

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)	
CORRECTIONS EMPLOYEES,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF OREGON,)	AND ORDER
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on June 30, 2004, on Respondent's objections to a proposed order issued on April 30, 2004, by Administrative Law Judge (ALJ) Vickie Cowan, following a hearing on December 4 and 5, 2003, in Salem, Oregon. The hearing closed on January 20, 2004, upon receipt of the parties' post-hearing briefs.

Becky Gallagher, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97201, represented Complainant.

Helle Rode, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N E., Salem, Oregon 97301-4096, represented Respondent.

On June 27, 2003, the Association of Oregon Corrections Employees (AOCE) filed this unfair labor practice complaint alleging that the Department of Corrections (DOC) violated ORS 243.672(1)(a) and (e) by unilaterally implementing a new shift schedule. DOC filed a timely answer denying certain allegations and asserting affirmative defenses.

The issues are:

1. Did DOC unilaterally implement a new schedule in violation of ORS 243.672(1)(e)?
2. Did DOC's actions relating to the schedule change interfere with AOCE members' rights, in violation of ORS 243.672(1)(a)?

RULINGS

1. The ALJ deferred ruling on Exhibits R-14, R-15, R-16, and R-21. These exhibits provide relevant background information and will be admitted for that purpose.
2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. AOCE is the exclusive representative for a bargaining unit of correctional officers, sergeants, and corporals employed by the DOC at Oregon State Penitentiary (OSP), a public employer.
2. From March 2000 to July 2002, Paula Allen served as OSP's security manager.
3. Prior to 2000, security staff at OSP bid monthly for their shift schedules. In 2000, as a result of an interest arbitration award, security staff began bidding twice a year.
4. In 2000, Allen and AOCE worked together to revamp the bid package to conform to the twice-a-year schedule. Numerous shift start/stop times and days off were changed. Because the parties were working cooperatively in this process, AOCE did not demand to bargain the changes.
5. Allen and AOCE representatives also worked cooperatively in restructuring the recreation yard schedule. During this process, AOCE President Gary Harkins noticed that some of the proposed changes in start/stop times would result in several employees having less than 16 hours between shifts. These changes would have resulted in the institution having to pay a penalty. Allen worked with Harkins to revise the start/stop times which eliminated most of the penalty pay. Again, because the parties were working together cooperatively, AOCE did not demand to bargain the changes.

6. In 2001, the Oregon legislature mandated that DOC develop staffing standards to promote efficiency, reduce overtime, and resolve discrepancies with the sergeants' posts in terms of post relief scheduling.¹ Both AOCE and DOC management participated in developing the new standards. As a result of the new standards, OSP gained seven new sergeant positions and lost eight officer positions.

7. In response to the new staffing standards, Allen and AOCE worked together to revise the schedule to accommodate the new sergeant positions while Brian Belleque, Assistant Superintendent for Security, concentrated on getting the sergeant positions reclassified.

8. The changes in the sergeant positions and the resulting changes in the schedule were to be effective for the July-August 2002 schedule. Numerous changes were made to the schedule which effected start/stop times and days off. AOCE agreed with these changes. The new schedule was posted for 17 days. Subsequently, DOC was notified that the reclassification of the sergeant positions was not complete. Allen removed the revised schedule and reposted the previous schedule which contained no changes.

9. From 2000 through 2002, other than the proposed July-August 2002 bid package, there were primarily minor changes to the schedules. However, when DOC proposed to change the Intensive Management Unit (IMU) schedule from an 8-hour to a 12-hour schedule, AOCE demanded to bargain and the parties entered into a memorandum of understanding.

10. In July 2002, Thomas Wright succeeded Allen as OSP's security manager and in September 2002, Gerald Long replaced Belleque as OSP's assistant superintendent of security.

Contract Negotiations

11. AOCE and DOC were parties to a collective bargaining agreement (CBA) effective July 1, 2001 through June 30, 2003.

12. Article 2, Section 2, of the CBA contains an evergreen clause which provides that the CBA will remain in full force and effect during the negotiation process.

¹A post is a particular job assignment in a particular location.

