EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-23-10

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,	)	
Complainant,	)	
v.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
CLACKAMAS COUNTY,	)	
Respondent.	)	

On October 10, 2011, this Board heard oral argument on Complainant's objections to a Recommended Order issued on August 16, 2011, by Administrative Law Judge (ALJ) Peter A. Rader, following a hearing held on November 29, 2010, in Salem, Oregon. The record closed on December 13, 2010, following receipt of the parties' post-hearing briefs.

Kevin Keaney, PC, Portland, Oregon represented Complainant Clackamas County Employees' Association.

David W. Anderson, Assistant County Counsel, represented Respondent Clackamas County.

On May 11, 2010, the Clackamas County Employees' Association (CCEA) filed this unfair labor practice complaint alleging that Clackamas County (County) violated ORS 243.672(1)(e) during bargaining for their new labor contract. The County filed a timely answer.

The issues are:

1. Did the County's May 5, 2010 e-mail to bargaining unit members make a new proposal that had not previously been presented to CCEA's designated bargaining team? If so, did this conduct violate ORS 243.672(1)(e)?

2. If the County did not violate ORS 243.672(1)(e), is it entitled to an award of a civil penalty?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. CCEA is a labor organization and the exclusive representative for three of the eight bargaining units of employees who work for the County, a public employer.

2. Two of the CCEA-represented bargaining units are the wall-to-wall unit with between 600 to 800 members, and the unit composed of approximately 50 employees of the Housing Authority of Clackamas County (CCEA-HA).[1]

3. The County is headed by a Board of Commissioners which also serves as the Board of Directors for the Clackamas County Housing Authority. The Board of Commissioners is the designated bargaining representative in negotiations involving the County and the Housing Authority. Steve Wheeler is the County Administrator and Mark Stotik is the County's Labor Relations Manager and chief labor negotiator. John Bailey was the service representative and chief negotiator for CCEA until his retirement in late 2009.

The Parties' 2006-2009 Contract

4. The CCEA and CCEA-HA were parties to collective bargaining contracts (Contract) with the County in effect from July 1, 2006 to June 30, 2009. Although negotiations for the CCEA and the CCEA-HA were conducted separately, their contracts were similar enough that bargaining proceeded along parallel tracks.

5. Article IX of the expired Contract addresses health and welfare benefits and has identical language for both bargaining units. Article IX, Section 1 sets out the scope of benefits. It states:

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[1]The contracts covering the two units are identical and the negotiations were conducted simultaneously, but because the CCEA is the larger unit, the evidence addresses only the negotiations between the County and the CCEA, which is the sole complainant in this case.

"*1.* *Medical Coverage.*

"The County agrees to contribute toward the monthly composite premium for each medical plan for fulltime employees and their eligible family members, effective on the first day of the month following the benefit-waiting period described in Section 10. The design of the medical plans and eligibility of family members shall be determined by the Benefits Review Committee as described in Section 11.

"Effective July 1, 2006 through December 31, 2006, the County agrees to contribute up to $779.47 per employee per month toward the monthly composite premium.

"Effective January 1, 2007, the County agrees to contribute an amount equivalent to 95 percent of the monthly composite premium for each medical plan provided.

"Effective January 1, 2008, the County agrees to contribute an amount equivalent to 95% of the monthly composite premium for each medical plan provided up to a maximum of $949.37.

"Effective January 1, 2009, the County agrees to contribute an amount equivalent to 95% of the monthly composite premium for each medical plan up to a maximum of $1034.82.

"* * * * *

"The County and the union will make plan design changes through the Benefits Review Committee as may be needed to keep the total annual increase nine percent (9.0%) each year or less. In addition, the Benefits Review Committee will make an assertive effort to make plan design changes as may be needed to keep the total annual increase at or below seven and one-half percent (7.5%) each year."

6. Article IX, Section 11 sets out the responsibilities and composition of the Benefits Review Committee (BRC), which is a labor-management committee charged with determining the scope of medical, dental, vision, and disability insurance for represented units which are members of the BRC.

