

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-38/41-08

(UNFAIR LABOR PRACTICE)

EUGENE POLICE EMPLOYEES' ASSOCIATION,)	
)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
CITY OF EUGENE,)	AND ORDER
)	
Respondent.)	
_____)	

On August 26, 2009, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on June 29, 2009, following a hearing on February 18 and 19, 2009, in Eugene, Oregon. The record closed on May 5, 2009, following the receipt of the parties' supplemental briefs.

Becky Gallagher, Attorney at Law, Garrettson Gallagher Fenrich & Makler, Eugene, Oregon, represented Complainant.

Mark P. Amberg, Attorney at Law, Harrang Long Gary Rudnick, Eugene, Oregon, represented Respondent.

On October 14, 2008, the Eugene Police Employees' Association (Association) filed an unfair labor practice complaint against the City of Eugene (City) (Case No. UP-38-08) which alleges that the City violated ORS 243.672(1)(e), (f), and (g) when it proposed a ballot measure to expand the role of the police auditor in investigations of Association-represented police officers.

On October 27, 2008, the Association filed a second unfair labor practice complaint against the City (Case No. UP-41-08). As amended, the complaint alleges that the City violated ORS 243.672(1)(e) and (g) when it directed the police chief to allow the auditor to participate in internal affairs interviews contrary to the terms of the parties' collective bargaining agreement and memorandum of understanding and without providing notice of or bargaining the change.

The City filed timely answers. The cases were consolidated for hearing and decision.

The issues are:

Case No. UP-38-08

1. Did the City violate ORS 243.672(1)(e) by unilaterally changing the *status quo* regarding the role of the police auditor while the parties were in the process of negotiating a collective bargaining agreement?
2. Did the City violate ORS 243.672(1)(e) when, on the day it participated in collective bargaining mediation with the Association, it directed the City manager to prepare a ballot measure to authorize the police auditor's participation in investigatory interviews?
3. Did the City violate ORS 243.672(1)(f) by failing to notify the Association of the referral of Ballot Measure 20-146 and failing to bargain over the referral prior to submitting the ballot measure to the electorate, as required under ORS 243.698?
4. Did the City violate ORS 243.672(1)(g) by expanding the role of the police auditor in a manner that violated the parties' memorandum of understanding concerning police auditor protocols?

Case No. UP-41-08

1. Did the City violate ORS 243.672(1)(e) by making a unilateral change in a mandatory subject or a permissive subject with mandatory impacts when it took action on or about October 15, 2008, to permit the auditor's office to participate in internal affairs interviews of Association members?
2. Did the City violate ORS 243.672(1)(e) by making a unilateral change in the protections under *Garrity v. New Jersey*¹ when it took action on or about

¹*Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

October 15, 2008, to permit the auditor's office to participate in internal affairs interviews of Association members?

3. Did the City violate ORS 243.672(1)(g) by expanding the role of the police auditor in a manner that violated Article 36.5 of the parties' collective bargaining agreement and the parties' memorandum of understanding regarding police auditor protocols?

4. Should a civil penalty be awarded against the City?

RULINGS

1. On February 3, 2009, the Association amended its Complaint in UP-41-08 to add a factual allegation regarding a January 13, 2009 memorandum of understanding entered into by the police chief and the police auditor. The City objected to the amendment. The ALJ appropriately exercised her discretion under OAR 115-035-0010(2) by allowing the amendment, which added relevant factual allegations concerning events that occurred after the service of the complaint. Any prejudice to the City caused by the late amendment was cured when the ALJ allowed the City an opportunity to amend its answer prior to the hearing.

2. Case Nos. UP-38-08 and UP-41-08 were consolidated for hearing and decision. During the hearing, the parties presented evidence that there were pending grievances regarding the subject matter raised in UP-41-08. Normally, this Board defers processing complaints filed under ORS 243.672(1)(g) pending resolution of the parties' grievance procedure under the exhaustion of contract remedies doctrine we adopted in *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978). In addition, this Board generally postpones processing ORS 243.672(1)(e) allegations which raise matters similar to those raised in pending grievances. *International Union of Operating Engineers, Local 701 v. City of Portland*, Case No. UP-50-96, 17 PECBR 385 (1997); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners*, Case No. C-183-82, 8 PECBR 6559, *recons*, 8 PECBR 6767, 6770 n 1 (1985). On this basis, the ALJ notified the parties that she proposed to defer processing the second complaint pending resolution of the parties' grievances.

The parties subsequently notified the ALJ that they had withdrawn the pending grievances and requested that this Board resolve all issues in both complaints. The City never raised nor pled the Association's failure to exhaust contract remedies as an affirmative defense. Accordingly, we will address the merits of the allegations in this complaint. *See Graduate Teaching Fellow Federation Local 3544, AFT, AFL-CIO v. Oregon University System (University of Oregon)*, Case No. UP-18-00, 19 PECBR 496, 504 n 6 (2001); *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, Case No. UP-18-97, 17 PECBR 515, 516, n 3, *recons*, 17 PECBR 579 (1998).

3. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of certain non-confidential and non-supervisory employees of the City's Police Department, including the classifications of police officer and agent. The City is a public employer.

2. In early 2004, the City convened a Police Commission to review the City's police department complaint process and look at other civilian police oversight models. The City convened the commission as a result of the highly publicized convictions of two police department employees for criminal misconduct while on duty, which resulted in a loss of public trust in the department.

3. Also in early 2004, the City contracted with the International City/County Managers Association (ICMA) and the Police Executive Research Forum (PERF) to audit a number of police department functions, including the department's complaint investigation process. The ICMA/PERF issued its report in June 2004. Sometime after the report was issued and prior to the implementation of the Police Auditor/Civilian Review Board (CRB) System, Police Chief Robert Lehner added an internal affairs (IA) sergeant position.

After this addition, IA conducted virtually all police department complaint investigations.² After IA investigated a complaint, it forwarded a recommended adjudication up the chain of command, with the police chief making the final decision. Before the police department implemented this procedure, the first-line supervisor normally conducted complaint investigations. Officers in the chain of command reviewed the supervisor's adjudication recommendation and collectively decided what to do with the complaint. The supervisor signed and delivered the final adjudication to the employee. On rare occasions, IA conducted investigations.

4. The City and the Association were parties to a collective bargaining agreement effective July 1, 2005 to June 30, 2008. During bargaining for this agreement, the parties were aware that a police commission was looking into the possible implementation of a police oversight system. As a result, the parties entered into a memorandum of understanding in which they identified contract articles that either

²The exact date on which Lehner implemented the IA investigation process is unclear. Interim Police Chief Kerns testified that the change occurred sometime after the issuance of the ICMA/PERF report and before the police department hired a police auditor.

party could reopen to bargain changes related to the implementation of such a system. The parties also agreed that the City would provide "the proposed model of review and changes in policy to the Association prior to implementation and further agrees that the parties will have the opportunity to discuss the proposals prior to implementation and negotiate any mandatory subjects of bargaining." Article 44.4 of the parties' 2005-08 agreement also provides that "[t]he agreement shall remain in full force and effect during the period of negotiations and any subsequent impasse proceeding."

5. In July 2005, the Police Commission recommended that the City adopt a Police Auditor/CRB System. The Commission recommended that the City council directly supervise the auditor. However, at that time, the City's charter limited the council's authority for involvement in the day-to-day supervision and direction of City employees.

6. In November 2005, voters adopted an amendment to the City's charter which authorized the City council to hire and supervise a police auditor and appoint the CRB. The charter also provided that

"(1) * * * the city council may authorize the auditor to: * * * (c) monitor the city's internal investigations, including but not limited to access to all evidence developed as part of the investigation and participation in investigative interviews related to such complaints, and require the city to undertake additional investigation."