13. Article 3—Management Rights provides, in relevant part:

“ * * * The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. * * *”

14. Article 28—Working Conditions, Section 3, Work Schedule
provides:

“Schedules showing each employee’s shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, the Employer will provide seven (7) days notice of changes in work schedules.”

Section 7, Shift and Time Off Bidding provides, in relevant part:

“A. Regular status employees in the Correctional Officer series may bid for shifts and days off on a schedule posted by the Employer at their institution on the basis of their classification seniority as defined in Article 39. Regular status employees in the Correctional Officer series assigned to positions in Special Housing at OSP (DSU, SMU, and IMU) and * * * may bid within those work units for shifts and days off on a schedule posted by the Employer at the work unit on the basis of their classification seniority as defined in Article 39. The manner of bidding will be consistent with the method spelled out in paragraph E of this Section.

"B. Shift and time off schedule bidding shall apply to all bargaining unit work sections, except Education Services. * * *

* * * * *

"E. All affected employees, after placing two (2) successful and consecutive bids on the same shift/days off and working on such shift/days off for two (2) consecutive six (6) month periods, may remain on such shift/days off without placing any further bids unless out bid by a senior employee. Such employee will, however, be eligible to place bids on other shifts/days off as the rotation dates occur.^[2]

* * * * *

"H. Employees will bid for a six (6) to twelve (12) month cycle to commence on or about August and February of each year. The Employer shall post notice of proposed six (6) to twelve (12) month rotation of shift and time off schedules and a seniority roster at the work unit thirty (30) days in advance of the bid. * * *"

15. On or about January 22, 2003, the parties began successor contract negotiations for the expired CBA. At the first session, AOCE proposed to amend Article 28 of the CBA to provide for post bidding. The State did not respond to the proposal.³

²This section of the CBA is referred to as the incumbency provision. During bargaining for the 2001-2003 CBA, DOC proposed to eliminate the incumbency provision of Article 28(E) but subsequently withdrew the proposal.

³Post bidding is a permissive subject of bargaining over which the State may, but is not required to, bargain *AOCE v. State of Oregon, DOC*, Case No. UP-91-93, 14 PECBR 832 (1993), *AWOP* 133 Or App 602, 892 P2d 1030, *rev den* 321 Or 268, 895 P2d 1362 (1995).

AOCE made additional proposals to amend Article 28 in June. The new proposals did not involve post bidding.

16. Shortly before May 27, 2003, AOCE became aware that DOC intended to post a new schedule at OSP. This schedule changed the rank of various assignments, and changed the start/stop times and days off for a large number of security personnel. The results of these changes eliminated the incumbency provisions of the contract.

17. During bargaining, on May 27, 2003, AOCE Counsel Daryl Garrettson verbally addressed the planned implementation of the new schedule. Garrettson informed DOC that the schedule changes affected mandatory subjects of bargaining and that DOC would be committing an unfair labor practice if it implemented the new schedule without first bargaining. Assistant Superintendent of Security Services Long indicated he was not prepared to discuss the schedule that day. The parties then agreed to address the schedule issues outside of the formal contract negotiation process.⁴

18. By memo dated May 29, 2003, Long informed all security staff that due to the implementation of staffing standards and the additional sergeant positions, it was necessary for all staff to bid, including those staff who held incumbencies.⁵

19. On May 30, 2003, AOCE and DOC met to discuss the schedule. The parties did not reach a consensus. Later that same day, DOC posted the new schedule.

20. The posted schedule is similar to the schedule posted in July-August 2002, but includes additional changes to the shift start/stop times, days off, and assignments. Changes to the start/stop times differ as much as two hours. In addition, the new schedule required all incumbents to bid. This requirement differs significantly from the July-August 2002 schedule.

21. On May 30, Harkins posted a memo to all staff regarding the bid schedule changes. The memo provided:

⁴At hearing, DOC witnesses Jan Weeks and Long testified they did not recall Garrettson making a demand to bargain. Both, however, remember Garrettson discussing the schedule and the agreement that Long would address the schedules with Harkins, away from the main table negotiations. Weeks had nothing in her bargaining notes about the request and Long had no notes from bargaining. Harkins' notes indicate that the AOCE made a demand to bargain and that DOC "blew off our DTB [demand to bargain]."