"*11.* *Benefits Review Committee.*

"(a) A Labor-Management Benefits Review Committee shall have the responsibility for deciding the level, scope, and design of benefit plans offered to employees for medical and vision coverage, and for disability and life insurance. The primary emphasis in plan design shall be to provide a comprehensive, competitive benefit program at a reasonable cost.

"* * * * *

"(c) The Committee shall make plan design decisions for medical, vision, dental, disability, and life insurance plans at least 120 days prior to the beginning of the following plan year, unless the County waives such requirement."

7. The BRC has ten management and ten bargaining unit representatives. The CCEA has three members and CCEA-HA has one member on the BRC. The remaining BRC labor representatives are from other County bargaining units.

8. Under the 2006-2009 Contract, employees could select from among three medical plans, including two from Providence (Providence Personal and Providence Open Option) and one from Kaiser. Employees could also select from among dental plans offered by ODS and Kaiser.

9. CCEA and CCEA-HA participated in BRC meetings throughout the term of the 2006-2009 Contract. All members of the BRC were offered the same medical plan options.

Bargaining History for the 2009-2012 Contract

10. In April 2009, the parties entered negotiations for a successor Contract to run from July 1, 2009 to June 30, 2012. CCEA submitted a list of 53 items for negotiation, but it quickly became apparent that health and welfare benefits under Article IX would be a primary focus of bargaining. The parties held bargaining sessions on May 6, 13, and 20; June 3, 10, 17, and 24; August 12, 19, and 26; and September 2 and 16, 2009.

11. On April 29, 2009, the County submitted a proposal to maintain the *status quo* regarding payment of health insurance premiums under Article IX and retain the BRC language in the Contract. That meant the County would continue to pay 95 percent, and bargaining unit members would pay 5 percent, of the composite monthly rate for medical plan premiums.

12. At bargaining sessions on June 3, 10, and 17, 2009, CCEA stated that it had stopped participating in BRC meetings while bargaining was ongoing because it

believed the County was using the BRC to address benefit issues that were mandatory subjects of bargaining. The County's other bargaining units continued to participate in the regularly-held BRC meetings. County negotiator Stotik acknowledged that benefits were a mandatory subject of bargaining and that the BRC was likely permissive, but declined to suspend the meetings during bargaining because the County believed the BRC continued as part of the Contract *status quo* and it achieved efficiencies of scale and benefit cost control.

13. At the June 10, 2009 session, the County proposed deleting the BRC under Article IX if CCEA members would agree to choose only one medical plan under either insurance carrier, Providence or Kaiser, and forego the option of having three medical plan offerings. The County also proposed that members select one dental plan under ODS or Kaiser from among the plans currently offered.

14. On August 12, 2009, the County proposed two options relating to Article IX. Option 1 would retain the current Contract language, including the three benefit plans, except that the County's composite premium contributions for the medical plans would change. Option 2 would also retain the three medical and dental benefit plans, but it would eliminate the BRC. Under the second option there would be no benefit changes for the duration of the agreement, except those imposed by the external provider, and the 95 percent/5 percent ratio for premium contributions would remain the same.

15. In response to the August 12 proposal, the CCEA proposed assuming administration of the benefit plans for its members. The bargaining notes state:

> "**Article IX - Health and Welfare 11. Benefits Review Committee (#47)**
>
> "Mark [Stotik] distributed a proposal in response to the union's request to change the BRC contract language. The proposal provided the union with two (2) options: Option 1 - current contract language except as to County contribution amount; Option 2 - Choose one of three benefit plans currently available with no change to benefits for the duration of the agreement. John asked what would happen to the BRC language. Mark said it would be removed. John asked for a caucus."
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> "* * * John [Bailey] told management that the union is proposing (verbal) to take over benefits for CCEA. The proposal would allow CCEA to continue with the current benefits on a 95-5 split through June 30, 2010 and assume responsibility for negotiating benefits with a consultant for its members as of July 1, 2010. The union would not agree to participate in one plan through June 30, 2010; they want to participate in all plans. The

benefits administration for CCEA would be removed from the County and the union would not continue to participate in the BRC. Management and the union would need to agree on an amount the County would give CCEA. Mark [Stotik] asked if the union's proposal is like a union health fund. John said it is similar. John also explained that before the BRC each group had their own benefit structure. Mark confirmed that the County administered the benefits then and with the unions [*sic*] proposal this would eliminate the County from administering the benefits for CCEA."

