

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-07

(UNFAIR LABOR PRACTICE)

KLAMATH FALLS EDUCATION	)	
ASSOCIATION/OEA/NEA,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
KLAMATH FALLS CITY SCHOOLS,	)	AND ORDER
	)	
Respondent	)	
_____	)	

On November 3, 2008, this Board heard oral argument on Complainant’s objections to a Recommended Order issued on August 7, 2008, by Administrative Law Judge (ALJ) Wendy L. Greenwald following a hearing on March 11 and 12, 2008, in Salem, Oregon. The record closed on May 1, 2008, upon receipt of the parties’ post-hearing briefs.

Aruna A. Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan, represented Complainant.

Donald R. Crane, Attorney at Law, represented Respondent.

On July 20, 2007, the Klamath Falls Education Association/OEA/NEA (Association) and the Klamath Falls Association of Classified Employees/OEA/NEA (KFACE) filed a complaint against the Klamath Falls City Schools (District). The complaint, as amended on September 7, 2007, alleges that the District violated ORS 243.672(1)(e) when it failed to provide the Association with requested information and

used inaccurate experience rating data during bargaining in 2005. On January 17, 2008, the Association filed a second amended complaint withdrawing KFACE as a complainant in this matter

The District filed a timely answer on February 6, 2008. The issues are:

1. Did the District fail to provide the Association with requested information regarding the health insurance rate calculations, and the underwriting data and correspondence concerning such calculations, in violation of ORS 243.672(1)(e)?

2. Did the District use inaccurate experience rating data in negotiations after it knew, or should have known, that the data was inaccurate, in violation of ORS 243.672(1)(e)?

3. Should this Board order the District to pay a civil penalty or reimburse the Association's filing fee?

### RULINGS

1. Prior to the hearing, David Hytowitz, attorney for Great Basin Insurance, and Richard Lee, attorney for Pacific Health Plan, Inc., requested the right to appear at the hearing on behalf of their clients who had been subpoenaed by the Association and were also parties to civil litigation that had been filed by the Association in relation to some of the matters in this proceeding. The ALJ correctly ruled that these attorneys would be allowed to appear for the limited purpose of raising objections based on attorney-client privilege.

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

### FINDINGS OF FACT

1. The Association is the exclusive bargaining representative of all regular full-time and part-time licensed teaching employees at the District, a public employer. During the relevant period, Association representatives and officers included:

Eric Nelson

Past Association President, Insurance  
Committee Member (1995 - 2005);

Dennis Bailey

Association President (2004 - June 2006);

Patrick Ward	Current Association President, Insurance Committee Member (June 2006 - present); and
Linda Matthews Paddock	OEA UniServ Consultant

District administrators during the relevant period included:

Cec Amuchastegui	Superintendent (July 2004 - present);
Paul Peterson	Past Personnel Director (2004 - June 2006);
William Feusahrens	Current Director of Personnel (June 2006 - present); and
Patricia Baldini	Business Manager (September 2004 - present).

3. The District has a Health Insurance Committee that meets monthly to review health insurance information and make recommendations for benefit and plan changes. The committee, which is provided for in the parties' collective bargaining agreement, operates under the direction of District administrators, and includes representatives of the Association, KFACE, and other District groups.

4. Great Basin Insurance (Great Basin), the District's insurance agent of record, assists the District in purchasing, understanding, and managing the District's insurance plan. Jim Hoppe and Matthew Hurley own Great Basin. Hurley was also a member of the District's school board from 1995 to July 2007. The District's insurance carrier pays Great Basin a fee equal to one percent of the District's insurance premiums. The District pays nothing directly to Great Basin. Hoppe and Ida Lewis, a Great Basin employee, are agents of record for the District.

5. Hoppe and Lewis regularly attended the District's monthly insurance committee meetings to answer questions and discuss ways to control the District's insurance costs. At each meeting, Hoppe and Lewis provided committee members with information about the District's claims experience. Initially, Hoppe and Lewis provided the committee with the actual monthly experience data they had received from the District's insurance carrier. However, at the request of committee members, Hoppe and Lewis began putting the monthly experience data on charts so District employees could more easily understand the information.

6. Great Basin annually sought bids from health insurance carriers for District insurance coverage. Lewis provided potential carriers with current District insurance information including census data, premiums, claims experience, employer contribution amounts, current benefit plans, and high claims. Great Basin presented the

bids to the insurance committee. The committee then recommended a plan to the District's board of directors, which generally voted to accept the committee's recommendation.

7. Since July 1, 2003, Preferred Health Plan, Inc. (PHP) has provided insurance benefits for the District. The District is one of PHP's largest accounts. Ted Dicken, PHP's president/CEO until August 2006, was the contact person for the District's insurance plan. Dicken often attended District insurance committee meetings to provide information and answer questions.

8. As the District's insurance carrier representative, Dicken provided Great Basin with a monthly report on the District's group health insurance experience by provider type. Prior to November 2004, the report section entitled "Claims" was divided into a number of categories including participating, out-of-area, and non-participating doctors; Merle West Medical Center; participating, out-of-area, and non-participating hospitals; other medical expenses; dental; vision; prescription; and reinsurance recoveries. In addition, the report included a line for "Administrative/Reserves."

9. Sometime in November 2004, Hoppe asked Dicken to stop showing the administrative expenses on the experience report. It was not industry standard to include administrative expenses on claims experience reports and Great Basin did not need this information. Beginning with the November report, which was issued in December 2004, Dicken modified the experience reports by removing the "Administrative/Reserves" line from the reports and incorporating the administrative expenses directly into each of the categories listed under the "Claims" section of the report. Dicken also changed the title of the "Claims" section of the report to "Claims and Expenses." (Dicken did not change the categories listed under the claims section and did not indicate on the report that the administrative expenses had been incorporated into the claims data. Hoppe and Lewis were unaware that Dicken had incorporated the administrative expenses into the claims experience data. Incorporation of these expenses was not readily apparent when viewing the reports. A person reading the monthly report could not readily determine that administrative expenses were included in the claims experience data.<sup>1</sup>

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<sup>1</sup>The experience reports show monthly fluctuations in claims that would have made it difficult to detect the incorporation of the administrative expenses. When the administrative expenses were first incorporated into claims, the total claims for November 2004 were \$398,285, which was approximately \$128,000 more than the October report. However, the amount of total claims often fluctuated significantly. For example, the total December 2004 claims were

(continued .)

## 2005 Insurance Renewal and Bargaining

10. In the meetings leading up to the 2005 insurance renewal, Hoppe and Lewis presented the insurance committee with the following claims information: October 25, 2004—103 percent; November 22, 2004—107 percent; and January 24, 2005—108 percent.<sup>2</sup> At the January 24 meeting, Hoppe informed the committee that “[i]f this doesn’t level out, PHP will need more money at renewal time to recover from this high utilization.” When Association President Bailey asked why the claims were so high, either Hoppe or Dicken told him that it was related to high utilization.