⁵At hearing, Long admitted that this was a violation of the contract.

“This is to inform all staff that the AOCE does not agree with or support the wholesale changes to the Bid Schedule. There are over 130 changes to this schedule which equate to 60% of the schedule. Some of these changes should have been negotiated at the Bargaining table but were not. The AOCE will pursue the avenues it has available to us.”

22. On June 27, 2003, AOCE filed this unfair labor practice complaint.

23. At the time of this action, the parties had not reached agreement on the successor CBA and were scheduled for interest arbitration.

CONCLUSIONS OF LAW

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

2. DOC violated ORS 243.672(1)(e) by refusing to bargain over the schedule changes involving days off and the start-stop time for shifts. DOC did not violate ORS 243.672(1)(e) regarding changes to rank and to the incumbency provision.

3. DOC did not violate ORS 243.672(1)(a).

ORS 243.672(1)(e) requires a public employer to bargain in good faith with the exclusive representative of its employees. With few exceptions, this bargaining obligation prohibits a public employer from unilaterally altering conditions of employment that are mandatory subjects for bargaining. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89 (2001).

The complaint alleges that DOC's May 2003 bid schedule unilaterally altered four separate working conditions: (1) the rank employees must hold in order to bid on certain assignments; (2) the start-stop times for shifts; (3) days off; and (4) the incumbency provision of the CBA.

We begin with AOCE's fourth claim. It alleges that DOC violated ORS 243.672(1)(e) by breaching the incumbency provision of the CBA. We recently held that a contract violation does not constitute bad-faith bargaining under subsection (1)(e); such claims must be raised as a grievance under the CBA or through an unfair labor practice complaint under ORS 243.672(1)(g). *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04,

20 PECBR 850, 851 (2005) (Dismissal Order). AOCE's claim that DOC violated subsection (1)(e) by breaching the contract fails as a matter of law. We will dismiss it.

We turn to the three remaining allegations that DOC made unilateral changes in working conditions. When reviewing a unilateral change allegation, we determine whether a change was made to an established practice, whether the changed employment condition concerns a mandatory subject, whether the employer exhausted its duty to bargain the employment condition, and whether the exclusive representative waived its right to bargain the particular employment condition. *Roseburg Fire Fighters Association, IAFF Local 1110 v. City of Roseburg*, Case No. UP-47-97, 17 PECBR 611, 628 (1998).

Changes to Established Practices

Prior to May 2003, the parties' practice for addressing minor schedule changes was an informal one. The security manager notified AOCE of any proposed schedule changes and then worked cooperatively with AOCE to resolve any disputes *prior* to posting any schedule change. AOCE did not formally demand to bargain because the parties were able to informally resolve any disputes. If there was a major change in scheduling that the parties did not resolve informally, such as changing from 8-hour shifts to 12-hour shifts, AOCE formally demanded to bargain. With the exception of minor changes, the practice remained consistent concerning rank of assignments, the start-stop times for shifts, and days off. The new schedule significantly changed these established past practices.

Subject of Bargaining

DOC's new schedule changed the start/stop times and days off of several shifts. DOC argues that it had no bargaining obligation because scheduling is a permissive subject for bargaining under ORS 243.650(7)(f).⁶ We recently rejected this same argument. In *IAFF, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533 (2001), we determined that ORS 243.650(7)(f) addresses scheduling of services to the *public*, not scheduling of employee work hours.

