decided whether mediation is properly described as an “early stage” under the current statute. We need not reach that issue here because the Association does not raise it. It asserts that the College’s lack of movement at the table alone constitutes evidence of surface bargaining. Lack of movement in mediation is not at issue here. The only issue is whether table bargaining continues to be an

consider it proof of bad faith. 15 PECBR at 614-15 We note that here, the College did more than the employer in *Hood River School District*. It made a number of concessions in mediation and thereafter. In these circumstances, we do not consider the College's lack of concessions at the bargaining table to constitute evidence of surface bargaining.

The Association also asserts that the College rushed through the bargaining process. According to the Association, the College requested mediation shortly after 150 days of table bargaining; it declared an impasse in mediation after just two sessions; and it implemented its final offer just two days after the cooling-off period ended. The College acted in accordance with the timelines established in ORS 243.712. Although the timelines are a minimum that can be exceeded by mutual agreement, we do not consider the College's close adherence to the statutory timelines to be evidence of surface bargaining under these circumstances.

The Association asserts that the College made a number of misrepresentations. We rejected that claim in Conclusion of Law 8, and for the same reasons, we do not consider them to be evidence of surface bargaining.

The Association asserts the College refused to provide financial information the Association requested to verify the College's claimed economic problems. The College provided budget documents, discussed economic issues throughout bargaining, and offered explanations for its proposals. The Association did not charge the College with an unlawful refusal to supply information under ORS 243.672(1)(e). Under these circumstances, the College's conduct is not evidence of surface bargaining. *Oregon AFSCME Council 75 v. Coos County*, 21 PECBR at 400 n. 23.

What remains is a group of incidents that we have already concluded are unlawful. For example, the Association asserts that evidence of surface bargaining includes the College's regressive proposals in mediation, the College's late final offer, and the lack of a cost summary for the College's amended final offer. We consider other unfair labor practices committed during bargaining to be evidence of surface bargaining. *Amalgamated Transit Union, Local 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 587 (1996). Here, however, the other violations would constitute the *only* substantial evidence of surface bargaining. This makes further

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"early stage" under *Hood River School District*. It clearly is. No statutory changes impact that designation.

consideration of surface bargaining issues unnecessary. Ample direct evidence supports our conclusion that the College bargained in bad faith.

We will dismiss this claim.

### Remedy

We turn now to the question of remedy. ORS 243.676(2)(b) requires us to issue a cease and desist order against a party that commits an unfair labor practice. In addition, ORS 243.676(2)(c) requires us to “[t]ake such affirmative action \* \* \* as necessary to effectuate the purposes of” the PECBA.

We have concluded that the College committed nine separate unfair labor practices under ORS 243.672(1)(a), (b), (e) and (f). Accordingly, we will order the College to cease and desist.

We also grant other affirmative relief. Among the violations, we found that the College unlawfully implemented its final offer. Some of the implemented changes benefit members of the bargaining unit and others are detrimental to them. In *Lane Unified Bargaining Council v. McKenzie School District #68*, 8 PECBR at 8203, we discussed the appropriate remedy for unlawful implementation in similar circumstances:

“\* \* \* Ordinarily, we would order the District to rescind the unilateral implementation of working conditions and return everything to the *status quo* that existed prior to [the date of implementation]. Because of the lapse of time since that date and the date of this Order, we do not believe such remedy is appropriate. Instead, we will order the District to restore the *status quo* only to the extent it is requested to do so by the Council. To do otherwise, at this late date, could harm the employees as much as the District due to the amount of salary above the *status quo* the teachers have received. ‘The wrongdoer, rather than the victims of wrongdoing, should bear the consequences of his unlawful conduct; and any remedy for such conduct should be adapted to the situation that calls for redress.’ By allowing the Council to select the conditions to be returned to the *status*

*quo*, we hope to restore some semblance of the previous balance of bargaining power without unwarrantedly harming the individual employees.” (Footnote omitted).

*See also Association of Professors: Southern Oregon State College v. Oregon State Board of Higher Education*, Case No. UP-27-88, 11 PECBR 491, 515 (1989) (employees need not return a pay increase the employer unlawfully implemented).

We apply those principles here and will order the College to return working conditions to the pre-implementation *status quo* to the extent requested by the Association. For those working conditions restored at the Association’s request, the College will make bargaining unit members whole for any losses suffered due to the unlawful implementation.

We will also order the parties to resume bargaining at the step where the earliest violation occurred. *McKenzie School District #68*, 8 PECBR at 8203. We found no unlawful activity during the table bargaining process, so we will not require the parties to repeat it. The earliest violations occurred during the mediation process. The College committed several unfair labor practices that tainted mediation, so we will order the parties to return to that step and continue the statutory process from that point. In addition, because it is the College’s unlawful conduct that caused the parties to repeat mediation, we will order the College to pay the entire mediation fee in ORS 240.610 without contribution by the Association.

