

EMPLOYMENT RELATIONS BOARD
OF THE

STATE OF OREGON

Case No. UP-38-03

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY)	
EMPLOYEES ASSOCIATION,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW
)	AND ORDER
CLACKAMAS COUNTY,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on March 2, 2004, on Complainants's objections to a recommended order issued by Administrative Law Judge (ALJ) William Greer on December 31, 2003, following a hearing on November 10, 2003, in Oregon City, Oregon. The hearing closed on December 2, 2003, upon receipt of the parties' post hearing briefs.

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Complainant.

Susie L. Huva, Assistant County Counsel, Clackamas County, 906 Main Street, Oregon City, Oregon 97045-1881, represented Respondent.

Brian M. Thompson, Attorney at Law, Hutchinson Cox, 200 Forum Building, 777 High Street, Eugene, Oregon 97401-2782, represented *amicus* Workforce Investment Council of Clackamas County in proceedings before the ALJ. He did not appear before this Board.

Clackamas County Employees' Association (Association) filed this unfair labor practice complaint on July 11, 2003, alleging that Clackamas County (County) violated ORS 243.672(1)(e) by refusing to bargain over a decision about who would perform certain bargaining unit work. The ALJ investigated and scheduled the complaint for hearing. On September 26, the County filed an answer denying the allegations in the complaint and asserting three affirmative defenses.

The issues are:

(1) Did the County violate ORS 243.672(1)(e) by refusing to bargain over a decision regarding whether Association bargaining unit employees will continue to perform certain work?

(2) Is County payment of a civil penalty appropriate?

This dispute involves the elimination of the jobs held by 18 bargaining unit employees. The Association established that the County had some involvement in a process that resulted in the layoff of bargaining unit personnel who had been performing the subject work.

The County has the burden of proving its affirmative defense that it had no duty to bargain over the decision that led to that layoff. We conclude that the County met its burden by proving it had no control over the decision and no authority to countermand it. We therefore dismiss the complaint.

RULINGS

1. The Oregon Workforce Investment Council of Clackamas County, Inc. (WICCO) contracts with the County for the services at issue here. On September 26, 2003, WICCO filed a motion to intervene. On October 2, the Association filed an objection to WICCO's motion.

On October 7, the ALJ properly denied WICCO's motion. WICCO is neither a public employer nor a labor organization under the Public Employee Collective Bargaining Act (PECBA).

The ALJ properly granted WICCO the opportunity to file an *amicus* brief at the time that the parties submitted their post-hearing briefs. Compare *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90, 12 PECBR

693, *reconsidered* 12 PECBR 727 (1991). WICCO submitted a timely *amicus* brief, which has been considered.

2. The County stated an intention to call Judi Fisher, whom described as an expert in the administration of a federal law involved in this case. The Association opposed that testimony. The ALJ properly disallowed the testimony. *Portland Association of Teachers and Hanna v. Portland School District*, Case No. UP-64-99, 18 PECBR 816 (2000), *AWOP* 178 Or App 634, 39 P3d 292, 293, *rev den* 334 Or 121, 47 P3d 484 (2002). The ALJ properly took notice of the statutes and regulations that are involved in this case.

3. The ALJ's other rulings have been reviewed and were correct.

FINDINGS OF FACT¹

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of Clackamas County employees, including personnel employed by the County's Employment Training and Business Services Department (ETBS). The County is a public employer.

2. The Workforce Investment Act of 1998 (WIA), 29 USC § 2801, *et seq.*, authorizes various workforce training services. WICCO, an entity independent of the County, administers the WIA program in Clackamas County. The purpose of the WIA

“* * * is to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.” 29 USC § 2811.

3. WICCO is a “local workforce investment board” or a “local board” as defined in 29 USC § 2832 and ORS 660.327. The Clackamas County Commissioners constitute a “chief elected official” under state and federal law.

¹These findings of fact are based in part upon the stipulations of the parties and in part upon evidence introduced at hearing.

