

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-62-09

(UNFAIR LABOR PRACTICE)

SOUTHERN OREGON BARGAINING)	
COUNCIL/ROGUE RIVER EDUCATION)	
ASSOCIATION/OEA/NEA,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
ROGUE RIVER SCHOOL DISTRICT 35,)	
)	
)	
Respondent.)	
_____)	

An expedited hearing was held before this Board on January 8 and 22, 2010, in Salem, Oregon. The record closed on February 12, 2010, upon receipt of the parties' post-hearing briefs.

Elizabeth A. Joffe, Attorney at Law, McKanna, Bishop, Joffe & Arms, Portland, Oregon, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Salem, Oregon represented Respondent.

On November 23, 2009, the Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA (Association) filed an unfair labor practice complaint against the Rogue River School District 35 (District). The complaint alleges that the District violated ORS 243.672(1)(e) by: (1) submitting new proposals in mediation; (2) engaging in *per se* bad faith bargaining by making regressive proposals on April 10

and June 4, 2009; and (3) bargaining in bad faith, based on the totality of the circumstances. The complaint requests a civil penalty and asks that this Board grant expedited consideration under OAR 115-035-0065.¹

This Board granted expedited consideration to the Association's claims that the District violated subsection (1)(e) by submitting new proposals in mediation and by engaging in *per se* bad faith bargaining. This Board denied expedited consideration to the Association's claim that the District bargained in bad faith based on the totality of the circumstances.²

On December 21, 2009, the District filed a timely answer to the complaint.

The issues in this case are:

1. Did the District violate ORS 243.672(1)(e) by making regressive proposals on April 10 and June 4, 2009?
2. Did the District violate ORS 243.672(1)(e) by submitting new proposals in mediation?
3. Should the District be required to pay a civil penalty to the Association?

RULINGS

All rulings were reviewed and are correct.

¹Under OAR 115-035-0065(1), this Board will grant expedited consideration to a complaint alleging "that an unfair labor practice has been committed during or arising out of the collective bargaining procedures set forth in ORS 243.712 and 243.722." (ORS 243.712 specifies procedures for mediation and ORS 243.722 specifies procedures for fact-finding.) This Board may conduct the hearing on a complaint for which it has granted expedited consideration, and generally issues an Order within 45 days of the date on which the complaint was filed. OAR 115-035-0065(2). Here, the parties waived any timelines that apply to issuing a decision.

²The Association filed a new complaint alleging that the District violated subsection (1)(e) by bargaining in bad faith based on the totality of the circumstances. This complaint was assigned to an Administrative Law Judge for processing under Board rules and procedures applicable to complaints that are not expedited.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of licensed personnel employed by the District, a public employer.

2. The Association and the District were parties to a collective bargaining agreement effective September 13, 2007 through June 30, 2008.

3. The parties' bargaining teams met a number of times in May 2008 to discuss negotiations for a successor collective bargaining agreement. On the District team were: Oregon School Board Association Attorney Jeff Heinrich, District Superintendent Harry Vanikiotis, and District Administrator Jesse Pershin. On the Association team were: Oregon Education Association UniServ Consultant Jane Bilodeau, and Association bargaining unit members Joe Burns, Cindy Gaines and Fran Gunson.

Because past negotiations had been contentious and difficult, the parties decided to use an interest-based bargaining (IBB) process. The parties understood that the process required them to do the following:

- (1) Identify and discuss each party's interests and issues.
- (2) "Brainstorm," *i.e.*, discuss and list solutions to problems identified through this process.
- (3) Evaluate the solutions listed using agreed-upon criteria to reach conceptual agreement on issues.
- (4) Draft contract language to express conceptual agreements reached and sign tentative agreements.
- (5) Vote to ratify the contract, once tentative agreements were reached on all outstanding issues.

The parties understood that a major difference between IBB and traditional bargaining was the use of proposals. In traditional bargaining, each party takes a position, develops proposals that reflect its position, and advocates for these proposals through the negotiation process. In IBB, the parties discuss their concerns and develop solutions. These solutions are considered part of a collaborative effort to resolve contract issues and do not belong to one party.

4. At their May 29 meeting, the District and Association bargaining teams orally agreed to the following document

"Acceptable Process Understandings 2008"

- "1. Bargaining sessions will be on 5/29, 6/10, 6/19, 6/27, 7/1. The sessions will start at 4:00 and end at 6:45 P.M. on 5/29, begin at 4:00 to 8:00 P.M. on 6/10. Sessions will begin at 9 A.M. until 5 P.M. on 6/19, 6/27, 7/1.
- "2. Sessions will be self-facilitated.
- "3. Bargaining sessions shall be held in the Rogue River High School or Middle School.
- "4. The parties will attempt to set an agenda for the following session d at the end of each session.
- "5. During collaborative bargaining, the IBBS process will be followed. Conceptual agreement, draft language, tentative agreement, ratification votes
- "6. By May 29th teams will be prepared to share a list of their issues and interests. Neither party will criticize the issue or interest statements. The parties will not propose solutions at this stage of the process.
- "7. The parties will not criticize or evaluate options during the brainstorming stage of the process.
- "8. Either team may, with advance notice, invite experts, consultants, or extra participants to a session to provide additional information.
- "9. Committees may be used with the agreement of both teams.
- "10. The sessions shall be closed to the media and public, unless otherwise agreed by both parties.(Research and decide)
- "11. Each team may keep their own minutes. The parties will jointly keep a record of items discussed and actions taken to help track progress. This record will be updated at the beginning and end of each session.
- "12. The parties may issue joint written statements.
- "13. Comments made at the bargaining table will not be attributed to any one individual.

