

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-29-08

(UNFAIR LABOR PRACTICE)

| | | |
|----------------------|---|---------------------|
| FEDERATION OF OREGON |) | |
| PAROLE AND PROBATION |) | |
| OFFICERS, WASHINGTON |) | |
| COUNTY CHAPTER, |) | |
| |) | |
| Complainant, |) | RULINGS, |
| |) | FINDINGS OF FACT, |
| v. |) | CONCLUSIONS OF LAW, |
| |) | AND ORDER |
| WASHINGTON COUNTY, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

On June 17, 2009, this Board heard oral argument on Complainant's objections to a Recommended Order issued on April 21, 2009, by Administrative Law Judge (ALJ) Wendy L. Greenwald after a hearing held on February 24, 2009, in Salem, Oregon. The record closed on March 11, 2009, following receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Garrettson Gallagher Fenrich & Makler, P.C., Portland, Oregon, represented Complainant at oral argument. Patricia B. Urquhart, of the same firm, represented Complainant at hearing.

Adam S. Collier and Kirk S. Peterson, Attorneys at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On September 5, 2008, the Washington County Chapter of the Federation of Oregon Parole and Probation Officers (Federation) filed an unfair labor practice

complaint against Washington County (County), alleging that the County violated ORS 243.672(1)(e) by: (1) filing a petition for declaratory ruling, as provided for in Article 13, Section 4 (Article 13.4) of the parties' collective bargaining agreement and refusing to modify the facts in the petition after the Federation objected to them; and (2) refusing to renegotiate Article 13.4 after the Employment Relations Board (Board) refused to consider the parties' petitions for a declaratory ruling and the Federation demanded to bargain under ORS 243.702.¹

The issue presented is:

Did the County violate ORS 243.672(1)(e) by refusing to bargain under ORS 243.702 after this Board refused to consider the Petition for Declaratory Ruling?

RULINGS

1. Prior to the hearing, the County filed a motion to dismiss the complaint for failure to state a cause of action. On January 28, 2009, the ALJ granted the motion to dismiss in regard to paragraphs 20 and 21 of the complaint in which the Federation alleged that the County violated ORS 243.672(1)(e) when it failed to bargain over the facts included in the petition for declaratory ruling. The Federation submitted an offer of proof at the hearing in support of the dismissed portion of the complaint.

In paragraph 20 of the complaint, the Federation alleged that "[t]he actions of the County in putting forth a Petition for Declaratory Ruling that could not be agreed to was not in good faith, in violation of ORS 243.672(1)(e)." In paragraph 21 of the complaint, the Federation alleged that the County's refusal "to modify the facts of the Petition for Declaratory Ruling was not in good faith, in violation of ORS 243.672(1)(e)." These Federation claims arise solely out of an obligation established by Article 13.4 of the parties' collective bargaining agreement; paragraphs 20

¹ORS 243.702 provides:

"Renegotiation of invalid provisions in agreements. (1) In the event any words or sections of a collective bargaining agreement are declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or the employees to perform to the terms of the agreement, then upon request by either party the invalid words or sections of the collective bargaining agreement shall be reopened for negotiation.

"(2) Renegotiation of a collective bargaining agreement pursuant to this section is subject to ORS 243.698."

and 21 allege a dispute over the meaning and interpretation of this contractual provision. Resolving these allegations would require us to determine if Article 13.2 obligated the County to file a petition for a declaratory ruling acceptable to the Federation. Accordingly, these claims are appropriately filed under ORS 243.672(1)(g), which makes it an unfair labor practice for an employer to violate the provisions of a written contract. *Laborers' International Union of North America, Local 483 v. City of Portland*, Case No. UP-12-06, 22 PECBR 12, 15 (2007). A contract violation does not constitute bad-faith bargaining. *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04, 20 PECBR 850, 851 (2005). The Federation failed to state a claim for which relief can be granted in paragraphs 20 and 21 of its complaint, and we dismiss this portion of the complaint.

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

FINDINGS OF FACT

1. The Federation is the exclusive representative of a bargaining unit of parole and probation officers employed by the County's Department of Community Corrections. The County is a public employer.

Background

2. The Federation and the County entered into negotiations for a successor collective bargaining agreement in May 2007. During bargaining, the Federation proposed that employees be allowed to carry firearms while performing their duties. The County asserted that the issue of employees carrying firearms while on duty was a permissive or prohibited subject of bargaining; the Federation contended that the issue was a mandatory subject of bargaining.

