

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-09

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,)	
LOCAL #3997,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
DESCHUTES COUNTY,)	AND ORDER
)	
Respondent.)	
_____)	

On December 22, 2010, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter L. Rader after a hearing conducted by ALJ Wendy L. Greenwald on February 12 and 24, 2010, in Salem, Oregon. The record closed on April 8, 2010, following receipt of the parties' post-hearing briefs.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented Complainant.

Christopher E. Bell, Assistant Legal Counsel, Deschutes County, Bend, Oregon, represented Respondent.

On July 24, 2009, Oregon AFSCME Council 75, Local #3997 (Union) filed an unfair labor practice complaint against Deschutes County (County) alleging that the County violated ORS 243.672(1)(g) by failing to comply with the requirements of Article 14 of the parties' collective bargaining agreement. The County timely filed an answer to the complaint.

The issue is: Did the County fail to comply with the requirements of Article 14 of the parties' collective bargaining agreement, in violation of ORS 243.672(1)(g), when it laid off Barbara Rich in 2009?

RULINGS

1. Respondent's Motion to Dismiss

At hearing, the County moved to dismiss the claim as untimely pursuant to ORS 243.672(3), which provides that an injured party may file a written complaint "not later than 180 days following the occurrence of an unfair labor practice." The County alleges that the 180-day filing period commenced on January 15, 2009, when the County notified Rich that it planned to lay her off, rather than her actual layoff date of June 30, 2009. The County asserts that the complaint, which was filed on July 24, 2009, was untimely.

This Board has long held that "an unfair labor practice generally occurs when the alleged act becomes final, not when the employer gives notice of intent." *Washington County Police Officers' Association v. Washington County*, Case No. UP-15-08, 23 PECBR 449, 476 (2009); *Oregon State Police Officers' Association v. State of Oregon, Oregon State Police*, Case No. UP-30-07, 22 PECBR 970 (2009). Our rationale is that the "occurrence" is not the respondent's announcement but rather the effective date of the action, because until the announced action takes effect, the respondent could change its decision or be persuaded not to take the action. *AFSCME Council 75, Local 3327, and Lahr, M.D. v. State of Oregon, Department of Human Resources, Mental Health and Developmental Disability Division*, Case No. UP-64-97, 18 PECBR 257, 264 (1999). Accordingly, the complaint was filed well within the 180-day period and the ALJ properly denied the County's Motion to Dismiss.

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

FINDINGS OF FACT

1. The County is a public employer under ORS 243.650(20). The Union is a labor organization under ORS 243.650(13), and the exclusive representative of a bargaining unit of employees who work for the County.

Relevant County Structure

2. The County is governed by a Board of Commissioners, whose current administrator is Dave Kanner. The County is organized into multiple departments, one of which is the Community Development Department (CDD), which is supervised by current director Tom Anderson. The CDD consists of the following four divisions, each with different functions: Building and Permits, Land Use Planning, Environmental Health, and Code Enforcement. CDD also includes geographic information services and web applications, which Anderson supervises as well.

3. The Land Use Planning Division, whose director is Nick Lelack, is divided into two sections, Current Planning and Long-Range Planning. Principal planner Kevin Harrison supervises Current Planning and principal planner Peter Gutowsky supervises Long-Range Planning. Other positions in the Land Use Planning Division include senior planner, associate planner, and assistant planner.

4. The duties of a senior planner in the Land Use Planning Division include carrying out highly-sophisticated and detailed technical research and analysis to assist in the urban and community development of the County's comprehensive plan, and conducting highly-involved qualitative and quantitative analyses.

5. Director Dan Haldeman supervises the Environmental Health Division of the CDD, where Barbara Rich was employed as a senior planner at the time of her layoff. This division includes the licensed facilities program, the on-site program, and the water program. At the time relevant to this matter, the positions in the division included senior planner, sanitarian I, sanitarian II, sanitarian III, and secretary. The sanitarian position is at a lower pay grade than the senior planner.

6. The senior planner position in the Environmental Health Division is responsible for developing on-site wastewater performance standards, performing cost/benefit analysis on possible wastewater solutions, developing technical approaches to fund incentives, and helping homeowners retrofit to performance standards. The job requires knowledge of wastewater treatment methods, nitrogen cycles, water quality principals, decentralized wastewater management, and computer modeling.