DOC essentially asks us to overturn *Klamath County Fire District, supra*. DOC asserts that "[i]t is disingenuous to argue that there is a difference between scheduling services to the public and scheduling employee work hours." We have no difficulty seeing this difference. A public employer is free to establish the hours of service

⁶ORS 243.650(7)(f) provides, in part, that "scheduling of services provided to the public" is permissive for bargaining.

to the public, but it must bargain over which of those hours a particular employee will work. This Board has consistently held, both before and after the legislative changes in 1995, that scheduling the particular hours of the day and days of the week an employee is assigned to work constitutes "hours of work," a *per se* mandatory subject of bargaining under ORS 243.650(7)(a). *Eugene Police Employees' Assoc. v. City of Eugene*, Case No. UP-5-97, 17 PECBR 299 (1997), *aff'd* 157 Or App 341, 353, 972 P2d 1191 (1998), *rev den* 328 Or 418, 987 P2d 511, 512 (1999); *OPEU v. Executive Department*, Case No. UP-71-93, 14 PECBR 746, 772-73 (1993); *Klamath County Fire District*, *supra*, 19 PECBR at 547. We decline DOC's invitation to overturn this body of law.

DOC next argues that when we determine whether a subject is mandatory, ORS 243.650(7)(c) requires us to weigh the impacts the subject has on employer prerogatives against the impacts it has on employee wages, hours, and working conditions. According to DOC, the balance is in its favor. DOC's argument lacks merit. The changed working conditions at issue here concern hours, a subject expressly listed as mandatory in ORS 243.672(7)(a). Such matters are *per se* mandatory and are not subject to the balancing test. *City of Eugene*, *supra*, 157 Or App at 352-54, 328 Or 418, 987 P2d at 512.

DOC also argues that the changes were *de minimus*, and therefore permissive for bargaining under ORS 243.650(7)(d). DOC's argument fails on both the law and the facts. Legally, our analysis begins with the words of the statute. We give the words their plain meaning and must consider them in context. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). ORS 243.650(7)(d) concerns "*subjects that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment.*" (Emphasis added.) As discussed, the changes here involve the subject of employee work hours. If we give the words of the statute their plain meaning (as we must), DOC's argument would require us to conclude that the "subject" of employee hours has a "de minimus effect on public employee * * * hours." Common sense rebels.

DOC's argument also fails on the facts. It reaches the conclusion that the changes were *de minimus* by comparing the 2003 bid package to the 2002 bid package. DOC, however, *never implemented* the 2002 bid package; it withdrew that package and reposted the regular bid schedule without changes. The proper comparison is not to the withdrawn package, but to the one that was posted and implemented. By that comparison, the changes are not *de minimus*. Employees' days off were changed, and their start-stop times were changed by as much as two hours.

Here, DOC unilaterally changed the particular hours of the day and the days of the week which employees worked. These changes concern a mandatory subject of bargaining over which DOC was required to bargain, unless AOCE waived its rights.

We reach a different conclusion regarding the change in rank necessary for certain positions. The decision of whether to assign a corporal or a sergeant to a position is generally the employer's prerogative. Such determinations concern assignment of duties and minimum qualifications, both of which are permissive subjects for bargaining. ORS 243.650(7)(f). A public employer is not required to bargain its decision to change a working condition that concerns a permissive subject for bargaining.⁷ DOC did not violate ORS 243.672(1)(e) when it unilaterally changed the rank for certain positions. We will dismiss this claim.

Affirmative Defenses

Waiver

A party may waive its right to bargain through (1) "clear and unmistakable" contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) by the party's action or inaction. *OSEA v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 623-24 (2002). Waiver of bargaining rights is an affirmative defense. The party asserting it has the burden of proof. *Id.* at 624.

DOC asserts that AOCE waived its bargaining rights both by express contract language and by its prior actions. DOC has the burden of proving its allegations.

A. Waiver by Express Contract Language

A party may waive its right to bargain by "clear and unmistakable" contract language. *Bandon School District, supra*, 19 PECBR at 623-24. DOC first points to Article 28 of the contract which contains details of the bidding and scheduling process. DOC does not identify any particular language that expressly permits DOC to act as it did. Instead, it lists several subsections of Article 28 and argues, in essence, that there is contract language specifically relevant to the dispute. In *Bandon School District, supra*,

⁷In some circumstances, an employer must bargain the impacts of its decision before it can implement that decision. AOCE does not assert that DOC refused to negotiate the impacts of the rank change, and we therefore do not decide the issue.

we abandoned the “specifically relevant” defense to a bad-faith bargaining charge.⁸ Instead, we held that the proper defense in such circumstances is waiver, and that the party asserting it must prove the defense by “clear and unmistakable” evidence. 19 PECBR at 624. We find no clear and unmistakable waiver in Article 28.