4. Under the WIA, workforce investment activities may include adult and dislocated worker training, and youth activities, among other things, *see* 29 USC § 2801(51). WICCO contracted with ETBS to provide various workforce training services under the WIA from 1998 to December 31, 2003. ETBS provided such services for many years prior to 1998, under the terms of federal laws that preceded the enactment of WIA.²

5. On November 30, 2000, in a letter to WICCO, the County stated that it would continue to allocate certain adult and dislocated worker services grant dollars to ETBS. According to the County, it served as the grant recipient, receiving and disbursing funds made available to the County under WIA. The County stated that it had made no policy decision to change the method of disbursing these funds, but noted that ETBS had a long history under the Job Training Partnership Act and would ensure continuity of service to adult and displaced workers.

6. WIA authorizes local boards such as WICCO to enter into agreements which describe the respective roles and responsibilities of the parties in rendering services under WIA. 20 CFR § 661.300(c). On February 14, 2002, the County and WICCO executed a Memorandum of Agreement (MOA) effective until June 30, 2005. The MOA provided in relevant part as follows:

"I INTENT OF AGREEMENT

"(A) To form an active partnership that is consistent with state and federal law between the [County] and [WICCO] that supports, oversees, and advocates for a workforce development system within the County.

"(B) To acknowledge the authorities and responsibilities of both parties as they are held individually and jointly.

* * * * *

"(D) To remain consistent and in compliance with the requirements of Title I, sec. 117(b) of the [WIA], and with the governing provisions of state law.

²The WIA's predecessor was the Job Training and Partnership Act. Under that statute, according to County witnesses, the County had a greater role in decision-making than under the WIA.

*"II AUTHORITIES AND RESPONSIBILITIES OF THE
[WICCO]*

" * * * **

*"(C) * * * [WICCO] will direct the County to disburse funds for workforce investment activities in a manner consistent with the budget, local, state and federal law.*

" * * * **

*"(F) The [WICCO] will submit an annual budget for Title I B funds for consideration by the [County]. * * *
* The [WICCO] budget will be considered by the [County] through the normal state mandated budget process.*

" * * * **

*"III. AUTHORITIES AND RESPONSIBILITIES OF THE
COUNTY OF CLACKAMAS*

*"(A) * * * The County shall disburse funds *on the direction of* [WICCO], in a manner consistent with the approved budget, so long as the direction does not violate a provision of the WIA. The County shall serve as the fiscal agent for all [WICCO] funds that are generated by or allocated to the [WICCO]. * * **

" * * * **

"(E) Other County administrative responsibilities and authorities include:

"1. The County shall serve as the contracting agent for [WICCO] for services to carry out the WIA program, as provided for in the approved [WICCO] budget. The contracts shall be between the County and the service provider,

and the procedures, exceptions, selection process and standards of the County purchasing process shall apply.

“* * * * *

“IV AUTHORITIES AND RESPONSIBILITIES HELD JOINTLY BY BOTH PARTIES

“* * * * *

“C. In the event the County and [WICCO] cannot agree on an issue *where their agreement is required* by this MOA or state or federal law, the County Administrator or designee and [WICCO] staff shall first attempt to resolve the disagreement. If a resolution is still not reached a representative of the [County] and [WICCO] shall meet and attempt to resolve the disagreement. If the matter is still unresolved, the County and [WICCO] shall submit the matter to the state, for their assistance in mediating a solution. After completing this process, if the matter is still unresolved, each party shall have recourse to any remedy provided by law.”(Emphasis added.)

7. The County and the Association were parties to a collective bargaining agreement that applies to bargaining unit personnel employed in ETBS. The contract was effective from July 1, 2000 through June 30, 2003, or the date the parties signed a subsequent contract.³

8. Pursuant to the MOA, the County has executed contracts, on behalf of WICCO, with various providers of WIA services. Some of these service providers have been non-County entities, including Clackamas Community College (CCC)

³29 USC § 2931(2) provides that a WIA program or activity “shall not impair an existing contract for services or collective bargaining agreement, and no such activity that would be inconsistent with the terms of a collective bargaining agreement shall be undertaken without the written concurrence of the labor organization and employer concerned.” Complainant does not contend that the County has breached the labor agreement in any way.

9. On April 10 2003, the County, at WICCO's request, issued a request for proposal (RFP) to providers for workforce investment services, specifically for adult and dislocated workers. WICCO developed the RFP with the assistance of a paid consultant who is familiar with WIA.

