

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-04

(UNFAIR LABOR PRACTICE)

LEBANON ASSOCIATION OF)
 CLASSIFIED EMPLOYEES,)
)
 Complainant,)
)
 v.)
)
 LEBANON COMMUNITY)
 SCHOOL DISTRICT,)
)
 Respondent.)
 _____)

RULINGS,
 FINDINGS OF FACT,
 CONCLUSIONS OF LAW
 AND ORDER

On June 22, 2005, this Board heard oral argument on objections filed by Complainant and Respondent to a Proposed Order issued on March 22, 2005, by Administrative Law Judge (ALJ) B. Carlton Grew following a hearing on December 16, 2004, in Salem, Oregon. The hearing closed on January 21, 2005, upon receipt of the parties' post hearing briefs.

Monica A. Smith, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

David Turner, Oregon School Boards Association, 1201 Court Street N.E., Suite 400, P.O. Box 1068, Salem, Oregon 97308-1068, represented Respondent.

On June 29, 2004, the Lebanon Association of Classified Employees (Association) filed this unfair labor practice complaint, alleging that the Lebanon Community School District (District) violated ORS 243.672(1)(e) and (f) by refusing to bargain a proposal to contract out some bargaining unit work until agreement was reached, or for the

150 days required by ORS 243.712. On November 10, 2004, the District timely filed its answer, admitting and denying certain allegations and asserting affirmative defenses. The District contended that the relevant bargaining period is only 90 days, pursuant to ORS 243.698.

The issues are: was the District required to bargain its proposal to contract out bargaining unit work in accordance with the requirements of ORS 243.712, and, if so, did the District violate ORS 243.672(1)(e) and (f)?

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT¹

1. The District is a public employer. The Association is a labor organization and the exclusive representative of a bargaining unit of approximately 225 classified District employees, including custodians, affiliated with the Oregon Education Association (OEA).

2. The District and the Association were signatories to a collective bargaining agreement in effect from July 1, 2003 through June 30, 2005. Article 23 of that agreement provides as follows:

“If the District wishes to contract out work, it will bargain the decision and the impact with the Association.”

3. The 2003-2005 agreement includes provisions governing the wages and benefits of unit custodians.

4. The parties have addressed the issue of contracting out in labor agreements since at least 1992. The 1995-1997 labor contract contained a provision regarding contracting out in the contract article governing layoffs. That language stated the following:

“The District agrees that it will not contract out work presently being accomplished by employees in the bargaining unit from the effective date of the Agreement through June 30, 1997. If the District wishes to contract out work, it will bargain the decision and the impact with the Association.”

¹Most of these findings of fact are drawn from a stipulation of facts by the parties.

5. The relevant provisions in the 1997-1999 and 2000-2003 labor agreements provide, at Article 6.9, “[i]f the District wishes to contract out work, it will bargain the decision and the impact with the Association.”²

6. In January 2003, the District told the Association that it was contemplating contracting out some bargaining unit work. On March 18, 2003, District Representative Ron Wilson sent a letter regarding contracting out to Kim Matlock, Association president, and James Sundell, OEA UniServ consultant. The letter stated, “[t]his notice is being provided to you pursuant to ORS 243.698.” On March 20, 2003, the Association responded with a demand to bargain which stated that it was “pursuant to ORS 243.698.”

7. The proposed changes by the District affected only two employees and would not result in the layoff of any employees. In citing ORS 243.698 in his letter, Sundell mirrored the citation sent to him without giving it much thought. The parties took more than 90 days to negotiate a resolution of this issue, and a memorandum of understanding was signed in September 2003, more than 160 days from the employer’s notice of proposed changes.

8. On March 8, 2004, Wilson sent another letter to Matlock and Sundell. The letter stated that the District wished to contract out work performed by bargaining unit custodians beginning July 1, 2004. The letter stated that it was sent pursuant to ORS 243.698.

9. On March 10, Sundell responded, demanding to bargain pursuant to ORS 243.712. Wilson replied on March 15, stating the District’s belief that ORS 243.698 would govern their negotiations. Wilson asked if the Association objected to the District’s interpretation of the statutory time lines. Association Attorney Monica Smith replied by a letter dated March 17, 2004, stating that the Association believed that ORS 243.712 applied to the bargaining and explaining her reasoning.

