

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-36-02

(UNFAIR LABOR PRACTICE)

BENTON COUNTY DEPUTY	)	
SHERIFF'S ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
BENTON COUNTY	)	AND ORDER
SHERIFF'S DEPARTMENT,	)	
	)	
Respondent.	)	
_____		

The Board heard oral argument on September 18, 2003, upon Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) William Greer on May 28, 2003, following a hearing on January 10, 2003, in Corvallis, Oregon. The record closed on March 3, 2003, upon receipt of the parties' post-hearing briefs.

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

Barbara A. Bloom, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented Respondent.

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The Benton County Deputy Sheriff's Association (Association) filed this unfair labor practice complaint on July 8, 2002. The complaint alleged that Benton County Sheriff's Department (County) violated ORS 243.672(1)(e) by submitting a last best offer (LBO) to interest arbitration that included a prohibited subject for bargaining. Specifically, the LBO included a "zipper clause" that would allow the County to modify any employment condition not covered by the agreement without any obligation to bargain over either the decision to make the modification or its impact on the bargaining unit. The Association alleged that this proposal is unlawful because it constitutes an "involuntary waiver" of its statutory bargaining

rights. The parties' interest arbitrator awarded the County's LBO, including the zipper clause. The Association further alleged that inclusion of the zipper clause renders the entire interest arbitration award unenforceable.

The complaint also alleged that the interest arbitrator failed to base his award on the statutory criteria, which rendered the award unenforceable. The Association withdrew this allegation at the hearing.

On August 12, 2002, the Association filed an amended complaint that added two further allegations. First, it alleged that the County implemented the entire new agreement except for the retroactive pay provisions, and that such partial implementation was unlawful. Second, it alleged that the County implemented the agreement without first presenting a draft of it to the Association for review or approval.

On November 12, 2002, the County filed an answer that admitted and denied portions of the amended complaint; asserted that the complaint failed to state a claim; and sought a civil penalty because the amended complaint was allegedly frivolous and filed to harass the County.

The issues are:

1. Did the County submit an unlawful proposal (Article 2.1 Zipper Clause) in its LBO, in violation of ORS 243.672(1)(e)?
2. Did the County implement a collective bargaining agreement that contained an unlawful proposal (Article 2.1 Zipper Clause), in violation of ORS 243.672(1)(e)?
3. Did the County implement only portions of the interest arbitration award, other than retroactive pay, in violation of ORS 243.672(1)(e)?
4. Did the County implement the collective bargaining agreement without first presenting a draft to the Association for review or approval, in violation of ORS 243.672(1)(e)?
5. Does the Association's pursuit of this complaint warrant a Board order directing the Association to pay a civil penalty to the County under ORS 243.676(4)(b)?<sup>1</sup>

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<sup>1</sup>The Association raised the third and fourth issues in its amended complaint. The ALJ inadvertently failed to include them in both his October 30, 2002 proposed statement of the issues and in his statement at the outset of the hearing. On January 21, 2003, after the hearing but before submission of the parties' post-hearing briefs, the ALJ presented an issue statement to the parties that included the third and fourth issues. The County objected to the addition of issues. The ALJ overruled the objection. The County then requested additional time to submit its brief, and the ALJ

(continued ...)

The ALJ recommended that this Board find that the County's zipper clause proposal concerned a prohibited subject for bargaining, and that the interest arbitration award therefore was not enforceable. He also recommended that this Board find that the County unlawfully implemented a collective bargaining agreement incorporating the zipper clause. He further recommended that this Board deny the Association's request for a civil penalty. For the reasons discussed below, we find that the County's zipper clause proposal concerns a mandatory subject for bargaining, and the interest arbitration award is enforceable. We also find that the County's implementation of the collective bargaining agreement containing that zipper clause was lawful. Finally, we find that a civil penalty is not warranted.

### RULINGS

1. At hearing, the Association requested authorization to withdraw three paragraphs of its amended complaint in which it alleged that the interest arbitrator had failed to abide by the statutory criteria. The County did not object, and the ALJ correctly granted the Association's request. The County did, however, assert that the Association's last-minute withdrawal after the County had prepared to litigate the issue constituted further evidence to support its request for a civil penalty on the grounds that the complaint was frivolous. We treat this as a motion by the County to amend the allegations in its answer regarding its request for a civil penalty. We grant the motion to amend. Further, the ALJ correctly observed that this Board may consider such a late withdrawal of a pleading in its decision on the prevailing party's request for representation costs.

2. The ALJ's other rulings were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is a labor organization and the County is a public employer. The Association is the exclusive representative of a bargaining unit of personnel employed by the County.

2. The Association and the County were parties to a 1998-2001 collective bargaining agreement. Article 2.1 of that agreement ("Zipper Clause") provided, in part: "[T]he County shall have the unqualified right to unilaterally modify any employment condition not covered by the terms of this agreement, and to do so without bargaining either the decision to do so or its impact on the bargaining unit."

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<sup>1</sup>(...continued)  
extended the parties' brief filing date. We note that the County filed an answer that specifically addressed these allegations, and that the parties fully litigated the issues. Upon review, we concur with the ALJ's ruling on the County's objection and with his statement of the issues. *AFSCME Council 75, Local 3940 v. Department of Corrections*, Case No. UP-9-01, 20 PECBR 1 (2002).