11. At the February 28, 2005 insurance committee meeting, Hoppe told the committee that Great Basin was going to seek bids for the next insurance year and that the District should be ready by the end of April to select its carrier for the subsequent year. Dicken was also present at this meeting. The minutes of the meeting reflect that:

“Ida shared reports and graphs. We are at 104% without admin [*sic*] now. This higher [*sic*] than we like, and is about the same as last year. Jim Hoppe reviewed that our rolling 12 months running at (108% + 9 - 10% for inflation + 15% admin fees) will result in larger fees at renewal.”

12. When Superintendent Amuchastegui was hired in the fall of 2004, the District’s revenue forecast was \$2 million less than the budget prepared by the prior superintendent. As a result of this, and concerns about other potential increases, Amuchastegui believed the District might have to cut anywhere from \$2.4 million to \$4 million from the budget. In April 2005, Superintendent Amuchastegui presented her 2005-2006 budget message, in which she stated that the District’s increased expenditures of about \$2.3 million were due primarily to the 2005-2006 increases in PERS and health insurance premiums, and that the District needed to make large cuts due to the “above-mentioned large increases, most notably health insurance premiums.” Amuchastegui also identified other increased expenditures, including step and column salary increases, utilities, and liability and property insurance. Amuchastegui stated that

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<sup>1</sup>( .continued)

approximately \$613,635 or \$215,000 higher than the November claims. This type of fluctuation is evident whether the comparison is made based on the claim reports that incorporated the administrative expenses or the revised reports, in which the administrative expenses were removed.

<sup>2</sup>The percentages referred to in these and subsequent experience reports reflect the relationship of total monthly claims to total monthly premiums.

“[h]ealth insurance premiums were increased by 20%, but that may not prove to be enough. It is yet to be determined by the insurance carrier.”

13. On March 31, 2005, Lewis sent requests for bids to other carriers around the state and provided them with information related to District insurance, including the PHP’s monthly experience reports which included administrative costs within the experience information.

14. On April 8, 2005, PHP provided a renewal rate of 14.5 percent. On April 11, PHP offered to renew the District insurance for a 10 percent increase if the District immediately stopped the bidding process and changed dental coverage from Advantage to PHP. On April 13, the District told staff about PHP’s offer, and explained the advantages of the offer. The District asked for input from the insurance committee and the union leadership. The District told staff that PHP’s offer would result in a \$500,000 budget savings because the District had budgeted for a 20 percent insurance increase.

15. Between April 14 and April 18, PacificSource Health Plans (PacificSource), OEA Choice Trust (OEA Choice), and LifeWise Health Plan of Oregon (LifeWise) notified Great Basin that they declined to bid on the District’s insurance proposal. OEA Choice and LifeWise stated their decision was based on an inability to be competitive.

16. At its April 18 meeting, the insurance committee accepted PHP’s offer.<sup>3</sup>

17. In April 2005, the District and the Association began bargaining for a successor collective bargaining agreement. On April 20, Hoppe and Lewis attended an Association bargaining team meeting where they provided information, answered questions about insurance, and discussed options to modify current insurance benefits to reduce costs.

18. On April 25, 2005, the parties agreed to bargaining ground rules which provided that without mutual consent, no bargaining team members would be added once initial proposals were exchanged.

19. The parties exchanged bargaining proposals in May 2005. The District proposed a one year contract with no salary increase, a cap on District insurance benefit

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<sup>3</sup>It is unclear from the evidence if the insurance committee members or District administrators knew that the other carriers had declined to bid on the District insurance when they accepted the PHP offer.

contributions at the 2004-05 level, a phase-out of the early retirement program, and new school closure language.

20. On May 25, Superintendent Amuchastegui updated staff on the budget and negotiations. She also informed staff that the school board would meet that night to finalize its budget recommendation for 2005-2006 and discuss alternative ways of balancing the budget, including the possibility of permanently laying off teaching staff, increasing class sizes to more than 30 students, and reducing educational programs and other classroom resources for the 2005-06 school year.

21. The parties' contract required that the District notify individual teachers about layoffs no later than 20 days prior to the end of the school year.<sup>4</sup> Since this date fell before the final budget meeting at which the need for layoffs would be decided, Amuchastegui asked the Association for a five-day extension on the notice requirement. The Association refused to agree to an extension. In May 2005, the District sent out layoff notices to approximately 78 teachers and then met with teachers to explain why it sent the notices. After the final budget meeting in June, the District rescinded the layoff notices.

22. At the June 13, 2005 insurance committee meeting, Hoppe and Lewis gave the committee the following experience report: "May month to date not as well, 123% without administrative costs. Administrative costs with PHP is about 116%."

23. The parties met again for bargaining on September 15, 2005. District Board Member Carol Wendt was present. Wendt had not previously attended bargaining sessions and was not listed as a District bargaining team member in the ground rules. The Association representatives considered this a violation of the parties' ground rules. Association President Dennis Bailey also believed that the District's proposal presented at this meeting was worse than the proposal the District had presented in June.<sup>5</sup>

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<sup>4</sup>The parties' prior agreement is not in evidence. However, the tentative agreement for 2005-2008 shows no change to Article 31; therefore, we infer that the 20-day notice requirement in the 2005-2008 agreement also existed in the prior agreement.

<sup>5</sup>In a September 16 bargaining report to teachers, Association President Bailey reported that "[t]he current District proposal is far worse, financially and in benefits, than their last proposal in June." However, there is no evidence in the record regarding the differences in the District's proposals.

24. At an insurance committee meeting on October 3, 2005, Hoppe reported that the District's experience rating "is at 103% without Admin [*sic*] on the rolling 12 month cycle."

25. On December 1, 2005, the District and the Association tentatively agreed on a 2005-2008 collective bargaining agreement. The agreement established a cap on the District's insurance premium contribution at the 2005-2006 contribution rate, and increased that cap by five percent in 2006-2007 and eight percent in 2007-2008. The tentative agreement also reduced early retirement benefits effective June 30, 2008. The insurance committee proposed, and the District board adopted, reductions in the insurance plan benefits. As a result, the insurance cap covered the full premium cost.

26. The Association membership ratified the tentative agreement by a very close vote. After the vote, Bailey surveyed the bargaining unit members. Approximately 40 teachers stated that they would have to retire earlier than planned due to the new retiree insurance cap provision. Bailey and UniServ Consultant Paddock met with Superintendent Amuchastegui and Personnel Director Peterson to share the survey results and attempt to persuade the District that the retirement cap language was not in the interest of either party. At the end of June 2006, Bailey and Paddock met with District administrators and several board members to discuss a possible remedy to the retirement insurance cap issue. Amuchastegui later informed Bailey that the District school board had no interest in reconsidering the parties' agreement on early retirement.

