

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UP-22-09

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
LOCAL #2746-5,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF WARRENTON,)	
)	
Respondent.)	
_____)	

On August 11, 2010, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on March 10, 2010, following a hearing on October 8, 2009, in Salem, Oregon. The record closed on October 23, 2009, with the receipt of the parties' post-hearing briefs.

David Martinez, Council Representative, Oregon AFSCME Council 75, Portland, Oregon, represented Complainant.

Frank Forbes, Labor Relations Consultant, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On May 1, 2009, Oregon AFSCME Council 75, Local #2746-5 (Union) filed this complaint which alleges that the City of Warrenton (City) violated ORS 243.672(1)(g) when it failed to implement the parties' November 5, 2008 classification and compensation agreement. The City filed a timely answer and asserted that it did not violate ORS 243.672(1)(g) because the agreement was subject to ratification.

The issue in this case is: Did the City violate ORS 243.672(1)(g) when it failed to implement the November 5, 2008 classification and compensation agreement between the City and AFSCME.

RULINGS

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

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of employees who work for the City, a public employer.

2. The City has a commission-city manager form of government. Chapter III, Section 6 of the City Charter states “[e]xcept as this charter provides otherwise, all powers of the city shall be vested in the commission.”¹ Chapter III, Section 11, entitled “Salaries,” provides, in relevant part, that “[t]he compensation for the services of each city officer and employe shall be the amount fixed by the commission.”

3. The city manager is the “administrative head of the government of the city.” The city manager’s powers and duties include: 1) attending Commission meetings and advising the Commission on the affairs of the city and its departments; 2) enforcing all city ordinances, franchises, leases, contracts, permits, and privileges; 3) appointing, removing, and supervising city officers and employees and supervising city departments to the extent not otherwise provided in the charter; 4) acting as the department’s purchasing agent; 5) preparing and submitting annual budget estimates and other budget reports; and 6) supervising city property and public utilities.

4. The Union and City were parties to a collective bargaining agreement effective July 1, 2006 through June 30, 2009.

5. Article 12.1 of that agreement, entitled “COMPENSATION,” provided, in part:

“12.1 General

“Employees shall be compensated in accordance with the following and the wage schedule attached to this agreement and marked Exhibits “A” and “B” which is hereby made a part of this agreement. Payroll errors shall be corrected within thirty (30) days of notice to the City.”²

¹The parties used the terms commission and council interchangeably.

²Exhibit “A” is entitled Job Classification; Exhibit “B” is entitled Salary Schedule.

“A. Effective July 1, 2006 all employees shall receive a cost of living increase of three and one half percent (3.5%) and effective July 1, 2007 all employee [sic] shall receive a cost of living increase of three and one half percent (3.5%). For the fiscal year beginning July 1, 2008 the parties shall renegotiate wages prior to the beginning of the fiscal year based on the results of the joint class and compensation review.

“* * * * *

“C. Classification/ Compensation Review: The City and the Union shall collaboratively prepare an outline for a classification/compensation review. This outline shall include positions to be reviewed, a job description review process, including an appeals, classification and classification/compensation survey proposal (to be conducted by a mutually agreeable third party). This timeline shall be completed by November 1, 2007. The classification/compensation survey must be completed by February 1, 2008. The parties will negotiate wages once the review is completed. All dates may be changed upon mutual agreement of both parties.”

6. The parties began negotiating under Article 12.1 in September 2008. During negotiations, the parties bargained wage adjustments based on a cost of living increase (COLA) to be effective July 1, 2008, and the results of the classification/compensation survey.

7. City Manager Robert Maxfield alone represented the City in negotiations. The Commission hired Maxfield as acting city manager in January 2007 and appointed him to the position permanently in May 2007. Maxfield was not involved in negotiating the parties' 2006-09 agreement, and had no prior experience and minimal training in negotiating collective bargaining agreements. Maxfield does not have authority to change the salary structure without Commission approval. Maxfield understood that the City and Union were negotiating a COLA increase and the outcome of the classification and compensation study. He believed the two issues were connected because they were both economic issues.