- “14. An outside facilitator may be used if approved by joint decision.
- “15. The parties agree that the required 150 days of bargaining begin _____ unless the initial interest statements are not exchanged. The 150 days shall not be reset if the parties return to the traditional bargaining.
- “16. On June 19th the parties will revisit the process and evaluate the progress of the IBB model. At that time parties may continue with the process or alter the practices. All tentative agreements reached through the collaborative model will remain binding on the bargaining teams if the parties return to a traditional bargaining process.”

5. The parties’ negotiating teams met four times in June and July 2008 to discuss interests and issues. At their June 19 meeting, the District expressed concern about how the parties would calculate the 150-calendar-day period of good faith negotiations required by ORS 243.712.³ After some discussion, the parties executed the following agreement:

“The parties agree that the required 150 days of bargaining begin June 19, 2008. The 150 days shall not be reset if the parties return to the traditional bargaining.

“All tentative agreements reached through the collaborative model will remain binding on the bargaining teams if the parties return to a traditional bargaining process.”

The agreement was signed by Superintendent Vanikiotis and Association bargaining team member Gaines.

6. When the parties met on July 1, 2008, they agreed to continue IBB. The parties next met on November 10, 2008.⁴ They continued the discussion of interests and issues at three meetings in December 2008 and January 2009.

³ORS 243.712(1) provides, in pertinent part: “[i]f after a 150-calendar-day period of good faith negotiations over the terms of an agreement * * * no agreement has been signed, either or both of the parties may notify the Employment Relations Board of the status of negotiations and the need for assignment of a mediator.”

⁴Both District negotiator Heinrich and Association negotiator Bilodeau had unforeseen personal circumstances that prevented the parties from meeting earlier, as originally planned.

7. In November 2008, the State of Oregon began preparing its budget for the 2009-2010 fiscal year. As part of this process, the state released a quarterly revenue forecast on November 19, 2008. The forecast predicted a shortfall in state revenue for the 2007-2009 biennium. Based on this forecast, the governor called for immediate reductions in all state funded programs, including reductions in School Improvement Funds (SIF)⁵ and the State School Fund (SSF) payments to kindergarten through 12th grade school districts. The forecast also predicted significant decreases in the two major sources of funds available to school districts—general fund and lottery revenues—in the 2009-2011 biennium.

During the 2008-2009 school year, the District avoided reducing staff and cutting programs by spending approximately \$700,000 of money budgeted for end-of-the-year cash carryover. Other school districts in Jackson County made significant reductions in their budgets by laying off staff and cutting the school year.

8. At the parties' December 2, 2008 negotiation meeting, District Business Manager Nena Woodhead presented documents and information about the District's financial situation; these materials included the District's 2007-2008 fiscal year audit.

The District representatives told the Association bargaining team that based on the most recent state revenue forecast, it feared a substantial loss in state funds allocated to the District for the 2009-2010 fiscal year.

9. At the parties' February 9, 2009 meeting, the District negotiating team presented a written solution that addressed all outstanding issues. The District solution included the following items:

(A) Increase District monthly contribution for health insurance benefits to \$842 per teacher, effective October 1, 2008 (an increase of \$50 from the preceding year). Increase this amount to \$942 on October 1, 2009 and \$992 on October 1, 2010.

(B) No increase in hourly extra duty pay for assignments not on an agreed-upon schedule. Bargaining unit members would continue to receive \$15 per hour for a maximum of \$120 per day for supervising activities, and \$20 per hour for a maximum of \$160 per day for professional development activities.

⁵SIF was a state fund that provided money to school districts for educational programs and projects.

(C) Effective July 1, 2008, increase the salary schedule by 1% and add an additional step to each column on the salary schedule.

Increase the salary schedule by 1% for 2009-10 and add an additional step to each column on the salary schedule.

Increase the salary schedule by 1% for 2010-11 and add an additional step to each column on the salary schedule.

(D) Contract duration of three years.

(E) Form a professional development team in each building which would review and approve professional development requests. Each team would receive some SIF⁶ to distribute. If the District received no SIF, then no money would be allocated to the teams.

10. Also on February 9, 2009, the Association offered a "Possible Solution" that addressed all outstanding issues. The solution included the following notation: "In the spirit and intent of IBB, this is offered as a solution NOT a proposal. It belongs to no one party." (Emphasis omitted.) The Association solution included the following items:

(A) Increase monthly District contribution for health insurance benefits to \$1,000 per teacher, effective October 1, 2008.

(B) Increase extra duty pay for assignments not on an agreed-upon schedule to \$20 per hour for a maximum of \$160 per day for supervising activities and to \$25 per hour to a maximum of \$200 per day for professional activities.

(C) Increase base salary by 5% for 2008-2009.

(D) Contract duration of one year.⁷

⁶On the date the parties met, it was unclear whether SIF would be available for the 2009-2010 fiscal year.

⁷Article 30, Duration of Agreement, in the Association solution, specified that the agreement would be effective from July 1, 2007 through June 30, 2008. Given the other provisions in the solution, this appears to be a typographical error. The Association undoubtedly intended the agreement to be effective from July 1, 2008 through June 30, 2009.