16. On August 15, 2009, CCEA negotiator John Bailey sent Stotik an e-mail proposing to maintain the 95 percent/5 percent split for health premiums for the first year of the new Contract, but thereafter giving CCEA responsibility for securing benefits for its members. The County would then send its portion of the benefit contribution to the CCEA on a monthly basis for each employee in the bargaining unit for the remainder of the Contract.

17. On August 26, 2009, the County proposed the creation of a VEBA, a voluntary employee beneficiary association, which is sometimes referred to as an HRA, a health reimbursement account. The characteristics of a VEBA and an HRA are similar and typically include tax-free status, portability, funding derived solely through employer contributions, and employees' rights to draw on the money in the accounts to pay for a defined set of medical expenses such as premiums, over-the-counter medications, or prescriptions. The County's proposal was conditioned on retaining the BRC language in the Contract.

18. On September 2, 2009, in response to the CCEA's August 26 proposal regarding the County's contributions for medical benefit premiums, the County proposed contributions to a VEBA which included an increase in the composite monthly contribution caps. That proposal, which the CCEA rejected, increased the County's contribution in an amount equal to 95 percent of the monthly premium for each medical plan up to a maximum of $1,086.55, effective January 1, 2010; up to a maximum of $1,140.92, effective January 1, 2011; and up to a maximum of $1,197.92, effective January 1, 2012.

19. On October 7, 2009, CCEA submitted a consolidated proposal that was intended to address all outstanding issues. Under Article IX, it renewed its August 12 proposal which used the 95 percent/5 percent ratio with no caps on the County's composite monthly contributions. In response, the County proposed making monthly composite contributions towards medical benefits to a VEBA, but increased the contribution amounts in years two and three of the Contract to $1,157.18 and $1,232.40, respectively. The County also renewed its alternative proposal in which

bargaining unit members could select one of the three benefit plans currently offered with no change in benefits, and the BRC language would be retained in the Contract.

20. On November 23, 2009, the County submitted a package proposal that increased the monthly contribution amounts to the VEBA to $1,112.43 for 2010, $1,119.86 for 2011, and $1,285.55 for 2012. In exchange, it proposed keeping the BRC in place to make benefit plan changes and to keep the annual increases limited to 7.5 percent or less per year.

21. When bargaining proved unsuccessful, the parties entered mediation with State Conciliator Robert Nightingale, who met with them in January, March, and April of 2010.

22. On January 14, 2010, the County submitted a mediation proposal in which the medical contribution payments to a VEBA would be made to an HRA which the parties agreed was the appropriate vehicle for union-administered medical benefits. The County also proposed that the BRC make plan design changes to keep the annual increases to 7.5 percent or less per year. The County also proposed making a $100 contribution to each unit member's HRA account.

23. On April 19, 2010, the parties met for a final mediation session. The County presented two options regarding health and welfare benefits under Article IX. Option 1 deleted the BRC language but required CCEA bargaining unit members to choose only one of the currently existing medical/dental plans. The chosen plan would be the only one available to bargaining unit members. Option 2 retained the BRC to make benefit plan changes, but also (1) offered higher caps on the County's monthly premium contributions in future years, (2) offered a range for a cost-of-living wage increase in 2011-2012 which was one-half percent higher at the lower end of the range, and (3) offered to create an HRA for each employee and fund it with a $100 contribution to each account.