8. The Union's bargaining team included AFSCME Council 75 Field Services Director Rick Henson and Local Union President Larry Nearing. Henson did not normally represent the Union in bargaining and was not involved in negotiating the parties' 2006-09 agreement. He became involved in the negotiations with the City after the Union's assigned representative, Stacy Chamberlain, went on leave. Henson has extensive experience negotiating collective bargaining agreements.

9. Henson understood that the negotiations involved two separate topics. The first topic was the contract reopener to address a potential COLA increase. Henson believed that a tentative agreement reached on this issue was subject to the parties' ratification.

The second topic was the implementation of the results of the classification and compensation study. Henson understood that the parties would look at the collected data and, if the data reflected that raises were needed, the parties would negotiate over how and when to implement those raises. Henson believed that because the study was part of an existing contract, these raises would then be implemented without the need for ratification. Henson perceived that Maxfield had authority to sign the agreement on the classification/compensation plan implementation because he was the City Manager and never said he did not have the authority. Henson saw the classification/compensation study negotiations as different from the reopener negotiations because during the reopener negotiations the parties would not rely on collected data. Instead, they would bring their own views, and bargain within the full scope of their rights.

10. Nearing had been local Union president since approximately 2004. He was involved in negotiations for one other contract. He was never involved in negotiating or implementing a classification/compensation study at the City. Nearing understood that under the reopener the parties would negotiate wages and compensation. He believed that the Union had to vote on an agreement reached as a result of the reopener negotiations. Under the classification plan, he believed that the parties would work together to find an organization that would study the wages and make wage comparisons, based on which the parties would then negotiate wages and compensation. Nearing understood that Maxfield was the negotiator for the City, and believed Maxfield had authority to negotiate and sign the agreements.

11. During the negotiation process, the parties never proposed, discussed, or entered into any ground rules. They also never talked about Maxfield's authority to negotiate and sign any agreements or the parties' obligations to seek ratification of any agreements. Maxfield never stated during the negotiations that he had authority to enter into agreements that were not subject to the approval of the Commission or that he was required to get the Commission's approval for any agreements. Nor did the parties discuss Henson's or Maxfield's understanding of the negotiation process.

12. Sometime prior to November 5, 2008, the parties reached a conceptual agreement on a COLA increase and adjustments to the classification ranges and steps. Henson did not attend all of the meetings in which the parties' discussed the terms of their agreement.

13. Based on the conceptual agreement, Henson prepared two separate written agreements because he believed that the COLA increase needed to be ratified but that the adjustments resulting from the classification/compensation review did not. Henson did not tell Maxfield why the agreements were presented separately.

14. One agreement entitled "Tentative Agreement Between City of Warrenton and AFSCME Local 2746-5" (Wage Agreement) includes signature lines for the City and the Union and states:

"By the signing of the signatures below the parties agree that they have reached a tentative settlement for 2008. The terms are as follows.

"Wage Reopener:

- "1) A three percent (3%) across the Board wage increase added to all classifications.
- "2) Retroactivity pay increase back to July 1, 2008.
- "3) Subject to ratification by the Union and the City."

15. The other agreement is entitled "Agreement Between City of Warrenton and AFSCME Local 2746-5" (Classification/Compensation Agreement). The first sentence in this Agreement states that "[b]y the signatures below the parties agree to the terms adjusting classification Ranges and Steps." The Classification/Compensation Agreement then lists thirteen adjustments to specific classification ranges and steps and ends with signature lines for Maxfield, on behalf of the City, and Nearing, on behalf of the Union. The Classification/Compensation Agreement includes no reference to the Wage Agreement or ratification.

16. On November 5, 2008, Maxfield and Nearing met and signed the two agreements prepared by Henson. Henson was not present during this meeting. Maxfield did not question why there were separate agreements and, based on his limited experience, assumed this was the correct procedure. After signing the agreements, Maxfield told Nearing that he would take the two agreements to the Commission for their approval.

17. On December 4, 2008, the Union ratified the Wage Agreement. The Union did not vote on the Classification/Compensation Agreement.

18. On December 9, 2008, the Commission met to consider the Wage Agreement and the Classification/Compensation Agreement. Maxfield recommended that the Commission approve the agreements as a package, but the Commission declined to ratify the agreements. The Commission recommended that the parties continue their negotiations over the issues.