Contract Language

7. The Union and County are parties to a collective bargaining agreement (Agreement) in effect from July 1, 2006 through June 30, 2011. The parties' Agreement includes a four-step grievance process, the last step of which is a hearing before the County Board. The grievance process provides that "[t]he decision of the board shall be final and binding." The grievance process provides for advisory arbitration prior to a hearing before the County Board but does not provide for binding arbitration.

8. Article 3 of the parties' Agreement, entitled "MANAGEMENT RIGHTS," states:

"In order to operate its business, the County, in its sole discretion, retains and shall have the following exclusive rights: to determine the number, location and type of facilities; to determine the type and/or quality of services rendered; to determine the methods, techniques and equipment utilized; to hire, supervise, evaluate, discipline, discharge, promote, demote, lay off, transfer and recall the work force; to assign work and

change, combine, create or abolish job classifications and job content; to establish and make known reasonable work rules and safety rules for all employees, to contract; and to determine the number of employees, including the number of employees assigned to any particular operation or shift.

“Any of the rights, powers, authority and functions the County had prior to the negotiation of this Agreement are retained by the County and the expressed provisions of this Agreement constitute the only limitations on the County’s right to manage its business. The County not exercising rights, powers, authority and functions reserved to it, or its exercising them in a particular way, shall not be deemed a waiver of said rights, powers, authority and functions or of its right to exercise them in some other way not in conflict with a specific provision of this Agreement.

“All other traditional rights of management are also expressly reserved to the County and the express provisions of this Agreement constitute the only limitations upon the County’s right to manage its business.”

9. Article 14 of the parties’ Agreement, entitled “ASSIGNMENT OF PERSONNEL,” states:

“Section 1

“The decision to hire, transfer, assign, promote and layoff employees shall be based on skill, ability, qualifications, recency of experience, training, length of service and work record. In recognition of length of service, the senior employee shall have preference if all the foregoing factors are equal in the sole judgment of the County. The County shall make every effort to transfer laid off employees into any vacant position for which they are qualified. Employees shall be notified of layoff at least thirty days in advance of lay off.

“Section 2 – Recall

“Employees shall be eligible for recall for a period of eighteen (18) months. Employees shall be notified of recall in writing, and shall have ten (10) calendar days in which to respond. The County will make every effort to place laid off employees in any other position for which they are qualified.”

10. The current Article 14 includes essentially the same language that was proposed by the County and included in the parties’ initial collective bargaining agreement, which was in effect from July 1, 1995 through June 30, 1998. The only change in the language since it was originally adopted was the addition of the sentence regarding the reassignment of personnel under the recall provisions in Section 2.

11. Article 28 of the parties' Agreement, entitled "SCOPE OF AGREEMENT", states:

"Section 1

"The Agreement expressed herein in writing constitutes the entire Agreement between the parties. This agreement shall supercede all previous oral and written Agreements between the County and the employees. It is agreed that the relations between the parties shall be governed by the terms of this Agreement only, no prior agreements, understandings, past practices, existing conditions, prior benefits, oral or written, shall be controlling or in any way affect the relations between the Parties, or the wages, hours and working conditions unless and until such Agreement, understandings, past practices, existing conditions an [*sic*] prior agreements shall be reduced to writing and duly executed by both parties.

"Section 2

"In the event the County intends to make a unilateral change in a mandatory subject of bargaining as determined by the Employment Relations Board, the County agrees to notify the Union and subsequently fulfill its obligation under PECBA prior to making said change."

Bargaining History

12. When the parties negotiated their first collective bargaining agreement in 1995, the Union proposed that employees be laid off on the basis of seniority; the proposal would have given employees rights to displace or bump employees in other divisions. The County did not agree to this proposal, however. In 2003 contract negotiations, the Union again proposed that employees be laid off on the basis of seniority and the County again rejected this proposal. The Union did not raise the subject of employee layoffs during bargaining for the 2006-2011 Agreement.

In negotiations, the parties never discussed how the criteria in Article 14 would be applied.

The Parties' History Regarding Layoffs

13. The County applied a layoff policy in 2003 when it reorganized and then instituted a layoff in the Adult Treatment Services Program in the Mental Health Division of the Health Services Department. The Adult Treatment Services Program was divided into various teams, including the Community Support Services Team, the

Community Assessment Services Team, the Community Treatment Services Team, and the Child and Family Program, all of which provided different services. The department uses a generic job classification entitled mental health specialist 1 and 2 department-wide, but the positions within each division or team have different skill sets.¹

14. The County developed matrices using the criteria set out in Article 14 of the Agreement, and applied them to job classifications within each program or team that was identified for layoff. The criteria rated each employee's skill, ability, qualifications, recency of experience, training, length of service, and record, and the results were compared to employees in their same classifications within their respective programs or teams, but not department-wide. If application of the matrices resulted in equal scores, then seniority would prevail.