7. In October 2006, the City hired Christina Beamud as the police auditor. After she was hired, Beamud was busy setting up an office, establishing the CRB and recruiting its members, and developing the auditor's operations. Soon after Beamud was hired, she reviewed a series of property trespass complaints and asked Officer Randy Ellis, an Association-represented employee, for assistance in understanding the complaints. Ellis met with Beamud to discuss the complaints and explained the property trespass system.

As a result of Beamud's meeting with Ellis, the Association filed a grievance. The Association understood that Beamud would not conduct any investigations until bargaining had concluded. At the request of Police Chief Lehner, Beamud agreed to limit her direct contact with bargaining unit employees. The Association and the City agreed to postpone arbitrating the grievance until the parties negotiated over the implementation of the Police Auditor/CRB System.

8. After the charter amendment was adopted, Association Attorney Rhonda Fenrich sent the City a demand to bargain over the ordinance which the City would be adopting to implement the Police Auditor/CRB System. City Attorney Sharon Rudnick

notified the Association that she believed that bargaining was premature, but the City was willing to bargain about policies and contract provisions after the City adopted an ordinance. The Association agreed to wait until after the City adopted an ordinance.

9. In December 2006, the City adopted Ordinance No. 20374, which established the Police Auditor/CRB System to “provide a system of independent oversight of the police complaint process.” The ordinance provided that the auditor would “[r]eceive and process complaints concerning police employees and monitor the complaint investigation and review process as set forth in sections 2.456(1)³ and (2).” Section 2.456(2), which outlined the complaint process, states:

“(2) Complaint Investigations.

“(a) The police auditor shall actively monitor internal investigations to ensure a thorough, objective, and timely investigation, and is authorized to:

1. Participate in complainant, employee and witness interviews;
2. Require the city to undertake additional investigation.

“* * * * *

“(c) The police auditor will not be directly involved in any criminal investigations, but shall be kept apprised of the status of such investigations involving police employees.”

10. On January 3, 2007, Association Attorney Fenrich sent a letter notifying Rudnick that the Association was demanding to bargain over the implementation of the Police Auditor/CRB Ordinance. Fenrich identified a number of issues that triggered bargaining requirements, including impacts on the standards for discipline, the timeliness of investigations, confidentiality of investigations, use-of-force investigation procedures, and the internal investigation process. After receiving the demand to bargain, Rudnick and auditor Beamud agreed to develop and provide the Association with draft policies and procedures for the Association to review prior to the parties’ first bargaining meeting. During these preliminary discussions, Fenrich raised the Association’s concerns about the auditor’s participation in investigatory interviews. Beamud indicated that she was too busy establishing the Police Auditor/CRB System and drafting the protocols and procedures to participate in interviews.⁴

³Section 2.456(1) specifies the intake procedure for complaints.

⁴While neither Rudnick or Beamud recalled this discussion, we find it likely that a conversation such as this did occur in some form. First, Beamud testified that her participation in interviews initially was not an issue because she was so busy setting up the Police

(...continued)

11. On May 8, 2007, Rudnick provided Fenrich with proposed revisions to the police department operations manual (POM) and proposed police auditor and citizen review board protocols. Rudnick also notified Fenrich that the City intended to reopen Article 37 for bargaining and requested that prior to meeting, Fenrich identify proposals the Association considered to be mandatory for bargaining. The City's proposals provided that the auditor would be responsible for the intake of complaints from the community about all police employees and would conduct a preliminary investigation sufficient to allow the auditor to classify the complaints based on specified categories. The City's proposal specified that the auditor would: (1) forward service complaints to IA for assignment to the employee's supervisor, who would conduct an investigation, assign an adjudication, and take the appropriate action, if any, regarding the employee; (2) forward complaints alleging criminal behavior to the police chief or a prosecutor; (3) forward complaints alleging misconduct to the police chief for a formal IA investigation or to other appropriate department staff; and (4) respond to inquiries, after coordinating the gathering of the necessary information with IA.

Under the section entitled "Auditor Review of Completed Administrative Investigations," the proposed protocols provided that "[a]llegations of misconduct will normally be investigated by Internal Affairs. Upon conclusion of the internal investigation, all relevant case files will be provided to the Police Auditor for review and a determination that the investigation was thorough and complete." The proposal also provided that the auditor would authorize additional investigation and confer with the immediate supervisor to develop a case adjudication recommendation to be forwarded through the chain of command. If the auditor and the supervisor disagreed, the auditor could then send his/her comments to the police chief. The auditor had no authority to recommend discipline.

12. On June 11, 2007, the parties met to bargain the proposed policy and protocol changes. The City's bargaining team included spokesperson Rudnick, Police Auditor Beamud, and Captain Chuck Tilby. Human Resources Division Manager Helen Towle, who was retiring effective June 30, was present to take notes for the City. Fenrich

(...continued)

Auditor/CRB System, she did not have time to be involved in investigations. Based on the cooperative relationship between Beamud and the Association at this time, it is likely that she conveyed her intent in this regard to the Association. In addition, the proposal Beamud then developed addresses all aspects of the auditor's role except her participation in the investigation. Since participation in investigations was part of the ordinance, we find it unlikely that Beamud would have excluded a direct reference to it in the City's proposal unless she had decided not to exercise this authority at this time.

was the Association's spokesperson; other Association representatives included Association President Willy Edewaard, Association Vice President Erik Humphrey, and Randy Berger.⁵ Fenrich took notes for the Association.

⁵The Association witnesses testified that during bargaining, the parties extensively discussed the auditor's participation in investigations and the City agreed that the auditor would not participate. In particular, they testified that during the first day of bargaining the Association clearly explained this issue was a make-or-break issue and that any changes in policies or protocol that would allow someone outside the department to participate in interviews had to be bargained. Association witnesses also testified that the following participants made the following statements during bargaining: (1) Association President Edewaard said he would "fall on his sword" over this issue; (2) the auditor said she had no intention of and saw no need to sit in on these interviews because she could monitor them by listening to the recordings; (3) both the auditor and Rudnick said the language in the ordinance was permissive and, if requiring the auditor to sit in on interviews would prohibit the parties from coming to an agreement, they would agree that the auditor would not attend the interviews; and (4) after the Association specifically told the City that whatever portions of the ordinance the City wanted to apply to their agreement had to be specifically included in the contract, the City changed its proposals to incorporate specific references to ordinance provisions.

We take our findings regarding the discussions during bargaining primarily from the parties' bargaining notes. Association witnesses relied almost exclusively on their memories of what occurred during bargaining. This testimony is not supported by the recollections of the City's witnesses or the Association's or City's bargaining notes. Although the Association insists this was a critical issue, there is no indication of this discussion in their own notes of the June 11 bargaining. Nor is it reflected in the City's notes of that meeting. In addition, the notes of both the Association's vice president and the City regarding the July 9 session reflect that the auditor stated that she had retained the right to sit in on officer interviews and participate in administrative investigations. None of the parties' bargaining notes from this or subsequent meetings reflect the City's concession on this issue, however.

We find that the witnesses' recollections of what occurred during the 2007 bargaining were affected by the passage of time and subsequent events. The parties' notes reflect that during bargaining, much of the discussion regarding the auditor's participation in interviews concerned the preliminary investigation and critical incident scene interviews, but not complaint investigation interviews. It also appears that due to the extensive discussion about implementation of the auditor process over a long period of time, some witnesses confused 2007 and 2008 negotiations. For example, the City's notes reflect that Edewaard's comment that he would "fall on his sword" over the Auditor's participation in investigation interviews actually occurred during the 2008 negotiations, not the 2007 negotiations. Finally, the City note takers testified credibly that their sole focus was taking comprehensive and contemporaneous notes. The City's notes were also consistent with the Association's notes. Accordingly, we find the parties' bargaining notes are the most reliable evidence.