10. During the preceding eight months, WICCO had reviewed, defined and adopted a business service delivery model, identified service needs, adopted a budget to fund delivery of these services, and concluded a request for proposal process to select a vendor for delivery of these services. WICCO's new strategic plan identified moving to a Business Service model, changing how WICCO invests in Clackamas County workforce development, and framing the scope of work to be included in the RFP.

11. WICCO developed the standards by which applicants for the RFP would be judged. These standards were different than in the past. WICCO characterized the difference as shifting from a social service model with economic development benefits to an economic development model with social service benefits. Through its budget development process, WICCO determined the result to be achieved by the workforce delivery system in Clackamas County. This vision was expressed as a set of goals, which were to guide both budget decision and the development of the scope of work outlined in the RFP.

12. Prior to issuing the RFP, WICCO had sent out a Request for Qualification, to which five responses were received by March 31, 2003. Three agencies, including ETBS and CCC, qualified and were invited to submit responses to an RFP.

13. The contract form included in the RFP referred to the contracting entity as "WICCO/County." The RFP included the following provisions:

(a) The County Board of Commissioners, in awarding the contract, "will accept the proposal which in their estimation will best serve the interest of Clackamas County, and reserves the right to award the contract to the contractor whose proposal shall be best for the public good."

(b) The County's award of the contract "shall constitute a final decision of the County to award the contract if no written protest of the award is filed [by a RFP proposer] with the County Purchasing Manager within seven (7) calendar days of the award."

14. On April 22, during the pendency of the RFP process, the County wrote WICCO and stated: "* * * Clackamas County is extremely satisfied with the

comprehensive WIA services that ETBS provides to job seekers and businesses. * * * The County fully supports ETBS and is invested in their continued role as the WIA Adult and Dislocated Worker provider.”

15. On April 28, 2003, ETBS and CCC submitted proposals. At that time, ETBS was performing training services for adult and displaced workers.

16. While WICCO was considering these proposals, the Association wrote to the County, on May 6, 2003:

“I also demand to bargain over this proposal to consider other providers for these services, as this, in essence, is a proposal to contract out the jobs of many [Association bargaining unit] members. * * *”

17. On May 16, 2003, WICCO voted to award the contract to CCC and to begin negotiations with CCC. WICCO reviewed the RFP process, the recommendation from the RFP committee, and passed a motion “to approve [CCC] as the contract provider * * *.” Minutes of the meeting state: “Staff will begin negotiating the contract with CCC and will bring it to the WICCO Board for approval, with final approval by the Board of County Commissioners.” WICCO recognized the “great strength that ETBS brings to the table and supported the intention to have ETBS participate in the delivery of services.” WICCO also included the direction that an experienced service provider from Clackamas County provide these services. Finally, it authorized the WICCO to approve all subcontractors chosen by CCC.

18. In a May 27, 2003 meeting, the County Board of Commissioners considered WICCO’s vote. During that discussion, Cam Gilmore, Director of the County’s Department of Transportation and Development, stated the County Board of Commissioners could approve or not approve the contract. County Administrator Jon Mantay stated that the Board had the responsibility for the program with no authority to make the selection. He went on to state that if the Board did not support WICCO’s selection, there is a mediation process in the MOA. A worksheet prepared by WICCO on May 27 described options of the parties as follows:

“The Board of COUNTY Commissioners has the option to support the issuance of the Notice of the Intent to Award as recommended by WICCO or to return the recommendation to the WICCO thereby invoking paragraph C of section IV Authorities and Responsibilities Held Jointly by Both Parties,

in the Memorandum of Agreement between Clackamas County and [WICCO] which outlines how issues can be resolved if both parties must be in agreement.”

By all accounts, neither WICCO nor the County had received legal advice regarding the meaning of WIA at the time of these discussions. According to Mantay, legal counsel has since advised the County that the authority under WIA to select the provider rests exclusively with WICCO.

19. On May 29, WICCO submitted a memo to the County Board with additional information. In it, WICCO summarized the May 27 study session as follows:

“At [that] study session with the Board of County Commissioners, WICCO presented its recommendation to issue an “Intent to Award” notice to Clackamas Community College, (CCC) for the delivery of Adult and Dislocated Worker services. Although the Commissioners agreed to CCC being the prime contractor for services, questions arose concerning subcontractors, their role and transitioning issues. A decision was tabled until the questions could be answered and a continuation of the study session was scheduled for June 3, 2003 * * * .”