The Association included no language in its solution concerning building professional development teams and SIF. The Association believed that the parties had reached conceptual agreement on these matters.

At their February 9 meeting, the parties discussed deleting a memorandum of understanding from the 2007-2008 collective bargaining agreement. The memorandum included the following provision:

“A. AGREEMENT OF THE PARTIES

“The parties agree that during the 2007-2008 school year the board will be able to cut up to 6 school days.

“The Board will contact the Council if there is a need to implement the day cuts. The parties will meet in March 2008 with the Superintendent and the Business Manager to review the financial status of the district for the purpose of determining how many days, if any, will be reinstated. If the projected ending fund balance is expected to be above \$525,000 the parties will reinstate projected day cuts.

“Any day cuts will be scheduled no sooner than 30 days after the initial March meeting has occurred.”

11. The parties’ negotiating teams next met on April 10, 2009. The District gave the Association a document entitled “District Formal Proposal # 1-04/10/09.” The proposal was identical to the solution the District had offered at the February 9 meeting, except for the following changes:

(A) Extra duty pay for assignments not on the agreed-upon schedule was increased to \$20 per hour up to a maximum of \$160 per day for supervising activities, and \$25 per hour up to a maximum of \$200 for professional activities.

(B) A provision was included that allowed the District board to cut up to six school days per school year. If the board wanted to cut days, it would contact the Association. The parties would then meet in April of the year in which the District proposed cuts to review the District’s financial status and determine how many days, if any, would be reinstated. If the projected ending fund balance was expected to be 8.33% of the District’s general fund’s annual operating expenditures, inclusive of the days in question, the District would reinstate the projected day cuts.

The Association negotiating team caucused to consider the District's proposal. After the caucus, Association negotiator Bilodeau explained that she was disappointed the District did not want to continue with IBB. Heinrich responded that the parties were still far apart after nearly a year of IBB and the District had lost faith in the process. Bilodeau suggested bringing in an outside facilitator to assist the parties in their bargaining. Heinrich proposed that they ask for mediation. Other Association negotiating team members spoke in favor of IBB, explaining that the more traditional style of bargaining had a poor history with the community.

Also on April 10, 2009, the Association offered a solution that was identical to the one offered on February 9, with the exception of the proposed increase in the base salary. The Association now proposed a 3.35% in the base salary.

12. Between November 2008 and April 2009, the Oregon Department of Education (ODE) periodically released estimates regarding the amount of SSF the legislature would allocate to school districts for the 2009-2011 biennium. Each estimate designated about 49 percent of the funds projected for the first year of the biennium and 51 percent to the second year. The estimates were based on projected tax revenues for the biennium and student enrollment (ADM). ODE averaged each school district's ADM for the two years preceding the year in which the calculation was made. It then selected the higher year average and applied it to a formula that used state revenues and other funding sources to compute the amount each district could expect to receive. In making its calculations, ODE gave extra weight to students with special educational needs.

On April 15, 2009, ODE released two estimates: one projected a \$5.4 billion SSF appropriation for the 2009-2011 biennium, and the other projected a \$5.9 billion SSF appropriation for the 2009-2011 biennium. The estimates differed for primarily political reasons. The governor, fearful that revenues would continue to be less than anticipated because of the recession, supported the more conservative allocation. The legislature, however, had announced its intent to approve the more generous allocation. Because the amount of the final allocation was uncertain, ODE offered both estimates for school districts to use in their budget development processes.

Laurie Wimmer, an experienced lobbyist for the Oregon Education Association (OEA) who is knowledgeable about Oregon school finance and maintained close contact with legislators during the 2009 session, believed that the final allocation would be \$5.9 billion.

13. On April 28, 2009, Heinrich sent Bilodeau the following email:

"Harry [Vanikiotis] met with the Board last week to provide a bargaining update. He provided the Board with my recommendation that we request the assistance of a mediator as well as the concerns and objections raised

by the Council at the end of our last meeting. Harry has informed me the Board accepted my recommendation and authorized the District's bargaining team to seek the assistance of a mediator. I will be sending the required paperwork to the Employment Relations Board tomorrow."

14. By letter dated April 29, 2009, Heinrich asked the State Conciliator for "the assistance of a mediator." In his letter, Heinrich listed the contract articles the parties had failed to resolve. Among those listed were insurance benefits (Article 19), extra duty pay schedule (Article 20), professional compensation (Article 21), reduced school year (new Article 30), and duration (Article 31).

Also on April 29, 2009, Bilodeau sent Heinrich the following email:

"Jeff

"First, I remain upset over the change in bargaining venue. It appears to be bad faith. The guidelines clearly state that 'On June 19th the parties will revisit the process and evaluate the progress of the IBB model. At that time parties may continue with the process or alter the practices'.

"We did just that and determined to continue with IBB: no practices were altered and we were left with the understanding that RRSD would continue with IBB until the end of July 1, 2008. July 1 came and left with no request for a change. In fact we continued with the IBB process. It was not until our last meeting that you surprised us with a proposal and said you wanted to discontinue IBB. This was done with no forewarning or even a discussion on how we were to continue and/or that proposals were to be brought.

"Next, I have questions:

"The district has supplied its proposal but the Association has not.

"In conversations, we have said that a TA is a TA. I understand then that they continue?

"Since the Association has never exchanged a proposal, my understanding is that we can bring forward our initial proposal next time.