10. The Association and District met for their first bargaining session on May 6, 2004. The parties bargained until June 7, 2004, 115 days after the date of the District’s notice that it planned to contract out unit work.

11. On June 7, the District board met to consider the issue of contracting out. Association representatives spoke at the meeting, urging the board not to contract out the work and to follow the 150-day bargaining period provided for in ORS 243.712. The board voted to implement the District’s proposal effective July 1, 2004.

²The parties stipulated at hearing that they have no evidence that the parties negotiated or discussed the time periods for bargaining pursuant to this section or its predecessors.

12. The District implemented its proposal as directed by the District board, laying off 14 unit custodians and contracting out their work.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it terminated bargaining and implemented its proposal to contract out the work of Association employees before bargaining at least 150 days pursuant to ORS 243.712. We find no separate subsection (1)(f) violation, and so dismiss that portion of the complaint.³

Standards for Decision

ORS 243.712 sets out the general procedure for bargaining under the Public Employees Collective Bargaining Act (PECBA). The statute requires parties to enter into negotiations for no more than 150 days after their first bargaining session and receipt of bargaining proposals. Thereafter, the parties may proceed to mediation, and if necessary, a cooling off period, following which the employer has the right to implement and the labor organization has the right to strike. ORS 243.698 provides for an exception to the 150-day time line for certain negotiations during the term of an agreement. It provides:

“* * * (1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.

“(2) The employer shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain.”

³See, e.g., *Willamina Education Association v. Willamina School District*, Case No. C-142-78, 4 PECBR 2318, 2324, n. 2 (1979) (Board will not find a subsection (1)(f) violation that is derivative of a subsection (1)(e) violation.)

OAR 115-40-000 provides:

“Mediation

“115-40-000 (1) Negotiations concerning a new or reopened collective bargaining agreement.

“* * * * *

“(b) The 150-calendar-day period of negotiations begins:

“(A) When an exclusive representative is recognized or certified; or,

“(B) Where the parties are negotiating over the terms of a successor agreement or *pursuant to a contractual reopener provision*, when the parties meet for the first bargaining session and each party has received the other party’s initial proposal.

“* * * * *

“(2) Mid-contract negotiations.

“(a) At any time during a 90-day period of expedited negotiations concerning a proposed change in employment relations not covered by a collective bargaining agreement or concerning the renegotiation of contract terms pursuant to ORS 243.702, the parties may jointly request mediation. * * *

“(b) Mediation of a labor dispute subject to expedited negotiations shall not continue past the 90-day period. The 90-day period of expedited negotiations begins:

“(A) When the employer notifies the exclusive representative in writing of anticipated changes that impose a duty to bargain; or

“(B) When a party requests in writing renegotiation of contract terms pursuant to ORS 243.702.” (Emphasis added.)

This Board has stated as follows:

“* * * The 150-day bargaining period applies when parties are ‘negotiating over the terms of a successor agreement or pursuant to a contractual reopener provision * * *.’ OAR 115-40-000(1)(b)(B) * * * By contrast, the 90-day bargaining period applies when the parties are negotiating ‘concerning a proposed change in employment relations not covered by a collective bargaining agreement,’ or the parties are renegotiating an invalid contractual provision pursuant to ORS 243.702. OAR 115-40-000(2)(a). * * *” *In the Matter of the Joint Petition for Declaratory Ruling Filed by Medford School District 549C and OSEA Chapter 15, Case No. DR-2-04, 20 PECBR 721, 725 (2004) (emphasis omitted).*

DISCUSSION

Contract Reopener:

Article 23 of the parties’ 2003-2005 labor contract states the following:

“If the District wishes to contract out work, it will bargain the decision and the impact with the Association.” (Finding of Fact 2.)

The Association contends that the 150-day period set forth in ORS 243.712 applies to bargaining under this contract provision. It further argues that Article 23 is “essentially” a reopener provision on the issue of subcontracting, an issue which is covered by the contract. (Complainant’s Post-Hearing Brief at 6.) The District contends that the 90-day period set forth in ORS 243.698 applies. It argues that Article 23 is “solely an independent restatement of the District’s obligations under the PECBA related to subcontracting,” and that there is “*nothing* within the four corners of the document referring to the District’s *decision* to subcontract custodial services nor the *impact* on current employees if the District were to subcontract those services * * *.” (Respondent’s Post-Hearing Brief at 11-12, emphasis in original.)