15. The County gave the Union copies of the matrices it used to determine how, and which, employees were to be laid off. After applying the matrices to various positions within the Mental Health Division, the County rated employees, applied numeric scores and implemented layoffs based on the outcome of the scoring. Although at least seven employees filed grievances, which were ultimately denied, the complaints chiefly centered on individual performance scores or supervisors who displaced, or bumped, represented positions. The Union did not file an unfair labor practice complaint against the County concerning its application of the matrices solely by team, program, or division.

17. The County's process for determining who was to be laid off in the Adult Treatment Program was memorialized in a 2003 memorandum written by program manager Lori Hill. The memorandum states that laid-off positions on one team were not allowed to bump positions in the same classifications on another team, nor were they allowed to bump a position with a lower pay grade within a team. There was no evidence the Union saw, or was even aware of, Hill's memorandum. The Union knew about the process the County used to lay off employees in the Adult Treatment Program, however, because the County gave it copies of the matrices and the names of the employees being rated. Paragraph 7 of Ms. Hill's memorandum states in relevant part:

"Determinations will be made utilizing the 'Staff Qualification Outlines' and the 'Position Qualification Outlines' for each team. Priority will be given to seniority in the event that 2 staff are felt to be equally qualified in the judgment of the program manager. If a staff person is cut from a

¹At various times, the written and oral evidence refers to teams, programs, or sections, all of which are subsets of divisions, which in turn are subsets of departments within the County structure.

team, there is no bumping across to another team. There will also be no bumping across position categories within a team (i.e. an MHS II which is a Master's level staff will not be placed in an MHS I position which is a bachelor's [*sic*] level position.")

18. In 2004, the Mental Health Department's Park Place Adult Treatment Facility was closed due to funding issues and all of the employees working there were laid off. The County did not apply the matrices to any of these employees because their positions were being eliminated, along with the program and the facility itself. The Union did not grieve or otherwise argue that the County should have applied the matrices to these employees on a department-wide basis.

19. In 2005, an Adult Treatment Program mental health specialist 1 was laid off because the contract funding from the Department of Human Services ended and the position was being eliminated. The employee, who was hired specifically to perform drug and mental health screenings for State clients, held the only job classification in the program and the County determined that applying the matrix to the sole position in the program was not practical. The Union did not grieve or otherwise argue that the County should have applied the matrix to all other mental health specialist 1 positions within this classification on a department-wide basis.

20. In June of 2008, the County laid off a plumbing inspector in the CDD's Building Codes Division due to reduced funding from inspection fees. Although the inspectors in the CDD all have the same job classification, the unique skill sets of the electrical inspector, plumbing inspector, plans examiner, commercial plans examiner, and building inspectors were deemed to be sufficiently specialized that rating them department-wide was impractical. The Union grieved the layoff based on an argument that there was a business need for more than one plumbing inspector in the division, but never challenged the County's decision not to rate all CDD inspectors in the same job classification.

Factual Basis of the Claim

21. Barbara Rich was originally employed by the County in April 1996 as an assistant planner in the Land Use Planning Division of the CDD. An assistant planner is an entry-level position with a broad range of planning activities, including reviewing land use and zoning applications and permit requests.

22. Rich's academic background includes a Bachelor of Science Degree in Geomechanical Engineering in 1988 from the University of Rochester, a grant for a fifth year of study in the area of public policy planning from the National Science Foundation, and a Master of Arts Degree in Energy and Environmental Studies from Boston University.

23. Based on favorable reviews from her supervisors, Rich was promoted in May 1998, to the position of associate planner and continued in that position until March 2000. An associate planner supports senior planners in long range or larger projects but serves as senior professional over planning projects of smaller scope.

24. In March 2000, Rich left the County to work for the State Department of Environmental Quality (DEQ) as the project manager for the LaPine National Demonstration Project. The \$5.5 million project was funded by the Environmental Protection Agency to test denitrifying onsite systems to determine whether it was possible to reduce nitrogen loading in the groundwater. While in this position, Rich worked out of County offices and acted as a liaison with County personnel, including principal planner Gutowsky from Long-Range Planning.