"I guess I am wondering what your perspective is. I regret the turn of events; I believe it causes a lot of unnecessary concerns and questioning of motivation.

"I know as well as you do that negotiations will end with an agreement; I also know that relationships however can be damaged - hopefully we can avoid that."

15. In a May 1, 2009 email, Heinrich responded to Bilodeau. Heinrich asserted that the June 19, 2008 document did not obligate the parties to continue using IBB. Heinrich also explained that the District would honor all tentative agreements reached, and stated, "I think we have also reached conceptual agreement on the new article for professional development, though I don't have a signed agreement for that."

16. On May 19, 2009, ODE released an estimate projecting a \$6 billion SSF allocation for the 2009-2011 biennium. Wimmer and others who were knowledgeable about Oregon school finance considered this the most accurate projection of the funds that would probably be available to school districts in the upcoming biennium.

17. Sometime between May 19, 2009 and June 4, 2009, Superintendent Vanikiotis submitted a proposed 2009-2010 budget to the District budget committee and school board. The message Vanikiotis attached to the budget referred to a number of problems the District faced, including: declining enrollment;⁸ increases in the cost of transportation, food, utilities and fuel; decreases in investment interest rates; and increased employee-related costs, due to existing or soon to be settled collective bargaining agreements.

18. The Association negotiating team concluded it might be productive if two members of its bargaining team met privately with Superintendent Vanikiotis and District administrator Pershin. On May 28, 2009, Association negotiating team members Gunson and Burns met with Vanikiotis and Pershin. Gunson and Burns gave the administrators a document entitled "Association Possible Solution Offered in side bar." The document included the notation that "[i]n the spirit of IBB, this is offered as a solution NOT a proposal. It belongs to neither party." The document included the following items:

(A) Effective October 1, 2008, increase District monthly contribution to \$1000 per teacher for health insurance benefits 2008-2009. The amount of the District contribution for 2009-2010 was left blank.

⁸Enrollment in the District decreased from 1092.5 average daily membership (ADM), on September 4, 2007, to 1020 ADM on February 2, 2009. From February 2, 2009 through March 1, 2009, enrollment remained relatively steady. Enrollment then decreased from 1016.5 ADM on April 1, 2009, to 977.5 ADM on June 1, 2009. Enrollment fluctuated during the fall of 2009: it increased to 1011.5 on September 8, 2009, and decreased to 986 on December 1, 2009. The loss of each 1.0 ADM means an approximate loss of \$6,000 to \$6,500 in SSF for the District.

(B) Increase extra duty pay for assignments not on an agreed-upon schedule to \$20 per hour for a maximum of \$160 per day for supervising activities and to \$25 per hour to a maximum of \$200 per day for professional activities.

(C) Increase the base salary for 2008-2009 and 2009-2010. The amount of the increase was left blank, however.

The Association solution contained no language regarding building based professional development teams, and proposed deleting the memorandum of understanding from the expired contract that permitted the District to cut school days. The Association believed that by failing to specify particular increases in salary or benefits, it was demonstrating a willingness to be flexible. The parties were unsuccessful in reaching agreement at their meeting, however.

19. On June 3, 2009, the District budget committee and school board met to consider the budget committee's proposed 2009-2010 budget.⁹ During the discussion about the budget, Superintendent Vanikiotis explained that the budget was based on a projected \$5.6 billion SSF allocation for the 2009-2011 biennium. Vanikiotis said that some predicted a \$6 billion allocation,¹⁰ but he preferred to base his budget on a more conservative projection. Vanikiotis reminded the board and committee about the 2008-2009 state revenue shortfall, and told the board he was concerned that state revenues might again fall short of projected amounts.¹¹ Vanikiotis referred to the message that accompanied the proposed 2009-2010 budget in which he described the District's difficult financial situation. Vanikiotis also explained that he anticipated that the District would have at least one additional special education student in the 2009-2010 school year. He said that the District only received partial reimbursement for the cost of educating special needs students, and would have to pay approximately \$30,000 plus transportation costs to educate the new student.¹² Given these potential problems in

⁹Association bargaining team member Gaines attended this meeting.

¹⁰On June 2, 2009, ODE released an estimate projecting a \$2,940,000,000 SSF allocation for the 2009-2010 fiscal year. This estimate was made to correct an error made in the May 19 estimate, and was based on a projected allocation of \$6 billion for the 2009-2011 biennium.

¹¹Vanikiotis testified that he did not know if any Jackson County school districts based their budgets on the \$6 billion figure.

¹²Federal and state funds are available to assist school districts with the education of special needs students. The record contains no evidence that the District ever applied for any of these funds for the 2009-2010 school year, however.

funding sources, Vanikiotis recommended that the District not reduce the ending fund balance. The budget committee adopted a 2009-2010 budget that included no budgeted salary increases for Association bargaining unit members, laid off five classified and two licensed staff members,¹³ and cut some district programs.

Because of anticipated financial problems, Vanikiotis concluded that the District could not fund its April 10 bargaining proposal to the Association unless it laid off more staff, cut more programs, or reduced the school year. Vanikiotis understood that he could only reduce the school year if the Association and classified employees' unions agreed to do so, and he believed that any such agreement was unlikely. Vanikiotis also believed that additional staff layoffs or program cuts would be undesirable and harmful to the District. Vanikiotis recommended, and the board agreed, to offer a revised proposal to the Association. Neither the board nor Vanikiotis calculated the cost of the revised proposal or compared the cost of the revised proposal to the April 10 proposal.