The parties began the bargaining session by agreeing that the 90-day mid-term bargaining period required by ORS 243.698 began that day (June 11) and discussed the pending grievance. Fenrich then proceeded to go through a six page list of questions regarding the changes to General Orders 1102.1, 1102.2, and 1102.3. The parties did not specifically talk about the auditor's attendance at investigatory interviews during this meeting. Beamud clarified that the purpose of the preliminary investigation of the complaint was to identify the type of complaint and generally answer the questions who, what, when, and where.⁶ When Fenrich asked if officers would be interviewed during the preliminary investigation, Beamud responded that she had considered this because sometimes issues, such as lost property, might get resolved at this time. The parties discussed the current procedure, the chief's review of policy changes, and the need to clarify this situation before bargaining concluded. In discussing whether the auditor would be involved in complaints filed by employees, the auditor stated it was her intent to focus on external complaints, but that she had the authority to monitor such investigations and could send for an outside investigator if she believed IA was unable to conduct a thorough or objective investigation. Later, the auditor stated that it had been decided she would have input into the adjudication prior to the supervisor making his decision to avoid a public disagreement between the auditor and the department. She also clarified that she was not involved in the disciplinary process after the adjudication. At this and subsequent bargaining sessions, the parties discussed the issue of protecting the employee's privacy during the complaint process; the Association was particularly concerned about the database that tracked the complaint process.

13. The parties again met to bargain on July 9, 2007. Both Association Vice President Humphrey and Fenrich took notes at the bargaining session for the Association. Employee Relations Specialist Hally McCabe took notes on a laptop computer for the City. The parties discussed the Association's questions about the proposed Police Auditor/CRB System protocols. The parties first talked about the auditor's response to critical incident cases, such as use-of-force situations. Fenrich raised concerns about the auditor's participation and asked why the auditor would even respond to a use-of-force situation. Rudnick stated that the auditor would respond to critical incident scenes because the ordinance provided for such involvement. Fenrich asked if Beamud would interview officers or sit in on officer interviews at the scene. Beamud stated that she would not interview officers or contaminate the scene, but that she had the authority to sit in on officer interviews. Beamud continued that she did not know if she would sit in on interviews, but that she imagined the Chief would decide

⁶The auditor's preliminary investigation occurs during the intake process, when she is classifying the type of complaint.

how to conduct the interview depending on the case.⁷ Humphrey's notes reflect that Association President Edewaard then stated:

"Don't care about ordinance - We'll go the mat over this one.

"[Unknown] - Anticipate change in ordering an admin. invest. & criminal?

"[Beamud] - Retain the right to conduct admin. interview as well."⁸

The parties also discussed the auditor's involvement in the preliminary investigation process. Beamud stated that the preliminary investigation would be similar to the parties' current process and that she would be performing an administrative function.

14. The parties next met to bargain on July 13, 2007; at this meeting, the Association presented its proposal. In discussing the auditor's involvement in the complaint adjudication process, Fenrich stated that the Association wanted IA to conduct the investigation, the supervisor to make the adjudication, and the auditor to review the adjudication. Fenrich told the auditor "obviously you should be involved in the IA." Rudnick responded that the City needed to comply with the ordinance, which required the supervisor to confer with the auditor prior to making an adjudication. During the discussion, Rudnick stated that the auditor would "review the investigation," "be fully apprised of the investigation," and would be "monitoring the investigations," but did not specifically state that the auditor would participate in the interviews.

15. At the next bargaining session, on August 6, 2007, the City and the Association exchanged proposals and reached tentative agreements on several contract articles and department policies. During the presentation of the City's proposal, Rudnick stated "36.3 fixed there will be no disciplinary hearings with Auditor." The primary issue which remained unresolved at the end of the meeting was the Association's proposal that a complainant's signature would be required on a complaint before it could be processed. The Association identified this as a "drop dead" issue.

16. The parties met for their final negotiation session on August 23, 2007, and reached a complete agreement on all open contract articles, policies, and protocols. The parties then initialed the tentative agreements, including Article 36.3, which the City proposed on August 8. The tentative agreement on Article 36.3 provided, in part:

⁷While not identical, Humphrey's and McCabe's July 9 bargaining notes reflect that this discussion occurred. There is no further reference to the auditor's participation in interviews in either's notes.

⁸Humphrey's bargaining notes do not clearly identify who made these comments, but Humphrey testified that Beamud made the final statement.

“36.3 Upon the request of the employee, the City shall allow the employee an opportunity to consult with an Association representative or have an Association representative present as a witness during investigatory interviews with management representatives or the Auditor’s office or other disciplinary meetings with management representatives.”

17. On September 26, 2007, Police Chief Lehner sent an e-mail to all department personnel to respond to employee concerns about the new Police Auditor/CRB System. Lehner indicated that he anticipated “the effect on line staff to be minimal.” Lehner addressed the auditor’s role in investigations, first stating “[t]he most noticeable change is simply that the auditor will be receiving incoming complaints directly from those members of the public who choose that alternative. She will not be conducting investigations. Her role is simply one of classification and routing to Internal Affairs.” He later stated: “[t]he auditor and CRB are not investigating or reviewing the actions of individual employees. They are reviewing the investigation and, ultimately, the chief’s adjudication decision with regard to the case.” Lehner followed up his e-mail with a memorandum to all department staff that outlined the revisions to department policies that resulted from the parties’ negotiations.

18. On October 2, 2007, the parties executed the final agreements reached in the police auditor negotiations. The final agreement included the following language in Article 36.3, which represented a change in the language to which the parties tentatively agreed:

“36.3 Upon the request of the employee, the City shall allow the employee an opportunity to consult with an Association representative or have an Association representative present as a witness during interviews or other disciplinary meetings with management representatives.”⁹

The final agreement also included the following changes to Article 36:

“36.5 The parties acknowledge that they have negotiated to their mutual satisfaction changes in the Department policies for internal investigations into allegations of possible misconduct and investigations into the use of force. Violations of the internal

⁹There is no evidence in the record regarding the parties’ decision to drop the reference to the auditor that was included in the Article 36.3 tentative agreement.

investigations procedure and Police Auditor and/or Civilian Review Board protocols that directly affect the terms or conditions of an employee's employment for allegations shall be grievable, as defined in Article 35 of this agreement.

"36.9 Employees normally will be provided with seventy two (72) hours notice of an investigatory interview. If the Chief of Police determines that the nature of an investigation requires that an employee be interviewed with less than 72 hours notice, the Department will provide the employee with at least twenty four (24) hours notice of the investigatory interview and will provide EPEA with the rationale for the decision."

19. The agreed-upon Civilian Oversight Protocols provided that the auditor would (a) be notified of critical incidents and could respond to the critical incident scene, but would not interview the officer at the scene regarding the incident; (b) conduct the intake of complaints, including the preliminary investigation, which would include basic information such as the event, names, dates, employee name, and badge number; and (c) classify the complaints by the identified categories. The protocols provided further:

"Classification of Complaints

- "3. Service complaints that are not resolved at intake by the police auditor's office will be directed to internal affairs for assignment to a supervisor. The supervisor will conduct an investigation into the complaint. The supervisor will assign the adjudication, take the appropriate action concerning the employee, if any, and return reports to internal affairs.
- "4. Allegations of criminal behavior will be forwarded to the chief unless, in the police auditor's view, informing the chief will compromise a criminal investigation. In those circumstances, the police auditor may forward the allegation(s) directly to the appropriate government prosecutor.
- "5. Allegations of misconduct will be forwarded to the chief of police for formal investigation by internal affairs or other department staff if appropriate.
- "6. The police auditor may choose to contract for an outside investigation to ensure a thorough and objective review of the

complaint or if the chief disagrees with the auditor's classification of a complaint as one requiring an internal affairs investigation.