3. At a mediation session on December 21, 2007, the parties reached a tentative agreement on all issues, including the Federation's arming proposal. On January 22, 2008, the parties executed a successor collective bargaining agreement, effective January 22, 2008 through June 30, 2011.² Article 13.4 of that agreement provides:

"Parties agree to seek a declaratory ruling from the Employment Relations Board of the State of Oregon (and possibly the court) as to whether the below language is a prohibited[,] permissive or mandatory subject of

²All subsequent events occurred in 2008.

bargaining. If the ERB (and possibly the court) rules that the language is prohibited permissive, [*sic*] the language will be dropped by the Federation. If the ERB (and possibly the court) rules the language is a mandatory subject of bargaining the following language will become part of the contract[.]

“Employees may carry a firearm while in the field, but not in the office during working hours if the employee has a valid concealed handgun permit, passes any psychological testing, notifies the director of his/her intent to carry the firearm on duty and has successfully completed a firearms training program recognized by the County. Employees so electing must continue criteria minimum firearms qualifications applicable to parole and probation officers. Implementation is subject to the adoption of a County policy, which policy shall be adopted within 90 days of the effective date of this language and shall not violate the intent of this language.”

4. Article 16 of the 2008-2011 collective bargaining agreement contains a grievance procedure which ends in binding arbitration. Section 16.1 states that the scope of matters that may be resolved through the grievance process include “[a]ny grievance or dispute which may arise between the parties, regarding the application, meaning or interpretation of this Agreement.”

5. The parties could not agree on the facts to be included in a petition for declaratory ruling under Article 13.4. On April 18, the County filed its own petition for declaratory ruling with this Board. *In the Matter of the Petition for Declaratory Ruling filed by Washington County*, Case No. DR-2-08. On May 16, the Federation petitioned to intervene in the declaratory ruling process.

6. On May 30, this Board notified the parties that it concluded that the parties disagreed about the facts in the County’s petition for declaratory ruling and in the Federation’s petition to intervene. This Board told the parties that unless they could agree to a fact stipulation, it would refuse to consider the parties’ petitions for a declaratory ruling.

7. On June 11, Daryl Garrettson, attorney for the Federation, notified this Board that to move the process forward, the Federation would accept the facts in the County’s petition, but that it “reserves the right to contest the facts set forth therein in such other forms as may be appropriate.”

8. By letter dated June 11 this Board declined to consider the County’s petition for declaratory ruling, stating:

“[o]ne of the main determinants is the parties’ failure to reach an unqualified stipulation of facts, as indicated in Mr. Garrettson’s letter of June 11, 2008 where he states that ‘[t]he Federation reserves the right to contest the facts set forth [in the petition] in such other forms as may be appropriate.’”

9. By letter dated June 18, Garrettson requested that this Board

“reconsider the decision set forth in your letter of June 11, 2008, declining the issuance of a Declaratory Ruling in this matter. My letter of June 11, 2008, contained a typo. The Federation intended to say that it reserves the right to contest the facts set forth in the petition and such other forums, not forms. With this clarification, the Federation would request that the Board reconsider.”

10. By letter dated June 19, this Board notified the parties that it had “voted not to reconsider and will adhere to its decision to deny the petition.”

Bargaining Demand

11. By letter dated July 7, Garrettson notified the attorneys for the County, C. Akin Blitz and Kirk S. Peterson, of the Federation’s intent to reopen the contract under ORS 243.702 for the purpose of renegotiating Article 13.4. Garrettson asked that Blitz and Peterson contact him to schedule expedited bargaining under ORS 243.698. Garrettson explained the bargaining demand as follows:

“ORS 243.702 provides that if any provision of a Collective Bargaining Agreement becomes invalid as a result of the inability of the employer or the employees perform [*sic*] the terms of the agreement, then upon request by either party the invalid words or sections of the Collective Bargaining Agreement shall be reopened for negotiations.

“The Employment Relations Board has declined to issue a Declaratory Ruling in regard to the arming of Parole and Probation Officers. Therefore, the provision of the contract relating to the arming of Parole and Probation Officers, can not be completed. The Federation of Oregon Parole and Probation Officers hereby request that the provisions relating to the arming of Parole and Probation Officer contained in Article 13 of the Collective Bargaining Agreement be reopened for negotiations.”