20. By e-mail dated June 4, 2009, Heinrich sent the Association a revised District proposal. Heinrich explained that the District was altering its proposal because of "various changes in economic circumstances beyond the District's knowledge or control." The District proposed the following in regard to the major outstanding issues:

- (A) A two year contract (from 2008-2010).
- (B) No increase in the monthly District contribution for insurance benefits during the first year of the contract and a \$50 monthly per teacher increase for the second year.
- (C) No change in the 2008-2009 salary schedule. Eligible employees would receive step increases in both years of the proposed agreement.
- (D) No increase in extra duty pay.
- (E) No building based professional development teams.
- (F) The District board could cut up to six school days per school year. If the board decided to cut days, it would contact the Association and the parties would meet in April of the year in which the days would be cut to review the District's financial status. If the projected ending fund balance was expected to be more than 8.33% of the General Fund's annual operating expenditures (inclusive of the days in question), the projected day cuts would be reinstated.

¹³One licensed staff member was subsequently recalled.

(G) The agreement would be effective on ratification through June 30, 2010; only step advancements for 2008-2009 would be retroactive.

21. On June 11, 2009, the parties met with the mediator. The Association offered a solution on all outstanding issues; the solution included the notation that “[i]n the spirit and intent of IBB, this is offered as a solution NOT a proposal. It belongs to no one party.” (Emphasis omitted.) The Association solution included the following items:

(A) Effective October 1, 2008, increase District monthly contribution to \$942 per teacher for insurance benefits; contribution to increase to \$1,042 on October 1, 2009.

(B) Increase extra duty pay for assignments not on an agreed-upon schedule to \$20 per hour for a maximum of \$160 per day for supervising activities and to \$25 per hour to a maximum of \$200 per day for professional activities.

(C) Increase base salary by 2% for 2008-2009 and add a step to each column; increase base salary by 1.5% for 2009-2010 and add a step to each column.

(D) Delete language permitting District to cut school days

(E) Eliminate language concerning building based professional development teams.

22. On June 25, 2009, the District school board adopted the budget approved by the District budget committee at its June 3 meeting.

23. On July 6, 2009, the legislature appropriated \$6,000,196,003 to the SSF for the 2009-2011 biennium. This amount was higher than previous estimates because it included federal stimulus money. In calculating the projected revenues on which the allocation was based, ODE assumed that ballot measures 66 and 67, which authorized increased taxes on certain corporations and individuals, would pass.¹⁴

24. On July 13, 2009, the parties met again with the mediator. The Association offered a solution that was identical to the one offered on June 13 with the exception of the following changes:

¹⁴Both ballot measures were approved by voters at a January 26, 2010 special election. Had the ballot measures failed, the actual appropriation would have been \$5.8 billion.

(A) Effective October 1, 2008, increase District monthly contribution for health insurance benefits to \$900; increase contribution to \$950 on October 1, 2009.

(B) If the Oregon legislature restored SIF, the parties would bargain the issue.

The solution included a notation that it was offered in the spirit and intent of IBB and belonged to no one.

During the July 13 meeting, the Association asked to meet face-to-face with the District team. The District agreed, but asked that the Association submit written questions to them for the meeting. The primary topic the parties discussed was why the District based its budget on an SSF allocation of \$5.6 billion. The Association asked what the District planned to do if it received more SSF than anticipated. District negotiators told the Association that they needed to check with the District board before responding to this question, but the District would probably restore programs and services it had cut from the budget if it received additional money.¹⁵

Also on July 13, the Association offered a “supposal.” The parties understood that the “supposal” was a one-time effort to settle the agreement that established no precedent. If the District did not accept the “supposal,” it disappeared from the process and the parties would behave as if it had never been made. The Association “supposal” included the following items:

¹⁵Association and District witnesses differ in their accounts of the face-to-face meeting on July 13. Bilodeau testified that the parties mainly discussed the District’s use of the conservative SSF estimate and did not discuss other aspects of the District’s financial situation or the District’s rationale for its June 4 proposal. According to Bilodeau, she only received an explanation of the District’s proposal on October 16, when Superintendent Vanikiotis responded to her request for information. Vanikiotis testified that on July 13 he gave the Association bargaining team the same reasons for the District’s changed proposal as he did in his October 16 letter to Bilodeau.

Based on this record, we hold that the parties primarily discussed the District’s use of the \$5.6 billion estimate of the SSF allocation at their July 13 meeting, and that the District provided no detailed explanation of its June 4 proposal. Had the District completely explained the rationale for its June 4 proposal at the parties’ July 13 mediation session, Bilodeau’s request for such an explanation would have been unnecessary.

(A) District monthly contribution of \$792 per teacher for insurance benefits for 2008-2009; increase the amount to \$900 in 2009-2010. The District would also make a one-time only payment of \$600 in 2009-2010 to each bargaining unit member's Section 125 Benefit Plan.

(B) Increase the base salary by 2 percent in 2008-2009 and add an additional step to each salary column; increase the base salary by 1.5 percent in 2009-2010 and add an additional step to each salary column.

(C) Increase extra duty pay for assignments not on an agreed-upon schedule to \$20 per hour for a maximum of \$160 per day for supervising activities and to \$25 per hour to a maximum of \$200 per day for professional activities.