For reasons set forth below, we conclude that the 150-day time line set forth in ORS 243.712 applied to negotiations between the Association and the District regarding the decision and impact of subcontracting custodial work, and that the District violated its duty to bargain under ORS 243.672(1)(e) when it refused to apply that time line to those negotiations. We reject the District’s assertion that the contract does not refer to subcontracting custodial services. Article 23 specifically refers to bargaining over the decision and impact of contracting out. We also reject the District’s plea to ignore the contract language because it merely restates the law.

When reviewing a labor agreement, we construe its language to give each provision meaning. "We must give effect to all words of an agreement, taking care to avoid an interpretation that would render a provision meaningless or ineffective when there is an alternative interpretation possible that would not do so." *Lane Unified Bargaining Council/SLEA/OEA/NEA v. South Lane School District #45J3*, Case No. UP-36-98, 18 PECBR 1, 24 (1999), 169 Or App 280, 9P3d 130 (2000); citing Elkouri & Elkouri, *How Arbitration Works* 493 (5th ed. 1997). A provision of a labor contract is not meaningless simply because it restates a statutory obligation.⁴

In any event, Article 23 does not merely restate the statutory obligation to bargain, but goes beyond it. ORS 243.698 applies when the employer has a bargaining obligation, which is triggered only when "the exclusive representative demands to bargain." Article 23 does away with this trigger, and requires instead that "[i]f the District wishes to contract out work, it will bargain the decision and the impact with the Association."

In *Medford School District*, the contract stated that:

"If, as a result of the bargaining described in the paragraph above, salary or benefits are reduced, the District agrees to reopen for negotiations those items that had been reduced if it receives significantly more revenue than anticipated.

"In the event of a budget deficit from the prior year, legislative action or initiative affecting any portion of this agreement, the salary and related economic items agreed to herein shall not be reduced without negotiations between the Association and the District. * * *" (20 PECBR at 722-23.)

We described these provisions as "optional or conditional reopeners." (20 PECBR at 726.) We concluded that the employer was obligated to bargain for 150 days under ORS 243.712. We find no reason to treat Article 23 differently than the reopeners at issue in *Medford School District*. The wages and benefits for District custodians are also part of the labor agreement. Article 23 is a reopener provision, and the 150-day time line of ORS 243.712 applies to negotiations undertaken pursuant to that reopener.⁵

⁴A reopener provision linking a specific subject to an employer's obligations under the PECBA has independent legal effect under the Association's theory because it would require that the parties reach agreement, or bargain for 150 days, regarding any proposed changes in a covered subject. OAR 115-40-000.

⁵The District argues that our decision in *Medford School District* requires that a valid contract reopener clause must include "the word 'reopener' or 'reopening' * * * in an article's heading or the phrases 'Reopen for negotiations' or 'renegotiate the contract' * * * in the text of the contract article." (Respondent's Post-Hearing Brief at p 8). We do not interpret the PECBA to require that any particular words be used to

Waiver:

The District argues that the Association's reference to ORS 243.698 in connection with the 2003 contracting out negotiations represents a waiver of the application of ORS 243.712 to this labor agreement. We disagree. A waiver of a statutory right under the PECBA must be made in "clear and unmistakable language." *OSEA v. Crook County School District*, Case No. UP-66-93, 15 PECBR 30, 35-36 (1994). Sundell's 2003 letter does not meet this standard.

Estoppel:

The District argues that the Association is equitably estopped from claiming that ORS 243.712 applies to this dispute because the Association's 2003 demand to bargain letter referred to ORS 243.698 in connection with the 2003 contracting out negotiations.

"The doctrine of equitable estoppel is employed to prevent a party from alleging a crucial fact to be other than what by act or omission that party previously led another party justifiably to believe." *In re Menard*, 180 Or App 181, 186, 42 P3d 359 (2002). The doctrine rests "upon principles of good faith and honesty and the notion that one should not be able to take advantage of the falsity of what he has led another to believe to be true." *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 689, 669 P2d 1132 (1983).