### 2006 Insurance Renewal

27. At the insurance committee meeting on December 5, 2005, the District's experience was reported for October as 104 percent "without admin [*sic*]" and November as 102 percent "without admin [*sic*]." In early 2006, the minutes of the insurance committee reflect that the District's experience rating was reported as: January 9 - "98% without Admin [*sic*] (about 12%)"; February 6 - "96.7[%] with admin [*sic*]"<sup>6</sup>; March 6 - 116%; and April 3 - "without admin [*sic*] is 125%." Dicken attended the December 5, January 9, February 6, and April 3 meetings.

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<sup>6</sup>We find that the phrase "with admin" in the February 6, 2006, insurance committee minutes was most likely a typographical error. This is the only time the phrase "with admin" is included in the committee minutes in reference to the experience data. All of the other minutes stated that the claims percentage was "without admin." In addition, there was no direct testimony from witnesses who had attended insurance committee meetings that Hoppe or Lewis had ever stated that the administrative expenses were included in the claims information when the information was presented. Finally, this would have been a significant change in the prior practice and it seems likely that someone on the committee would have questioned the inclusion of administrative expenses, especially since the experience rating was lower than usual.

28. In Spring 2006, Lewis requested insurance bids from OEA Choice, PacificSource, LifeWise, Advantage Dental, and OSBA. In April, Pacific Source, LifeWise, and OEA Choice notified Lewis that they would not submit bids. Both OEA Choice and LifeWise told Lewis they could not be competitive.

29. At the insurance committee meeting on May 8, Lewis reported an experience rate of 96 percent. Lewis notified the committee that the carrier options were either OSBA Regence Blue Cross or PHP, which had provided a renewal rate of 14.5 percent. The committee voted against considering the OSBA plan and decided to consider changes to its current PHP plan, so employees would not be required to pay the difference between the actual cost of benefits and the District's contribution.

### 2007 Insurance Renewal

30. In August 2006, Kelly Thomas replaced Dicken as PHP's director of operations. PHP retained Dicken as a consultant for a year to aid in the transition process. Thomas was responsible for PHP's large accounts, including the District. As part of this responsibility, she familiarized herself with the District's raw claims experience data. PHP Chief Financial Officer Ken Webb-Bowen began providing the claims experience reports to Great Basin.

31. On October 24, 2006, Thomas attended her first District insurance committee meeting. After Hoppe and Lewis made their claims experience report to the committee, they asked Thomas to confirm that the numbers were raw claims and premiums. Prior to the meeting, Dicken and Webb-Bowen told Thomas that she was to answer "yes" when asked this question. However, Thomas became concerned that something was wrong with the experience numbers because the numbers in the Great Basin report were higher than the raw experience data she had previously reviewed. Thomas decided that she needed to look into why the numbers were higher.<sup>7</sup>

32. In December 2006, Thomas notified Hoppe and Lewis that there was a problem with the District's claim experience information: it appeared that the administrative expenses and the incurred, but not reported, expenses (IBNR) were included in the numbers they had been provided. Hoppe and Lewis were shocked by

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<sup>7</sup>Thomas testified that when she discovered a problem with the District experience reports during the October insurance meeting, she stated that something did not look right to her. However, none of the other witnesses who attended the October meeting recalled this, and the meeting minutes do not reflect this. We need not resolve this discrepancy, as it is not critical to our opinion in this matter.

this information. Hoppe told Thomas that he specifically told Dicken that administrative expenses were not to be included in the claims reports. Hoppe and Lewis asked Thomas to meet with the District insurance committee immediately. Thomas stated that she was not prepared to meet with the committee until she obtained additional information.

33. William Guest was a PHP board member since 2001, and provided contract management services for PHP since November 2006. On January 10, 2007, PHP representatives Thomas and Guest met with Great Basin representatives Lewis and Hoppe to discuss the claims information reports. After the meeting, Guest questioned Dicken about the contents of the claims reports. Dicken told Guest that administrative and IBNR expenses were included in the reports and that he thought that the brokers understood this.

34. At the January 17, 2007 insurance committee meeting, Lewis distributed charts showing that the District's experience rating was "down once again." He did not mention the claims report issues.

35. On January 22, 2007, Thomas, Hoppe, and Lewis met with Personnel Director Feusahrens, Business Manager Baldini, and Superintendent Amuchastegui to discuss PHP's inclusion of administrative expenses in the claims reports. Amuchastegui was very surprised at the information and asked to schedule an emergency insurance committee meeting for the next day. After the meeting, Amuchastegui contacted PHP representatives Dicken and Guest as well as several PHP board members to determine what had occurred. Dicken told Amuchastegui that the inflated experience information did not affect PHP's renewal rate because the actuary who determined PHP's renewal bid used raw claims experience data that did not include administrative expense.

36. At the emergency insurance committee meeting on January 23, 2007, Thomas told the committee that the experience rating information it provided to Great Basin for the last 18 months included inflated numbers that may have scared off some other insurance companies from bidding on the District insurance.<sup>8</sup> Thomas explained that the numbers were inflated by 14 percent, the amount of PHP's administrative cost. Amuchastegui reported that the insurance company changed its method of calculating claims experience. She said that PHP never meant any harm and that she was unsure how this error affected the District.

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<sup>8</sup>Thomas recalled that these events occurred at the January 14 insurance committee meeting. However, our finding that the information was shared at the January 23 meeting is consistent with the testimony of other witnesses and the minutes of that meeting.

During the January 23 meeting, Hoppe apologized to the committee and said he and Lewis were devastated by the news of the inflated reports. Hoppe also said that PHP was willing to do something about the inaccurate information, but he did not know what. He confirmed that the inflated numbers would not have affected PHP's renewal rates, but may have affected quotes from other insurance carriers. The committee decided to take another look at the OSBA plan, and asked Hoppe and Lewis to ask PHP to provide enhanced dental and vision benefits because of the inflated reports.

37. At the insurance committee meeting on February 1, PHP representative Guest proposed enhanced dental and vision benefits beginning February 1, 2007, resulting in saving approximately \$16,000. PHP did not admit wrongdoing, but made the offer as a customer relations move. Association President Ward stated that he had not received the 18 months of revised reports he requested and he felt at a disadvantage. He asked whether PHP had bid on actual experience numbers. District Personnel Director Feusahrens stated that PHP went to an actuarial service which used actual claim expenses.