(D) Add a funding clause specifying that if the District received more than \$5.6 billion in SSF funds in 2009-2010, and/or the District's ending fund balance is more than 6 percent, the salary schedule would be increased up to 3 percent.

The District agreed to consider the "supposal," consult with the Board about it, and respond to the Association.

At the end of the July 13 mediation session, the Association orally proposed to accept no salary increases for two years; if, however, the District received more than \$5.6 billion in SSF or the District's ending fund balance was greater than 6%, these additional funds would be used to increase the base salary up to 3 percent. The District rejected this offer.

25. On July 24, 2009, Heinrich sent Bilodeau and Association bargaining team member Gaines the following email:

"On Wednesday, July 22, the District's bargaining team met with the Rogue River School Board. As promised, we updated the Board on the status of mediation and sought the Board's guidance on how it would like us to proceed.

"During our last mediation session on Monday, July 13th, the Council's bargaining team presented the District team with a list of questions. The Council's first question asked what the District's intentions would be should the District be funded at a level higher than had been budgeted (e. g., if actual District revenue was received at levels consistent with a SSF of higher than the budgeted \$5.6 billion). Our tentative response was that the District's priority would be to begin restoring that which had been cut

in the adopted budget. Our meeting with the Board confirmed that answer. Accordingly, we cannot accept the Council's last proposal. Nor do we have any additional movement to make on the District's financial offer. The Board has no intention of offering any additional compensation increases in the face of the drastic cuts the District has experienced and might continue to experience in the near future.

"I am attaching a copy of the District's current proposal. The only substantive change to this document from our last proposal is the addition of a contingent reopener in Article 29 in case the Legislature reestablishes SIF funds.

"We hope the Council will accept the District's offer. The Rogue River Association of Classified Employees have already settled their contract in support of the best interests of Rogue River students and we hope the Council will do the same."

The language in Article 29, Professional Development, that was included in the proposal attached to Heinrich's e-mail specified that if SIF monies became available, the parties would bargain

" * * * over whether and to what extent such funds may be used for building-based professional development opportunities. Negotiations under this section will take place in accordance with the 90-day expedited bargaining process outlined in ORS 243.698."

26. By letter dated September 23, 2009, Bilodeau responded to Heinrich. Her letter stated in relevant part:

"Thank you for your call recently. I thought it best to provide the enclosed proposal before we talk. Per your e-mail dated May 1, 2009 when you stated: 'And finally, we would welcome the Council's initial formal proposal at any time', I have enclosed the RREA's formal bargaining proposal for a two-year contract covering 2008-2009 and 2009-2010. The Association has attempted in good faith to uphold the IBB process and after much consideration and frustration, we offer the enclosed formal proposal. As you can see, the major compensation components are as follows:

"Article 19, Insurance: \$942 for 2008-2009 and \$1042 for 2009-2010

“Article 20, E, Extra Duty: \$20/hour with \$160/day max for supervising, and \$25/hour with \$200/day max for professional activities (same as District’s April 10, 1009 proposal)

“Article 21, Professional Compensation: 2% increase plus an additional salary step for 2008-2009 (retro to 7/1/08); 1.5% increase plus an additional salary step for 2009-2010.

“This is an imminently fair and reasonable proposal, especially when compared to the District’s April 10, 2009 proposal. We believe that the District’s subsequent June 4, 2009 and July 24, 2009 proposals were clearly regressive, and we are seriously considering filing an unfair labor practice complaint regarding that. Before we decide whether to do that though, we want to explore just why the District moved so substantially backwards between April 10 and June 4, 2009 with respect to compensation and benefits. Your June 4, 2009 email explaining your ‘modified’ proposal merely stated that the District was withdrawing its April 10, 2009 proposal ‘due [to] various changes in economic circumstances beyond the District’s knowledge or control.’ We are hereby requesting more specific information about these ‘various changes.’ Please explain with specificity what circumstances changed between April 10 and June 4, 2009, and why such changes were beyond the District’s knowledge or control.”

The proposal enclosed with Bilodeau’s letter included the salary and benefit proposals described in her letter. The proposal also included language in Article 29, Professional Development, that specified that each building would create a professional development team that would have an annual budget funded solely by SIF dollars. If no SIF dollars were provided to the District, the teams would not be formed. The Association proposal included no language permitting the District to cut school days.

27. By letter dated October 8, 2009, Bilodeau wrote Heinrich to explain that she had received no response to her request for information. She told Heinrich that she expected a response by October 16, 2009.

28. By letter dated October 16, 2009, District Superintendent Vanikiotis responded to Bilodeau’s request as follows:

“Hello Jane,

“The following information is provided to you based on your previous written request. The primary economic reasons for withdrawing the April 10 offer on June 4 are:

- “1. The RRSD [District] sustained a significant enrollment decline from April 1, 2009-June 1, 2009. The total loss of ADM was 390 students. This was a greater loss than from October 1, 2008 - April 1, 2009 (27.0 FTE/ADM). Our projected loss for the year was estimated at 3-4%. The total decline from 10/1/08 -6/1/08 was 6.3% (nearly twice projected).
- “2. The District’s budget committee had just completed its recommendation to reduce the 2009-10 budget by nearly \$600,000 and was considering two options: reducing the 2009-10 workdays (which required approval of SOBC [Southern Oregon Bargaining Council]) or a Reduction-in-Force of both licensed and classified personnel. Administrative staffing reductions had already been adopted and positions vacant due to resignation or retirement were unfilled. Additionally, the district’s minimum ending fund balance minimum was reduced by nearly 28%.
- “3. On May 19, our projected deficit from SOESD’s purchased services was over \$110,000. After that projection, two additional STEPS (special education) students being [sic] added. The additional cost of those two students is more than \$52,000. The total deficit is now projected at more than \$160,000 and doesn’t include the fact that more students may arrive this school year that require a STEPS placement.
- “4. At the time, the legislature was deliberating a bill that would have impacted our state transportation support and would have led to reduction of nearly \$50,000.¹⁶

“This document was faxed at 3:35 p.m. on Friday, October 16, 2009.”

