

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-61-05

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 503,	)	
OREGON PUBLIC EMPLOYEES UNION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
SCHOOL DISTRICT NO. 1,	)	AND ORDER
MULTNOMAH COUNTY	)	
(PORTLAND PUBLIC SCHOOL DISTRICT),	)	
	)	
Respondent.	)	
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A hearing was held before Administrative Law Judge (ALJ) Vickie Cowan on May 9, 2006, in Portland, Oregon. The hearing closed on June 16, 2006, upon receipt of the parties' post-hearing briefs. On December 22, 2006, the ALJ issued her proposed order dismissing the complaint. Neither party filed objections. We adopt the ALJ's proposed findings of fact and conclusions of law, as modified herein, and dismiss the complaint.

Elizabeth Baker, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant.

Richard F. Liebman, Attorney at Law, Barran & Liebman, ODS Tower, 601 S.W. 2<sup>nd</sup> Avenue, Suite 2300, Portland, Oregon 97204-3159, represented Respondent.

Service Employees International Union Local 503, Oregon Public Employees Union (SEIU), filed this unfair labor practice complaint on November 7, 2005, alleging that School District No. 1, Multnomah County (Portland Public School District) (District), intentionally delayed the bargaining process in violation of ORS 243.672(1)(e). SEIU also sought its reasonable representation costs and reimbursement of its filing fees, together with a civil penalty. The District filed a timely answer, in which it admitted certain allegations of the complaint and denied others. The District sought an order dismissing the complaint and awarding the District its reasonable representation costs.

The issues are:

1. Did the District fail to bargain in good faith in violation of ORS 243.672(1)(e) by deliberately delaying the bargaining process?
2. Is a civil penalty warranted?

#### RULINGS

The ALJ's rulings were reviewed and are correct

#### FINDINGS OF FACT

1. SEIU is the exclusive representative of a bargaining unit of custodial and cafeteria employees employed by the District, a public employer.
2. SEIU and the District were parties to a collective bargaining agreement which expired on June 30, 2005.
3. By letter dated January 3, 2005, Julia Brim-Edwards, then school board chair, notified SEIU that the District wished to begin bargaining for a successor agreement. The District proposed that the first session be scheduled during the week of January 31 to February 4, and a second session during the week of February 7 to 11, 2005. SEIU did not respond.<sup>1</sup>

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<sup>1</sup>The District attempted to begin negotiations early in the hopes the parties could reach agreement by July when the new school board members took their positions. Historically, negotiations began later in the year.

4. By letter dated January 24, 2005, District Labor Relations Manager Gregg Newstrand again asked SEIU to begin negotiations for a successor agreement and offered dates during the week of February 21, 2005.

5. Newstrand served as the District's chief spokesperson from February 2005 until November 2005. Director of Nutrition Services Kristy Obbink assisted Newstrand.

6. Lane Toensmeier and Shannon Strumpfer headed SEIU's bargaining team which included several central kitchen employees.

7. SEIU was not prepared to begin bargaining in February. The parties agreed to schedule their first meeting for March 28, 2005.

8. In February 2005, the District terminated Newstrand's direct supervisor, Human Resource Director Steve Goldschmidt. Newstrand and Maureen Sloane, an attorney for the District, assumed Goldschmidt's duties, in addition to their own.

9. From February through November 2005, Newstrand was also negotiating with the District Council of Unions and the Portland Federation of Teachers and Classified Employees (PFTCE).

10. In March, the District notified SEIU that it was considering contracting out some of the central kitchen functions. SEIU requested information from the District to assist in bargaining over the possible reduction in force (RIF).

11. On March 28, 2005, the parties met to establish ground rules and a tentative schedule for successor bargaining.

12. At that meeting, the District and SEIU mutually agreed to cancel the April bargaining sessions so that each side could gather information and concentrate on the central kitchen RIF. The parties scheduled successor bargaining sessions for May 5 and 13.

13. However, on May 2, 2005, Newstrand e-mailed Toensmeier and suggested they discuss the central kitchen RIF at the next successor bargaining session. Toensmeier agreed.

14. In May 2005, changes in the school board were announced. Co-chair Brim-Edwards, who was the only school board member with extensive bargaining knowledge, left, as did two other school board members. Only four members remained.

15. At their May 5, 13, and 19 meetings, the parties negotiated layoff language regarding the central kitchen RIF. On May 20, 2005, the parties signed a letter of agreement regarding layoffs which resulted from the central kitchen RIF.