19. Sometime prior to February 20, 2009, Council 75 Representative Chamberlain contacted the City's labor consultant, Frank Forbes, to determine the status of the Classification/Compensation Agreement. On February 20, Forbes sent an e-mail to Maxfield, with a copy to Chamberlain, which stated:

"I discussed the status of the classification study and current bargaining with the union representative, Stacy Chamberlain, both yesterday and today. I indicated to her that I will be recommending to the City Council on March 5, 2009, to implement the study and resume bargaining for both the current year and the year beginning July 1, 2009.

"Ms. Chamberlain has indicated that the union may choose to file an Unfair Labor Practice (ULP) regarding the study implementation. If that occurs, it might delay settling the issues for some time."

20. On March 11, 2009, Forbes sent an e-mail to Chamberlain notifying her that the Commission "did not change their earlier disapproval of the package recommended by the City Manager that included the July 1, 2008, COLA [cost of living adjustment] and the implementation of the Classification and Compensation Study." Forbes indicated that the Commission had directed its representatives to resume negotiations with the Union and requested potential bargaining dates from Chamberlain.

21. On May 1, 2009, the Union filed this complaint.

22. In late May 2009, the parties entered into negotiations over the 2008 COLA and a successor to the 2006-09 Collective Bargaining Agreement. In July 2009, as part of these negotiations, the City and the Union entered into an agreement on the remedy for this unfair labor practice proceeding, which provides:

- "1. The City agrees to implement a three percent (3%) COLA for all bargaining unit employees retroactively to July 1, 2008.
- "2. If the Union prevails on the pending ULP against the City, the union agrees that the compensations and classification study agreement adjustments will be reduced by the three percent (3%)

2008 COLA for those employees whose classification is to be adjusted by more than three percent (3%). For example: If an employee classification is to be adjusted by seven percent (7%) under the compensation and classification study agreement the City will reduce the percentage by three percent (3%) and the classification will be adjusted upward by four percent (4%). Employees in classifications that are adjusted to a level equal to or less than three percent (3%) by the compensation and classification study agreement shall receive the full the [sic] three percent (3%) 2008 COLA regardless of the outcome of the ULP.

- “3. In no event will a classification be adjusted below the current rates or will employees receive wages below the amount they received prior to the result of the ULP as a result of this agreement.
- “4. If the City prevails on the pending ULP, the employee’s wages will not be adjusted and the employees will only be entitled to the three percent (3%) 2008 COLA.
- “5. This agreement has no bearing on any cost of living or wage adjustments employees may receive pursuant to a collective bargaining agreement or future agreements.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City did not violate ORS 243.672(1)(g) when it failed to implement the November 5, 2008 Classification/Compensation Agreement.

DISCUSSION

ORS 243.672(1)(g) makes it an unfair labor practice for “a public employer to violate the provisions of any written contract with respect to employment relations.” Pursuant to Article 12 of their collective bargaining agreement, the parties completed a classification/compensation review and negotiated a COLA increase for the fiscal year beginning July 1, 2008. The Union drafted the final agreement for signature which consisted of two separate documents; one covered the COLA increase and stated that it was subject to ratification, and the second covered the

classification/compensation review and stated it was effective upon signature. The City Manager and the Local Union president signed both agreements but the City failed to ratify either agreement.

The parties agree that the COLA agreement was subject to ratification. The issue before us is whether the classification/compensation agreement was effective upon signature or was subject to ratification by the parties.

The Union contends that we must limit our review of this matter to the plain language of the wage and compensation agreement, which was effective upon signature. The City contends that the classification/compensation agreement was merely one part of an overall wage and compensation agreement as provided for in the collective bargaining agreement—a contract which both parties agree was subject to ratification. The City further argues that the City Manager did not have the authority to bind the City without ratification.

To determine the parties' intent to enter into a contract and determine the meaning of that contract, we must begin with the parties' collective bargaining agreement. We apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We first examine the text of the disputed language in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we examine extrinsic evidence of the parties' intent. Finally, if the provision remains ambiguous, we resort to appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997). We begin by examining the text and context.