¹⁶The bill to which Vanikiotis referred, Senate Bill 555, did not pass. Lobbyists for major education groups, including the Oregon Education Association, the Confederation of School Administrators, and Oregon School Boards Association, believed that the bill never had a chance of passing. There is no evidence to indicate that Vanikiotis or any other District administrator or board member knew this.

29. In December 2009, Bilodeau examined District budgets and audits for the 2001 through 2010 fiscal years. Bilodeau discovered the following facts regarding the District's financial situation during these years:

Fiscal Year	Ending Fund Balance as a percentage of audited expenditures
2001-02	15.9%
2002-03	16.2%
2003-04	22.7%
2004-05	18.5%
2005-06	20.8%
2006-07	21.9%
2007-08	25.3%
2008-09	16.6%

Fiscal Year	Amount budgeted for contingency fund (Percent of budgeted resources)	Amount spent (From audit)
2001-02	\$114,578 (1.5%)	0
2002-03	\$505,767 (6.0%)	0
2003-04	\$466,174 (5.2%)	0
2004-05	\$383,950 (4.4%)	0
2005-06	\$10,285 (0.1%)	0
2006-07	\$313,645 (3.5%)	0
2007-08	\$166,400 (1.9%)	0
2008-09	\$173,000 (1.8%)	0

30. District policy DBDB, "Fund Balance," adopted on June 10, 2004 and revised in July 2009 states:

"* * * the Board directs the superintendent to manage the currently adopted budget to an ending fund cash balance between 6.0% and 12.5% of the General Fund's annual operating expenditures."

CONCLUSIONS OF LAW

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

2. The District did not violate ORS 243.672(1)(e) by making regressive proposals on April 10 and June 4, 2009.

In negotiations for a successor to their 2007-2008 contract, the Association and District decided to use IBB, an alternative approach to bargaining. As part of this process, the parties' negotiating teams met for ten months—from June 2008 through March 2009—to discuss contract-related concerns and offer solutions.

The District concluded that the IBB approach was ineffective, however. On April 10, 2009, District negotiators told the Association that the District wanted to abandon IBB and seek assistance from a state mediator. Also on April 10, the District made its first formal proposal for a three year contract; the proposal included annual increases in the base salary and District contribution for health insurance benefits, and a one-time increase in hourly extra duty salaries. In addition, the District proposed language that would allow it to cut up to six school days per year under certain circumstances. The Association rejected the District's proposal and urged the continued use of IBB. Over the Association's protests, the District requested mediation on April 29, 2009.

On June 3, 2009, before the parties' first meeting with the state mediator, the District board and budget committee met and approved a 2008-2009 budget that included reductions in staff and programs. After considering the District's financial situation, Vanikiotis and the board concluded that the District could only fund its April 10 proposal to the Association if it made additional cuts in staff and programs. Rather than make these reductions, Vanikiotis and the board decided to offer the Association a revised proposal.

On June 4, 2009, the District offered the Association a proposal for a two year contract that included no increases in base salary, extra duty pay, or District contributions for health insurance benefits. The proposal also contained the previously proposed provision permitting the District to cut up to six school days per year.

The parties met with the mediator on June 11 and July 13, 2009. The parties were unable to reach agreement, however, either in mediation or in negotiations that occurred after the parties' two mediation sessions.

The Association asserts that the District engaged in bad faith bargaining in violation of ORS 243.672(1)(e) by making regressive proposals on April 10 and June 4.

An employer violates subsection (1)(e) when: (1) its conduct in negotiations is so inimical to the bargaining process that it is a *per se* violation of its obligation to bargain in good faith; or (2) the totality of its conduct during negotiations indicates an unwillingness to reach agreement. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08, 23 PECBR 365, 378 (2009), citing *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06, 22 PECBR 198, 206 (2007); *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 387 (2006), quoting *Portland Police Association v. City of Portland*, Case No. UP-64-01, 20 PECBR 295, 310 (2003). Here, the Association does not claim that the totality of the District's conduct violated subsection (1)(e).¹⁷ Instead, the Association asserts that the District engaged in *per se* bad faith bargaining by offering proposals on April 10 and June 4 that were allegedly regressive and made after table bargaining ceased and mediation began. We begin our analysis by examining the relevant case law concerning *per se* bad faith bargaining.¹⁸

¹⁷As discussed above, the Association filed a separate unfair labor practice alleging that the totality of the District's conduct during negotiations constituted bad faith bargaining.