12. On July 14, after receiving no response to his letter, Garrettson called and left a message with Blitz regarding the Federation's demand to bargain. Again Garrettson received no response, and on July 29, he wrote Blitz and Peterson to remind them of his request to bargain and to tell them that if "the Federation does not hear from the County by the 15th day of August, the Federation will assume that the County is refusing to negotiate, and will take appropriate action."

13. By letter dated August 8, the County's attorney, Jacqueline Damm, notified the Federation that the County declined to reopen Article 13.4. Damm explained that the County did not believe that Article 13.4 was invalid based on an inability of the employer or employees to perform the terms of that provision within the meaning of ORS 243.702, because the County had "performed its obligation under Article 13 -- specifically Section 13.4 -- by seeking a declaratory ruling from the ERB." Damm also notified the Federation that even if ORS 243.702 applied, "the Federation's notice is untimely because it was not made within 14 days of the ERB's decision to decline jurisdiction" as required in ORS 243.698(3).

14. By letter dated August 14, Garrettson notified Damm that the Federation believed the County was refusing to bargain. On September 5, the Federation filed the unfair labor practice complaint in this proceeding.

15. In a letter dated October 13, responding to a question by the ALJ concerning why the complaint had been filed under ORS 243.672(1)(e) rather than ORS 243.672(1)(g), Garrettson stated:

"The County fulfilled that portion of the contract [Article 13.4], however, the Public Employees Collective Bargaining Act also requires the parties to do so in good faith. The County put forth a petition that it knew could not be agree[d] to and did so in bad faith. After the petition was filed the County then refused to bargain with the Federation over the stipulated facts, resulting in the Employment Relations Board refusing to consider the petition. It is the acts of the County in putting forth the petition, and then refusing to bargain which constitute the 1(e) violation. The County technically complied with the contract in that the County did file a petition. Because of that, 1(g) violation did not occur."

CONCLUSIONS OF LAW

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

2. The County did not violate ORS 243.672(1)(e) by refusing to bargain under ORS 243.702 after this Board declined to consider the petition for declaratory ruling.

DISCUSSION

In negotiations for a successor contract, the parties disagreed about a Federation proposal to permit probation officers to carry guns. The Federation asserted that the proposal was mandatory; the County claimed it was permissive or prohibited. The parties ultimately resolved their dispute when they agreed to language in Article 13.4 of the new collective bargaining agreement. The provisions of this article required that the parties seek a declaratory ruling from this Board. If this Board found the proposal non-mandatory, it would be dropped; if it found it mandatory, it would be added to the contract. [See Finding of Fact 3.] When this Board refused to issue a declaratory ruling, the Federation asserted that the parties were unable to perform to the terms of their agreement and demanded that the County renegotiate Article 13.4 under ORS 243.702. This statute provides that parties must negotiate about the provisions of any collective bargaining agreement “declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or the employees to perform to the terms of the agreement * * *.” When the County refused to reopen negotiations on Article 13.4, the Federation filed this unfair labor practice in which it claims that the County’s actions constitute a refusal to bargain in good faith in violation of ORS 243.672(1)(e).

At the heart of the Federation’s allegations is the charge that the parties were required to renegotiate Article 13.4 as required by ORS 243.702(1) because they were unable to perform to the terms of their agreement. We begin our analysis of the Federation’s claim by analyzing the applicable statute. When interpreting a statute, we use the methodology explained in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Our goal is to determine the legislators’ intent; to do so, we begin by examining the text and context of the statute. We also consider any legislative history a party may offer. ORS 174.020(1)(b). We give such legislative history the “evaluative weight” we determine to be appropriate. *State v. Gaines*, 346 Or at 171-72. Here, neither party has provided any legislative history regarding ORS 243.702; as a result, we need not consider it.³

³A court may permissibly limit its consideration of legislative history to what is offered by the parties. ORS 174.020(3). The court has no obligation to independently research a statute’s legislative history. *State v. Gaines*, 346 Or at 166.