3. In 2001, the parties began negotiations for a successor agreement. Rhonda Fenrich was the Association's spokesperson. Candace Ludtke was the County's spokesperson, and Sheriff James Swinyard was a member of the County's bargaining team.

4. During negotiations and mediation, the parties exchanged proposals regarding Article 2.1, "Zipper Clause."

5. On March 27, 2002, after failing to reach agreement, the parties submitted their LBOs to interest arbitration.

6. The Association's LBO regarding Article 2.1, "Zipper Clause," provided, in part:

"\* \* \* The County shall have the right to modify any employment condition not covered by this agreement, subject to the statutory duties of notice and bargaining with the Association."

The County's LBO regarding Article 2.1 provided, in part:

"\* \* \* [T]he County shall have the unqualified right to unilaterally modify any employment condition not covered by the terms of this agreement, and to do so without bargaining either the decision to do so or its impact on the bargaining unit. The county agrees that for the initial implementation of the 'General Operating Manual' to bargain the mandatory subjects of bargaining and mandatory impacts." (Emphasis omitted.)<sup>2</sup>

7. The County's LBO regarding Article 16, "Wages and Salaries," provided, in part:

"ARTICLE 16. WAGES AND SALARIES.

"16.1. Wages. For the first year of this agreement, the salary schedule for positions in the bargaining unit shall be increased by ~~two and half (2.5%)~~ three percent (3%) across the board effective the first pay period following signing of this agreement. ~~For the second year of this agreement, the salary schedule for positions in the bargaining unit shall be across the board on June 17, 1999. For the~~

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<sup>2</sup>The County asserts that the Association agreed to the County's version of Article 2.1 prior to the submission of LBOs. An LBO should address "unresolved" issues. ORS 243.746(3). The fact that the County submitted a zipper clause proposal in its LBO indicates it did not believe the parties had resolved the issue. We reject the County's current assertions to the contrary.

~~third year of this agreement, the salary schedules shall be subject to negotiations pursuant to Article 27.~~

\* \* \* \* \*

"In addition, for each member of the bargaining unit employed with the county as of the signing of this agreement, an amount equal to 3% of their old base semi-monthly salary times the number of pay periods worked since July 1, 2001 through the pay period immediately prior to the period in which the 3% salary adjustment takes effect, will be added to a payroll check within 60 days of signing." \* \* \*

\* \* \* \* \*

"Additionally, for each member of the bargaining unit employed with the county as of the signing of this agreement, overtime paid during the period July 1, 2001 to date of signing will be recomputed on a case-by-case basis to include the retroactive 3.0% salary increase. This retroactive payment will be made within 60 days if [sic] signing."(Underlining and strikeouts in original;<sup>3</sup> footnote omitted; italics added.)

8. During a May 7, 2002 bargaining session, Fenrich asserted that the County's Article 2.1, "Zipper Clause," proposal was unlawful. Ludtke asked Fenrich to support that assertion with citations to Board or court decisions. Fenrich cited ORS 243.698. During mediation, the Association again asserted that the County's zipper clause proposal was unlawful. In particular, the Association objected to the breadth of the County's zipper clause proposal. The Association never refused to bargain over the County's zipper clause proposal.

9. The dispute proceeded to interest arbitration. On June 9, 2002, Arbitrator R. Douglas Collins issued his interest arbitration opinion and award. In his consideration of Article 2.1, Arbitrator Collins recited the parties' proposals and then stated the following:

*"Analysis:* In my judgment, the only statutory criterion that applies to this issue is the 'interest and welfare of the public.' Although the law dictates that this criterion be given 'first priority,' it does not attempt to define that phrase. However, the parties have thoroughly discussed the meaning of that term as refined by

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<sup>3</sup>The County presented its LBO in a manner that compared its proposals to the prior agreement. The underlined words identify language it proposed to add to the prior agreement, and the struck words indicate language it proposed to delete from the prior agreement.

arbitrators in previous cases arising under the Act. It is therefore unnecessary to burden this decision with a lengthy discussion of that topic. Suffice it to say that arbitrators generally agree that the public's 'interest and welfare' is best determined by applying the remaining criteria specified in the Act. Where, as here, those factors are inapplicable or inconclusive, it is generally accepted by arbitrators that it is in the public's interest and welfare to adopt the proposal that best provides the public with affordable services that are of sufficient quality to ensure adequate protection of persons and property. In my view, that end is best achieved where the parties have a stable and predictable relationship that minimizes conflict and does not undermine employee morale.

"Zipper clauses are frequently included in collective bargaining agreements precisely because they are presumed to stabilize the parties' relationship by closing out bargaining and making the written contract the exclusive statement of the parties' rights and obligations. The County and the Association apparently accepted that proposition in the past as they included such a provision in their Agreement.

"The burden of proof in interest arbitration generally rests with the party that is seeking some change in the *status quo*, and absent persuasive evidence to justify some significant change, the proposal that most nearly continues the existing terms and conditions of the Agreement is preferred. In this instance, the County's proposal retains the existing language of Article 2, deleting nothing and adding only one sentence dealing with the obligation to bargain over the initial implementation of the General Operations Manual. In contrast, *it appears that the Association's proposal would fundamentally alter the zipper clause, removing the provision that permits the County 'to unilaterally modify any employment condition not covered' by the Agreement and instead requiring notice and bargaining before any such change can be made. In essence, the Association's proposal would unzip the zipper, rendering the provision essentially meaningless. While the Association's position is understandable, in my judgment it is not supported by the statutory criteria that are controlling here.*<sup>1</sup>

"I therefore find that the statutory criterion of the interest and welfare of the public tends to support the County's offer regarding Article 2.