16. On June 16, 2005, the parties exchanged their first proposals for a successor agreement. SEIU's proposals included changes to contracting out language, new RIF language (which differed from that contained in the May 20 agreement), the addition of Martin Luther King Day as a paid holiday, a three-year term for the successor contract, and a 3 percent increase in wages for each of the three years. SEIU made no proposal regarding insurance. The District's proposal related to noneconomic items. It reserved the right to address wages and health and welfare contributions at some future date.

17. Historically, the District bargained with SEIU and other District unions over noneconomic items first. Only after those items had been substantially resolved did the parties start to bargain over wages and insurance contributions. The parties continued this practice in their negotiations for a successor agreement.

18. The parties met again for successor bargaining on June 22 and 30; again on July 11, 18, and 25; and yet again on August 11 and 25. During those sessions they discussed SEIU's new RIF and contracting out proposals and other non-economic items.

19. In July, the new school board members took office. In late August, new board members received training for their positions. The new members began their tenure in September, after the start of the school year.<sup>2</sup>

20. On August 22, Newstrand e-mailed Toensmeier, stating that the District was unable to meet the following week due to school starting, and suggesting they meet September 15th instead. However, Newstrand had to cancel that session because he got sick.

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<sup>2</sup>When the new board members assumed their positions, the District was faced with a financial crisis. As a result, the board was very cautious in making a cost proposal and wanted a full understanding of the financial situation.

21. On October 13, Newstrand e-mailed Toensmeier and informed him that the District was unable to meet during the week of October 17. Newstrand suggested a sidebar on October 25, followed by regular meetings on October 28, November 4, 8, and 14.

22. On October 25, Toensmeier requested the 2005 Nutrition Services salary survey. Newstrand provided the survey the following day.

23. At the October 28 meeting, SEIU voiced its frustration with the central kitchen RIF and demanded an economic proposal from the District.

24. In early November 2005, Richard Liebman took over as the District's chief spokesperson and Newstrand thereafter assisted him.

25. On November 4, 2005, SEIU filed this unfair labor practice complaint. This Board received the complaint on November 7, and mailed the complaint to Newstrand on November 8.

26. On November 14, the school board met and approved an economic package including wages and health and welfare contributions.<sup>3</sup>

27. On November 15, 2005, the District presented its comprehensive package. The District proposed a \$779 health and welfare premium contribution, together with a 2.5 percent wage increase retroactive to July 1, 2005.

#### CONCLUSIONS OF LAW

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

2. The District did not delay bargaining in violation of ORS 243.672(1)(e).

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." SEIU contends that the District engaged in unlawful "surface bargaining." This Board first dealt with allegations of surface bargaining in *Lane Unified*

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<sup>3</sup>At the meeting, the Board also approved an economic proposal for PFTCE bargaining. They decided to extend the substitute teacher contract rather than go into full negotiations.

*Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160 (1985).

In a surface bargaining case, there is no direct evidence of bad faith bargaining. We must examine the totality of circumstances to see if bad faith bargaining may be inferred from a party's conduct. Among the factors we consider in such cases are: (1) whether dilatory tactics were used; (2) the content of a party's proposals; (3) the behavior of a party's negotiator; (4) the nature and number of concessions made; (5) whether a party has failed to properly explain its bargaining positions; and (6) the course of negotiations. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, UP-15-04, 21 PECBR 360, 393 (2006).

In support of its surface bargaining claim, SEIU alleges only that the District engaged in unlawful dilatory tactics when it canceled bargaining sessions and delayed providing its economic proposals. SEIU neither alleges, nor attempts to prove, that the District engaged in any of the other activities which, taken together, may constitute unlawful surface bargaining. These may include failing to explain its proposals, bad behavior by the spokesperson, or failing to make concessions or counter proposals. It follows that this is not really a surface bargaining case at all. We will not treat it as such.

However, this Board has held that dilatory tactics alone may constitute bad faith bargaining:

“Whether a delay in scheduling constitutes bad faith depends on the circumstances. In some cases, a delay of some length might not be unreasonable. In other circumstances, a delay of short duration might show bad faith. \* \* \* It is not solely the length of delay that makes it unlawful but rather the nature of and reason for the delay. *Deliberate* delay—delay intended to frustrate or obstruct the orderly progression of the PECBA [Public Employee Collective Bargaining Act] process—is contrary to the intent of the PECBA. \* \* \*”  
*Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94, 15 PECBR 692, 726 (1995), emphasis in original.