- "7. Service complaints will be forwarded to internal affairs who will work with the involved employee's supervisor to address any possible employee performance issues and to determine the most appropriate complaint resolution option. The police auditor will be notified of the resolution of the complaint within ten (10) days of the resolution. If the supervisor uncovers possible misconduct during review of the incident, the matter may be reclassified.
- "8. The police auditor will coordinate with internal affairs to gather appropriate information necessary to resolve inquires.

"* * * * *

"Auditor Review of Completed Administrative Investigations

- "1. Allegations of misconduct will normally be investigated by internal affairs. Upon conclusion of the internal investigation, all relevant case files will be provided to the police auditor for review and a determination that the investigation was thorough and complete. The police auditor will make this determination within ten (10) business days of receipt of the completed investigation.
- "2. The police auditor may require the city to undertake additional investigation if the investigation is deemed incomplete.

"* * * * *

- "4. After the police auditor has reviewed the investigation and it is deemed complete, the employee's immediate supervisor will develop a case adjudication recommendation after conferring with the auditor. The supervisor's recommendation then will be forwarded through the chain of command to the chief of police for final adjudication. The police auditor may develop independent adjudication recommendations, but is not allowed to recommend the level of discipline for police employees."

20. The parties agreed that the investigator's role, specified in the police department's General Order 1102.2, would include the following duties:

"1. Employee Notification

- "a. Notify the named employee of the allegation(s) as soon as practicable. The affected division manager or the Chief may authorize a delay if s/he deems that immediate notice may jeopardize the investigation.

- “b. The notice will include:
 - (1) The name of the assigned investigator.
 - (2) Sufficient information about the allegation(s) to reasonably apprise the employee of its nature, including a copy of the AIC intake form.
 - (3) Notice as to whether there is a separate criminal investigation into the same circumstances, and who is conducting that investigation.

- “2. Conduct a complete investigation to include interviewing witnesses and involved employees, and gather any relevant evidence. (If there is a separate criminal investigation into the same incident, obtain authorization from the appropriate prosecuting attorney or investigations supervisor before conducting any administrative interview of an employee who is the focus of the investigation. This does not preclude gathering other investigative information or interviewing a person who is not a focus of the investigation.)

- “3. Conduct employee interviews using these guidelines:
 - “a. Normally allow the employee at least 72 hours notice prior to any interview of the employee. If the Chief of Police determines that the nature of an investigation requires that an employee be interviewed with less than 72 hours notice, the Department will provide the employee with at least 24 hours notice of the investigating interviews and will provide EPEA with the rationale for the decision.

 - “b. Schedule interviews at a reasonable hour, preferably during the employee’s normal working time, if practical.

 - “c. Conduct the interview at the facility where the employee is normally assigned, except when circumstances preclude doing so.

 - “d. Limit the interview to activities, circumstances, events, conduct, or acts which pertain to the subject investigation.

- “e. Generally you should tape record the interview. (We will share the content of any tape recording we make with the appropriate bargaining unit.)
- “4. Complete the investigation and forward it to your supervisor within 25 days from the date you received the investigation or by the deadline set by the affected division manager, whichever comes sooner. If it cannot be completed within this time period, notify the named employee, your supervisor, your division manager, the involved employee’s bargaining unit (when applicable), and Internal Affairs of any extension and the reason for it.
- “5. If the investigation is purely administrative, employees may be required to answer all questions that relate to performance of duty. Failure to respond in a complete and truthful manner will subject the employee to disciplinary action. (For information on *Garrity* warnings, refer General Order 901.6, Attachment 1.)
- “6. Treat all information and documents as confidential.
- “7. You may only discuss the course of the investigation and confidential information with those supervisory and management personnel with a need to know.
- “8. If, during your investigation, you find evidence of misconduct not documented in the original report, notify the employee of the new allegation and include it in your investigation.
- “9. Prepare an investigative report using the AIC report format with sufficient detail to report the circumstances. Forward it to the involved employee’s supervisor for adjudication. If you are the involved employee’s supervisor, review the investigation with your immediate supervisor to ensure that all appropriate investigative issues have been addressed thoroughly. Consult regarding adjudication as needed, then proceed to that phase.”

21. In early 2008, Police Auditor Beamud published a progress report covering the period November 1, 2006 through December 31, 2007. Beamud reported that she had “bargained the necessary provisions of the ordinance with the Eugene Police Employees Association, and has begun to perform all intake and review of investigations of misconduct.” The report explained that the most significant change to the process was that the auditor would now perform intake for all complaints. In discussing internal

investigations, the report states that “[t]he auditor is required to review completed investigations to ensure that they were handled thoroughly. After this determination is made, the auditor confers with the immediate supervisor of the involved employee and develops a case adjudication recommendation for the Police Chief’s consideration.”

22. In early 2008, Beamud hired Dawn Reynolds as the deputy police auditor. At this point, since Reynolds could assist her with her auditor duties, Beamud considered participating in investigatory interviews. Also at this time, the Association heard rumors that the City council was pressing the auditor to attend investigatory interviews. At a meeting Beamud and Edewaard attended, Beamud tried to talk with Edewaard about her participation in interviews. Edewaard refused to discuss the subject, however. As a result, Fenrich telephoned Rudnick to talk about the Association’s concerns about these rumors and Beamud’s contact with Edewaard.

23. On February 22, Rudnick sent a letter to Fenrich which stated:

“The EPEA has complained about the Police Auditor’s participation in investigatory interviews involving EPEA members. We have not yet addressed this subject. Ms. Beamud intends to participate in interviews from time to time in order to facilitate her role as auditor of investigations. There is nothing in the current contract or policies that defines or limits which management employees may participate in interviews. The contract requires that we share with you any proposed changes to the contract and meet and discuss them before implementation. We propose that General Order 1102.2, Part ii, B. a. to state: ‘Normally allow the employee 72 hours notice prior to any interview of the employee. The notice will inform the employee whether the auditor will participate in the interview. If the Chief of Police ...’¹⁰

“Please let me know if you would like to meet and discuss this proposal. If I do not hear from you within 10 days of the date of this letter, we will regard your failure to respond as acceptance and implement this change.” (Emphasis and ellipsis in original.)

24. On February 28, 2008, Fenrich responded to Rudnick:

¹⁰The only addition proposed to General Order 1102.2 was to include notice of the auditor’s participation. See Finding of Fact 20 for the existing notice provision under General Order 1102.2.

“The Eugene Police Employees Association resoundly [sic] rejects the City’s proposed modification of the internal affairs policy to permit the Auditor’s participation in internal affairs investigation interviews. The parties negotiated the policies and protocols regarding the Auditor’s role. These negotiations did not result in a change permitting the Auditor to actively participate in interviews. Any attempt to change these protocols must now be accomplished during collective bargaining for a new contract. The parties have dates set for negotiations and we would be happy to receive the City’s proposals at that time.”

25. On April 24, 2008, Edewaard sent an e-mail to Patrol Captain Peter Kerns asking for clarification of comments Kerns made in a meeting with sergeants about the auditor sitting in on IA interviews. Edewaard told Kerns that the protocols currently did not provide for this and that any such change in the protocols would need to be bargained.

26. On April 25, 2008, Kerns replied to Edewaard by e-mail and said that during the meeting at issue, a sergeant had asked if the auditor could attend interviews and Kerns had responded that under the ordinance, the auditor was authorized to participate in interviews. Kerns said “if that, or any other action by the Auditor, happens for the first time, it will play out in slow motion, if it wasn’t already worked out and carefully orchestrated in advance. Which is to say nothing, like an interview with the Auditor, will happen until EPEA, Police Management, and probably the City Attorney’s Office have gone to battle over it.”