For equitable estoppel to apply, however, the misrepresentation must be of a material fact and not of a conclusion of law. *Day v. Advanced M&D Sales, Inc.*, 336 Or 511, 86 P3d 678 (2004). In *Day*, the Supreme Court held that an employee who filed a workers' compensation claim was, at most, asserting his belief that he was entitled to benefits under the statute. The Court determined that this was an assertion of a legal conclusion rather than a representation of fact, and as such it could not form the grounds for equitable estoppel.

We reach a similar result here. The question of which statutory bargaining procedure applies here is a question of law. The citation of ORS 243.698 in Sundell's 2003 letter does not trigger the imposition of estoppel against the Association because his was an assertion of a legal conclusion, rather than a representation of fact. The District reached its own legal conclusions regarding the applicability of ORS 243.698.

Remedy:

The District was aware of the controversy surrounding the bargaining time lines, but chose to proceed headlong into a subcontracting arrangement and end the

designate a reopener. Instead, we will determine the meaning of alleged reopener provisions as we do with any other contract terms. The plain meaning of Article 23 is that the parties will reopen negotiations if the District decides to contract out bargaining unit work.

employment of unit custodial employees. From the first bargaining session on May 6, the District and the Association bargained for only 31 days until the District implemented its decision to contract out. To remedy the violation, we will order the District to reinstate all affected unit employees and pay them full back pay and benefits beginning July 1, 2004, and continuing until the District has completed its 150-day statutory bargaining obligation under ORS 243.712 (or reaches agreement with the Union), less interim earnings. We will not give the District credit, as it has suggested, for time spent bargaining in 2004; rather, the bargaining clock will begin when the parties meet and exchange proposals. The very different time lines and statutory procedures for bargaining under ORS 243.698 and ORS 243.712 require this result.⁶

Although the District engaged in bargaining concerning its decision to contract out bargaining unit work and its impact, it refused to apply the proper statutory time frame, and therefore, did not lawfully bargain under the PECBA. To remedy this, the *status quo ante* must be restored, not from June 7, 2004, the date on which the District implemented its decision, but from March 8, 2004. That is the date on which the District notified the Association of its proposal to contract out custodial work.

Under the circumstances of this case, reinstatement of all affected unit employees is necessary to restore the balance of influence between the parties. This is the objective of a “make whole” order of the kind this Board ordinarily crafts. See *Central Education Association and Vilches v. Central School District*, Case No. UP-74-95, 17 PECBR 54 (1996), *on recons* 17 PECBR 93 (1997), *aff’d* 155 Or App 92, 962 P2d 763 (1998), *compliance order* 17 PECBR 792 (1998); and *State Teachers Education Association, Andrews, et al v. Willamette ESD and Oregon Education Department*, Case No. UP-14-99, 19 PECBR 228 (2001), *AWOP* 188 Or App 112, 70 P2d 903 (2003), *rev den* 336 Or 509, 87 P3d 1136 (2004). In the *Willamette ESD* case, in order to remedy an unlawful refusal to hire, we ordered the public employer to offer employment to the affected employees, not merely to allow them to reapply for employment.

Contrary to the ALJ, we do not view *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 338 (2003) (Rulings and Order on Both Parties’ Petitions for Reconsideration), as controlling. In that case, this Board found that the evidence did not establish that there was a “transfer” of work, but rather a “plant closure,” citing to *OSEA v. Department of Human Resources*, Case No. C-194-80, 6 PECBR 4658 (1981), and the decision of the United States Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 US 666, 107 LRRM 2705 (1981). The City simply ceased performing the work. The work was not transferred elsewhere. The City was no longer in the police business, and

⁶Contrary to the position taken by Member Thomas in her dissent, we view the District’s insistence on bargaining under ORS 243.698 as rendering unlawful the entire course of bargaining undertaken by the District. The District’s conduct cannot be rendered lawful merely by saying that it committed no overtly unlawful acts during negotiation sessions, when it refused to bargain under the proper statute to begin with.

therefore had no obligation to bargain the decision. However, the City did fail to bargain the impact of the decision, and we remedied that failure. *Vale* is inapposite because it involved a “plant closure,” not a transfer of work, as found in this case.