At the end of the February 1 meeting, Feusahrens told committee members that the District believed there had been a mis-communication and that it intended to accept PHP's proposal for enhanced dental and vision benefits. Association President Ward again stated that the Association had asked for information, which it needed before it could judge the offer, and that it was not willing to accept the proposal without the information. Feusahrens asked the Association to write a letter stating its opposition. Subsequent to the meeting, the District notified staff that it had accepted the enhanced dental and vision benefits.

38. By letter dated February 2, KFACE President Rhonda Antley asked Personnel Director Feusahrens for "verified data that shows experience ratings for the last 18 months from PHP." That same day, Ward sent Feusahrens a letter objecting to the District's acceptance of the enhanced benefits, stating:

"KFEA would like to note to the district, that as of the Insurance Committee meeting on February 1, 2007, the association had received no verified documents or data regarding recent concerns with PHP (the district's insurance provider). Because of this and other outstanding issues already discussed with the district, KFEA felt it could not accept PHP's offer to enhance current Dental and Vision coverage."

39. On Friday, February 2, Ward told Hoppe that the Association would not respond to the District's insurance proposal until it got the documents it requested. Hoppe responded that he tried to obtain the data from PHP, but would be unable to talk with the person who could provide that information until Monday, February 5.

40. By fax dated February 2, Feusahrens informed Guest at PHP that the District accepted the offer for enhanced dental and vision benefits. Guest asked the District to provide PHP with a full release of claims regarding the dispute over the inaccurate experience data. Guest said the release was necessary because PHP thought that members of the benefit committee believed "that the past reporting by PHP could possibly involve 'falsifying of numbers', 'misuse of public funds', and 'fraud'." Guest sent Feusahrens a proposed release, which required that the District waive any claims it might have, and that the District also:

"further agrees to indemnify, defend and hold harmless Preferred Health Plan, Inc. it's [sic] officers, agents, directors and employees from any claim or damage sought by others resulting from any claim relating to the disclosure of the claims experience."

41. On February 5, Hoppe responded to Guest and asked if PHP was willing to eliminate the requirement that the District indemnify PHP against claims from persons other than the District. Guest replied that PHP could accept this change and sent Hoppe a report which compared the claims and administrative expenses as originally reported to Great Basin with the claims only information.

42. On February 5 and 6, Personnel Director Feusahrens notified District staff that the District would research several legal issues and review the corrected claims data provided by PHP before it decided whether to accept PHP's enhanced benefits offer.

43. On February 6, Great Basin sent Association President Ward the information it sent in March 2005 to insurance companies for bid requests and the insurance companies' responses

44. On February 8, Guest sent an e-mail to Hoppe and Lewis explaining incurred but not reported estimates compared to claims payouts in a generic situation. Guest said he used the assumptions in the last forecast by PHP's actuary to generate the report. On February 9, Lewis e-mailed Guest to request copies of experience reports with pure claims data

45. On February 15, PHP notified the District that it wanted a signed release from each of the unions representing District employees in exchange for the enhanced benefits.

46. At the February 15 insurance committee meeting, Hoppe provided revised claims experience reports for July 2004 through December 2006, which no longer included administrative costs or incurred but not reported claims. Personnel Director Feusahrens told committee members that the District would sign a hold harmless release on behalf of its employees but was not willing to sign a release on behalf of the unions, since the benefits were for the employees, not the District. Association representative Ward responded that OEA's attorney recommended that the Association not sign a hold harmless release with PHP and that the Association would not jeopardize future litigation by accepting PHP's offer. Feusahrens responded that litigation could take time and may not be successful, while the proposal would provide an immediate benefit. The committee continued to discuss its options and ended the meeting by asking Hoppe and Lewis to request dental and vision bids from other insurance carriers based on the revised experience ratings.

47. After the February 15 meeting, the District notified its employees that it could not accept PHP's proposal for the enhanced benefits because neither the Association or KFACE was willing to sign the release.

48. On February 21, Lewis sent out requests for bids for insurance with a proposed effective date of May 1, 2007. On March 15, LifeWise declined to submit a bid because it could not be competitive. On March 16, PacificSource declined to bid due to the passage of Senate Bill 426<sup>9</sup>. OEA Choice provided quotes for benefits beginning July 1, 2007. PHP provided an initial rate increase of eight percent for the 12 months beginning July 1, 2007; however, it indicated that if the District could wait until OSBA announced its rate increase in May 2007, PHP could provide an offer for benefits through October 2008.

### Information Request

49. Sometime after the February 15 insurance committee meeting, Ward met with OEA Choice representative Steve McNannay to determine if PHP's enhanced

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<sup>9</sup>Senate Bill 426 established the Oregon Education Benefit Board (OEBB). OEBB's purpose is to contract for health and other benefits for school and education service district employees.

benefit proposal was reasonable. McNannay told Ward that he could not determine if a loss had occurred based on the information that Ward had provided him.

50. On March 15, Association Attorney Aruna Masih faxed the District an information request stating that the Association was prepared to pay reasonable costs related to collecting the information and sign a non-disclosure agreement or take other measures to address any confidentiality concerns. The Association requested the District either deliver the documents within 14 days or tell the Association when the documents would be delivered. The request provided:

“This letter is submitted, pursuant to ORS 243.672(1)(e) of the Public Employee Collective Bargaining Act (PECBA), to request the following information from the District which is of probable or potential relevance to contract administration of such benefits and is also reasonably necessary to allow meaningful bargaining regarding the District’s current contract proposal regarding additional benefits:

- “1. health insurance rate calculations for the District for the following years:
  - a. July 2004-June 2005;
  - b. July 2005-June 2006; and
  - c. July 2006 to the present;
  
- “2. underwriting data and correspondence for the period referenced above in paragraph 1;
  
- “3. communications between the District and Preferred Health Plan (PHP) or Great Basin Insurance regarding reporting the District’s experience rating, including but not limited to any changes in the manner of reporting such experience rating, for the period referenced above in paragraph 1;
  
- “4. communications between the District and Preferred Health Plan (PHP) or Great Basin Insurance regarding any discrepancies in reporting the District’s experience rating for the period referenced above in paragraph 1;

- “5. documents reflecting the financial value attributable to any errors, changes or discrepancies in reporting the District’s experience rating for the period referenced above in paragraph 1;
- “6. documents reflecting how or why any errors, changes or discrepancies in reporting the District’s experience rating occurred for the period referenced above in paragraph 1;
- “7. communications between the District and District employees concerning any errors, changes or discrepancies in reporting the District’s experience rating for the period referenced above in paragraph 1;
- “8. minutes of the District’s Insurance Committee for the period referenced above in paragraph 1;
- “9. minutes of the District School Board meetings for the period referenced above in paragraph 1;
- “10. any District bargaining updates regarding health insurance benefits for the period referenced above in paragraph 1;
- “11. any District budget updates regarding health insurance benefits for the period referenced above in paragraph 1;
- “12. documents reflecting all insurance carriers to whom requests for proposals were issued by the District or its Insurance Agent of Record and all responses for the period referenced above in paragraph 1;
- “13. any contracts for insurance related services between the District and Great Basin Insurance or Matt Hurley;
- “14. any documents reflecting, referencing or relating to any moneys paid to either Great Basin Insurance or Matt Hurley

by PHP attributable to PHPs contract to provide health insurance benefits to District employees;