WICCO also included the names of the subcontractors CCC intended to use as part of its proposal, and noted that additional subcontractors would be named later, possibly including ETBS for core, case management and retention services.

WICCO recognized that the new service model was a major change, and planned to address the shift in delivery through contract negotiations with CCC and by approval of the subcontractors. It advised the County of specific funds which WICCO had set aside to fund the transition, and indicated that a lump sum contract to cover these costs would be executed in advance of transition activities commencing between WICCO and Clackamas County.

20. On June 3, 2003, the County Board of Commissioners held public meetings, including a resumption of the study session with WICCO representatives, to further discuss WICCO’s request that the County award CCC the contract. County representatives noted that the County had recently received a demand from the Association to bargain this decision. County Counsel indicated that the Association and the County were within the 150-day window for bargaining, which extended to November 11, 2003.

At the meeting, Association representative Smithers said that she was concerned about 18 people who would lose their jobs, and "will do whatever it takes to fight this." The County Board requested WICCO to extend the existing contracts with ETBS and CCC to provide adult and dislocated worker services through the end of the calendar year, rather than allowing those contracts to terminate by their own terms on June 30, 2003. WICCO agreed, and the County extended the contracts with ETBS and CCC from their original deadline of June 30, 2003 to December 31, 2003.

21. On June 4, 2003, the Association demanded that the County bargain the decision to award the adult and dislocated worker services contract to CCC. The demand was reiterated in a letter dated June 20, 2003.

22. The Association's first demand to bargain was made before WICCO reached a decision on its preferred service provider. Its second demand was made after the existing agreements with ETBS and CCC were extended from June 30 to December 31, 2003, and renewed several weeks later. According to the uncontradicted testimony of County witnesses, at none of these times had the County made the decision to award a service contract for adult and dislocated workers to CCC, WICCO's preferred service provider. Indeed, as of November 11, the date of hearing in this case, the County had not awarded this contract to CCC.

23. On June 25, 2003, the County offered to bargain the impact of the WICCO decision but refused to bargain WICCO's decision to award the contract to CCC. The Association did not respond to this offer.

24. Neither the County nor WICCO has invoked the dispute resolution procedure set forth at Article IV(1) of the MOA. The County position is that WICCO has the authority to identify and contract with WIA service providers.

25. The County issued notices to ETBS employees on November 25, 2003, stating that they were to be laid off effective January 15, 2004.

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 refused to bargain over a decision to have CCC personnel perform work that was previously performed by bargaining unit employees.

The Association alleges that the County violated ORS 243.672(1)(e) by refusing to bargain with the Association regarding a decision to have certain bargaining unit work performed by non-bargaining unit personnel. The Association argues that the County is responsible, at least in part, for a decision to move work from ETBS to another employer. In the Association's view, the County is either *a* decision maker or *the* decision maker, and it therefore has a duty to bargain with the Association about the decision to award the contract to CCC rather than ETBS.

The County answers that it had no control over the decision. WICCO, not the County, has the authority to designate the service provider who will perform the subject work. The County contends that its involvement in the process is simply ministerial and that, because it cannot veto WICCO's decision, it has no duty to bargain with the Association about WICCO's decision. The County further argues that at time of hearing, it had not made a final decision to award a contract to CCC.

Ordinarily, a public employer must bargain both the impact and the decision to contract out bargaining unit work. *OSEA v. Morrow County School District*, 16 PECBR 299, AWOP 142 Or App 595, 922 P2d 729, 730, *rev den* 324 Or 394, 927 P2d 599, 600 (1996); *School Employees Local Union 140, SEIU, v. Multnomah County School District No. 1*, Case No. UP-44-02, 20 PECBR 420 (2004).

However, a public employer is not required to bargain about decisions over which it has no control or which it cannot countermand. *Bend Firefighters Association v. City of Bend*, Case No. UP-55-95, 16 PECBR 378 (1996); *Oregon State Police Officers Association v. State of Oregon*, 127 Or App 144, 871 P2d 1018 (1994), *affirming* 14 PECBR 530 (1993); *OSPOA v. State of Oregon*, Case No. UP-79-88, 11 PECBR 332 (1989); *Federation of Oregon Parole and Probation Officers v. Dept. of Corrections*, 322 Or 215, 905 P2d 838 (1995), *affirming* 14 PECBR 739 (1993).