DOC also relies on the management rights clause of Article 3 of the contract. The clause states that DOC “retains all inherent rights of management,” including the right to “schedule work.” DOC asserts that by agreeing to this language, AOCE waived its right to bargain over shift schedules. A review of the contract, however, does not convince us that the language is sufficiently “clear and unmistakable” to constitute a waiver. Article 3 gives DOC the right to schedule work. It is unclear, for example, whether the language applies to scheduling services to the public, or instead to individual employee work hours. The language might also apply to the employer’s decision about when during the day to schedule a particular task, rather than to the hours a particular employee works. One point is clear: the provision does not expressly give DOC the right to unilaterally change the start/stop times and days off of employees. Such ambiguity and lack of specificity preclude us from finding a “clear and unmistakable” waiver of bargaining over these subjects.⁹

B. Waiver by Action or Inaction

DOC further argues that AOCE waived its right to bargain by inaction. It notes that AOCE never demanded to bargain changes in *previous* bid packages. That is true. However, AOCE had no reason to demand bargaining because the parties were able to resolve their disputes informally. There is no Public Employee Collective Bargaining Act (PECBA) requirement that formality is a prerequisite to bargaining. We will not punish a party for settling its disputes in an informal manner with the least cost and disruption to both parties. In fact, we encourage the parties to do just that. The fact that the parties were able to informally resolve their disputes on these issues in the past does not operate as a waiver of future bargaining rights.

⁸In a later case, the Court of Appeals held that this Board acted within its authority in abandoning the “specifically relevant” analysis and applying instead the “clear and convincing” standard *Lincoln Cty. Ed. Assn. v. Lincoln Cty. Sch. Dist.*, 187 Or App 92, 67 P3d 951 (2003).

⁹DOC argues that this holding will lock it into the same schedules forever, without regard to changing institutional needs. This misses our point. DOC can make these changes, but it first needs to give notice and bargain. During the life of the agreement, it must bargain for 90 days ORS 243.698. In light of the fact that DOC now posts bid schedules every six months, it has ample time to complete the bargaining process within the current time frame. And if DOC experiences a true emergency, it can immediately implement the changes and bargain after. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 590 (2002).

DOC also argues that AOCE did not make an effective demand to bargain over *this* bid package. It contends that AOCE should have made a written proposal if it was demanding to bargain. The PECBA does not require formal structured negotiations in order to meet the definition of collective bargaining. *OSEA v. Eagle Point School District 9*, Case No. C-123-80, 5 PECBR 4054, 4058-59, n. 4 (1980).

Even if we were to find that AOCE's statements at the bargaining table were insufficient to constitute a demand to bargain, DOC's implementation of the schedule three days later essentially presented AOCE with a *fait accompli*. In *IAFF v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988), we held that there is no requirement that a union demand to bargain when the employer has already made a unilateral change.

Timeliness

DOC argues that the complaint is untimely and should have been filed in 2002 after the July-August bid. We do not find that argument persuasive. DOC withdrew the 2002 bid schedule and reinstated the previous schedule. The reinstated schedule established the relevant practice that DOC was required to maintain until it completed bargaining over changes. The May 2003 bid schedule contained significant changes to the established practice.¹⁰ The instant action arose when DOC posted the May 2003 bid package. AOCE filed this complaint on June 27, well within the 180-day time limit.

Based on the above reasoning, we conclude that DOC violated ORS 243.672(1)(e) by unilaterally changing start-stop times and days off.

(1)(a) allegation

ORS 243.672(1)(a) provides that it is an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." In order to establish a prima facie case, AOCE must plead facts that, if proven, would establish protected activity, employment related action against the employee by the employer, and a sufficient connection between the two to suggest a causal relationship.