In interpreting a statute, we also apply rules mandated by other statutes, such as “the statutory enjoiner ‘not to insert what has been omitted, or to omit what has been inserted.’ ORS 174.010.” *PGE v. Bureau of Labor*, 317 Or at 611. We utilize rules of statutory construction, such as “the rule that words of common usage typically should be given their plain, natural, and ordinary meaning.” *Id.*

We conclude that the legislature’s intent concerning contract language that is “invalid * * * by inability of the employer or the employees to perform to the terms of the agreement * * * ” is clear from the text and context of ORS 243.702(1). Because “invalid,” “inability,” and “perform” are all words of common usage, we consider the ordinary meaning of each word. Among the definitions of “invalid” are “being without foundation in fact or truth,” “lacking in effectiveness,” and “being without legal force or effect.” *Webster’s Third New International Dictionary* 1188 (unabridged ed 1971). “Inability” is defined as “the quality or state of being unable : lack of ability : lack of sufficient power, strength, resources or capacity.” *Id.* at 1139. “Perform” when applied to a contract means “to adhere to the terms of [a contract] : treat as an obligation : IMPLEMENT, FULFILL.” *Id.* at 1678. Thus, for a contract to be invalid because of an inability to perform under ORS 243.702(1), it must be without legal force or effect because the parties lack the power, strength, resources, or capacity to adhere to or fulfill its terms.

To decide if the parties lacked the capacity to adhere to the terms of the agreement they made in Article 13.4, we must interpret the agreement to decide what it obligated the parties to do. We interpret a collective bargaining agreement as we do any other contract. We begin by examining the text and the context of the disputed provision to determine if it is ambiguous. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). If the contract language is clear, we generally enforce it according to its terms. *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004); *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991). If the contract language at issue is ambiguous, i.e., it can reasonably be given more than one plausible interpretation, we will look at extrinsic evidence to determine the parties’ intent. If the ambiguity persists, we utilize maxims of contract construction to determine the meaning of the language. *Yogman v. Parrott*, 325 Or at 363-364.

Here, we readily conclude that the terms of Article 13.4 are clear—they require the parties to “seek a declaratory ruling” from this Board regarding the Federation’s arming proposal. The parties do not define “seek.” In the absence of an agreed-upon definition, we give words their ordinary meaning. *Quail Hollow West v. Brownstone Quail Hollow*, 206 Or App 321, 331-332, 136 P3d 1139 (2006), *rev dismissed as improvidently allowed*, 343 Or 115, 162 P3d 989 (2007). Among the dictionary definitions of “seek”

are “to go in search of : look for : search for,” “to inquire for : ask for,” and “to make an attempt : TRY.” *Webster’s Third New International Dictionary* 2055 (unabridged ed 1971). The contract did not require the parties to obtain a declaratory ruling, but only to “to ask for” or “make an attempt” to obtain such a ruling. The parties complied with this provision: on April 18, 2008, the County petitioned this Board for a declaratory ruling and on May 16, 2008, the Federation petitioned to intervene in the declaratory ruling process. The parties fully performed to the terms of the agreement they made in Article 13.4 and there was no “inability to perform” that rendered the contract invalid under ORS 243.702.⁴

We recognize that Article 13.4 does not specify what happens if this Board did not issue a declaratory ruling on whether the Federation’s proposal is permissive, prohibited, or mandatory. The parties may have assumed that this Board would entertain their petition. However, in interpreting a contract, we do not consider the parties’ subjective intentions or assumptions; instead, we examine the “objective manifestations” of their intent. *Oregon School Employees Association v. Athena-Weston School District*, Case No. UP-2-97, 17 PECBR 586, 590 (1998), and *Lane Unified Bargaining Council v. South Lane Sch. Dist.*, Case No. UP-36-98, 18 PECBR 1 (1999), *aff’d* 169 Or App 280, 9 P3d 130 (2000) (“the relevant inquiry is not into the parties’ ‘undisclosed intents and ideas,’ but into their ‘communications and overt acts.’”) (quoting *Blakeslee v. Davoudi*, 54 Or App 9, 13-14, 633 P2d 857 (1981)). Here, clear contract language to which the parties agreed obligated them to “seek a declaratory ruling” from this Board. The contract does not address the possibility that this Board may refuse to make such a ruling. When they agreed to this language, the parties knew (or should have known) that this Board issues declaratory rulings at its discretion. OAR 115-015-0000.⁵ Yet, the parties did not address this possibility in their contract language. The Federation asks us to insert a bargaining obligation into Article 13.4 which the parties chose not to include. We may not do so. ORS 42.230 (in construing an instrument, courts may not “insert what has been omitted.”); *Elgin Education Association and Gale Wilson v. Elgin School District, No. 23*, Case No. UP-44-90, 12 PECBR

⁴As Board Member Allen Hein explained in his dissent in *AFSCME Local Union No. 328 v. State of Oregon, Executive Department*, Case Nos. UP-78/79/80/81/89/90/91/92/93/94-92, 14 PECBR 180, 198 (1992), “[t]he legislature, in ORS 243.702(1), has provided a process, within the PECBA itself, for handling situations where a party cannot perform its contractual obligations.” (Footnote omitted.) Here, the parties were fully able to perform their contractual obligation—to “seek a declaratory ruling” from this Board concerning the Federation’s arming proposal. The provisions of ORS 243.702 do not apply.