27. In March 2008, the parties met to negotiate a successor collective bargaining agreement. The Association bargaining team included spokesperson Fenrich and Association President Edewaard. The City’s bargaining team included spokesperson City Attorney Mark Amberg and Employee Relations Specialist McCabe, who took notes for the City.

The Association initially proposed some changes to the prior agreements reached during the negotiations regarding police auditor protocols. The City essentially proposed that the prior agreements be incorporated into the successor agreement. During the parties’ bargaining session on May 14, 2008, however, Amberg raised the issue of the auditor’s participation in investigations, referring to Rudnick’s prior proposal and the fact that the auditor was authorized to participate in interviews under the ordinance. Fenrich then said that “[t]he ordinance doesn’t trump bargaining agreement.” Association President Edewaard also stated a couple of times: “We’ll fall on our sword over this.”¹¹ Edewaard and Fenrich talked about their lack of trust in the police auditor

¹¹McCabe testified from her July 14 meeting notes, which are not part of the record.

and concern about her being part of the process. The parties recognized that they would not be able to reach agreement with these issues on the table and agreed that they would withdraw the proposed changes to the auditor protocols.

28. On May 28, 2008, in response to a request from Fenrich for the City's counterproposal, Amberg stated:

"I have a couple of questions/issues I wanted to clarify. With regard to the police auditor and related issues, my understanding from our discussions is we have agreed to take those issues off the table. I believe, with the exception of the issue of providing notice if the auditor intends to attend an investigatory interview - which the City proposed through [Rudnick's] letter of February 22, 2008 - that issues related to auditor protocols are permissive subjects for bargaining. I don't think we need to resolve that issue if we have agreed to take the auditor issues off the table. Also, if we have agreed to take the issues off the table, the City won't re-propose the language change in [Rudnick's] Feb. 22 letter which the City would propose as part of Article 36.9. I assume the Association's position regarding that proposed language hasn't changed since your response to [Rudnick's] letter."

29. After Amberg's May 28 letter, the parties both withdrew their proposals regarding the changes to the October 2, 2007 memorandum of understanding and did not talk further about the auditor's participation in investigatory interviews. At the bargaining session on June 3, 2008, the parties entered into a tentative agreement on Article 36. The tentative agreement included the following changes to Article 45.4:

"General Procedures Potential Discipline Situations. Any employee who will be interviewed by an investigator or supervisor at a disciplinary interview concerning an act which, if proven, could reasonably result in disciplinary action involving loss of pay or dismissal, will be afforded the following safeguards:

"* * * * *

"j. The City will adhere to the Internal Affairs policies, Civilian Review Board policies and protocols, and the Police Auditor policies and protocols."

30. As part of their negotiations, the parties participated in a July 14, 2008, mediation session. After the mediation session, Fenrich and other Association representatives learned that on July 14, the City council directed the City manager to

prepare a ballot measure which would amend the City charter to require the City council to authorize the auditor's participation in investigatory interviews.¹² Fenrich and other Association representatives were shocked by the actions of the City council and felt that the council was trying to achieve something through the ballot measure they did not achieve in bargaining. The Association representatives discussed pursuing an unfair labor practice complaint against the City. They decided, however, that because of the downturn in the economy it was in their members' interests to move forward with the bargaining process and get an agreement on economics without upsetting the City council. The Association was fearful that the City council might withdraw their economic proposals.

31. In August 2008, Police Auditor Beamud resigned her employment and Reynolds was appointed to the position of interim police auditor.

32. On August 28, 2008, the City Council placed Ballot Measure 20-146 on the November 2008 ballot. The proposed amendment provided in pertinent part:

"(1) The city council [~~is authorized to~~] shall hire, supervise and specify the salary of an independent police auditor to oversee investigations of complaints involving police employees. Notwithstanding section 16 of this charter, the city council [~~may~~] shall authorize the auditor to: * * * (c) monitor the city's internal investigations, including but not limited to access to all evidence developed as part of the investigation and participation in investigative interviews related to such complaints * * *." (Emphasis in original.)

33. On October 1, 2008, the parties executed a collective bargaining agreement effective July 1, 2008 through June 30, 2011, which incorporated the June 3, 2008 tentative agreements.

34. In late September 2008, Association President Edewaard spoke with Interim Police Auditor Reynolds about her participation in the investigation of a bargaining unit member. By letter dated October 3, 2008, Fenrich also wrote to Reynolds about her involvement with the investigation and stated that "[t]he Auditor, under the negotiated protocols and policies, cannot actively participate in the internal affairs investigations. Violating the protocols is a violation of Article 36.5 of the Collective Bargaining Agreement between the City of Eugene and the Eugene Police Employees' Association." Reynolds provided Fenrich's letter to the press, even though

¹²On July 28, 2008, the City council adopted Resolution 4954 which included the amendments to the City charter the council had directed the City manager to draft. The text of Resolution 4954 became Ballot Measure 20-146.

the letter included the name of an employee who was under investigation. The Association was upset about the violation of the employee's privacy right. As a result of this incident and other interactions with Reynolds, the Association believed that Reynolds, unlike Beamud, was untrustworthy and unwilling to work with the Association.

35. In early October 2008, Peter Kerns became the Interim Chief of Police replacing Police Chief Lehner, who left City employment in mid-October.

36. On October 15, 2008, City Manager Jon Ruiz directed Interim Chief Kerns to take the steps necessary to enable the police auditor to participate in Association-represented employee internal affairs interviews beginning in November. That same day, Ruiz notified the City council of the directions he had given Kerns.

37. On October 15, 2008, City Attorney Amberg left a voice message for Fenrich notifying her of the auditor's anticipated participation in investigatory interviews of Association-represented employees. Amberg considered the call to be a "courtesy call" and not a formal notice of implementation.

38. On October 17, 2008, Fenrich sent a letter to Amberg demanding that the City bargain its decision to have the auditor participate in Association-represented employee interviews and delay implementation of the decision during bargaining.

39. On November 7, 2008, Amberg sent formal written notice to the Association of the City's "intent to have the police auditor begin attending and participating in investigatory interviews of EPEA members, on or after November 24, 2008." Amberg also stated that the City declined to bargain over this issue because it was the City's position that the auditor's participation in investigatory interviews was neither a mandatory subject of bargaining nor had an impact on any mandatory subject of bargaining.

40. On December 30, 2008, the Association filed a grievance under Article 36.5, and Article 45.4(J) over the auditor's participation in investigatory interviews.

41. On January 12, 2009, Interim Deputy Police Auditor Elizabeth Southworth attended the investigatory interview of an Association-represented employee. On January 29, 2009, the Association filed a grievance asserting that the auditor's participation in the interview violated Articles 36 and 45 of the parties' collective bargaining agreement.

42. Because of disagreements between Police Auditor Reynolds and prior Police Chief Lehner, on January 13, 2009, Interim Chief Kerns and Auditor Reynolds entered into a memorandum of understanding for the purpose of clarifying the role of the police chief and the police auditor in processing complaints. The memorandum provided in part:

“The Police Auditor Ordinance provides that the Auditor shall actively monitor internal investigations and that the Auditor is authorized to participate in complainant, employee and witness interviews when the interviews are conducted as part of an administrative investigation. The Auditor’s participation in investigatory interviews shall be coordinated with the Internal Affairs Office.”

43. On January 28, 2009, an auditor attended the investigatory interview of an Association-represented employee. On February 5, 2009, the Association filed a grievance asserting that the auditor’s attendance violated Articles 36 and 45 of the parties’ collective bargaining agreement.

44. On February 2, 2009, the Association filed a grievance alleging that the January 13, 2009 memorandum entered into by Kerns and the auditor violated Articles 36 and 45 of the parties’ agreement.