25. At the conclusion of the LaPine Demonstration Project, Rich and Gutowsky submitted a grant request for federal funding for a project entitled "Protection of Groundwater Resources in the Upper Deschutes Basin." Rich was instrumental in securing this funding for the County, and had extensive experience in the area based on her work with the LaPine Demonstration Project, so she was the obvious person to assume this grant-funded position with the County. The project included the position of project coordinator.

26. The County did not have a project coordinator job classification and it was not the County's practice to create a new classification to fit one individual job. The Planning Director at the time, Catherine Morrow, was responsible for developing the project coordinator's job and designed it around Rich's experience and salary expectations. Morrow recommended that the project coordinator job be posted as a senior planner position because it was the closest match to the salary Rich had received at DEQ. County Administrator Kanner approved this recommendation.

27. On July 6, 2005, the County posted a job announcement for a temporary, full-time senior planner in the CDD's Environmental Health Division. The posting identified the position as a two-year, grant-funded position, which was:

"[P]rimarily responsible for project management of a federally funded grant, administered by the Environmental Protection Agency (EPA). The project is for a four-phase project that protects water resources by advancing decentralized wastewater treatment techniques in rural residential settings. Using groundwater and nitrate fate transport and optimization models developed by USGS [United States Geological Survey] and innovative denitrifying on-site technology, the project aims to implement performance standards, pollution credits, incentive programs and administrative procedures to protect and improve water quality."

28. The County hired Rich for the position and on September 6, 2005, she began working with the County in the CDD's Environmental Health Division in the union-represented position of senior planner. When he hired Rich, CDD Director Anderson told her that her position was temporary but that he would attempt to find a vacant regular position that she could move into at the end of the two-year project.

29. By 2007, the County still had not completed the project Rich was hired to manage. Although the County no longer had federal funding for Rich's position, the County extended her employment for two years using funds generated from the sale of land.

30. By the fall of 2008, Anderson had determined that Rich's position should be eliminated because there was no longer any funding for the position and the project she was hired to manage was essentially completed. CDD Director Anderson recommended to County Administrator Kanner that Rich's position be eliminated.

31. Kanner approved Anderson's recommendation and decided that Rich would be laid off. In making this decision, neither Anderson nor Kanner rated Rich's job performance in comparison to other CDD planners because she was the only senior planner in the Environmental Health Division and the funding loss meant her position was being eliminated.

32. On January 15, 2009, Anderson notified Rich in writing that she would be laid off from her position effective June 30, 2009.

33. On February 17, 2009, the Union filed a grievance asserting that the County's decision to lay off Rich violated Article 14 of the parties' Agreement. On March 4, 2009, Anderson denied the grievance. In his denial, Anderson stated that Rich's layoff was the result of reduced CDD revenues due to the reduction in development permit fees. Anderson explained the process used to lay off Rich as follows:

"Article 3 (Management Rights) of the Agreement states in part that '...the County, in its sole discretion, retains and shall have the following exclusive rights:...to hire, supervise, evaluate, discipline, discharge, promote, demote, lay off, transfer and recall the work force;...and to determine the number of employees, including the number of employees assigned to any particular operation or shift.' In practice, this means, among other things, that management determines which county operations must be reduced in times of financial difficulty, and which classifications within those operations must be reduced or eliminated. In your case specifically, it was

determined that no funding was available to pay for your position within Environmental Health, and that the important functions you perform in support of groundwater protection must unfortunately be eliminated or absorbed by other division staff.

“If the business needs of the county dictate that a particular operation of the county must be reduced to match available funding (i.e. Building Safety) and that positions must therefore be eliminated, and there are multiple employees within the classification identified for reduction, then Article 14 is used to determine the order of employees to be laid off. If there is only one employee in a classification to be eliminated within an operation, then the Article 14 process is not required. Further, an employee within an operation who may score high with respect to the factors used in Article 14 cannot displace (e.g. “bump”) an employee within the same classification in another operation under the terms of the Agreement.” (Emphasis in original.)

34. Rich appealed her grievance to County Administrator Kanner at step three of the grievance procedure. By letter dated April 1, 2009, Kanner denied the grievance. In his letter, Kanner explained his decision as follows:

“The decision to lay you off was neither arbitrary nor targeted. It was strictly a function of lack of funding for a specific position in the Environmental Health Division. This position has been housed in Environmental Health since its inception. * * * Developing layoff lists within individual divisions or organizational units is consistent with the County’s past practice and has been used to develop other layoff lists in CDD and in other County departments. However, since there is only one senior planner in Environmental Health and since the decision to eliminate that position due to lack of funding is a business decision that is not grievable, there is no need for a layoff list.