“15. a copy of any documents reflecting, referencing or relating to any requests by the District that employees waive any claims against PHP;[sic]”

51. At the March 20 insurance committee meeting, Personnel Director Feusahrens told the committee that the unions agreed to accept the enhanced benefits but would not sign a release of claims against PHP. Guest said he would take the matter to the PHP board for consideration. On March 27, Guest notified Hoppe that the PHP board had declined to provide enhanced benefits without a waiver from the unions

52. On March 28, Feusahrens sent Masih the minutes of the District board meetings and the District insurance committee meetings from July 2004 to the present. He also told her that “it is not possible to provide you with all the documents you have requested within the 14-day period. We will continue to work diligently to compile the remaining documents in a timely manner.”

53. On April 3, Masih sent an e-mail to Donald Crane and Nancy Hungerford, attorneys assisting the District with the information request, which stated: “I’d appreciate an update as to when you think the District will be able to provide the other requested records. I am most interested in receiving the health insurance rate calculation and underwriting information as soon as possible.” Hungerford responded to Masih that day stating that, “I’m checking when the two items you mentioned can be produced.”

54. On April 5, Crane e-mailed Masih that he was in the process of responding to her information request but that her request had come “at an extremely busy time for the district, due to budget preparation and hearings as well as studies being conducted regarding a proposed merger/boundary change.” Masih responded to Crane by e-mail that same day stating “[a]s I mentioned, I am most interested in receiving the the [sic] health insurance rate calculation and underwriting information as soon as possible. Therefore, if the District could at least get that out right away, it would be helpful.”

55. On April 6, Hungerford e-mailed Masih stating: “The Superintendent sent a request yesterday to the insurance agent of record for the two items you especially wanted to see, so I think we’ll be able to get those to you shortly.” Later that day, Masih e-mailed Hungerford stating that the proposals regarding the enhanced benefits

“are being conditioned upon waiver of legal rights. The Association remains interested in some resolution to this matter but we need cost data showing that the cost of whatever is proposed is equivalent in value to the loss attributable to the error in reporting the experience rating. Your help in getting that cost data to us promptly will really help to move the resolution process along.”

56. On April 12 and 16, Masih e-mailed Hungerford to inquire about the status of the requested records. On April 17, Hungerford responded to Masih asking her to call to talk about the request.

57. On April 20, Masih faxed Hungerford and Crane the following letter:

“This letter is submitted to follow-up with both of you as to the status of the District’s response to the PECBA request for information faxed to the District on March 15, 2007.

“Although I have exchanged e-mail and telephone calls with both of you regarding the request, to date, the only responsive documents I have actually received are Board and Insurance Committee minutes. It has now been over a month since the request was issued and almost three weeks since I informed both of you that given the time constraints of the June termination date of the current PHP contract, it would be acceptable for the District to focus its efforts initially on producing the health insurance rate calculation and underwriting information first. Nonetheless, the District has produced nothing further.

“Therefore, I would appreciate both of your professional assistance and courtesy in assuring compliance by the District within the next week”

58. On April 23, Crane e-mailed Masih, stating:

“I have not been ignoring your request. However, for the most part the district does not have the information you request. I am on my way to meet with a district representative to define whether we have anything you need. I have been attempting to get information from the agent’s office as well, even though that does not come within what we are required to do.

“In your original letter you suggested that you are willing to sign a confidentiality agreement. Do you have a form of agreement?”

59. Between April 23 and May 22, Masih and Crane negotiated by e-mail over the terms of the confidentiality agreement.

60. On May 9, Crane provided Masih with a confidentiality agreement that had been approved by "all parties that have input into the school district." From May 9 through May 15, Crane and Masih discussed the details of this agreement.

61. On May 22, Crane asked Masih about the status of the list of individuals to be added to the confidentiality agreement. Masih responded that she would get the list to him as soon as possible. Crane replied that Masih should fax him a signed copy and he would then sign it and fax it back to her, concluding: "In the meantime I will prepare what I already have for you. The rest may not be delivered until the end of this week." Masih faxed the signed agreement to Crane at 4:54 p.m. that afternoon.

62. On May 23, Masih sent Crane the original signed confidentiality agreement with a cover letter which stated: "It is my understanding that this is all the district requires to commence production of the remaining documents responsive to the PECBA information request originally issued to the School District on March 15, 2007." That same day, Crane faxed a signed confidentiality agreement to Masih and mailed Masih the following:

"In accordance with your request of March 15, 2007, and the Confidentiality Agreement entered into by the parties, I am sending you the following documents, in addition to those previously sent by Dr. Feusahrens on March 28, 2007. Additional documents may be sent later when they are received from third parties. Such additional documents are not presently in the District's possession but will be sent to me and forwarded to you in reliance on the Confidentiality Agreement.

"I will use the numbers contained in your March 15 letter

- "1. Enclosed are three Account Analyses with the dates 0405, 0506, and 0607. These represent the amount in each year budgeted for employee insurance. They do not break it down by employee.
- "2. None, except as contained in responses to other requests.
- "3. Enclosed. It seems that requests 3, 4 and 6 are similar. I have marked responses to all of them with the number 3.
- "4. See 3.
- "5. None.
- "6. See 3.

- "7. E-mails between any party and the District are included in 3.
- "8. Previously sent.
- "9. Previously sent.
- "10. See 3 and 5.
- "11. See 1.
- "12. Enclosed.
- "13. None in possession of the District.
- "14. None in possession of the District.
- "15. Enclosed."

63. On May 23, Hoppe sent Crane a binder of information and Great Basin's response to each of the Association's requests, subject to the confidentiality agreement. Concerning the request for the health insurance rate calculations, underwriting data, and related correspondence, Hoppe responded:

- "1. Great Basin Insurance has no insurance rate calculations for the years requested. All Great Basin Insurance receives from the carrier is the quoted and final rates, which information was previously passed on to the Insurance Committee and School Administrators. Copies of these quotes and final rates were provided to the Insurance Committee, which includes its union representatives. Thus, the union should already have the quotes and final rate information. If the union desires how the rates were calculated, they need to secure that information from PHP, as Great Basin Insurance is not privy to it.
- "2. Great Basin Insurance does not perform underwriting functions. Great Basin receives claims experience statements from PHP and provides that information along with other data provided either by the School District or PHP. This information is assembled by Great Basin Insurance into the Request for Proposal (RFP) Binders, which is then sent to potential carriers. A copy of the 2006 binder was provided to the OEA representative as requested by Pat Ward. This 2006 binder was picked up by Linda Paddock at Great Basin's office. We do have the 2005 and the 2007 binders. A copy of the 2005 and the 2007 RFP binders are enclosed. The Insurance Committee and/or the School Administrators receives the monthly experience reports each month and should have that data already for 2004-present. Again, all information in the RFP Binder was provided by either PHP

or the School District, Great Basin Insurance just assembles it into a RFP Binder, drafts the letter to potential carriers and sends it out.