Article 12 COMPENSATION of the parties' collective bargaining agreement provides, in pertinent part;

"12.1 General

"Employees shall be compensated in accordance with the following and the wage schedule attached to this agreement and marked Exhibits 'A' and 'B' which is hereby made a part of this agreement * * *."

Section A of Article 12.1 provides that for the fiscal year beginning July 1, 2008, the parties shall renegotiate wages "based on the results of the joint class and compensation review." Article 12, Section C provides for a classification/compensation survey by an outside third party and states that "[t]he parties will negotiate wages once the review is completed."

The term “wages” is not defined in the parties’ collective bargaining agreement. Accordingly we assign it its plain meaning. *Webster’s Third New International Dictionary* (2002) defines wages as “a price paid someone for his labor or services.” We also note that Oregon’s wage and hour law, defines “wages” as “all compensation for performance of service by an employee for an employer, whether paid by the employer or another person, including cash value of all compensation paid in any medium other than cash.” ORS 652.210(5).

When we apply the plain meaning of the term “wages” to the context of Article 12, we conclude that wages encompass both the COLA increase and an employee’s classification and its corresponding rate of pay. It is axiomatic that an employee’s classification and rate of pay are part and parcel of an employees wages.

The collective bargaining agreement clearly establishes a bargaining relationship between the classification/compensation survey and the COLA. Article 12.1.C sets out the process for the compensation/classification review and provides that the parties “will negotiate wages once the review is completed.” Article 12.1.A specifically provides that the parties “shall renegotiate wages prior to the beginning of the fiscal year *based on the results of the joint class and compensation review.*” (Emphasis added.) Article 12 requires the parties to complete a two-part process: first establish a position’s classification and corresponding rate of pay, then based on those results, agree to a COLA adjustment (if any). Only the combination of the two issues constitutes a “wage” agreement.

The parties’ actions bolster this interpretation. The parties negotiated over both issues at the same time and reached tentative agreement on both at the same time. The issues were never treated separately until the Union artificially separated them by drafting two agreements.³ The City Manager stated at signing that he would take the agreements to the Commission for ratification and the Union did not object. We conclude that the issues are inextricably bound and cannot be separated.

The Union contends, and the City disagrees, that the City Manager had apparent authority to bind the City with his signature. The Union cites *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506 (2008) in support of its argument. We do not agree. In *TriMet*, the union asserted that a signed agreement between the union’s president and an employer representative was not a binding contract because the

³The Union drafted the Classification/Compensation Agreement. Along with the Oregon courts we have adopted the adage that any ambiguity in an agreement is resolved against the party who drafted it. *Heinzel v. Backstrom*, 310 Or 89, 96, 794 P2d 775 (1990).

agreement was subject to ratification by bargaining unit members. We held that “[a] contract made by negotiators for a labor organization and an employer will be enforceable without ratification when the parties give their negotiators authority to reach agreement. * * * Authority may be either actual or apparent.” *Id.* at 546. “Actual authority is ‘that authority which the principal confers upon the agent in express terms.’ Apparent authority is created ‘by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for him on that matter. The third party must also rely on that belief.” *Id.* at 546. (Citations omitted.)

The Union does not argue that Maxfield had actual authority but that he had apparent authority. The Union bases its assertion on the fact that the Commission appointed Maxfield to bargain on its behalf, and neither the Commission nor Maxfield conditioned agreement on the classification/compensation adjustments on ratification. Where an understanding exists that a whole agreement is subject to ratification, “[a] party that departs from such an understanding bears the burden of showing that the parties had agreed to a different procedure.” *International Association of Fire Fighters, Local No. 2285 v. Douglas County Fire District No. 2*, Case. No. UP-40-88, 11 PECBR 806, 817 (1989). Here, the Union bears the burden of proof.

In *TriMet* we considered evidence of the parties’ past practice and prior communications to determine whether ratification was required. Unlike *TriMet*, here there is no evidence regarding the parties’ past practice or prior communication. The Union produced no evidence that the City Manager has ever had the authority to adjust compensation without the Commission’s prior approval. Accordingly, the Union failed to meet its burden of proof.