The Court in *Federation of Oregon Parole and Probation Officers (FOPPO)* considered facts similar to these. The case involved a third-party decision which resulted in the loss of jobs in an existing bargaining unit. There, FOPPO represented a unit of employees of the Oregon Department of Corrections (ODOC) which included parole and probation officers who supervised felons in Multnomah County. For its own reasons, the County decided to exercise its statutory authority under ORS 423.550 to provide probation services for felons. The statute required ODOC and the County to enter into an intergovernmental agreement regarding the transfer of the officers from state to county employment. When FOPPO learned that the County had exercised its statutory option, it demanded that ODOC bargain the decision and impact of the intergovernmental agreement. ODOC refused.

The Supreme Court ruled ODOC had no duty to bargain the County's decision to remove parole and probation work to its own jurisdiction, since ODOC could not countermand it. Once the decision was made, ODOC had a statutory duty to transfer affected parole and probation officers, and to enter into an intergovernmental agreement, the terms of which, insofar as wages and other benefits were concerned, were set by statute, ORS 423.550(1) and (2)(c). As to impact, the FOPPO-ODOC labor contract covered pre-transfer wages hours and working conditions, so no further bargaining was required; and as to post-transfer conditions, ODOC had no duty to bargain with FOPPO regarding County employees outside of the corrections bargaining unit.

FOPPO and the other cited cases require us to determine whether the County had control over, or the authority to countermand, the decision to select CCC, rather than ETBS, as the provider of training services. We conclude that the County had no control over the decision or authority to countermand it, and for that reason, the County had no obligation to bargain the decision.⁴

Resolution of this issue requires us to interpret portions of the Workforce Investment Act of 1998 (WIA), 29 USC § 2801, *et seq.* When construing a federal statute or regulation, Oregon courts follow the analytical method prescribed by the federal courts. *Hagan v. Gemstate Manufacturing, Inc.*, 328 Or 535, 545, 982 P2d 1108 (1999); *Perri v. Certified Languages International, LLC*, 187 Or App 76, 86, 66 P3d 531 (2003).

In federal courts, the starting point in construing a statute is the language itself. *Watt v. Alaska*, 451 US 259, 265 (1981); *Int'l Brotherhood of Teamsters v. Daniel*, 439 US 551, 558 (1979). The courts look at the ordinary meaning of statutory language. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 US 246, 252 (2004); *FMC Corp. v. Holliday*, 498 US 52, 57 (1990). Statutory construction is a "holistic endeavor," so the language should not be viewed in isolation. Context is important in the quest for a statute's meaning. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 US 72, 79 (1991). A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 US 365, 371 (1988). If the language in context is clear, that is the end of the

⁴We make no ruling on the County's duty to bargain the impact of WICCO's decision. The County offered to bargain the impacts of the decision to change service providers, but the Association never responded to the County's offer. The Association's failure to respond operated as a waiver of any rights it may have had in this regard. *See Tualatin Valley Bargaining Council v. Hillsboro Union High School District 3J*, Case No. UP-125-92, 14 PECBR 541 (1993) (union's failure to pursue bargaining waived its bargaining rights). The only question before us concerns decision bargaining.

inquiry; only if an ambiguity remains do the courts look to outside sources such as legislative history. *West Virginia Univ. Hosps., Inc. v. Casey*, 499 US 83, 98-99 (1991); *Int'l Ass'n of Machinists v. BF Goodrich*, 387 F3d 1046, 1051-1052 (9th Cir. 2004).⁵

A brief review of the structure of WIA is essential to understanding this dispute.⁶ WIA is an extensive statutory scheme whose purpose is

“* * * to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.” 29 USC § 2811.

This dispute centers on the portion of the statute that establishes “local workforce investment boards” in each local area of a state. These boards set policy for the workforce investment system within their area. 29 USC § 2832(a). WICCO is the local board in the Clackamas County area. The County selects the members of WICCO. 29 USC § 2832(b)(1) and (c)(1)(A).⁷

The local board must work “in partnership with the chief elected official for the local area” to develop a plan to carry out the statute, and submit that plan to the Governor. 29 USC § 2832(d)(1). The parties agree that the chief elected official under the statute is the Clackamas County Board of Commissioners.