The request for correspondence for 2004 – present is ambiguous and unclear. What specifically is KFEA and KFACE requesting? As noted above, Great Basin Insurance does not underwrite.” (Emphasis in original.)

64. On June 1, Masih e-mailed Crane thanking him for the information he had provided and checking on the other requests. She specifically pointed out that “the underwriting records are the ones we are most interested in reviewing. I appreciate your cooperation in getting these final records to us promptly.” On June 4, Crane e-mailed Masih that he had “received the information and I am trying to determine how to get it copied.”

65. On June 5, Crane mailed to Masih the binder of information that Great Basin provided the District and a copy of a letter from Feusahrens to PHP faxed on February 2, 2007.

66. On June 12, after reviewing the documents provided by the District, Masih e-mailed Crane that “[t]here still does not appear to be any ‘underwriting information’ included in the documents produced. Can you follow-up with PHP to obtain such information, please. You can reassure PHP that the info [*sic*] will be subject to the previously agreed upon confidentiality order.” On June 19, Masih e-mailed Crane asking for a response to her June 12 e-mail. On June 20, Crane responded to Masih by e-mail that “[a]ccording to the information I have to date, underwriting would be a function of PHP not the agent and Great Basin does not possess any of it. If that is incorrect, I will let you know when I find out.” He also stated that he had been out of the office due to a family emergency, which could also result in his absence in the future.

67. On July 20, 2007, the Association filed the unfair labor practice complaint in this matter.

68. On January 23, 2008, Crane sent Masih additional documents in response to the Union’s request, but did not provide the rate calculations or underwriting information from PHP.

69. Neither the District nor Great Basin asked PHP for the information related to rate calculations and underwriting data or provided this information to the Association. The Association also did not request this information directly from PHP.

## Alleged Conflicts of Interest

70. Superintendent Amuchastegui's husband was a PHP board of director from 2001 until December 2003 or January 2004, prior to the time that Amuchastegui became the District's superintendent.<sup>10</sup>

71. Carol Wendt has been a District school board member since 1992. Her husband, Rod Wendt, has been a PHP board member since approximately 2003. Rod Wendt is also part owner of RRW Investment Group, LLC. In May 2004, RRW Investment Group loaned PHP approximately \$2.1 million.

72. On June 12, 2006, the District school board voted to approve a list of District agents and partners, including Great Basin Insurance. Board member Hurley declared a conflict of interest because of his part ownership of Great Basin and abstained from voting. Later in the meeting, board member Wendt moved that the school board approve the insurance committee's recommendation to accept the PHP plan design changes for the 2006-2007 insurance year. The full board voted to accept the committee's recommendation. At the time of the vote, Wendt did not disclose that her husband was a board member and major creditor for PHP. Hurley did not disclose that PHP pays Great Basin a commission because Great Basin is the agent of record for the District's insurance benefits.

73. In June 2006, then-Association President Bailey met with Personnel Director Peterson regarding the Association's concerns about the early retirement agreement. Bailey also told Peterson that because of relationships with Great Basin and PHP, the Association believed that several board members and Amuchastegui had conflicts of interest regarding District insurance benefits decisions. Peterson told Amuchastegui about Bailey's concerns about conflicts of interest. Amuchastegui told Peterson that her husband was no longer on the PHP board.

74. On January 12, 2007, Amuchastegui and Feusahrens met with current-Association president Ward and UniServ Consultant Paddock. Ward said that the Association had learned there were conflicts of interest regarding the relationships between PHP and board member Wendt, and between Great Basin and board member Hurley. Ward read an opinion letter prepared by the Association's attorney regarding

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<sup>10</sup>The Association implied that Amuchastegui's husband may have also owned stock in PHP since he was on the PHP board when it made a restricted stock offering to board members. However, Amuchastegui testified that her husband did not currently own stock and no evidence was presented that he ever owned such stock.

the conflicts of interest. Ward said he did not raise these issues earlier because the District was trying to pass a bond measure and because the Association was hoping the board would address their concerns about retirement insurance. Ward proposed that the parties try to reach agreement on the retirees' insurance issue; if they did, the Association would drop their conflict of interest charges.

75. After meeting with Ward and Paddock, Amuchastegui discussed the conflict of interest issues with District board members. On February 16, 2007, the District filed a "self report" complaint with the Government Standards and Practices Commission regarding the allegations of conflict of interest concerning Hurley and Wendt.

76. On October 10, 2007, UniServ Consultant Paddock filed complaints with the Government Standards and Practices Commission concerning Hurley's and Wendt's failure to disclose their relationships with Great Basin and PHP to the Association or KFACE during the 2005 bargaining at which they discussed insurance issues.

77. In January 2008, the Government Ethics Commission dismissed Paddock's complaints finding that Hurley's and Wendt's roles in the negotiation process did not result in a conflict of interest because the negotiation teams did not have a role in selecting a specific health insurance plan or provider.

78. On February 29, 2008, the Government Ethics Commission entered into stipulated final orders of settlement with Hurley and Wendt on the self-report ethics complaints. Both Hurley and Wendt stipulated to violations of ORS 244.120(2)(a) and (b) for participating in and voting on the renewal of the health insurance on June 12, 2006, without disclosing an actual conflict of interest. Hurley was assessed a civil penalty of \$100. Wendt was not required to pay a civil penalty.

#### CONCLUSIONS OF LAW

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

2 The District violated ORS 243.672(1)(e) when it failed to make a good faith effort to obtain the rate calculation, underwriting information, and related correspondence requested by the Association.

ORS 243.672(1)(e) requires public employers to bargain in good faith. This requirement includes the obligation to provide the union with requested information

that is of probable or potential relevance to bargaining or contract administration. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5030-5031 (1982); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999).

In contract negotiations, we consider requested information relevant when the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal. *Washington County School District No. 48 v. Beaverton Education Association*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981).