In *TriMet*, we stated our future expectations regarding ratification:

“In the future, however, if a party has not provided timely written notice that its negotiator’s agreements need to be ratified, it must demonstrate by clear and convincing evidence that it expressed this requirement early in the negotiations process.” *TriMet*, 22 PECBR 547-48 n 21.

Neither the City or Union met our expectations. Unlike *TriMet*, however, the parties here agreed that the Article 12 wage reopener was subject to ratification. The only question was whether the classification/compensation survey was part of the wage reopener. We concluded that it was and therefore subject to ratification.

Based on the clear language of the collective bargaining agreement and the parties' actions, we conclude that the Classification/Compensation Agreement was only one part of the Wage Agreement and was thus subject to ratification. Accordingly, the City did not violate ORS 243.672(1)(g) when it refused to implement that Agreement. We will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 21 day of June, 2011.

**Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

**Chair Gamson Dissenting:

The City and the Union conducted labor negotiations through their designated bargaining representatives. The representatives reached an agreement, which they reduced to writing and signed, regarding a class and compensation study. Prior to signing the agreement, neither party indicated that the agreement had to be ratified before it became final. To the contrary, the agreement provides that by their signatures, the parties agree to the terms. The City Commissioners refused to ratify the agreement and now assert the City is not bound by it. The issue is whether, in addition to the City negotiator's signature on the agreement, the City Commissioners needed to ratify the

agreement in order for it to become enforceable. Based on a long line of cases from the courts and this Board, I am compelled to conclude that the City is bound by the agreement of its designated representative because the City never made ratification a condition of agreement.

More than 30 years ago, this Board observed that “[t]here is no requirement in Oregon law that a contract be ratified.” *Coliseum Employees Association/Oregon Independent Labor Council v. Exposition and Recreation Commission, City of Portland, and Theatrical Employees Union, Local B-20*, Case No. C-83-78, 3 PECBR 1971, 1972 (1978). About eight years later, in a case strikingly similar to this one, we explained and applied this principle. In *South Benton Ed. Assn. v. Monroe Union High*, Case No. UP-97-85, 9 PECBR 8556 (1986), *aff’d* 83 Or App 425, 732 P2d 58, *rev den* 303 Or 331, 736 P2d 565 (1987), a school district argued that an agreement reached by its designated bargaining representative had to be ratified in order to become effective. This Board rejected the argument. We explained:

“[D]esignated representatives of a school board - - that is, those persons authorized to act as agents in collective bargaining on behalf of a school board - - may, as a result of collective bargaining, reach an agreement with a labor organization that is enforceable by this Board, even though the agreement has not been formally ratified. The settlement proposal of May 3 was not conditioned on ratification by the full School Board. It is not disputed that the District’s designated representatives had the authority to make and accept proposals in bargaining. No provision of the PECBA requires that collective bargaining agreements be ratified by the negotiators’ constituents before they are enforceable.” 9 PECBR at 8567.⁴

We applied these principles and held that the agreement reached by the designated bargaining representative was binding because it was not conditioned on ratification. *See also Lane Unified Bargaining Council v. Crow-Applegate-Lorane School District*, Case No. UP-28-97, 17 PECBR 328, 338 (1997) (citing *South Benton* for the proposition that “an agreement may be formed without ratification where the settlement was not conditioned on ratification.”).

More recently, we further clarified that ratification is necessary only when a party notifies the other early in the bargaining process that ratification is a condition of agreement. In *Tri-County Metropolitan Transportation District of Oregon (TriMet) v.*

⁴The Court of Appeals affirmed the Board’s order in *South Benton*, and quoted this portion of the Board’s order with approval. 83 Or App at 429.