CONCLUSIONS OF LAW

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

Case No. UP-38-08

2. The City did not violate ORS 243.672(1)(g) by expanding the role of the police auditor in a manner that violated the parties’ October 2, 2007 memorandum of understanding concerning police auditor protocols.

3. The City did not violate ORS 243.672(1)(e) by unilaterally changing the *status quo* regarding the role of the police auditor while the parties were in the process of negotiating a collective bargaining agreement.

4. The City did not violate ORS 243.672(1)(f) by failing to notify the Association of the referral of Ballot Measure 20-146 and failing to bargain over the referral prior to submitting the ballot measure to the electorate, in violation of ORS 243.698.

5. The City did not engage in bad faith bargaining in violation of ORS 243.672(1)(e) when, on the day the parties were engaged in collective bargaining mediation, it directed the City manager to prepare a ballot measure to amend the City charter to require that the City council authorize the police auditor's participation in investigatory interviews.

The allegations in Case No. UP-38-08 arise from the City's decision to refer a ballot measure to the voters that required the City council to authorize the police auditor's participation in investigatory interviews of Association bargaining unit members. The Association alleges that these City actions: (1) violated ORS 243.672(1)(g) because they violated the parties' October 2, 2007 memorandum of understanding regarding police auditor protocols; (2) violated ORS 243.672(1)(e) because they changed the *status quo* while the parties were bargaining a successor agreement; (3) violated ORS 243.672(1)(f) because the City failed to notify the Association of anticipated changes that impose a duty to bargain under ORS 243.698; and (4) violated ORS 243.672(1)(e) because the City decided to create the ballot measure at issue on the same day the parties engaged in mediation. We consider each of these allegations in turn.

ORS 243.672(1)(g) Allegation

Under ORS 243.672(1)(g), it is an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations * * *." The Association alleges that the City violated the parties' October 2, 2007 memorandum of understanding regarding police auditor protocols and subsection (1)(g) when it created and referred to the voters a ballot measure concerning the police auditor's participation in investigations. We agree with the City, however, that this portion of the complaint is premature. This Board will only consider a complaint under the Public Employee Collective Bargaining Act (PECBA) that presents a controversy that is ripe for resolution. ORS 243.676(1)(b); *Washington County Police Officers' Association v. Washington County*, Case No. UP-42-92, 13 PECBR 627, 630 (1992). The Association challenges a ballot measure which was subject to approval by the voters. Had voters rejected the ballot measure, the City would not have allegedly violated the agreements with the Association. Accordingly, any such injury based on merely referring the ballot measure for a vote was speculative. Therefore, because the Association's (1)(g) allegation is not ripe, we will dismiss this portion of the complaint.

ORS 243.672(1)(e) Unilateral Change Allegation

We also agree with the City that the Associations charge that the City made a unilateral change in the *status quo* while the parties were bargaining is premature. An employer violates subsection (1)(e) when it implements an unlawful unilateral change.

North Clackamas Education Association v. North Clackamas School District 12, Case No. UP-17-09, 23 PECBR 200, 207-08 (2009), *appeal pending*. Here, the City did not implement the allegedly unlawful change in the police auditor's role when it created Ballot Measure 20-146. It merely proposed that the voters approve the allegedly unlawful change. As noted above, the voters could have rejected the ballot measure and no alleged change would have occurred. Therefore, we also dismiss as unripe the Association's allegation that the City unilaterally changed the *status quo* in violation of subsection (1)(e) when it submitted a ballot measure to the voters.

ORS 243.672(1)(f) Failure to Notify and Bargain Allegation

Under ORS 243.672(1)(f), it is an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." The Association alleges that the City failed to comply with ORS 243.698, which provides that "[t]he employer shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain." According to the Association, the City violated this statutory provision when it failed to notify the Association that it intended to refer Ballot Measure 20-146 to the voters. We have, however, dismissed the Association's claim that the City made an allegedly unlawful unilateral change because the matter was not ripe for adjudication. We will also dismiss as premature the Association's claim that the City had a duty to notify the Association about the allegedly unlawful unilateral change. We will dismiss the allegation that the City violated ORS 243.672(1)(f).

ORS 243.672(1)(e) Bad Faith Bargaining Allegation

The Association's final allegation in UP-38-08 is that the City bargained in bad faith in violation of subsection (1)(e) when it withdrew its proposal for the police auditor's participation in investigatory interviews during bargaining, but decided to refer the same issue to the voters while the parties were in mediation. The Association contends that the City failed to fulfill its good-faith bargaining obligation that one party "deal honestly and fairly with the other party." The Association asserts that "[t]he City decided it would get from the voters what it couldn't obtain at the bargaining table. To effectuate a change in such a manner is completely contrary to the concept of good faith bargaining."

In *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman, v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 767-68 (2007), we stated:

"The duty to bargain in good faith requires a party to honestly and candidly explain its bargaining position and proposals. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199 (1985). A party violates ORS 243.672(1)(e) if it

deliberately misrepresents its bargaining position and its intentions on an issue under negotiations. *Association of Professors: Southern Oregon State College v. Oregon State Board of Higher Education*, Case No. UP-27-88, 11 PECBR 491, 512 (1989).”

The Association failed to prove that the City deliberately misrepresented its bargaining position regarding the police auditor’s participation in the investigatory interviews. When the Association began negotiations for a successor contract in 2008, the Association knew that the City wanted the police auditor to participate in interviews, and also knew that the City did not believe the parties’ October 2, 2007 memorandum of understanding prohibited such participation. During bargaining, the parties discussed this issue, but realized that their different opinions about the police auditor’s role in investigations would prevent them from reaching agreement on other matters. Accordingly, both the City and Association agreed that neither party would pursue proposals concerning the police auditor’s investigatory role. After the parties agreed to this procedure, the City told the Association that it believed that all matters related to the police auditor’s role in interviews, except notice of the interview, were permissive topics of bargaining. By identifying the police auditor’s role in investigations as a permissive bargaining topic (a position which the Association apparently never challenged), the City clearly indicated to the Association its belief that it had discretion to make changes in this subject. The City never told the Association it would not exercise this discretion. Therefore, the City did not deliberately misrepresent its negotiation position to the Association in violation of ORS 243.672(1)(e). We will dismiss this portion of the complaint.

Case No. UP-41-08

6. The City did not make an unlawful unilateral change in violation of ORS 243.672(1)(e) when it took action on October 15, 2008 to permit the auditor to participate in internal affairs investigations.

7. The City did not make an unlawful unilateral change in the protections under *Garrity v. New Jersey* in violation of ORS 243.672(1)(e) when it took action on October 15, 2008 to permit the auditor to participate in internal affairs investigations.

8. The City did not violate ORS 243.672(1)(g) by expanding the role of the police auditor in a manner that violated Article 36.5 of the parties’ collective bargaining agreement and the parties’ October 2, 2007 memorandum of understanding concerning police auditor protocols.

While the allegations in UP-38-08 concern the City’s actions before the passage of Ballot Measure 20-146, the claims in Case No. UP-41-08 arise from the City’s conduct after the voters passed this ballot measure. The Association alleges that after the

passage of Ballot Measure 20-146, the City altered the police auditor's role to authorize her participation in internal affairs interviews. According to the Association, these actions violated ORS 243.672(1)(e) because they: (1) unilaterally changed a mandatory subject for negotiations or a permissive subject for negotiations with mandatory impacts, and (2) unilaterally changed the protections under *Garrity v. New Jersey* without notice or bargaining. The Association also alleges that these City actions violated ORS 243.672(1)(g) because they violated the terms of the parties' collective bargaining agreement and the October 2, 2007 memorandum of understanding regarding police auditor protocols. We begin our analysis of the Association's claims by considering the alleged violation of subsection (1)(g).¹³

ORS 243.672(1)(g) Allegation

The Association alleges that the City violated Article 36.5 and the parties' October 2, 2007 memorandum of understanding regarding police auditor protocols when it expanded the police auditor's role by allowing her to participate in investigatory interviews. According to the Association, the memorandum of understanding and the parties' collective bargaining agreement specify a role for the police auditor—one that does not involve participation in investigatory interviews. The Association also contends that its understanding that these agreements do not allow police auditor participation in interviews is supported by the parties' past practice and bargaining history.