Here, the dispute over information sought by the Association developed after the parties negotiated their 2005-2008 collective bargaining agreement. The parties discovered that PHP, the District's insurance carrier for the past several years, gave them incorrect claims experience data. The joint Association-District insurance committee used this faulty data to solicit proposals for insurance benefits from insurance companies. Ultimately, the committee chose to retain PHP as the District's insurance carrier because it offered the best benefits at the lowest cost. To correct any problems caused by the inaccurate information it provided, PHP offered to give District employees enhanced dental and vision benefits. The District decided to accept PHP's proposal. In order to properly evaluate PHP's offer, the Association asked the District to give it information about rate calculation, underwriting, and related correspondence, so it could check the accuracy of PHP's claims experience figures and determine any loss caused by the inaccurate figures.

When the Association requested this information on March 15, 2007, the parties were in the midst of negotiations over PHP's enhanced benefits proposal. Discussions over the proposal continued at insurance committee meetings on March 20, March 27, and April 6. Accordingly, the information requested by the Association was reasonably necessary to allow meaningful bargaining.

The Association also needed the information to administer its contract with the District. In contract administration cases, requested information must have probable or potential relevance to a grievance or other contractual matter. *Colton*, 6 PECBR at 5031. Information about insurance coverage and premium costs typically has probable or potential relevance to a union's ability to monitor contractual benefits. *AFSCME Local 88 v. Multnomah County*, Case No. UP-35-92, 13 PECBR 702, 708 (1992), *order on reconsideration*, 13 PECBR 748 (1992); *Oregon AFSCME Council 75 v. State of Oregon, Executive*

*Department*, Case No. UP-99-85, 9 PECBR 9085, 9098 (1986).<sup>11</sup> Accordingly, we must consider whether the specific information sought by the Association is relevant to administration of the collective bargaining agreement.

The committee wanted the best plan at the lowest price. On March 15, 2007, when the Association requested the information at issue, the insurance committee was choosing a plan for the 2007-2008 benefit year. Accurate information about claims experience was necessary to get the best rate. Only by reviewing the rate calculations and underwriting data could the Association confirm the accuracy of the claims experience. Accordingly, the information sought by the Association – premium rate calculation and underwriting data – was necessary to permit the Association to engage in meaningful bargaining and also had probable or potential relevance to the Association’s administration of its collective bargaining agreement with the District.

The District, however, contends that neither it nor its insurance agent of record, Great Basin, has the information the Association sought. The District asserts that only PHP had the information the Association wanted, and the District had no obligation to try to get the data from PHP.

Accordingly, we must determine the extent of the District’s obligation under subsection (1)(e) to attempt to obtain requested information it does not have but that is in the possession of a related third party.

We have never defined an employer’s obligation under subsection (1)(e) when faced with a request for information that is not in its possession or control. We have however, addressed the analogous circumstance where an employer asks the union for information the union does not have but might be able to get from a related third party. In *Multnomah County Sheriff’s Office v. Multnomah County Corrections Officers Association*, Case No. UP-5-94, 15 PECBR 448, 471 (1994), the employer asked the union for detailed information about a bargaining unit member-grievant. We concluded that the information was relevant to an arbitration concerning the grievant’s discharge and the union had an obligation to provide the information as part of its good faith bargaining duty under ORS 243.672(2)(b). We also held that “[a] party has a duty to provide relevant information that is in its possession or to which it has access.” *Id.* After reviewing precedent under the National Labor Relations Act (NLRA), we concluded that the union was required to make a reasonable effort to obtain the information for the

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<sup>11</sup>The National Labor Relations Board has consistently held that information directly related to bargaining unit employees’ wages, hours, and other working conditions, such as pension and medical benefits, are presumptively relevant. See *International Protective Services, Inc and United Government Security Officers of America, Local 46*, 339 NLRB 701, 704 (2003).

employer. We held that the union made a “reasonable, good faith effort” to obtain the information when it got permission from the grievant’s personal attorney to ask the grievant for the information. *Id.* at 472. Although the grievant ultimately refused the request, we held that the union met its obligation under subsection (2)(b).

In this regard, we see no reason to treat employers any differently from unions. We hold that the District was obligated to make a reasonable, good-faith effort to get requested information it did not have but which was in the possession of a related third party.

Cases decided under the NLRA bolster our conclusion.<sup>12</sup> Under the NLRA, the duty to provide information to a union includes the obligation to make efforts to obtain information relevant to contract administration from a third party. In *Congreso de Uniones Industriales de Puerto Rico*, 966 F2d 36, 38 (1<sup>st</sup> Cir 1992), the court explained that an employer’s duty to provide information during grievance processing extends to certain situations where the information sought by the union is in the possession of a third party. An employer must request information from a third party if the information can likely be obtained from the third party and if the third party has a business relationship with the employer that is implicated in the alleged contract violation.

In a number of cases, the NLRB held that an employer violated its duty to provide information by failing to request information from a parent or sister company (*Arch of West Virginia, Inc.*, 304 NLRB 1089 (1991)); from an employment agency providing temporary employees (*United Graphics, Inc.*, 281 NLRB 463,(1986)); from a subcontractor (*Public Service Co. of Colorado*, 301 NLRB 238 (1991)); and from the administrator of the pension plan provided to bargaining unit members under the contract (*International Protective Services, Inc.*, 339 NLRB 701(2003))

The principles expressed in these NLRB cases are persuasive and we apply them here. The District had a business relationship with PHP, and that relationship was directly implicated in the administration of benefits under the collective bargaining agreement. The District thus had an obligation to make reasonable efforts to secure the information sought by the Association from PHP. The District made no effort to obtain

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<sup>12</sup>The PECBA is modeled on the NLRA, so decisions under the NLRA can be persuasive. *Elvin v. OPEU*, 313 Or 165, 175 n7, 832 P2d 36 (1992). We frequently look to NLRA precedent in deciding cases concerning the duty to supply information. *Morrow County Education Association v. Morrow County School District*, Case Nos UP-68/69-89, 11 PECBR 695, 712 (1989).

information from PHP.<sup>13</sup> Accordingly, we conclude that the District violated ORS 243.672(1)(e).

We reject the District's argument that it should be excused from providing the information because the Association could have subpoenaed the information directly from PHP. The right of a labor organization or employer to enforce an information request before this Board is separate and distinct from the right of parties in a pending unfair labor practice proceeding to seek and enforce a discovery request. *See Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-40-86, 11 PECBR 659, 665-666 (1989). The duty of the parties to share information allows bargaining and contract administration to proceed in an efficient and timely manner. These goals would be undermined if a party had to file an unfair labor practice complaint and obtain a subpoena whenever it needed information.

The District violated its good faith bargaining duty under subsection (1)(e) by failing to make a good faith effort to obtain rate calculations, underwriting data, and related correspondence from PHP. We will order the District to attempt to obtain this information from PHP.

3. The allegation that the District violated ORS 243.672(1)(e) by using inaccurate experience rating data in negotiations for the 2005-2008 collective bargaining agreement is untimely.