24. On May 5, 2010, the County notified State Conciliator Nightingale that it was declaring impasse in negotiations with the CCEA and the CCEA-HA. It submitted its final offer for both units to the State Conciliator and to CCEA Attorney Kevin Keaney.

25. The County's final offer regarding health and welfare benefits once again proposed two options. The first option would eliminate the BRC and no HRA would be created. The CCEA members could choose only one medical/dental benefit plan from among the three currently existing plans. The County offered to pay the 95 percent of the monthly composite rate for the chosen medical plan up to $1,112.43 in 2010; up to $1,195.86 in 2011; and up to $1,285.55 in 2012. The alternative option, which was the same as the County's proposal made at the April 19 mediation session, retained the BRC

to make benefit plan decisions. The three medical/dental plans would still be available, an HRA would be created with an initial $100 contribution to each employee's account, and increases in medical insurance premiums would be capped at eight percent per year.

26. Also on May 5, 2010, County Administrator Steve Wheeler sent an e-mail to all bargaining unit members outlining the final offer and the alternative proposal. That e-mail, which was reviewed by the County's Labor Relations Manager and Chief Negotiator Mark Stotik; the Director of Employee Services, Nancy Drury; and Assistant County Counsel, David Anderson, states in full:

> "Dear Employees:
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> "Today management declared an impasse in the contract negotiations with the Employees' Association and the Employees' Association-Housing Authority. By law, we are entering a 30-day cooling off period during which mediated talks will continue. We are striving to reach a settlement in that time.
>
> "The Employees' Association (EA) and the County have been in contract negotiations for over one year. The law requires a minimum of 150 days of good faith bargaining. On April 19, management made two settlement offers to the Employees' Association. These are (1) the 'Final Offer' and (2) the 'Alternative Proposal.'
>
> "The Final Offer, which is required by law to be submitted to the Employee [*sic*] Relations Board (ERB), includes no cost-of-living adjustment for fiscal year 2009-10; then an adjustment based on the consumer price index (CPI-W) with a minimum of 1.5% and a maximum of 4.5% for fiscal year 2010-11, and the same CPI-W adjustment for fiscal [year] 2011-12. Other features of the Final Offer:
>
> "• No Benefits Review Committee (a labor-management committee that has been designing our benefit plans since 1991), which is a permissive subject of bargaining and was removed from the bargaining table at EA's request. A permissive subject can only be bargained with both parties' permission.
>
> "• EA will choose <u>one</u> insurance carrier for all employees among the existing plans. Employees will not have an option to choose another medical plan. Future BRC-directed changes will not apply to EA.

"• No Health Reimbursement Account contribution will be provided. Health Reimbursement Accounts are paid for by the County and can be used for co-pays or deductibles, tax free.

"• Increases in medical insurance premium caps at 7.5% per year.

"The Alternative Proposal includes no cost-of-living adjustment for fiscal year 2009-10; then an adjustment based on the CPI-W with a minimum of 1.5 percent and maximum of 4.5% for fiscal year 2010-11, and a CPI-W adjustment with a minimum of 2% and a maximum of 4.5% for fiscal year 2011-12. Other features of the Alternative Proposal:

"• Continues the current labor-management Benefits Review Committee.

"• Employees may choose individually among all the BRC-designated benefit plans.

"• Health Reimbursement Accounts will be created for each employee, with a $100 initial contribution by the County per employee.

"• Increases in medical insurance premium caps at 8% per year.

"Both offers were rejected by EA leadership. The Alternative Proposal is the same settlement the County has reached with AFSCME-WES and AFSCME-DTD. Both AFSCME contracts have been ratified by the union members.

"At the end of the 30 day cooling off period, if a settlement has not been reached, the County is prepared to implement all or part of the Final Offer. I will keep you informed of the next steps in this process.

"These are tough times financially. The County has made a number of difficult decisions to reduce staff and budgets while honoring the hard work and commitment of our employees. We have been able to avoid the really painful steps taken by some other local governments such as large-scale employee layoffs and unpaid furloughs.