The City, however, asserts that neither the agreement regarding the police auditor protocols or the parties' collective bargaining agreement addresses the police auditor's role in interviews. Since these agreements do not mention the police auditor's role in investigatory interviews, the City contends it did not violate these agreements when it took action to permit the auditor to participate in investigatory interviews.

We begin our consideration of the Association's claims by analyzing the relevant language in the agreements at issue. We interpret a collective bargaining agreement in the same manner and using the same rules of construction as do courts. *OSEA v. Rainier School Dist. No. 13*, 311 Or 188, 194, 808 P2d 83 (1991); *Marion Cty. Law Enforcement Assn. v. Marion Cty.*, 130 Or App 569, 575, 883 P2d 222 (1994), *rev den*, 3200 Or 567 (1995). We attempt to determine the parties' intent by first considering the language at issue in the context of the contract as a whole. If the provision is unambiguous, the

¹³We do so because a conclusion that the City's actions violated subsection (1)(g) would dispose of the allegations that the same actions also violated subsection (1)(e). *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-63-04, 20 PECBR 850, 851 (2005) (a contract violation does not constitute bad faith bargaining in violation of subsection (1)(e)).

contract language will be enforced according to its terms. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997). Where a contract provision is ambiguous, we examine extrinsic evidence of the parties' intent, such as their bargaining history and past practice. If the language remains ambiguous, we apply appropriate maxims of contract construction. *Id.*; *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, *interim order*, 20 PECBR 823, *final order*, 21 PECBR 20, 29 (2005).

Based on our review of the parties' contract and their October 2, 2007 memorandum of understanding, we conclude the terms of these agreements are unambiguous: they do not prohibit the police auditor's participation in investigatory interviews. The contract contains no language that specifically addresses the auditor's role in interviews. Article 36.3 refers to an employee's right to have an Association representative present in interviews with management representatives. "Management representatives" could, of course, include the police auditor. This contract language does not, however, restrict or specify the management representatives who may participate in these interviews. Although Article 36.5 permits the Association to grieve violations of the police auditor protocols "that directly affect the terms or conditions of an employee's employment," the protocols are silent regarding the police auditor's participation in investigatory interviews. The parties' October 2, 2007 memorandum of understanding modified the police department's General Order 1102.2 to describe the investigator's role and to require that employees have notice of an investigatory interview. This general order does not address or limit the police auditor's participation in investigations.

Because the language in the parties' collective bargaining agreement and their October 2, 2007 memorandum of understanding is clear, it is unnecessary to consider past practice or the parties' bargaining history to aid us in interpreting these agreements. The City did not violate the contract or the memorandum of understanding when it authorized the police auditor to participate in investigatory interviews. We will, therefore, dismiss the subsection (1)(g) allegation.

ORS 243.672(1)(e) Allegations

The Association alleges that the City unilaterally changed the *status quo* when, on October 15, 2008, it directed the police chief to take the steps necessary to authorize the police auditor to participate in investigatory interviews. The Association contends that the City violated subsection (1)(e) by making this change without notice to the Association as required by ORS 243.698 and before completion of its bargaining obligation.

The duty to bargain in good faith under ORS 243.672(1)(e) includes an obligation to bargain prior to changing existing employment conditions that concern

mandatory subjects of bargaining. In *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008), we outlined the process for determining whether a violation of (1)(e) has occurred:

“In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies).”

Accordingly, we begin our analysis by identifying the *status quo* in regard to the police auditor’s participation in investigatory interviews. The *status quo* can generally be established based on an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln Cty. Ed. Assn. v. Lincoln Cty. Sch. Dist.*, Case No. UP-53-00, 19 PECBR 656, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff’d*, 187 Or App 92, 67 P3d 951 (2003); *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279 (2008).

The Association first asserts that the parties’ October 7, 2007 memorandum of understanding, which was subsequently incorporated into the collective bargaining agreement, established the *status quo* which included no police auditor participation in investigatory interviews. As we previously decided, however, those agreements do not prohibit (or even address) the police auditor’s participation in investigatory interviews. Therefore, they also do not establish the *status quo* asserted by the Association.

In the alternative, the Association contends that past practice established the *status quo* in regard to the auditor’s role in investigatory interviews. The Association asserts that the parties developed a past practice that involved no participation by the auditor in these interviews. We disagree.

As the party asserting a past practice, the Association bears the burden of proving its existence. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 946, *recons*, 23 PECBR 34 (2009). A past practice is characterized by clarity, consistency, repetition over a long period, acceptability to both parties, and mutuality. *AFSCME Local 88 v. Multnomah County*, 22 PECBR at 285; *recons*, 22 PECBR 444 (2008). Acceptability means that both parties know about the conduct at issue and consider it the acceptable method for dealing with a particular situation. Mutuality means that the practice resulted from a joint

understanding by the employer and union. *Id.* A practice which arises solely from choices made by the employer in the exercise of its managerial discretion is not mutual. *Tri-County Metropolitan District of Oregon*, 22 PECBR at 946-947, citing *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005).

Here, the Association failed to demonstrate two essential elements of a past practice—acceptability and mutuality. The Association did not establish that the City understood and accepted a role for the police auditor that did not involve participation in investigatory interviews. To the contrary, the City asserted a number of times that decisions about the police auditor’s role in interviews were a matter of management discretion and that it might choose to have the police auditor participate in interviews. In 2007 negotiations over police auditor protocols, City bargainers reminded the Association of Ordinance No. 20374 which authorized the police auditor to “[p]articipate in complainant, employee, and witness interviews.” Also during these negotiations, the auditor told Association bargainers that she had the authority to sit in on investigatory interviews and might do so if the police chief decided she should. In 2008 contract negotiations, the City again asserted its position that Ordinance No. 20374 authorized the auditor’s participation in interviews, and also told the Association it considered the issue of the police auditor’s role in investigatory interviews to be a permissive topic for bargaining. By making this statement, the City clearly indicated its position that decisions about the auditor’s participation in interviews were matters of management discretion. Thus, throughout the development and implementation of the Police Auditor/CRB System, the City contended it had the authority to allow the police auditor’s participation in investigatory interviews—a position with which the Association disagreed. Accordingly, the record fails to show that the parties shared a joint understanding of the auditor’s role in investigatory interviews. The Association did not establish acceptability or mutuality, critical characteristics of a past practice.¹⁴

Contrary to the Association’s claim, the *status quo* is established by the employer policy defined in Ordinance No. 20374. This ordinance authorizes the police auditor to participate in “complainant, employee, and witness interviews.” Thus, the City did not

¹⁴See *Tri-County Metropolitan District of Oregon*, 22 PECBR at 947. In that case, a union alleged that the employer unilaterally changed the *status quo* in violation of subsection (1)(e) by changing its representatives on a grievance committee. We concluded the union failed to demonstrate any mutual understanding regarding the selection of grievance committee representatives. Under the contract, the employer had the right to designate its representatives on the committee; we held that the employer properly exercised its discretion in selecting its representatives.

unilaterally change the *status quo* in violation of subsection (1)(e) when it directed the police chief to take the steps necessary to authorize the auditor's participation in these interviews.¹⁵ We will dismiss this portion of the complaint.