Under ORS 243.672(3), an unfair labor practice complaint is timely if filed "not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3); *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District No. 35*, Case No. UP-17-08, 22 PECBR 577 (2008), *appeal pending*. The Association alleges that the District violated its duty to bargain in good faith when it misrepresented experience rating data during negotiations for the 2005-2008 agreement, which the parties concluded in December 2005. The Association filed this complaint on July 20, 2007, approximately one and one-half years after the conclusion of bargaining. The Association argues that it first learned about the alleged violation on January 23, 2007, and the 180-day limitation period began when it discovered the District's allegedly unlawful actions. We disagree.

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<sup>13</sup>The District asserts that after the record closed in this case, it asked PHP for the information sought by the Association. This request is not part of our record and we do not consider it. *See Arlington Education Association v. Arlington School District No. 3*, 177 Or App 658, 34 P3d 1197 (2002), *rev denied*, 333 Or 399, 42 P3rd 1243 (2002).

In *Rogue River* we held that the limitation period began when the school district eliminated a retired teacher's health insurance benefit, allegedly in violation of ORS 243.672(1)(e). We rejected the union's argument that the 180-day period started only when the union discovered the district's action. Consistent with our conclusion in *Rogue River*, we hold that the alleged violation occurred no later than the date the parties concluded contract negotiations, December 2005, and not when the Association found out about the inaccurate data. Therefore, this allegation of the complaint is untimely and we will dismiss it.<sup>14</sup>

Even if this allegation was timely, we would dismiss it on its merits. In *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 767-768 (2007), we stated:

"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 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) "

The Association failed to prove that the District deliberately misrepresented claims information during the 2005 bargaining. There is no evidence that District administrators or its agents of record, Hoppe and Lewis, knew that Dicken had included the 14 percent administrative expense in the claims experience reports. In November 2004, Hoppe asked PHP to stop showing the administrative costs on the monthly claims reports. Hoppe had no reason to think PHP failed to fulfill his request.

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<sup>14</sup>When a violation is ongoing, we consider those violations that occurred within the 180 days of the occurrence as timely and those violations that occurred outside the 180 days as background to explain the significance of an alleged violation occurring within the 180-day period. *ATU v. Tri-Met*, Case No. UP-62-05, 22 PECBR 911, 920 (2009). Here, however, the Association pled no unlawful conduct regarding the 2005 negotiations which occurred after December 2005.

As soon as Hoppe, Lewis, and the District discovered that administrative costs were included in the reports, the District notified the Association and District employees of the inflated information, investigated the situation, and attempted to negotiate a resolution to address any harm caused by the inflated reports.

In providing the reports, agents of record Hoppe and Lewis acted consistently with their understanding that the administrative expenses had been removed from the reports. By contrast, PHP representative Dicken knew the administrative expenses were included and was present at many of the meetings at which these reports were made but never told Hoppe, Lewis, or the committee that the data in these reports was inaccurate. Further, PHP representative Thomas testified that PHP told her to tell the committee that administrative expenses were not included in the reports, and that Hoppe and Lewis were shocked when she told them these expenses *were* included.

The issue is whether the District is liable under the PECBA for PHP's actions. We decline to expand the District's obligation under ORS 243.672(1)(e) to guarantee the accuracy of the information provided by a third party. We understand and sympathize with the Association's belief that someone should be responsible for providing the inflated information. However, the District provided the information in good faith and also relied on the information itself. The District was as much a victim of the inflated information as the Association. The District did not violate subsection (1)(e) and we will dismiss this portion of the complaint. We will direct the District to make every reasonable effort to secure the rate calculations and underwriting information from PHP. If PHP refuses to give this information to the District, the District will explain to the Association the reasons for its unavailability and will document its efforts to obtain the information.

### REMEDY

We will order the District to cease and desist from violating ORS 243.672(1)(e) by refusing to make good faith efforts to obtain insurance rate calculations, underwriting information, and related correspondence from PHP. ORS 243.676(2)(b) We note that an employer satisfies its obligation to provide information to a union when it makes a reasonable, good-faith effort to obtain data from a third party, "even if those efforts fail to produce the information sought." *Multnomah County Sheriff's Office*, 15 PECBR at 472. *See also Pittston Coal Group, Inc.*, 334 NLRB 690, 693 (2001) (employer need not threaten to terminate contract or take contract action to obtain information).

We also decline to order the District to post a notice. The District's conduct does not meet any of the factors we use to determine whether the posting of a notice is appropriate. *See Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, AWOP, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).

Further, we decline to order a civil penalty. Under ORS 243.676(4)(a), this Board may award a civil penalty if the respondent engaged in an unfair labor practice “repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious.” In support of its claim for a civil penalty, the Association points to the District board members’ conflicts of interest, and alleges that the District’s conduct in this matter was “egregious” because the District worked “in concert” with PHP to make proposals for enhanced benefits contingent on the Association’s agreement to waive all claims with PHP. In addition, the Association contends that the District “repeatedly delayed” responding to the Association’s information requests.

“Egregious” means ‘conspicuously bad’ or ‘flagrant.’ *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). Knowing disregard of the law may be egregious. *Id.* at 9196. An employer’s actions may also be egregious if they ‘tend to undermine the very nature of the collective bargaining process.’” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02, 20 PECBR 571, 594 (2004).

The District’s failure to provide rate calculations and underwriting information to the Association was not “egregious.” The District did not deliberately conceal this information from the Association. Nor did the District violate well-established law. An employer’s obligation to attempt to obtain information from a related third party is an issue of first impression for this Board.

Finally, we will not order the District to reimburse the Association’s filing fees. The District’s answer was neither frivolous nor filed in bad faith. ORS 243.672(3); OAR 115-035-0075(3).

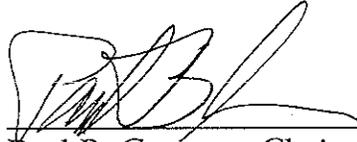
### ORDER

1. The District shall cease and desist from refusing to make a reasonable, good-faith effort to obtain the requested rate calculations, underwriting information, and related correspondence from its insurance company, PHP.

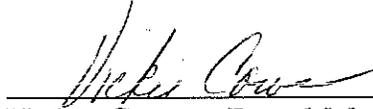
2. Within 20 days of the date of this order, the District will make every reasonable effort to secure the requested rate calculations, underwriting information, and related correspondence from PHP. If PHP refuses to give the District this information, the District shall provide the Association with the reason for its unavailability and document its efforts to obtain the information from PHP. In requesting the information, the District shall provide PHP with a copy of the parties’ confidentiality agreement.

3. The remaining portions of the complaint are dismissed.

DATED this 13<sup>th</sup> day of August 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.