WIA generally prohibits the local board (WICCO) from providing training services itself. *See generally* 29 USC § 2832(f)(1)(A) and (f)(2). It therefore contracts with service providers in the area.

⁵This analytical framework for *federal* statutes is quite similar to the first two steps used to interpret *state* statutes. *Compare PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) *with* the federal cases cited above.

⁶The U.S. Department of Labor has described the background and operation of WIA: Federal Register: August 11, 2000 (Volume 65, Number 156) at 49293. (See also the Federal Register Online via GPO Access www.access.gpo.gov; DOCID:fr11au00-7.)

⁷The local board must include, at a minimum, representatives from local business, local educational entities, labor organizations, community organizations, economic development agencies, and one-stop partners. 29 USC § 2832(b)(2)(A).

ETBS, a department of the County, has received money through a contract to provide training services under WIA since 1998, and it had provided similar services for many years under the law that preceded WIA.⁸ In May 2003, WICCO voted to award CCC the work that had been performed by ETBS. The County issued notice to the ETBS employees that they would be laid off. The Association, on behalf of the ETBS employees, demanded to bargain with the County over the decision to contract out bargaining unit work.

We turn now to the crux of this dispute. The County does not seriously dispute that in general, it must bargain over a decision to transfer bargaining unit work. Here, however, the County asserts it had no obligation to bargain because it had no control over the decision or authority to countermand it. The issue is whether the County had any control or authority over awarding the contract for training services previously performed by ETBS.

We begin, as we must, with the language of the statute. The pertinent provision is 29 USC § 2832(d)(2) which deals with the selection of service providers for various WIA programs. It states:⁹

“(2) Selection of operators and providers.

“(A) Selection of one-stop operators. Consistent with section 2841(d) of this title, *the local board, with the agreement of the chief elected official* — (i) shall designate or certify one-stop operators as described in section 2841(d)(2)(A) of this title; and (ii) may terminate for cause the eligibility of such operators.

“(B) Selection of youth providers. Consistent with section 2843 of this title, *the local board shall identify* eligible providers of youth activities in the local area *by awarding grants or contracts* on a competitive basis, based on the recommendations of the youth council.

⁸WIA superseded the Joint Partnership and Training Act (JTPA). *Midwest Farmworker Empl. & Training, Inc. v. US Dep't of Labor*, 200 F3d 1198, 1200, n. 1 (8th Cir. 2000).

⁹For definitions and descriptions of the various types of services and service providers, see 29 USC § 2801.

“(C) Identification of eligible providers of training services. Consistent with section 2842 of this title, the local board shall *identify* eligible providers of training services described in section 2864(d)(4) of this title in the local area.

“(D) Identification of eligible providers of intensive services. If the one-stop operator does not provide intensive services in a local area, the local board shall *identify* eligible providers of intensive services described in section 2864(d)(3) of this title in the local area by *awarding contracts*.”¹⁰ (Emphasis added.)

The contract at issue is to provide “training services.” The selection of providers of such services is addressed in subsection (C). It states that the local board (WICCO) shall “identify” eligible providers of training services. We must determine the extent of WICCO’s authority under this provision.

The dictionary unhelpfully defines “identify” in the relevant sense to mean “to establish the identity of.” *Webster’s Third New International Dictionary* 1123 (Unabridged 1971).¹¹ By itself, this sheds little light on the roles of WICCO and the County in awarding contracts.

We also look to the context of the words to help establish their meaning. Context includes other portions of the same statute. As quoted above, the providers of the various kinds of services under WIA are selected in a variety of ways. Under subsection (A), the local board (WICCO), with the agreement of the chief elected official (the County), “designate” one-stop operators. Under subsection (B), WICCO must “identify” providers of youth activities “by awarding grants or contracts * * *.” Under subsection (C), as discussed, WICCO must “identify” eligible providers of training services. Under subsection (D), WICCO must “identify” providers of intensive services “by awarding contracts.”