⁵OAR 115-015-0000 provides, “[o]n petition of any interested person, *the Board may, in its discretion*, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by the Board.” (Emphasis added.)

708, 723 n 11 (1991) (Board will not “read just cause” into a collective bargaining agreement; “[h]ad the parties intended that there be a just cause standard, the agreement would have so stated.”); *Oregon School Employees Association v. Amity School District 4J*, Case No. UP-44-94, 15 PECBR 811, 822 (1995) (Board refused to find an implied just cause standard in an agreement when the parties agreed to replace a “for cause” provision found in prior contracts with a due process provision); *Oregon School Employees Association, Chapter 81 v. Stanfield School District*, 61R, Case No. UP-11-06, 21 PECBR 505, *recons denied*, 21 PECBR 525 (2006), *AWOP* 215 Or App 358, 168 P3d 1262 (2007) (Board will not read just cause protection in a contract where the parties did not include it).

Finally, even if we found, as the Federation argues, that the County acted in a manner to prevent resolution of the arming issue when it sought a declaratory ruling, we would not find that the County’s actions rendered the agreement invalid under ORS 243.702(1). The Federation is dissatisfied with the manner in which the County performed their agreement, contending that the County did not act in good faith when it filed its petition for a declaratory ruling with this Board. A collective bargaining agreement includes the same implied covenant of good faith and fair dealing included in any other contract. *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93, 15 PECBR 476, 492 (1994). To determine if a party violated the covenant of good faith and fair dealing, we examine the contract to determine the parties’ reasonable expectation concerning the disputed language and decide if a party’s “actions in implementing the contract provisions effected or thwarted those expectations.” *Id.* at 494. The Federation’s contention regarding the way in which the County performed to the terms of Article 13.4 appears to raise a claim that the County breached its duty of good faith and fair dealing. A party’s failure to fulfill its duty of good faith and fair dealing is a breach of contract. *Id.* at 492. As discussed above, such claims must be alleged as a violation of ORS 243.672(1)(g), which makes it an unfair labor practice to violate the terms of a written agreement, and not as a violation of the County’s duty to bargain in good faith under subsection (1)(e). For that reason, we dismiss the Federation’s argument concerning the manner in which the County performed to the terms of Article 13.4.

The facts of this case differ markedly from those in *Oregon School Employees Association v. Baker School District 5J*, Case No. UP-81-89, 12 PECBR 474 (1990), where we held that parties to a collective bargaining agreement were unable to perform to its terms. In *Baker School District*, the parties agreed that bargaining unit members’ wage increases would be based on a consumer price index that did not exist. The employer could not grant a wage increase under this provision, and we concluded that the contract was invalid due to the employer’s inability to perform. We held that the employer violated subsection (1)(e) when it refused to negotiate about the contract terms which it could not implement.

Unlike the parties in *Baker School District*, the County and the Federation were able to (and did) comply with the terms of the agreement they made in Article 13.4. Their contract was not invalid due to an inability to perform, so the County had no obligation to negotiate under ORS 243.702(1). The County did not violate its good faith bargaining duty under subsection (1)(e) by refusing to bargain about the arming proposal. We will dismiss the complaint.⁶

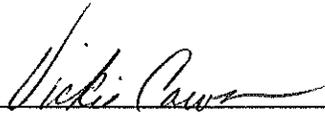
ORDER

The complaint is dismissed.

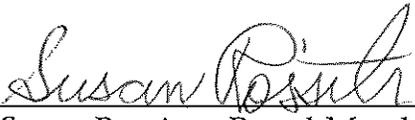
DATED this 15th day of March, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

⁶Because we have concluded that the County had no obligation to negotiate about the Federation's arming proposal under ORS 243.706(1), it is unnecessary to decide if the Federation was required to comply with the 14-day time limit for demanding to bargain in ORS 243.698(3).