“There is no question that you are a highly skilled and qualified employee, however your suggestion that you must be considered with all other senior planners employed by the County is not supported by contract language or the County’s past and current practice. What’s more, it assumes that all senior planners are interchangeable even though significantly different minimum qualifications are established for different senior planner positions in the recruitment process and the business needs of a division within CDD are not served by, for example, placing someone in the transportation planner position who has no experience with transportation planning or, in your case, placing someone with no experience in groundwater science in the Environmental Health senior planner position.”

35. On May 13, 2009, at step four of the grievance, the County Board voted to sustain the decision of County Administrator Kanner to deny the grievance. At that meeting, Kanner explained his decision, stating:

“[W]hether limited duration or regular, it is irrelevant to the grievance. It is not addressed in the contract. A business decision was made that a senior planner is no longer needed in environmental health and there is no funding for that position.

“Normally if a business decision is made that a particular position is no longer required or funding is not available, they would go through the article 14 process and look at the organizational unit and everyone who fits that position. Based on that analysis, someone would likely be laid off. There is only one senior planner in the environmental health division. If this analysis is required, current and past practice should be to compare only those within the division. It was not felt that this was necessary.”

36. At the time of Rich’s layoff, there were five senior planners, four associate planners, and two assistant planners working for the County in other divisions of the CDD.

37. Rich remained unemployed at the time of hearing.

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)(g) when it laid off senior planner Barbara Rich.

DISCUSSION

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations.” The Union asserts that the County breached Article 14 of the parties’ collective bargaining agreement in violation of subsection (1)(g) when it laid off senior planner Rich in 2009. Specifically, the Union alleges that the County erred because it did not compare Rich’s skill, ability, qualifications, recency of experience, training, length of service, and record to those of all other planners in the CDD. Had the County done so, the Union implies, Rich would likely have proven to be more qualified than at least some

of the other County planners and thus would not have been laid off. According to the County, however, the Article 14 criteria could only be used to compare Rich to other employees in similar positions in the division where Rich worked. Because Rich was the only Senior Planner in the division—Environmental Health Division—the County contends there were no other employees to whom it could compare Rich, and that it appropriately selected Rich for layoff. The County argues that the process it used to lay off Rich is consistent with its practice since 2003; the County applied Article 14 criteria to evaluate employees by division or program, and never made a department or county-wide assessment of employees to determine who would be selected for layoff.

We begin our consideration of the Union's claims and the County's defenses by analyzing the language in Article 14 of the parties' collective bargaining agreement. We generally interpret collective bargaining agreements in the same manner as other contracts. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491 (2002) (citing *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991)). Our goal is to determine the parties' intent; to do so, we apply a three part analysis. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005). We first examine the text of the disputed contract language in the context of the document as a whole. If the provision is clear, our analysis ends and we enforce the unambiguous terms of the agreement. If the provision is ambiguous, we proceed to the second step which is to examine the extrinsic evidence of the contracting parties' intent. "[W]e will examine the parties' prior actions or practice as an aid to contract interpretation *only* if the contract language is ambiguous." *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009) (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Accordingly, we first look to the relevant language in the parties' collective bargaining agreement to determine if it is ambiguous. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App at 91 (citing *Miller v. Miller*, 276 Or 639, 647, 555 P2d 1246 (1976)).

Here, the management rights clause in Article 3 of the parties' agreement gives the County unfettered discretion to lay off employees. The determination of which employees will be laid off, however, is governed by Article 14, which requires that the County choose employees for layoff on the basis of "skill, ability, qualifications, recency of experience, training, length of service and work record." If, in the County's "sole judgment," these factors are equal, the senior employee will be retained.

The Union argues that the County should apply the Article 14 layoff criteria to evaluate all employees who have the same job classification as the position being

eliminated. The County argues that the Article 14 criteria should more reasonably be applied only to employees who have the same job classification in the same program or division as the position the County wants to eliminate. The contract is silent on this issue, so we turn to the second step of our analysis and consider extrinsic evidence of the parties' intent.

The most reliable aid in interpreting ambiguous contract language is the parties' past practice. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 23 PECBR 222, 239 (2009), *appeal pending*. We may also look at the parties' bargaining history as a means of determining intent. *Id.* at 240.

A past practice is established by a course of conduct that is clear and consistent, occurs over a long period of time, and is acceptable to both parties. *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-038/41-08, 23 PECBR 972, 998 (2010); *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005). Acceptability means that both parties are aware of the conduct at issue and accept it as the appropriate method for dealing with a situation. Mutuality means that the practice arises from a joint understanding of the parties. *City of Eugene*, 23 PECBR at 998.