Amalgamated Transit Union, Division 757, Case No. UP-55-05, 22 PECBR 506 (2008), the local union president signed a written agreement with the employer concerning a controversial issue. The union membership opposed the agreement, and the union asserted that the president's agreement was unenforceable because the bargaining unit never ratified it. The union never gave the employer oral or written notice that ratification by the bargaining unit was a condition of agreement. As a result, we had to comb through a long and often contradictory record, developed over three days of hearing, to determine whether the employer knew, or should have known, that the agreement would be valid only if the bargaining unit ratified it. In a 48-page order, we concluded that the agreement was enforceable because the union failed to adequately notify the employer that ratification was required.⁵

To make the rules clear for parties in bargaining, and to avoid the need for this type of extensive litigation, we laid out a clear and simple analytical framework we would apply to future disputes about the need for ratification. We explained:

“As discussed above, the PECBA does not require collective bargaining agreements to be ratified by a negotiator's constituents in order to be enforceable. *South Benton Education Association v. Monroe Union High School District #1*, Case No. UP-97-85, 9 PECBR 8556 (1986), *aff'd* 83 Or App 425, 732 P2d 58, *rev den* 303 Or 331, 736 P2d 565 (1987). A party that intends to condition agreement on ratification must clearly indicate this

⁵The rule that a negotiator's agreement is enforceable unless it is conditioned on ratification is a neutral principle that does not favor labor or management. In *South Benton*, we applied the principle against the employer's interests; in *TriMet*, we applied it against the union's interests.

The case against the need for ratification is even more compelling here than in *South Benton* or *TriMet*. In both of those cases, the signed agreements were silent on the need for ratification. Here, the document the parties signed is not silent. It is entitled “Agreement Between City of Warrenton and AFSCME Local 2746-5,” and the first sentence says: “[b]y the signatures below the parties agree to the terms adjusting classification Ranges and Steps.” (This is in sharp contrast to the companion document, signed at the same time, which is entitled “Tentative Agreement” and which specifies that ratification is a condition of agreement.) The majority ignores a cardinal rule of interpreting a document: “[i]n the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted * * *.” ORS 42.230. The majority omits language that the contract is enforceable upon signing, and it inserts a condition that the contract must be ratified.

intent. [AFSCME Council 75 and] *Worthington v. City of Sweet Home*, [Case No. UP-107-89] 12 PECBR 224 [(1990)]. This case illustrates the need for the parties to establish their positions early in the bargaining process regarding ratification. The clearest indication is written notice to the other party that, in addition to the negotiator's agreement, ratification by the constituents is required before an agreement is final. Written ground rules are an optimal example. The parties can express their mutual understanding of whether agreements are subject to approval by the employer's governing board or the union's membership. We will not establish a bright-line rule that requires all limitations on a negotiator's authority to be written. In the future, however, if a party has not provided timely written notice that its negotiator's agreements need to be ratified, it must demonstrate by clear and convincing evidence that it expressed this requirement early in the negotiations process. This furthers the underlying PECBA policy of 'encouraging practices fundamental to the peaceful adjustment of' labor disputes. ORS 243.656(3). A clear understanding of the authority of the other party's negotiator is essential to an orderly and effective bargaining process." *TriMet*, 22 PECBR at 547-48 n 21.

This language is recent and it's clear. It describes precisely how we will analyze cases like the one currently before us. It creates a presumption that ratification is not necessary unless a party gives clear and timely notice that its agreement is conditioned on ratification. But did we really mean what we said? Apparently not. The majority acknowledges that the parties failed to meet the *TriMet* requirements, but it then ignores that conclusion. Instead, it engages in the same type of labyrinthine analysis that *TriMet* was designed to avoid.⁶

In my view, the quoted passage from *TriMet* provides all the guidance we need to resolve this case:

⁶The majority concludes there is no evidence that the City negotiator had authority to enter a binding agreement with the Union. That misses the whole point of *TriMet*. Under *TriMet*, negotiators are presumed to have such authority unless they give notice to the contrary. The City gave no such notice here. In any event, there was evidence the City's negotiator had authority. In *South Benton*, both this Board and the Court of Appeals found sufficient authority in the negotiator's ability "to make and accept proposals in bargaining." 9 PECBR at 8567; 83 Or App at 429. There is no dispute here that the City's negotiator had such authority. In addition, and unlike any other reported case, the City's negotiator signed an agreement which stated that it was effective upon signing. In my view, this constitutes overwhelming evidence of the negotiator's authority to enter an agreement.

1. It tells us *who* must act—the party asserting that ratification is a condition of final agreement. In this case, the City must act because it is the party asserting that the agreement is conditioned on ratification.