<sup>41</sup> The Association argues that its position is supported by comparisons to other public agencies. However, I note that the statutory criterion concerning such comparisons is limited to compensation. Although comparisons of contractual language might arguably fall within the ambit of the 'other factors' criterion, the Act specifically precludes the use of such factors if, in the judgment of the arbitrator, the other statutory factors 'provide sufficient evidence for an award.'" (Emphasis added.)

After considering all of the parties' proposals and positions in light of the relevant statutory criteria, Arbitrator Collins awarded the County's LBO.

10. On June 27, 2002, the County wrote the Association about the new agreement. The County stated its position that the wage article of the contract by its terms "requires the parties' signatures on the contract before the County can release the retroactive pay to bargaining unit members. With this one exception, the County will implement the terms of the award which effectively 'executes' the contract in accordance with the arbitrator's award."

11. From June 27 to July 8, 2002, Sheriff Swinyard—a member of the County bargaining team—was on vacation and unavailable to assist in the County's effort to compile the 2001-2004 collective bargaining agreement. Some portions of the new contract were stored on his office computer. Other County personnel did not have access to that computer.

12. In mid-July 2002, before the parties signed a collective bargaining agreement, the County implemented what it contended were the parties' tentative agreements plus all terms of Arbitrator Collins' interest arbitration award. At that time, the County did not pay retroactive wages to bargaining unit members.

13. On July 23, 2002, the County gave the Association a draft of the parties' 2001-2004 collective bargaining agreement.

14. In October 2002, the parties signed their 2001-2004 collective bargaining agreement.

15. Later in October 2002, after the parties signed the agreement, the County paid retroactive wages to bargaining unit members.

#### CONCLUSIONS OF LAW

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

2. The County did not violate ORS 243.672(1)(e) when it submitted a mandatory proposal, Article 2.1, "Zipper Clause," to interest arbitration.

3. The County did not violate ORS 243.672(1)(e) when it implemented a collective bargaining agreement that contained the County's zipper clause proposal, as awarded in interest arbitration.

4. The County did not, in these circumstances, violate ORS 243.672(1)(e) when it implemented only a portion of the new agreement until such time as the parties signed the agreement.

5. The County did not violate ORS 243.672(1)(e) when it implemented the new agreement without first presenting a draft for Association review and approval.

6. Assessment of a civil penalty against the Association is not warranted.

### DISCUSSION

The Public Employee Collective Bargaining Act (PECBA) mandates that a public employer has the duty to bargain in good faith over mandatory subjects for bargaining with the exclusive representative of a bargaining unit of public employees. ORS 243.672(1)(e).

At the end of the collective bargaining process for strike-prohibited employee bargaining units, the PECBA provides that disputes can be resolved through interest arbitration; ORS 243.742-243.762. In particular, ORS 243.746(4) states, in part, that "unresolved [proposals involving] *mandatory* subjects [of bargaining] submitted to the [interest] arbitrator in the parties' last best offer packages shall be decided by the arbitrator." (Emphasis added.)

### ***COUNTY SUBMISSION OF NEGOTIATION WAIVER PROPOSAL TO INTEREST ARBITRATION***

The Association asserts that the County bargained in bad faith by submitting an LBO that included a zipper clause that concerns a prohibited subject for bargaining. The arbitrator selected the County's LBO. The Association further asserts that the arbitrator's award is unenforceable because it includes the prohibited zipper clause.

The County responds that the Association waived its right to complain about inclusion of the zipper clause in its LBO submission and in the arbitrator's award because the Association failed to raise the issue in a timely and appropriate manner *prior* to the interest

arbitration proceeding.<sup>4</sup> The County further asserts that, in any event, the award is enforceable because the zipper clause concerns a mandatory subject for bargaining.

We conclude that the County's zipper clause proposal concerns a mandatory subject for bargaining, and the interest arbitration award is enforceable. It is therefore unnecessary to address the County's arguments regarding waiver.<sup>5</sup>

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<sup>4</sup>One of the County's proposed solutions in cases of this nature is for this Board to require the challenger to file a "blocking charge"; that is, a party that asserts the other has submitted a nonmandatory proposal to interest arbitration should be required to file a charge with this Board before the interest arbitration hearing is conducted, and this Board should then order the interest arbitration held in abeyance until it decides the issue. We reject this suggestion. We need not decide here whether a case-by-case consideration might reveal particular circumstances in which it would be appropriate to stay an interest arbitration proceeding until we can decide a charge. We hold only that we will not automatically stay an interest arbitration proceeding every time a party files a charge that raises scope of bargaining questions. We also note the potential for abuse if we were to give a party the power to unilaterally require the last-minute cancellation of a scheduled hearing by simply filing a complaint. This Board already has in place an expedited process for deciding scope of bargaining disputes. Board Rule 115-35-060.