"While it is a difficult decision to declare impasse in the bargaining talks, I am confident that it will not affect the overall quality of services that we provide to the citizens and customers of Clackamas County every day.

"The Board of County Commissioners and I deeply appreciate the commitment and hard work that you demonstrate. I remain optimistic that

the state and region are heading toward better economic times and a more prosperous future for Clackamas County and its employees."

27. Subsequent to the declaration of impasse and the cooling off period, the parties reached agreement on the 2009-2012 Contract. The CCEA accepted the County's alternative proposal which maintained the BRC language in the Contract but created a union-administered HRA for unit members.

CONCLUSIONS OF LAW

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

2. The County's May 5, 2010 e-mail did not directly deal with unit members about a new proposal that had not been previously submitted to the CCEA's designated representatives, and it therefore did not violate ORS 243.672(1)(e).

3. The County is not entitled to an award of a civil penalty.

DISCUSSION

Standard of Review

As the complainant in this case, CCEA bears the burden of going forward with the evidence and proving the matters asserted. ORS 183.450(2); OAR 115-035-0042(6). We review the claim under a preponderance of evidence standard, meaning that the facts are more likely true than false. *Gallant v. Board of Medical Examiners*, 159 Or App 175, 180, 974 P2d 814 (1999); *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 15 PECBR 115, 118 (1994).

The Direct Dealing Allegation

ORS 243.672(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.*" (Emphasis added.) An employer violates its bargaining duty when it makes a new proposal directly to employees without first offering it to the employees' exclusive representative. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College,* Case No. UP-22-05, 21 PECBR 673, 769 (2007). In *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8194-96 (1985), we described the violation as dealing "with the Union through the employees, rather than the employees through the Union." *Id.* at 8196

(quoting *NLRB v. General Electric Co.* 418 F2d 736, 759 (2d Cir. 1969), *cert den,* 397 US 965 (1970)).[2] An employer generally may, however, provide bargaining unit members with summaries or copies of bargaining proposals it has already presented to the union.

The issue here is whether Wheeler's May 5, 2010 e-mail made a new proposal directly to bargaining unit members without first offering it to CCEA, or whether instead the e-mail merely summarized the proposal the County previously made to CCEA. For the reasons discussed below, we conclude the e-mail contained a lawful summary rather than an unlawful new proposal.

The parties' expired labor contract allowed each bargaining unit member to choose among three separate health insurance plans, one offered through Kaiser and two offered through Providence. The County's final offer[3] proposed to eliminate the employees' choice among the three health insurance plans, and instead would require CCEA to select one of those plans for everyone.[4] The two plans CCEA did not choose would no longer be available.

County administrator Steve Wheeler sent an e-mail to all bargaining unit members purporting to summarize the County's final contract offer. CCEA alleges the County violated ORS 243.672(1)(e) because Wheeler's e-mail refers to a choice of "<u>one</u> insurance carrier for all employees among the existing plans." (Emphasis in original.) CCEA objects to the portion of the summary that says CCEA would choose one "carrier." According to CCEA, use of the word "carrier" rather than "plan" conveys to employees that they might continue to have a choice between two plans, because the current carrier Providence offers two plans. CCEA asserts the summary is unlawful

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[2]The PECBA is similar to the National Labor Relations Act (NLRA) in structure, language, and purpose. *Elvin v. OPEU*, 313 Or 165, 175 n 7, 832 P2d 36 (1992). As a consequence, we interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year the PECBA was enacted. *Id.* at 177-178, 179; *Rogue River Education Assoc. v. Rogue River School,* 244 Or App 181, 260 P3d 619 (2011). *McKenzie School District* is this Board's first direct dealing case. We adopted the legal standard after examining NLRA cases decided before 1973.