Instead, we apply the rationale of the *Klamath County* case, (*IAFF Local 890 v. City of Klamath Falls*, Case No. UP-43-92, 13 PECBR 810 (1992)). In that case, the city proposed to consolidate its fire department with that of a nearby fire district, resulting in the transfer of all city fire department employees to the district, and the city going out of the fire protection business. The union made a demand to bargain, and the parties met to bargain the impacts of the transfer decision. The city and the fire district entered into an intergovernmental agreement concerning the transfer before impact bargaining was completed. As we noted in *Vale*, Klamath Falls “acted unlawfully by implementing the transfer before negotiations were finished. We also concluded that, under the ‘all things considered’ test, the city had an obligation to bargain about both the decision and its impact. That conclusion was based on the fact that the dispute involved a transfer of functions.” (20 PECBR at 354)

However, in *Klamath Falls*, while the union made a timely demand to bargain the decision, it failed to pursue decision bargaining—and thereby waived its right to bargain the City’s decision. The union had, however, pursued its impact bargaining rights.

We stated that “[t]he usual remedy for a unilateral change violation, besides a cease and desist order, is an order for the employer to restore the status quo that existed before the unlawful change.” (13 PECBR at 820.) This Board nevertheless declined to order a return to the status quo for two reasons: (1) because the union waived its right to decision bargaining, it basically acceded to the decision; and (2) because a restoration order was not necessary to restore the balance of power between the parties, since the bargaining unit was strike-prohibited. Therefore, this Board directed the city to resume bargaining with the union until agreement was reached or the case was submitted to binding interest arbitration.

In this case, we apply the “usual remedy.” There was a transfer of work before bargaining under ORS 243.712 was completed. The Association assiduously asserted its right to bargain both decision and impact and the parties are not subject to interest arbitration. More than back pay to bargaining unit custodians is needed in order to maintain the status quo. Instead, the affected employees must be reinstated and made whole in accordance with Board practice.

ORDER

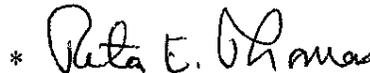
1. The District shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain pursuant to ORS 243.712 concerning the contracting out of bargaining unit work.

2. The District shall, within 30 days of the date of the final Order of this Board, offer reinstatement to all bargaining unit custodians, and make them whole for the wages and benefits they would have received had they continued their employment, less interim earnings, with interest at 9 percent per annum from the respective paydays for a period beginning July 1, 2004, and ending when the parties reach an agreement or complete the statutory 150-day bargaining period including mediation and a cooling off period, whichever comes first.

SIGNED AND ISSUED this 24th day of October 2005.



Paul B. Gamson, Chair

* 

Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

*Board Member Thomas Concurring in part and Dissenting in part.

I concur that the District violated the law by not bargaining under the time lines of ORS 243.712. However, the law requires that the District be given credit during the required 150-day bargaining period for the time that it did bargain in good faith. ORS 324.712(1) provides: "*Any period of time* in which the public employer or labor organization has been found by the Employment Relations Board to have failed to bargain in good faith shall not be counted as part of the 150-day bargaining period." (Emphasis added.) There is no legal or factual basis for concluding that the actual bargaining which took place between May 6 and June 7, 2004, was done in bad faith.

The dispute which we have been asked to decide is over the statutory time lines for bargaining. The majority holds that it is bad faith per se when a party is mistaken over which statutory time line applies to the bargaining process. I strongly disagree with this. If the Legislature wished to make such a mistake a per se violation, they would have done so. Instead the statute presumes that there may be some period of time during the 150 days in which parties fail to bargain in good faith, and that period will not be counted toward the 150 days. However, there must be evidence in the record of actual bad faith conduct other than

a time line dispute itself to reach a conclusion that there was not a good faith effort taking place when the parties were meeting.

There is no evidence in this record that the bargaining which took place between May 6 and June 7, 2004, was done in bad faith. Therefore those 31 days should be counted toward the 150 days of bargaining which we order here.

I respectfully dissent.

This Order may be appealed pursuant to ORS 183.482.