Here, we dismiss SEIU's complaint because SEIU did not meet its burden of proving that the District deliberately sought to frustrate or obstruct the orderly processes of the PECBA. First, SEIU maintains that the District repeatedly canceled or

refused to schedule bargaining sessions. However, SEIU did not prove this allegation at hearing. As we have previously found, the District did cancel some bargaining sessions. However, the record does not establish that these cancellations were made deliberately, in order to frustrate or obstruct bargaining.

SEIU next argues that the District delayed negotiations in bad faith. The facts of this case indicate otherwise. From March 28 to November 15, the parties met a total of 15 times; 12 for contract bargaining and another 3 times for the central kitchen RIF. There is no evidence that any session was unproductive or cut short.

Any delays in negotiations were for valid reasons. The District wanted to start negotiations early, with the hope they could be concluded before the new board members took office. This plan never came to fruition. In February, Newstrand's supervisor was terminated and Newstrand had to do "double-duty" until a replacement was found in November. Newstrand was also negotiating two other contracts.<sup>4</sup> In any event, SEIU was not prepared to begin bargaining until late March.

On March 28, both parties agreed to cancel existing dates for bargaining a successor agreement, and use them to bargain concerning the effects of a reduction in force in the central kitchen. The parties bargained exclusively on this matter until May 20, when agreement was reached. Negotiations for a new contract began on June 16. At that time, the District reserved the right to make its economic proposals at a later time, in accordance with the parties' past practice. In June, July, and August, the parties met seven times to discuss SEIU's non-economic proposals.

The new school board members took office in July, received training (including training and education regarding the District's finances) in August, and began their tenure in September. Because of the financial crisis the new board faced when it took office, the District was very cautious in making a cost proposal and wanted a full understanding of the District's financial situation first. This took time.

The parties did not meet in September. In October, they only met on October 28. At that time, SEIU demanded an economic proposal from the District. On November 15, the District made its economic proposal to SEIU. The proposal itself was close to what SEIU had proposed on June 16. The District did not delay negotiations in bad faith. *Portland Association of Teachers*.

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<sup>4</sup>The District also changed its chief spokesperson at the beginning of November. This did not cause any undue delay. The District presented its economic package on November 15.

SEIU contends separately that the District unlawfully delayed making its economic proposals until November 15. Again, we disagree. Until late May, the parties were engaged in negotiations regarding the RIF. The parties first exchanged proposals for a successor agreement on June 16. At that time, the District reserved the right to address wages and health and welfare contributions at a later date. In June, July, and August, the parties engaged in extended negotiations regarding SEIU's non-economic proposals. From June through November, the parties agreed on the majority of these non-economic issues, including extensive new RIF and contracting out language. SEIU did not demand a financial proposal from the District until October 28. The District made its economic proposal a little over two weeks later. It did not thereby act unlawfully.

We conclude that the District did not deliberately engage in dilatory tactics in order to frustrate or obstruct bargaining. We therefore dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 7<sup>th</sup> day of May 2007.

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\*Paul B. Gamson, Chair

  
James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Chair Gamson concurring:

The District's initial contract proposal addressed only non-economic issues. It reserved the right to address wages, health and welfare contributions, and other economic issues at some later time. This type of split proposal is not uncommon, but

there is apparently some confusion about whether it is lawful in public sector bargaining. I write separately to emphasize the narrow scope of our holding in this regard.

The parties here historically followed a procedure in which they substantially resolved their non-economic issues before turning to the economic ones. SEIU did not object to the procedure in this round of negotiations and proceeded on that basis. Five months into bargaining, SEIU demanded that the District present its economic proposals, and the District promptly complied.

Given SEIU's acquiescence and the District's prompt response when SEIU withdrew its acquiescence, I agree the District acted lawfully. There is nothing wrong with suggesting such a procedure and pursuing it if both sides agree. In my view, however, mutuality is key, and the outcome would likely be different if SEIU had not agreed to the procedure. Parties are obligated to reveal their bargaining positions. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8199 (1985). Withholding economic proposals would violate this obligation unless both sides agreed to the procedure. Stated differently, it is my view that a party may not make prior discussion of non-economic proposals a pre-condition to presenting and discussing economic proposals. With this understanding, I concur in the result.



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Paul B. Gamson, Chair