<sup>5</sup>Our concurring colleague would overrule portions of *Springfield Police Association v. City of Springfield*, Case No. UP-17/20-97, 17 PECBR 260, *reconsider* 17 PECBR 319, *reconsider* 17 PECBR 368 (1997). That case announced, *inter alia*, that this Board would analyze claims that a party had "unlawfully pursued a permissive proposal," by determining:

"\* \* \* (1) if the proposal concerns a permissive subject of bargaining; (2) if the objecting party gave timely and adequate notice of the item's permissiveness and refused to bargain over the item; (3) if the proponent had an opportunity to amend or withdraw the proposal; and (4) if, after being advised of the permissive status of the item and of the other party's refusal to negotiate, the proponent continues to pursue (condition agreement upon) the permissive item.\* \* \*" 17 PECBR at 273.

Although our colleague states that he would overrule only another portion of *City of Springfield* (that portion which refused to enforce an interest arbitration award containing a permissive subject even where the challenging party failed to make a timely and adequate objection), his concurrence would *sub rosa* overrule the quoted language above as well, by placing the first step at the end of the analysis. Those two steps together in some cases—those which, like *City of Springfield*, involve an arguably *permissive* item—have the potential to abbreviate and simplify the analysis, because a conclusion that the challenging party waived the arguably permissive item would resolve both the bad faith bargaining claim and the challenge to the interest arbitration award.

The changes urged in the concurrence would not have a similar effect in this case, which involves a claim that the County pursued a *prohibited* subject. This Board cannot enforce even an  
(continued...)

## ZIPPER CLAUSE

The duty to bargain does not end when the parties reach agreement on a contract. There is a continuing duty to bargain, upon demand, over mandatory subjects not covered by the agreement. A zipper clause attempts to eliminate this type of mid-contract bargaining. It “seeks to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties’ rights and obligations.” *Eugene School District No. 4J v. Eugene Education Association*, Case No. C-165-78, 4 PECBR 2403, 2407 (1979) (quoting *NLRB v. Tomco Communications, Inc.*, 97 LRRM 2660, 2664 (9<sup>th</sup> Cir 1978)).

This Board has held that a zipper clause is a mandatory subject for bargaining *Eugene School District No. 4J*, 4 PECBR at 2408. The Association asserts that the zipper clause at issue here nonetheless concerns a prohibited subject for bargaining. A prohibited subject is one that would require a party to violate the law or public policy. *Eugene Police Employees’ Association v. City of Eugene*, affirmed 157 Or App 341, 972 P2d 1191 (1998), *rev denied* 328 Or 418, 987 P2d 511 (1999).

The Association makes two separate arguments that this Board has not previously considered. The first is that the zipper clause is prohibited because it is contrary to ORS 243.698. The legislature added this provision to the PECBA in 1995 to give the parties an expedited procedure for bargaining that occurs during the life of a collective bargaining agreement. According to the Association, a zipper clause that purports to eliminate such bargaining is contrary to the statute and is therefore a prohibited subject of bargaining.

The plain words of the 1995 amendments contradict the Association’s argument that the legislature meant thereby to prohibit zipper clauses. Under ORS 243.698, the

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<sup>5</sup>(...continued)

agreement to include a prohibited subject. *Petition for a Declaratory Ruling Filed by the City of Portland*, Case No. DR-4-85, 8 PECBR 815, 8121-8122 (1985) (prohibited provision in existing contract unenforceable; proposed modification of that provision is also prohibited). Thus, here, as in any case where it is alleged that a party has pursued a *prohibited* subject and secured its inclusion in an interest arbitration award, it remains necessary to determine whether that subject is prohibited or mandatory for bargaining in order to resolve all the issues raised. The record and arguments in this case are sufficient to make that determination, as we have.

Two primary considerations militate against making this case the vehicle to address the broader questions raised in the concurrence, *i.e.*, whether *City of Springfield* either (a) erroneously sequenced the analytical steps, or (b) erroneously refused to enforce an interest arbitration award containing a permissive item. First, addressing those issues would not alter the ultimate conclusion because the case at hand does not involve an allegedly permissive subject. Second, and perhaps more importantly, no party has urged us to overrule any portion of *City of Springfield*, and we have not had the benefit of briefing or other argument on that point. For reasons of judicial economy, we will refrain from addressing issues beyond those presented in this case.

expedited procedure applies “[w]hen the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement \* \* \*.” The statute does not define the circumstances in which a mid-term bargaining obligation arises. It merely states that if such an obligation exists, then the parties must follow the procedure specified in the statute. We have stated that no bargaining obligation exists under ORS 243.698 when a party has contractually waived its right to mid-term bargaining. *Sandy Union High School District Declaratory Ruling*, Case No. DR-4-96, 16 PECBR 699, 704 (1996). This zipper clause attempts such a waiver.<sup>6</sup> It seeks to define by contract the circumstances in which an obligation for mid-term bargaining arises. We find nothing in such a proposal that is contrary to ORS 243.698.

The Association next argues that even if a zipper clause is generally a mandatory subject for bargaining, it nevertheless becomes a prohibited subject in the interest arbitration context. The Association’s argument begins with the general principle that a waiver is the voluntary relinquishment of a known right. *OSEA v. Coos Bay School District 9*, Case No. C-159-84, 8 PECBR 8248, 8260 (1985). The Association then notes that interest arbitration, at least for the losing party, results in contract language to which it never voluntarily agreed. According to the Association, inclusion of the County’s zipper clause proposal in the interest arbitration award compelled it to waive its right to bargain over mid-term changes in working conditions. The Association asserts that the waiver is unenforceable because it was not voluntary. We disagree.