The Association correctly observes that two of these sections expressly authorize WICCO to award contracts, whereas the section at issue here does not.

¹⁰Oregon has adopted a statute similar to and consistent with this section of the WIA. ORS 660.327

¹¹See *Engine Mfrs. Ass’n*, 541 US at 253 (relying on dictionary definition to determine the ordinary meaning of a term used in a federal statute).

According to the Association, this demonstrates that Congress knew how to authorize a local board such as WICCO to award contracts, and the absence of this specific authorization in subsection (C) shows that Congress did not intend WICCO to have authority to award contracts for training services.¹² We disagree.

Under subsection (C), the portion of the statute which is at issue here, Congress directed WICCO to “identify” providers of training services. The statute does not specify how this identification process is to occur. In context, it is clear that Congress intended the awarding of a contract to be *one* permissible method of identifying a service provider. Thus, in subsection (B), a local board must “identify” providers of youth activities “*by awarding grants or contracts * * **” Similarly, in subsection (D), a local board must “identify” providers of intensive services “*by awarding contracts.*” In contrast, subsection (C) does not limit WICCO to any specific method—such as awarding a contract—for identifying providers of service training. WICCO is free to “identify” service training providers in any of the myriad of ways an identification can occur. This includes the award of a contract, but unlike the other sections, the award of a contract is not the exclusive or prescribed method.¹³

Here, WICCO chose to identify CCC as the service provider by awarding it a contract. We conclude that under WIA, WICCO had the right to do so.

¹²When Congress includes language in one section of a statute but omits it in another section of the same statute, the presumption is that Congress did so intentionally. *Gozlon-Peretz v. United States*, 498 US 395, 404 (1991). This rule of construction applies here, but not in the way the Association asserts. The omission means that in identifying a provider of training services, WICCO is not subject to the limitation, found in other sections of the statute, that identification of a service provider can be accomplished *only* by awarding a contract.

¹³An example may clarify. Suppose a company wants two of its executives to attend an out-of-town conference. It tells one executive to travel to the conference by air; it tells the second to travel to the conference, without any instructions on the mode of travel. If we apply the Association’s analysis, the second executive would be prohibited from traveling by air because the first executive was directed to use that means of travel, but that direction was omitted in the travel instructions to the second. The more natural and obvious reading is that the first executive is limited to travel by air; the second executive is not subject to that limit, and could travel by air or any other type of transportation. The same is true here. Local boards acting under subsections (B) or (D) can “identify” service providers *only* by awarding a contract. Under subsection (C), the provision at issue here, the local board is not subject to that limitation. It can identify a provider in the manner it sees fit, including by awarding a contract.

The Association also asserts that even if WICCO had authority to award the contract to CCC, it could only do so with the agreement of the County. The language of the statute does not support this assertion. Other portions of WIA specifically require the local board (WICCO) to get the approval of local government (the County) to act. For example, the designation of a one-stop operator must be by “the local board [WICCO], with the agreement of the chief elected official [the County],” 29 USC § 2832(d)(2)(A); a local board must work “in partnership” with the chief elected official for the local area to develop a local plan, 29 USC § 2832(d)(1); a local board must develop a budget that is “subject to the approval” of the chief elected official, 29 USC § 2832(d)(3)(A); and a local board must act “in partnership” with the chief elected official in conducting oversight of specified programs, 29 USC § 2832(d)(4).

Congress did not include similar language that required WICCO to obtain the County’s approval or agreement, or to act in partnership with the County, when awarding a contract for training services under 29 USC § 2832(d)(2)(C). When Congress includes language in one section of a statute but omits it in another section of the same statute, the presumption is that Congress did so intentionally. *Gozlon-Peretz v. United States*, 498 US 395, 404 (1991). Omission in subsection (C) of language found in other sections of the same statute demonstrates that Congress did not intend to require local boards such as WICCO to get the approval, agreement, or cooperation of the County in awarding contracts for training services. This Board will not add language to a statute that Congress has chosen to omit. We conclude that under WIA, the County had no role in the decision to award the training services contract to CCC.

The Association next asserts that even if the County could not directly select the provider or participate in the selection process, the County nevertheless had means at its disposal to influence or countermand WICCO’s selection.