[3]Under ORS 243.712(2)(a), after at least 15 days of mediation, either party can declare impasse. Within seven days of impasse, each party must submit its final offer. ORS 243.712(2)(b). The final offer must contain the party's proposed contract language on each unresolved issue and a cost summary of its proposal. *Id.;* ORS 243.650(11).

[4]The County's final offer also included what it called an "Alternative Proposal" on health insurance benefits. That alternative is not at issue here.

because it makes a new proposal directly to employees for a choice between two plans, a proposal the County did not first make to CCEA.[5]

The County contends that the parties used the words "plan" and "carrier" interchangeably and, viewed in the context of the entire e-mail and the year-long bargaining between the parties, it could not possibly be construed as a new proposal.

Nothing in Wheeler's May 5, 2010 e-mail, other than a different choice of words, deviated from its previous proposals to the CCEA. The parties' bargaining history clearly indicates that as far back as June 10, 2009, the County proposed an alternative medical benefit option in which bargaining unit members could choose one insurance plan instead of the three that were offered in the expired contract. This single-plan option was again presented at the August 12 and October 7, 2009 bargaining sessions; it was offered as part of the County's mediation proposal on April 19, 2010; and it was renewed as an option in the Country's May 5, 2010 final offer.

Wheeler's description of the County's proposal may have been inartful, but it was not a new proposal. CCEA objects to the portion of the e-mail which states that CCEA will choose "one insurance carrier for all employees among the existing plans." (Emphasis in original.) This statement is technically accurate, as far as it goes—the County's earlier proposals for a single plan would necessarily require CCEA to select a single carrier. Read in isolation, the sentence CCEA objects to is at worst ambiguous because it does not indicate the number of plans available under the County's final offer. But we do not read the phrase in isolation; we read it in the context of the other provisions of the document. *Yogman v. Parrott,* 325 Or 358, 361, 937 P2d 1019 (1997). Any ambiguity is clarified by the rest of the e-mail. The sentence immediately following the one CCEA objects to explains that "[e]mployees will not have an option to choose another medical plan." Reading the e-mail in context, the County lawfully gave employees a summary of its final offer and did not engage in direct dealing with bargaining unit members about a new bargaining proposal. Accordingly, we conclude that the County did not violate ORS 243.672(1)(e) and we will dismiss the complaint.

Award of Civil Penalty

The County's answer asks us to impose a civil penalty against CCEA for filing a frivolous complaint. ORS 243.676(4) provides for a civil penalty up to $1,000 if the complaint was dismissed and the "complaint was frivolously filed, or filed with the intent to harass the other person, or both." OAR 115-035-0075 requires that the request for a civil penalty include a statement in support of the request. Subsection (2) states:

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[5]Because CCEA called no witnesses at hearing and offered Wheeler's e-mail as its only exhibit, there is no evidence to indicate how bargaining unit members construed the e-mail.

> "Pleadings. Any request for a civil penalty must be included in a party's complaint or answer. The request must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement."

We deny the County's request for a civil penalty for two reasons. First, the County's answer did not contain a clear and concise statement of facts alleged in support of the statement. Second, the complaint was not frivolous. A pleading is frivolous only if every argument presented

> "is one that [1] a reasonable lawyer would know is not well grounded in fact, or that [2] a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law." *SEIU Local 503, OPEU, v. State of Oregon, Department of Transportation*, Case No. UP-11-09, 23 PECBR 939, 960 (2010) (quoting *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993)).

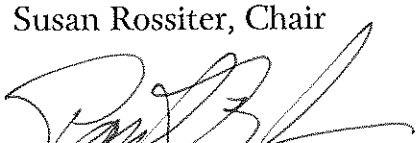
Although we dismissed the complaint, it had a basis in law and fact. We find no evidence that the complaint demonstrated a pattern of frivolous claims, or that it was meant to harass the County. Accordingly, we deny the request for a civil penalty.

ORDER

The complaint is dismissed.

DATED this 24 day of April 2012.

Susan Rossiter, Chair



Paul B. Gamson, Board Member

Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.