We will also order the College to post an official compliance notice. In *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* (1984), we listed the factors we consider in deciding whether to order a posting:

“\* \* \* This Board generally requires the posting of an official notice in situations in which the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated

bargaining representative as the representative; or  
(6) involved a strike, lockout, or discharge. \* \* \*

In *Oregon Nurses Association v. Oregon Health & Sciences University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002), we held that a posting was warranted when two of the *Fern Ridge* criteria were satisfied. Here, at least three of the criteria are met: the College engaged in a continuing course of illegal conduct that affected a significant number of faculty and had a significant impact on the Association in its role as the designated representative. We will order the College to post the attached notice for 30 consecutive days in a prominent place in each facility where bargaining unit members are employed or assigned.

### CIVIL PENALTY

This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice. We may do so in either of two circumstances: (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). The complaint asks us to assess a civil penalty against the College because its actions were egregious.

In *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order* 9 PECBR 9354 (1987), we observed that the dictionary defines "egregious" as "conspicuously bad" and identifies "flagrant" as a synonym for "egregious." Here, we begin with the fact that the College committed at least nine separate unfair labor practices during a single round of negotiations. The sheer number of violations indicates the College's conduct was flagrant and conspicuously bad.

The serial nature of the bargaining violations is also egregious. The College committed at least six separate violations of its duty to bargain in good faith. The violations occurred over time, first in mediation, then in the final offer and amended final offer, and culminating in the College's unlawful implementation of the amended final offer. The College offered little or no defense to several of these violations. As we noted in *Hood River Employees Local 2503-2/AFSCME v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451, *compliance order* 16 PECBR 696 (1996), AWOP 146 Or

App 777, 932 P2d 1216 (1997), a crucial element of good-faith bargaining is that a party take its duties under the PECBA seriously. The College's serial violations through much of the bargaining process demonstrates the College's flagrant disregard for its statutory responsibilities.

Several of the College's other violations stand out as egregious. We concluded that the College violated ORS 243.672(1)(a) when it interfered with the protected rights of bargaining unit members by ordering them to give a scripted response to students regarding the possibility of a strike. Subsection (1)(a) violations strike at the core of the PECBA. *Service Employees International Union Local 503 v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 179, 181 (2005) (Rep. Cost Order). The College's conduct was particularly flagrant in that it ignored controlling case law directly on point. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146 (1999).

The College also bypassed the Association and bargained directly with its employees. This conduct strikes at the very heart of collective bargaining. One of the legislative policies underlying the PECBA is to require "[r]ecognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation \* \* \*." ORS 243.656(2). The PECBA guarantees public employees the right to bargain with their employer through the exclusive representative of their choice. ORS 243.662. The College's conduct in bypassing the exclusive representative is repugnant to these core principles.

We conclude that the College's conduct was egregious. We will order the College to pay the Association a civil penalty of \$1,000.

#### ORDER

1. The College will cease and desist from violating ORS 243.672(1)(a), (b), (e), and (f);

2. The Association, within 14 days of the date of this Order, shall notify the College of those unilaterally-imposed working conditions the Association wishes to be restored to the *status quo* as it existed prior to March 25, 2005. Upon receipt of the notice, the College shall rescind its unilateral implementation of working conditions accordingly;

3. As to those working conditions the Association identifies in its notice, the College will make bargaining unit members whole for any losses incurred due to the College's unilateral change;

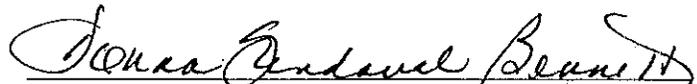
4. The parties will promptly resume the statutory bargaining process at the mediation step and will continue until they either reach agreement or complete the PECBA process. The College will pay the entire mediation fee with no contribution by the Association;

5. The College shall sign and prominently post one copy of the attached notice in each building or facility where bargaining unit members work. The notice shall be posted within 14 days of the date of this Order and may not be removed for 30 consecutive days;

6. Within 30 days of the date of this Order, the College shall pay to the Association a civil penalty of \$1,000; and

7. The remainder of the complaint is dismissed.

DATED this 26<sup>th</sup> day of February 2007.

  
Donna Sandoval Bennett, Chair

  
Paul B. Gamson, Board Member

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\*James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Kasameyer concurring.

I join in this Board's opinion, except as set forth below. My colleagues have reached the right result in this case. In some instances I do not agree with the analysis used by my fellow Board members, and therefore write this partial concurrence.

Thus, I agree with this Board's Conclusion of Law 2, that the College lawfully requested mediation after 150 days of table bargaining. However, I would not consider the Association's allegations that the College failed to negotiate in good faith during those 150 days, because all of the actions on which the Association relies occurred more than 180 days before the complaint was filed.