2. It tells us *what* action the party must take—notify the other party of the condition. Here, the City was obligated to notify the Union that agreement was conditioned on ratification by the City Commissioners. The majority completely flips this burden of giving notice on its head. It concludes that the Union failed to prove that it told the City the agreement was *not* subject to ratification. Slip op. at 10. Under *TriMet*, the Union had no obligation to notify the City. It was up to the City, as the party asserting the right to ratify, to notify the Union, and not the other way around as the majority would have it.

3. It tells us *when* a party must notify the other party that agreement is conditioned on ratification—“early in the negotiations.” We did not specify how early in the negotiation process the notice had to be given, but that does not matter here. The City did not, at any time during negotiations, mention the need for ratification. Finding of Fact 11. The City mentioned ratification for the first time after the parties had already signed the agreement. This clearly is not “early” in the negotiation process.

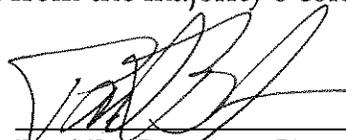
4. It tells us *how* the party must give the notice—either in writing or by “clear and convincing evidence” that it gave timely notice. It is undisputed that the City never gave written notice that agreement was conditioned on ratification. Absent written notice, there needs to be “clear and convincing evidence” that it gave timely notice. This is an extremely high standard. “Clear and convincing evidence” means evidence establishing that the truth of the facts asserted is highly probable.” *In Re Groom*, 350 Or 113, 121 (2011); *State ex rel Dept. of Human Services v. Simmons*, 342 Or 76, 95, 149 P3d 1124 (2006). There is *no* evidence that the City mentioned ratification at any time during negotiations, and certainly no clear and convincing evidence that it did.

5. It tells us *why* a party must give timely notice that its agreement is conditioned on ratification—because the notice is “essential to an orderly and effective bargaining process.” Timely notice furthers the purposes and policies of the PECBA.

When we apply the proper analysis to these facts, the outcome seems inescapable. We begin with the presumption that agreements are not automatically conditioned on ratification. A party that wants to make ratification a condition of agreement must give adequate and timely notice to the other party. Here, the City did not, at any time during the negotiation process, notify the Union that its agreement was conditioned on ratification by the City Commissioners. As a result, the class and compensation study agreement signed by the City’s negotiator was enforceable even though the City Commissioners never ratified it. Accordingly, I would order the City to abide by it.

The majority reaches a contrary conclusion. I find its analysis contrived and unconvincing. It ignores the unambiguous language of the signed agreement which expressly says it becomes effective upon signing; it ignores the analysis we established so recently in *TriMet*; it improperly shifts the burden away from the City to prove it gave notice that the agreement *was* conditioned on ratification, and places the burden instead on the Union to prove it gave notice that the agreement *was not* conditioned on ratification; it fails to explain how, under current Board precedent, a document could be subject to ratification even though the parties never discussed ratification as a condition of agreement; it interprets the collective bargaining agreement, which is not at issue here, and fails to interpret the signed agreement on class and compensation, which is the only document at issue; it creates the fiction that there was only one agreement, even though the parties signed two separate documents with different terms; and when it combines these two documents, the majority inexplicably decides that the requirement to ratify, contained in the companion document which is not at issue here, somehow also applies to the separate signed document at issue here and which expressly stated that ratification was not necessary.

The effect of the majority's order is to punish the Union because the Union was open and forthright regarding its intentions about ratification. The Union spelled out in explicit terms that the wage agreement needed to be ratified and the class and compensation agreement did not. The City's negotiator signed both agreements. The majority releases the City from its contractual obligation without any showing of fraud, misrepresentation, mutual mistake, illegality, or any of the other accepted grounds for voiding a contract provision. Under the majority's order, the Union would have been better off under Board precedent by remaining silent instead of making its intentions clear. Rewarding silence rather than clarity does not further the PECBA policy to encourage "practices fundamental to the peaceful adjustment of disputes * * *." ORS 243.656(3). I respectfully dissent from the majority's conclusion to the contrary.



Paul B. Gamison, Chair