Interest arbitration does not involve the type of offer and acceptance normally associated with contract formation. We have described agreements arrived at through interest arbitration as being formed “by operation of law.” *Grants Pass Police Association v. City of Grants Pass*, Case No. UP-62-97, 17 PECBR 656, 661 (1998); *Marion County v. Marion County Law Enforcement Association*, Case No. UP-100-93, 14 PECBR 922, 923 (1993) (Order on Reconsideration). This does not mean, however, that an agreement formed through interest arbitration is somehow different from other agreements. To the contrary, the legislature intended interest arbitration to be an effective alternative to strikes. ORS 243.742(1). To further this policy, we will treat contracts formed through interest arbitration the same as those formed through any other bargaining procedure. This Board’s analysis of a proposal as mandatory, permissive, or prohibited will not vary depending on whether the parties use the bargaining process for strike-permitted units or that for strike-prohibited units. Neither will it depend on the step the parties have reached in the bargaining process. As applied here, we hold that a zipper clause is a mandatory subject of bargaining for both strike-permitted and strike-prohibited employees, at all stages of bargaining.

To conclude otherwise would lead to anomalous results. The Association argues that the subject of zipper clauses is mandatory until the LBO stage, when it becomes

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<sup>6</sup>We express no opinion on whether this zipper clause language constitutes an effective waiver of bargaining over a particular subject or proposal.

prohibited. Under such a scenario, a union that opposed a zipper clause would gain a strategic advantage by refusing to reach agreement until after table bargaining and mediation concluded, at which point the union could avoid the zipper. This would run directly counter to the statutory goal of encouraging parties to settle their disputes at the earliest stage possible. We therefore reject the Association's notion of a "hybrid" proposal that begins as mandatory but becomes nonmandatory at the later stages of the bargaining process.

The Association's argument would also have implications for other contract provisions. The major premise of the Association's argument is that in interest arbitration, the losing party does not "agree" to the terms of the contract. If we were to apply this premise to other subjects, a number of basic contract provisions currently deemed mandatory for bargaining would become prohibited in interest arbitration. For example, this Board can compel a party to proceed to grievance arbitration, and we can enforce a grievance arbitration award, only if "the parties have *agreed* to accept such awards as final and binding." ORS 243.672(1)(g) (emphasis added). Similarly, a "fair share" provision requires an "agreement" between the employer and the exclusive representative. ORS 243.650(10).

If we were to accept the Association's argument that an interest arbitration award does not constitute an agreement, we would be compelled by the plain words of the statute to further conclude that we could not enforce grievance arbitration and fair share provisions if they entered the contract through the interest arbitration process. We find nothing in the text of the PECBA, its legislative history, or its policy underpinnings that would support such a conclusion.

We adhere to our earlier decisions that a zipper clause proposal concerns a mandatory subject for bargaining. Inclusion of such a clause in an interest arbitration award is lawful, and an award that contains such a clause is enforceable.

We will dismiss this portion of the complaint.

#### ***COUNTY IMPLEMENTATION OF INTEREST ARBITRATION AWARD***

The Association's next claim is derivative of its earlier one. It asserts that the County acted unlawfully by implementing an interest arbitration award that is unenforceable because it contains an illegal zipper clause. We concluded that the zipper clause was not illegal and that the award is enforceable. It follows that the County's implementation of a collective bargaining agreement that contained the County's zipper proposal, as awarded in interest arbitration, did not violate ORS 243.672(1)(e). We will dismiss this portion of the complaint.

#### ***PARTIAL IMPLEMENTATION***

The Association next alleges that the County implemented part of the contract but unlawfully delayed implementing the wage increase awarded by the interest arbitrator. The County answers that the award itself—reflecting one of the proposals in the County's

LBO—required the parties to sign the new collective bargaining agreement before paying the wage increase.

For *strike-permitted* bargaining units, ORS 243.712(2)(d) provides that, at the conclusion of negotiations, a public employer “may implement all or part of its final offer \* \* \*.”<sup>7</sup> For *strike-prohibited* bargaining units that conclude bargaining in interest arbitration, the legislature has not authorized partial implementation of the resulting interest arbitration award. We need not decide here whether such a partial implementation would be unlawful because, on these facts, we conclude that the County’s implementation was not partial.

The wage proposal awarded by the interest arbitrator specifically stated that the wage increase would be “effective the first pay period *following signing of this agreement.*” (Emphasis added). It further stated that the County would pay retroactive raises and retroactive overtime payments “*within 60 days of signing.*” (Emphasis added.) By withholding the wage increases and the retroactive payments until after the parties signed the agreement, the County was merely implementing the provisions as written. Indeed, the County may have violated the provisions of the award if it acted as the Association urges and made the payments before the parties signed the agreement.

We will dismiss this portion of the complaint.

#### ***IMPLEMENTATION OF AWARD WITHOUT ASSOCIATION REVIEW OR APPROVAL***

The parties’ tentative agreements and the terms of the interest arbitration award constitute the parties’ collective bargaining agreement without the need for ratification by either party. *Marion County v. Marion County Law Enforcement Association*, 14 PECBR at 923-924. The Association alleges that the County did not provide the Association with an opportunity to review the new collective bargaining agreement before the County implemented it.