Here, the County's practice has been consistent over the past seven years—it applied Article 14 criteria to determine the order of layoff within the same team, program, or division of the eliminated position. In 2003, when the County imposed layoffs in the Mental Health Department due to a funding shortage, it used the Article 14 criteria to develop a matrix. The layoff involved employees who had the same job classifications—mental health specialist I and II—but worked on different teams. The County applied the matrix to rate employees within teams; it gave priority to seniority only if it determined that more than one staff member in the same classification on the same team was equally qualified. The County did not permit mental health specialists from one team to bump similarly-situated employees on other teams, and did not allow employees to bump lower-classified positions on their teams. Although the Union filed a number of grievances, none challenged the County's practice of limiting the application of the matrices to classifications within a team or its practice of preventing a higher classification from bumping a lower classification within a division.

The County adopted a similar approach in 2004 when it eliminated the Park Place Adult Treatment Facility; the County did not apply the matrices to compare Park Place employees to other employees in other programs of the Mental Health Division. Instead, the County laid off the Park Place employees because the entire program was eliminated and the facility closed. In 2005, when funding ended for a mental health specialist I position that performed drug and mental health screenings in the Mental Health Department, the County did not apply the Article 14 criteria because the

position was the only one of its kind in the Department. The Union never grieved the County's failure to apply the matrices to determine the order of layoff in these circumstances.

In June of 2008, the County laid off a plumbing inspector in the CDD's Building Codes Division. Consistent with its practice in prior layoffs, the County made no division-wide rating of the plumbing inspectors because each inspector was responsible for a different program. Instead, the County laid off the plumbing inspector who held the position selected for lay off.

Accordingly, the County's practice in regard to layoffs has been clear, consistent, and long-standing. The County used Article 14 criteria only to evaluate other employees on a particular team, division, or program who filled positions comparable to the one selected for layoff. If the position the County sought to eliminate was the only one of its kind, the County concluded no group existed for comparison purposes and laid off the employee holding the position. The Union indicated its acceptance of this practice by never protesting it or challenging it in a grievance.

Here, Rich occupied a unique position: she was the sole senior planner in the County's Environmental Health Division. Rich had job duties, responsibilities, and expertise that were different from the other senior planners, all of whom worked in the same department (CDD) but in a different division (Land Use Planning). When the County decided to eliminate her position because no additional funding was available, the County acted consistently with its past practice when it laid off Rich. The fact that Rich, who by all accounts is a highly-regarded and valued planner, may have been able to do some, or eventually all, of the work performed by a senior planner in the Land Use Planning Division, or even a sanitarian with a lower pay grade within her own division, misses the point. The County's layoff practice has been to prohibit cross-divisional bumping in the same job classifications and to prevent a higher pay grade within a job classification from bumping a lower pay grade in the same team, program, or division.

The manner in which the parties conduct themselves under specific contract language provides persuasive evidence of their intent. The conduct here demonstrates that the County and Union intended to apply the layoff criteria in Article 14 to groups no bigger than a division or program. The parties' past practice gives no indication that the parties ever intended to apply these criteria on a department or County-wide basis.

Furthermore, the parties' bargaining history does not support the Union's position that Article 14 requires the County to adopt a department-wide evaluation process when determining layoffs. Article 14 of the Agreement has remained largely intact through successor contracts since it was first negotiated in 1995. During negotiations for the parties' inaugural collective bargaining agreement in 1995, the Union tried to convince

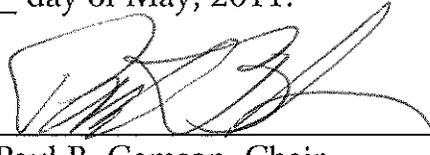
the County to accept a layoff policy that was based on seniority, which necessarily implied bumping rights, but the County never agreed to the proposal. The record is devoid of evidence that the parties subsequently negotiated the issue of how, or to whom, the evaluative criteria under Article 14 would be applied. During the negotiations for the 2006-2011 contract, the issue was not even raised by the Union. Thus, the parties' bargaining history demonstrates that the Union never succeeded in obtaining contract language that would require application of the Article 14 criteria on a department or County-wide basis.

The Union did not establish that the County violated ORS 243.672(1)(g) by failing to comply with the requirements of Article 14 of the parties' collective bargaining agreement when it laid off Barbara Rich. Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

SIGNED AND DATED this 26 day of May, 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.