In this case of first impression, the Association asks this Board to find the College guilty of unlawful surface bargaining. That is an unfair labor practice under ORS 243.672(1)(e), and should be treated as such. Since any unlawful acts by the College occurred outside the statute of limitations, this Board should not consider them. I would not allow a deduction of "bad faith" time from the 150-day bargaining period unless bad-faith bargaining has been established through unfair labor practice proceedings, based upon events which occurred within the 180-day statute of limitations.

I join in this Board's Conclusion of Law 3, that the College violated ORS 243.672(1)(e) when it made proposals in mediation concerning new issues, because, as a general rule, a party acts in bad faith by introducing new issues in mediation. I agree that the College made new proposals concerning Addendum C, and also when it added a requirement that faculty members must have mandatory training to its proposal that faculty would advise students—although I find that to be a close question. I do not agree that the College made a new proposal on recall, because I do not view layoff and recall as involving essentially separate subjects.

I also do not join in the "caveat" that offering a proposal on a new issue is not unlawful so long as the proposal is responsive to an issue properly in mediation and tends to narrow or resolve the dispute over that issue. We do not need to create this

caveat in order to resolve this case, and we should not do so. There are other formulations which might be used, if any are needed.<sup>53</sup>

The existing test has nothing to do with whether a proposal is responsive to a proposal made by the other side, nor with its intent, but only with whether it is “new.” This is because, as this Board has concluded many times, any “new” proposal, whether made in mediation or later in the bargaining process, tends to disrupt bargaining. We see this from my colleagues’ analysis of the College’s new mediation proposals: all are found to widen, rather than narrow, the issues in dispute.

The justifications given for the caveat are therefore fundamentally inconsistent with the “reasonably comprehended” rule. The caveat may also swallow the rule. Virtually *any* proposal could be deemed “responsive to an issue properly in mediation.” On the other hand, it is hard to see how any truly “new” proposal “tends to narrow or resolve the dispute” as a matter of law.

The example given in footnote 43 illustrates this. There, my colleagues refer to a “paid leave” proposal, first made in mediation. It is “new,” and hence unrelated or comprehended by any previous wage proposals. It is therefore unlawful—except that “it tends to narrow the issues between the parties.” How do my colleagues know? Because they say so.

I would have to look at the circumstances surrounding the mediation to reach the same conclusion. There are no such circumstances here. As a consequence, my colleagues have—in dicta—grafted an exception onto the existing rule, without guidance on how this Board will apply this exception in future proceedings.

I agree with this Board’s Conclusion of Law 4, that the College violated ORS 243.672(1)(e) when it submitted proposals regarding Addendum C and mandatory training in its final offer. I do not agree that the College unlawfully included proposals on recall in its final offer. I also wonder what effect this Board should give to a final offer which has been superseded and is no longer “final,” as here. However, that question is not before us in this case.

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<sup>53</sup>For example, *see, City of Portland v. PPCOA*, Case Nos. UP-19/26-90, 12 PECBR 424, 469 (1990), the standard proposed by Member Hein, dissenting in part, that a particular proposal was proper because it “logically evolved from the parties’ prior bargaining positions and was reasonably comprehended by the union’s original \* \* \* proposal.”

Subject to the exceptions set forth above, I join in this Board's Conclusion of Law 5. I agree that the College included yet more new proposals in its amended final offer, and that the College violated ORS 243.672(1)(e) when it implemented its amended final offer



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James W. Kasameyer, Board Member



**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**STATE OF OREGON**  
**EMPLOYMENT RELATIONS BOARD**

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-22-05, *Blue Mountain Faculty Association v. Blue Mountain Community College*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

The Employment Relations Board (ERB) found that Blue Mountain Community College (College) violated ORS 243.672(1)(a), (b), (e), and (f). To remedy those violations, ERB ordered the College to:

- (1) Cease and desist from violating ORS 243.672(1)(a), (b), (e), and (f);
- (2) To the extent requested by the Association, restore working conditions to the *status quo* that existed prior to March 28, 2005;
- (3) Make employees whole for any losses incurred due to the College's unlawful changes in working conditions;
- (4) Resume bargaining at the mediation step, with the College responsible to pay the entire mediation fee;
- (5) Pay the Association a civil penalty of \$1,000; and
- (6) Post this notice in a prominent place in all buildings where bargaining unit employees work.

Blue Mountain Community College

Dated \_\_\_\_\_, 2007 By \_\_\_\_\_  
Employer Representative

\_\_\_\_\_  
Title

\*\*\*\*\*

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

*This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street NE, Suite 400, Salem, Oregon 97301-3807, phone 378-3807*