A public employer that implements a collective bargaining agreement arising out of interest arbitration without conferring with the exclusive representative does so at its peril: the exclusive representative can file an unfair labor practice complaint alleging that the implemented terms do not accurately reflect the interest arbitration award, and that the implementation therefore was unlawful.

The Association asserts that the implementation was inaccurate in two ways: (1) it included an unlawful zipper clause, and (2) it unjustifiably withheld wage increases and retroactive pay. We rejected both of those contentions above. The implemented terms are not

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<sup>7</sup>Prior to the 1995 amendments to the PECBA, this Board held that a public employer did not violate ORS 243.672(1)(e) by implementing only parts of its final offer. *Roseburg Education Association v. Roseburg School District*, Case No. UP-26-85, 8 PECBR 7938, 7958 (1985).

inaccurate in the manner the Association alleges. The County did not act unlawfully in implementing those terms. We will dismiss this portion of the complaint.

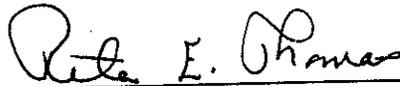
**CIVIL PENALTY**

The County asserted that the complaint was frivolous and requested this Board to order the Association to pay a civil penalty. The complaint raised several novel issues, and the ALJ found in favor of the Association. Although we ultimately dismissed the complaint, we do not find that it was frivolous. We deny the County's request.

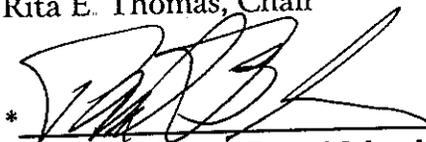
ORDER

1. The complaint is dismissed.
2. The County's request that this Board order the Association to pay a civil penalty is denied.

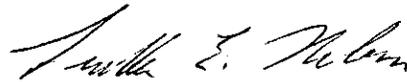
DATED this 19<sup>th</sup> day of March 2004.



Rita E. Thomas, Chair



\* Paul B. Gamson, Board Member



Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Board Member Gamson Concurring:

The majority has put the cart before the horse; the wedding before the marriage proposal; the pong before the ping. Its analysis is backwards. The majority issues a decision on the merits of the complaint without first determining whether the Association had waived its right to receive a decision on the merits. Under a proper analysis, the Association waived its right to a decision on one of its claims. The majority erred in deciding it

Logic dictates that before this Board decides an issue, we must first determine whether that issue is properly presented to us for decision. We typically follow this logical order

of analysis. For example, we ask first if a claim is filed within the statute of limitations. If not, we dismiss the case without considering the merits.<sup>1</sup> Similarly, if a claim is moot, we dismiss it without deciding the merits.<sup>2</sup> More pertinent to this case, we decline to decide the merits of a case where the complaining party has waived its right to proceed.<sup>3</sup>

The majority skipped over the waiver issue and proceeded directly to the merits. It offers no justification for this analytical shortcut. Even though it would not change the outcome in this case, I believe such an abbreviated analysis does a disservice to parties and practitioners. This Board's decisions do more than decide the specific case before us. We are a precedent-based body. Our decisions also provide guidance for future actions. A full analysis would allow public employers and their employees to proceed with confidence the next time a similar issue arises. This would decrease litigation and promote stability in the workplace. I write separately with my analysis of the waiver issue to further these worthwhile goals.

### BACKGROUND

The Association alleges that the County unlawfully pursued a proposal on a prohibited subject—a zipper clause—in its LBO. It further alleges that the interest arbitration award is unenforceable because it contains the allegedly unlawful zipper clause.

The Association never refused to bargain over the zipper clause. The first issue this Board should consider is whether the Association thereby waived its right to challenge the zipper clause. This Board has not previously provided a comprehensive review of the waiver issue in the final stages of interest arbitration. I do so below.

I conclude that the Association waived its right to object to the zipper clause in the LBO. The majority should have dismissed the claim without considering its merits. The majority instead dismissed the claim on its merits. I thus reach the same conclusion as the majority (dismissal of the charge), but for entirely different reasons.

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<sup>1</sup>See *Robert Ortez v. Washington County*, Case No. UP-121-93, 14 PECBR 919 (1993) (dismissing complaint as untimely without reaching the merits of the claim); *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17 (1996), *adhered to on reconsideration* 17 PECBR 75 (1997) (same); *DCTU v. Portland School District No. 1*, Case No. UP-42-02, 20 PECBR 82 (2002) (same).

<sup>2</sup>See *Oregon Administrative Services Dept. v. OPEU*, Case No. UP-78-95, 17 PECBR 399 (1997) (dismissing case as moot without deciding the merits); *Portland Association of Teachers v. Portland School District No. 1*, 94 Or App 215, 764 P2d 965 (1988) (same).

<sup>3</sup>See *Tualatin Valley Bargaining Council v. Tigard School District 23J*, Case No. UP-120-87, 11 PECBR 42, *adhered to on reconsideration*, 11 PECBR 53 (1988) (dismissing case on grounds claim was waived, without deciding the merits).

I further conclude that there was no waiver of the challenge to the zipper clause in the interest arbitration award. The majority opinion properly considered the merits of this claim. I join the decision that the zipper clause is mandatory for bargaining. This charge was properly dismissed.