The Association first argues that the County has control over WICCO’s budget and WICCO’s proposed expenditure of funds for the contract with CCC. According to the Association, the County could have vetoed payments to any provider except ETBS, and in this way effectively control the selection process. It is true that the County was the fiscal agent for WICCO and retained certain oversight of the WICCO budget. However, the County’s authority in this regard does not extend as far as the Association suggests. WICCO directs the County on how to disburse funds. The County must comply with WICCO’s direction so long as it does not violate WIA. Other than the claim that the County was denied its right to participate in the selection process—a claim which we

reject—the Association has not alleged a misuse of funds or a violation of WIA. Absent such a showing, the County cannot veto payments to a properly selected provider.¹⁴

The Association also asserts that the County should have invoked the dispute resolution procedures in the MOA between WICCO and the County. We disagree. Those procedures apply only when the County and WICCO “cannot agree on an issue *where their agreement is required* by this MOA or state or federal law * * *.” (Emphasis added.) We have concluded that WICCO does not, by law or contract, need the County’s agreement to select a provider of training services for adult and dislocated workers. The dispute resolution procedure, by its own terms, does not apply in these circumstances.

Even if the procedure did apply, it does not result in a binding resolution of the dispute. It contains no mechanism by which the County could compel WICCO to change its selection of CCC as the service provider.

The Association also relies on the RFP process to establish the County’s control over the selection process. The MOA provides: “The County shall serve as the contracting agent for [WICCO] for services to carry out the WIA program, as provided for in the approved [WICCO] budget. The contracts shall be between the County and the service provider, and *the procedures, exceptions, selection process and standards of the County purchasing process shall apply.*” (Emphasis added.)

The Association notes that the RFP for the subject work stated that the County Commissioners, in awarding the contract, “will accept the proposal which *in their estimation* will best serve the interest of Clackamas County, and reserves the right to award the contract to the contractor whose proposal shall be best for the public good.” (Emphasis added.) The Association also observes that, in a letter to WICCO, the County stated that it favored retaining ETBS as the service provider. The Association argues that, because

¹⁴Although the actions of WICCO and the County under the MOA are not prescriptive of the County’s duty to bargain under the PECBA, their actions are consistent with our interpretation of the WIA. When this dispute arose, WICCO had complied with the requirements of the state plan as required by WIA. It developed new standards for evaluating proposals from service providers; it established budgets for programs, determined which providers were qualified to bid under an RFP, and set the scope of the RFP; and it applied these standards to evaluate the proposals from ETBS and CCC.

By contrast, the County’s participation had been limited to supplying budget services and furnishing staff, forms, and procedures for RFPs. Given the County’s limited participation, we find no support for the suggestion that the County somehow had authority to veto WICCO’s selection of CCC as service provider.

WICCO agreed to be bound by the County RFP process, the County's preference—not WICCO's selection—should control. In other words, in the Association's view, the County has the authority, through the budget process, to select—or veto WICCO's selection of—WIA service providers.

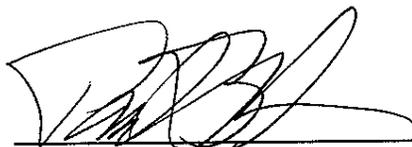
We reject that interpretation. The MOA agrees to adopt the County's *process*. We see no evidence that in doing so, WICCO intended to relinquish the *substantive* right to select a service provider. We also reject the Association's interpretation because it ignores the terms of the WIA that directly reserves to WICCO the authority to select the subject service provider.

We conclude that the County met its burden of proving that it did not have sole or joint authority over the decision to select CCC instead of ETBS as the service provider, and that it lacked authority to countermand WICCO's decision. For that reason, the County was not required to bargain with the Association about the decision. We will dismiss the complaint.¹⁵

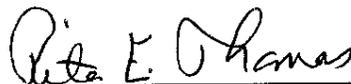
ORDER

The complaint is dismissed.

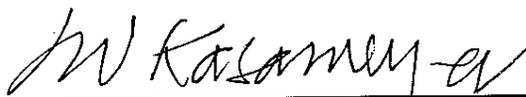
DATED this 29 day of April 2005.



Paul B. Gamson, Chair



Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482

¹⁵Because the County did not violate ORS 243.672(1)(e) as alleged, the Association's request for a civil penalty is denied.