We next address the Association's claim that the City's October 15, 2008 action, directing the City manager to take the steps necessary to allow the auditor to participate in investigatory interviews violated subsection (1)(e) because it destroyed the protections guaranteed by *Garrity v. New Jersey* and its progeny. In *Garrity v. New Jersey*, the Supreme Court held that statements made by public employees under threat of job termination were compelled, and that it was unconstitutional for a public employer to use these statements in a criminal prosecution. In this and subsequent cases, the Court defined a number of "Garrity Rights," that include the following: (1) employers cannot use compelled statements in subsequent criminal proceedings against employees (*Id.*); (2) employers cannot use threats of discharge to coerce employees to waive their constitutional right against self-incrimination (*Gardner v. Broderick*, 392 U.S. 493 (1968)); and (3) employers cannot lawfully dismiss employees on the grounds the employees refused to incriminate themselves (*Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968)).

The Association contends that these "Garrity Rights" are destroyed by the City's unlawful unilateral change authorizing the auditor to participate in investigatory interviews. In support of its position, the Association cites *City and County of Denver v. Powell*, 969 P2d 776 (1999) in which the Colorado Court of Appeals held that a public safety review commission could compel police officers to make statements related to citizen complaints regarding the officers' excessive use of force. The Colorado Court reasoned that the commission was the police officers' employer and could not compel the officers to testify under threat of discharge. The court concluded that any statements the officers might make to the public review commission were voluntary and could be used against the officers in subsequent criminal proceedings. The Association argues that its bargaining unit members now face a situation similar to the one faced by the officers in *City and County of Denver* because of the change the City made in the auditor's role.

¹⁵We note that the only change Ballot Measure 20-146 made was to the role of the City council, not to the role of the police auditor. Prior to the passage of the ballot measure, the City council had discretion to authorize the police auditor's participation in investigatory interviews. The City council exercised this discretion in December 2006 when it passed Ordinance No. 20374. Ballot Measure 20-146 made no change in the police auditor's already existing authorization to participate in interviews. The ballot measure did, however, change the City council's role: the City council was now *required* to authorize the auditor's participation in interviews.

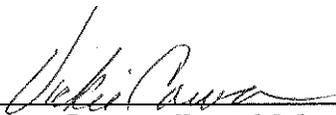
It is unnecessary to consider what effect, if any, the auditor's presence in investigatory interviews has on Association bargaining unit members' "Garrity Rights." The Association's claim fails because, for the reasons discussed above, the City's October 15, 2008 actions, authorizing the auditor to participate in investigatory interviews, is not an unlawful unilateral change in the *status quo* that violates subsection (1)(e). We will dismiss this portion of the complaint.

ORDER

The complaints in UP-38-08 and UP-41-08 are dismissed.

DATED this 27 day of October, 2010.

**Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

**Chair Gamson Concurring

I concur in the result but not the reasoning. I believe there is a simpler and more direct rationale than the one the majority relies on.

Nearly all claims in both of the Association's complaints involve the City's duty to bargain.¹⁶ The duty to bargain arises only when the issue concerns a mandatory subject for bargaining. ORS 243.650(4). Accordingly, the core question here is whether the City changed a mandatory subject for bargaining when it assigned the police auditor to participate in investigatory interviews of bargaining unit members. In my view, it did not. This assignment involves a permissive subject for bargaining, and as a result, the City can lawfully make changes without first bargaining.

¹⁶The exception is the claim that the City violated a memorandum of understanding when it assigned the police auditor to participate in investigatory interviews of bargaining unit members. I agree with the majority that nothing in the agreement prohibits the City's action.

By statute, both assignment of duties and qualifications for a position are permissive for bargaining. ORS 243.650(7)(g). Deciding who will conduct investigatory interviews clearly concerns assignment and qualifications. Under the statute, the City is not required to bargain over it.

Our cases bolster that conclusion. They hold that a public employer is generally not required to bargain over the manner in which it investigates alleged employee misconduct. In *Oregon Public Employees Union v. State of Oregon, Executive Department*, Case No. UP-71-93, 14 PECBR 746, 768 (1993), we held that “[d]ecisions about when to interview parties and in general how to conduct client abuse investigations are not ones over which the State can be required to bargain.”¹⁷ One aspect of how the City conducts its investigation is its determination of who will participate. The City is not required to bargain its decision to include the police auditor in an investigation.¹⁸

¹⁷One exception to this general rule concerns aspects of an investigation that involve fundamental fairness to the employee and do not unduly interfere with the investigation. Such issues are mandatory. *See, e.g.*, 14 PECBR at 768-769 (completing an investigation as promptly as possible is mandatory); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 872 (1993) (proposals that prohibit investigators from using “threats or intimidations,” and that allow tape recording of interviews, are mandatory).

The Association asserts fundamental fairness is involved here, and the topic is thus mandatory, because allowing the police auditor to participate in investigatory interviews would cause employees to lose their rights under *Garrity v. New Jersey*, 385 US 493 (1967). *Garrity* establishes constitutional rights of public employees. It recognizes that when a public employer requires an employee to answer a question or make a statement under threat of discipline, such statements are coerced and therefore cannot be used against the employee in a criminal proceeding. The Association does not cite, and I have not found, any cases that indicate an employee loses *Garrity* rights simply because a designee of a public employer participates in an investigatory interview of an employee.

¹⁸I also note that the issue concerns investigatory interviews. During investigatory interviews, bargaining unit members are entitled to request union representation. *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975); *AFSCME, Local 328 v. Oregon Health Sciences University*, Case No. UP-119-87, 10 PECBR 922, 926-929 (1988). Employees are entitled to the union representative of their choice. *Anheuser-Busch, Incorporated and International Brotherhood of Teamsters, Local Union No. 1149*, 337 NLRB 3 (2001), *enfd.*, 338 F3d 267 (4th Cir 2003). The PECBA policy to equalize bargaining power, ORS 243.656(3), dictates that the employer should likewise be able to choose its representative in an investigatory interview. Otherwise, for example, we could face the specter of mandatory bargaining over a union’s proposal to require that investigatory interviews be conducted by the union president or the accused employee’s spouse.

We have also held that public employers are not required to bargain over the assignment of duties to employees who are outside of the bargaining unit. In *Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279, 1 PECBR 446, 451-452 (1975), *aff'd after remand*, 290 Or 217, 621 P2d 547 (1980), a teachers union proposed a contract article that would allow an absent teacher to choose the classroom substitute, and also specified certain qualifications for a substitute teacher. This Board held the proposal permissive for two reasons. First, substitutes were not part of the teacher bargaining unit, so the union had no right to bargain over their working conditions. Second, staffing and assignment of duties are management prerogatives, and thus permissive for bargaining. See also *East County Bargaining Council v. Centennial School District No. 28JT*, Case No. C-185-82, 6 PECBR 5556, 5568 (1982), *partially vacated and remanded on other grounds*, 298 Or 146, 689 P2d 958 (1984) (a proposal to permit teachers to recommend a substitute is permissive because it interferes with the employer's right to make assignments); *Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347, 363 (1975), *aff'd after remand*, 290 Or 217, 621 P2d 547 (1980) (a proposal to allow an absent teacher "the first opportunity to select his substitute" is permissive for bargaining).

The same reasoning applies here. The police auditor is not in the Association bargaining unit, and assigning the auditor to participate in investigatory interviews of bargaining unit members is a management prerogative. As such, the City's action is permissive for bargaining.

I conclude that assigning the police auditor to participate in investigatory interviews concerns a permissive subject for bargaining, and the City was therefore not obligated to bargain over it. I would dismiss the complaints on this basis, and therefore concur in the result.



Paul B. Gamson, Chair

This Order may be appealed pursuant to ORS 183.482.