## ANALYSIS

### I. OVERVIEW

As a general rule, it is not unlawful for a party to make a proposal that concerns either a permissive or prohibited subject for bargaining. A party acts unlawfully only when it makes such a proposal a condition of agreement *over the other party's objection*. *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9486 (1987). A party that fails to make an adequate<sup>4</sup> and timely<sup>5</sup> objection waives its right to challenge the other party's pursuit of an allegedly permissive or prohibited proposal.

### II. INCLUSION OF NONMANDATORY SUBJECTS IN AN LBO

We apply the same general rules to the pursuit of an issue in interest arbitration. Submission of a nonmandatory proposal to interest arbitration (*i.e.*, including it in an LBO) over the other party's objection constitutes bad faith bargaining. *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 460-461 (1990). A party waives the right to challenge such a submission unless it makes a timely and adequate objection. *Springfield Police Association v. City of Springfield*, Case Nos. UP-17/20-97, 17 PECBR 260, 276-277, *reconsid* 17 PECBR 319, *reconsid* 17 PECBR 368 (1997). The objection requirement applies to the submission of proposals concerning either permissive or prohibited subjects. *See Eugene School District No. 4J*, 9 PECBR at 9486. Stated differently, we will dismiss

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<sup>4</sup>To be adequate, an objection must *both* identify the proposal as nonmandatory *and* refuse to bargain over it. These requirements apply to claims that a proposal is permissive as well as to claims that a proposal is prohibited. *Eugene School District No. 4J*, 9 PECBR at 9486. An objection must be specific enough to apprise the other side of the nature of and basis for the objection. The level of specificity required in the notice will vary with the length and complexity of the article. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, Case No. C-61-78, 5 PECBR 2771, 2775-2776 (1980).

<sup>5</sup>To be timely, an objection must allow the proponent of the language sufficient time to either withdraw the proposal or to rewrite it to make it mandatory. *OPEU v. State*, Case No. UP-64-87, 10 PECBR 51, 68 (1987); *Lincoln County Education Association v. Lincoln County School District*, Case No. C-64-78, 4 PECBR 2519, 2526 (1979). In the interest arbitration context, notice must be given far enough in advance of the submission of LBOs to allow the proponent of the language a reasonable opportunity to exercise its options. *See* ORS 243.742(3) (LBOs must be submitted 14 days before the interest arbitration hearing, and they can be altered only during the 24-hour period after submission).

a party's complaint alleging that an LBO contains a prohibited or permissive subject unless the challenging party has preserved the claim of error by making a timely and adequate objection that gives the proponent of the language a fair opportunity to correct the error.

### III. INCLUSION OF NONMANDATORY SUBJECTS IN AN INTEREST ARBITRATION AWARD

If the interest arbitrator subsequently chooses the package that contains the allegedly nonmandatory proposal, we are faced not only with an issue regarding the legality of the submission of the proposal, but also with the further issue of whether to enforce an interest arbitration award that contains it. The question is whether a party must make a timely and adequate objection in order to preserve its right to challenge the enforceability of an interest arbitration award on grounds that it contains a nonmandatory subject. The answer depends on whether the offending proposal is alleged to be permissive or prohibited.

#### A. Permissive Items in an Interest Arbitration Award

Parties can agree to include permissive items in their contract, and we will enforce such provisions. *Coos Association of Deputy Sheriffs v. Coos County Board of Commissioners*, Case No. C-261-80, 6 PECBR 4626, 4633, n. 4 (1981). Failure to make a timely and adequate objection waives the right to challenge an interest arbitration award on grounds that it contains a permissive subject. *IAFF, Local 696 v. City of Astoria*, Case No. C-72-84, 8 PECBR 6604, 6608 (1984).

This Board reached a different result in *Springfield Police Association v. City of Springfield*, 17 PECBR 260, 319, 368. There, we refused to enforce an interest arbitration award that included a permissive item, even though the party challenging the award failed to make a timely and adequate objection. This holding is out of step with the history, policy, and text of the PECBA. This Board should take the first available opportunity to overrule that portion of the *City of Springfield*.<sup>6</sup>

The better rule is that a party waives its right to challenge an interest arbitration award on grounds that it contains a permissive subject unless the challenging party makes a timely and adequate objection to the proposal. We should not decide whether an interest arbitration award includes a permissive subject unless the challenging party preserved its claim of error by meeting the objection requirements. This rule would give parties a fair opportunity to correct any problems in their proposals, and it could eliminate the time and expense of conducting a second interest arbitration proceeding.

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<sup>6</sup>I would disavow only the portion of *City of Springfield* that refused to enforce an interest arbitration award that contains a permissive subject even though the challenging party failed to make a timely and adequate objection. I would adhere to all other portions of the decision.

Our reasoning in the *City of Springfield* was faulty. We concluded that Senate Bill 750 (SB 750) required the result. A closer examination of the statute reveals that it contains no such requirement.

The statute, as amended by Senate Bill 750 (SB 750), states that “unresolved mandatory subjects submitted to the arbitrator in the parties’ last best offer packages shall be decided by the arbitrator.” ORS 243.746(4). In *City of Springfield*, we interpreted this language to mean that “an interest arbitrator may *only* issue a final and binding award concerning mandatory subjects of bargaining” 17 PECBR at 279 (emphasis added). Inclusion of the word “only” in this interpretation resulted in a decision that the arbitrator lacked authority to decide a nonmandatory subject, even if there was no proper objection.