AOCE relies on two arguments. First, it asserts that DOC's unilateral implementation of the schedule changes interfered with the members' right to bargain

¹⁰We note that the May 2003 bid schedule also differed from the 2002 *proposed* bid schedule in some of the start/stop times and days off.

collectively on the issue. If AOCE were correct, then *all* unilateral changes would violate not only subsection (1)(e), but also subsection (1)(a). In other contexts, this Board has refused to find derivative violations.¹¹ We follow that practice here and hold that a unilateral change does not, by itself, constitute a (1)(a) violation.

AOCE's only other evidence of retaliatory employer conduct was Harkins' hearsay testimony that Wright wanted to change the schedule because two people had been in their positions too long. This record is insufficient to prove a (1)(a) violation and therefore we will dismiss this claim.

REMEDY

In a typical unilateral change case, we order the offending party to rescind the change and restore the status quo until bargaining is complete. To do so here might cause unnecessary disruption. As noted, the bid process occurs every six months. There have thus been several rounds of bidding since this violation occurred. Bargaining unit members have arranged their lives to conform with the new schedule, and to order an immediate change would unfairly penalize them. We are also aware of the potential difficulties an abrupt change could create for DOC. We will delay any change until the next scheduled round of bidding. At that time, AOCE, as the innocent party, can choose to either maintain the current schedule for days off and start-stop times, or else return to the schedule on those issues as it existed prior to the unlawful change. AOCE will notify DOC of its choice at least 30 days prior to the posting so that DOC can begin any necessary preparations. Of course, the parties are free to implement any other schedule that they mutually agree upon.

ORDER

1. DOC shall cease and desist from refusing to bargain over days off and the start-stop times for shifts;

2. Unless the parties mutually agree otherwise, at least 30 days prior to the next scheduled round of bidding, AOCE shall notify DOC whether the days off

¹¹*Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93, 15 PECBR 347 (1994); *Cascade Bargaining Council v. Jefferson Cty. Sch. Dist.*, Case Nos. UP-29/43-85, 8 PECBR 8274 (1985), *aff'd* 83 Or App 418, 732 P2d 54 (1987); *Reynolds Education Association v. Reynolds School District*, Case No. C-82-77, 4 PECBR 2426 (1979); *Redmond Education Association v. Redmond School District*, Case No. C-5-78, 4 PECBR 2086 (1978), *aff'd* 42 Or App 523, 600 P2d 943, *rev den* 288 Or 173 (1979).

and the shift start-stop times up for bid shall be those currently in existence, or else those in existence prior to the May 30, 2003 posting;

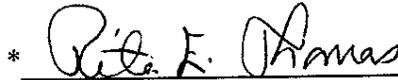
3. The allegations regarding rank and the incumbency provision are dismissed; and

4. The ORS 243.672(1)(a) allegation is dismissed.

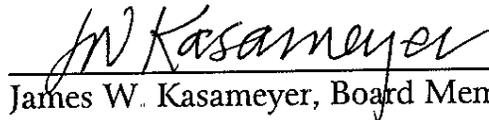
DATED this 29 day of April 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas Concurring in Part and Dissenting in Part:

I agree that the allegations regarding rank and the incumbency provision, along with the ORS 243.672(1)(a) allegation should be dismissed.

For the reasons discussed in my special concurrence in *911 Professional Communications Employees Association v City of Salem*, Case No. UP-62-00, 19 PECBR 871 (2002), I do not agree that the State violated ORS 243.672(1)(e) by failing to bargain bid schedules. Bid schedules, based on the facts in this case, are a permissive subject of bargaining under PECBA. Work schedules have been a permissive topic since the 1995 changes enacted by the passage of SB 750. This part of the complaint should be dismissed.

I also do not agree that the posting of the bid schedule was a "*fait accompli*" thereby relieving the Association of its duty to file a timely demand to bargain. The bid schedule was not implemented for another 60 days after posting. The Association agreed that they had never demanded to bargain bid schedules in the past. The State, I believe correctly, understood that bid schedules are a permissive topic and certainly the history of the parties would indicate this. The State followed a normal practice of posting a modified bid schedule, and there was ample time to demand to bargain prior to the implementation of the change.

I respectfully dissent.