The problem, of course, is that the word “only” is not in the statute and is not reasonably derived from its context. The statute says the arbitrator “shall” decide “unresolved mandatory subjects.” It does *not* say the arbitrator may resolve “only” unresolved mandatory subjects, nor does it say the arbitrator is prohibited from resolving any other issue (*i.e.*, unresolved nonmandatory subjects) submitted by the parties.

We may neither omit anything from, nor add anything to, the words of the statute. *Simpson Timber Co. v. Dept. of Revenue*, 326 Or 370, 374, 953 P2d 366 (1998); ORS 174.010. This Board ignored this admonition in *City of Springfield*. It added the word “only” to the statute. The statute’s plain text does not support this Board’s conclusion. Properly read, the statute *requires* an interest arbitrator to decide “unresolved mandatory subjects” presented by the parties, but it does not foreclose the arbitrator from deciding other issues presented by the parties. This Board plainly erred in *City of Springfield* when we concluded otherwise.

I also reviewed the legislative history of the change. I found nothing to indicate that the legislature intended to overturn our long-standing rule—in place since at least the *City of Astoria* decision in 1984—that a party waives its right to challenge an interest arbitration on grounds that it contains a permissive subject, unless the party raises a timely and adequate objection. We should not entertain an allegation that an award contains a permissive subject unless we first conclude that the challenger has properly preserved the question.

This rule is appropriate because it helps accomplish the intended purposes of interest arbitration. The legislature directed us to “liberally construe[]” the interest arbitration provisions so that they provide an “expeditious, effective and binding procedure for the resolution of labor disputes \* \* \*.” ORS 243.742(1). These goals are promoted by requiring a party to give timely and adequate notice if it believes the other side has made a proposal which, if awarded by the interest arbitrator, would render the arbitration award unenforceable. This rule gives the proponent of the language an opportunity fix any problems and thereby insure that the resulting arbitration award will be binding. It also increases the effectiveness of the process by making it less likely that a second interest arbitration will be necessary. Fairness and equity do not allow a party to remain silent in the face of a potentially fatal error in the proceedings and then attempt to use that error as its basis for seeking a second bite of the apple.

if it loses. Such "sandbagging" is contrary to the purposes underlying binding interest arbitration, and it is repugnant to the obligation of good faith that permeates all negotiations that occur under the PECBA.<sup>7</sup>

B. Prohibited Items in an Interest Arbitration Award

An interest arbitration award that contains a prohibited subject for bargaining raises different concerns. A prohibited subject is one that would require a party to violate the law or public policy *Eugene Police Employees' Association v. City of Eugene*, affirmed 157 Or App 341, 972 P2d 1191 (1998), *rev denied* 328 Or 418, 987 P2d 511 (1999). We will not enforce a prohibited provision in a contract. That is, we will not enforce a contract provision that requires a party to violate the law or public policy. This is true regardless of whether the challenging party gives timely notice of its view that the proposal is prohibited. Indeed, this Board has refused to enforce a contract provision concerning a prohibited subject even when the parties mutually agreed to include the provision in their agreement. *See Petition For a Declaratory Ruling Filed by the City of Portland*, Case No. DR-4-85, 8 PECBR 8115, 8121-8122 (1985).

The same rules apply to interest arbitration. A party does not need to object in order to preserve its right to challenge the inclusion of a prohibited subject in an interest arbitration award. *City of Astoria*, 8 PECBR at 6609.

A contrary holding would have the potential to create and enforce an unlawful contract. The interest arbitration award forms part of the parties' contract. If we were to find that a party waived its right to challenge a prohibited subject in the award, we might end up enforcing an agreement that contains an unlawful provision. This Board will not require the parties to violate the law.

I add a cautionary note. Even though raising an objection is not legally required, it continues to be the preferred practice. A timely objection will give the proponent of the language a fair opportunity to correct any errors. It may avoid the need for this Board to overturn an interest arbitration award and order the process to be repeated. A party that fails to timely reveal its position that a proposal concerns a prohibited subject for bargaining, and later raises a challenge on that basis, may be guilty of bad faith under ORS 243.672(1)(e) or (2)(b). In addition, if we cannot enforce the arbitration award, we may assess the cost of a second arbitration proceeding against a party that failed to make a timely and adequate objection.

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<sup>7</sup>I also note that we awarded a remedy in *City of Springfield* (overturning an interest arbitration award) without first finding that a party committed an unfair labor practice. This Board does not typically grant relief unless we first determine that a party engaged in some wrongdoing. *See* ORS 243.676(2).

V.

## APPLICATION TO THIS CASE

I apply these rules to the Association's complaint. It first asserts that the County bargained in bad faith by including an allegedly prohibited subject (zipper clause) in its LBO. The Association did not refuse to bargain over the proposal. The majority should have dismissed this claim because it was not properly preserved. It instead dismissed the claim on its merits. I concur with the majority because it reached the right result (dismissal of the claim), even though it did so for the wrong reasons.

The Association's second claim challenges the enforceability of the interest arbitration award because it contains the County's zipper clause proposal, an allegedly prohibited subject for bargaining. No objection is needed to preserve a claim that an interest arbitration award contains a prohibited subject. The Association is entitled to a decision on the merits of this claim. On the merits, for the reasons described in the majority opinion, the zipper clause is not a prohibited subject for bargaining.