¹⁸The parties' agreement regarding the use of IBB presents us with some substantial difficulties. Under ORS 243.712(1), parties start negotiations for a successor contract by engaging in 150 days of "good faith negotiations" which begin when they "meet for the first bargaining session and each party has received the other party's initial proposal." If unable to reach agreement, the parties may ask that the Board provide them with a mediator's assistance.

Here, the District and Association chose to waive some of these requirements, and used a process that took their bargaining outside of the statutory scheme. They agreed that the 150-day period of good faith negotiations would begin on a date certain *before* the parties offered initial proposals. In fact, the agreed-upon period of good faith negotiations involved no exchange of proposals. Under the IBB process the parties used, they did not make proposals. Instead, they discussed contract-related problems and offered solutions that belonged to neither party. The parties failed to reach clear agreement regarding the details of this alternative process, however. Specifically, they never discussed how they would make initial proposals and how bargaining would proceed if, as occurred here, one party refused to continue IBB and the other party insisted on doing so.

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The Association cites no authority for the proposition that a party engages in *per se* bad faith bargaining by making regressive proposals, and we have found none.¹⁹ To the contrary, we analyze the specifics of a party's proposal as only one of several factors we consider to determine whether the totality of circumstances indicates that a party bargained in bad faith.²⁰ Thus, proposals which are unduly harsh, unreasonable, or include rollbacks, *i.e.*, reductions in existing wages and benefits, are only one indicator of bad faith. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985); *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603, 613-614; *Lincoln County Employees Association v. Lincoln County and Daniel Glode, District Attorney*, Case No. UP-42-97, 17 PECBR 683, 705 (1998).

The National Labor Relations Board (NLRB) reached a similar result in defining an employer's duty to bargain in good faith under Section 8(a)(5) of the National Labor

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In its unfair labor practice, the Association now asks that we apply legal principles from the Public Employee Collective Bargaining Act (PECBA) dispute resolution process to determine if the District bargained in bad faith by making allegedly regressive proposals. It is difficult to do so when the parties apparently agreed to waive some of the requirements of ORS 243.712(1) by defining a 150-day period of good faith negotiations that involved no submission of proposals. Essentially, the parties agreed to waive some PECBA principles, but failed to clearly specify which ones. We caution parties, as we have before, that those "who devise their own extra-statutory dispute resolution process should articulate the terms of that process clearly." *Bend Police Association v. City of Bend*, Case Nos. UP-44/48-03, 20 PECBR 611, 627 (2004) (discussing the difficulty of applying PECBA standards to analyze a bad faith bargaining charge when the parties used an alternative bargaining process, but never agreed to the specific terms of the process).

¹⁹Conduct in negotiations that is considered "so inimical to the bargaining process" that it is a *per se* violation of subsection (1)(e) includes: (1) unilaterally implementing a change in a mandatory subject of bargaining; (2) submitting a new proposal in mediation; and (3) submitting a new proposal in a final offer. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 387 (2006).

²⁰In addition to the contents of a party's proposals, we generally consider the following other factors to determine if the totality of a party's conduct indicates an unwillingness to reach agreement and bad faith bargaining: "(1) dilatory tactics; (2) contents of the proposals; (3) behavior of the party's negotiator; (4), nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations." *Dallas Police Employees Association v. City of Dallas*, UP-33-08, 23 PECBR 365, 378 (2009), quoting *International Association of Firefighters Local #1431 v. City of Medford*, UP-32/35-06, 22 PECBR 198, 207 (2007).

Relations Act (NLRA).²¹ Absent other indicia of bad faith, a regressive contract proposal is not *per se* unlawful under the NLRA. John E. Higgins, Jr., ed., *The Developing Labor Law* 869 (Fifth Edition 2006); *Chicago Local No 458-3M v. NLRB*, 206 F3d 22, 340 (2d Cir 2000) (NLRB precedent establishes the proposition that “regressive bargaining is not so harmful to the collective bargaining process as to require a general prohibition.”). The NLRB views an employer’s unreasonable bargaining demands as one of the factors it considers in determining whether the employer’s “totality of conduct” demonstrates bad faith bargaining. *Mid-Continent Concrete*, 336 NLRB 258, 259-260 (2001), *enforced*, 308 F3d 859 (8th Cir 2002). *See also Pittsburgh-DesMoines Corp. v. NLRB*, 663 F2d 956, 959 (9th Cir 1981) (to determine whether bad faith bargaining under the NLRA has occurred, the NLRB must decide whether the totality of circumstances demonstrates that a party has a genuine desire to reach agreement and cannot rely solely on the content of the proposals made).

We find this NLRB precedent persuasive and adopt it. Assuming *arguendo* that the District’s April 10 and June 4 proposals were regressive, we conclude that the District’s conduct in offering them did not constitute *per se* bad faith bargaining.²²

²¹Because the PECBA was adopted to model the NLRA, we look to cases decided under the federal law to assist us in interpreting the PECBA. Particularly helpful are cases decided before 1973, the year the PECBA was enacted. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000), citing *Elvin v. OPEU*, 313 Or 165, 177, 832 P2d 36 (1992).

²²Even if we were to consider the District’s allegedly regressive April 10 and June 4 proposals as possible indicators of bad faith bargaining under the totality of circumstances test, it is unlikely that we would give much weight to them. In *Portland Association of Teachers v. Portland School District No. 1J*, Cases Nos. UP-35/36-94, 15 PECBR 692 (1995), we analyzed a school district’s offer of regressive proposals during negotiations for a successor contract. During the first several months of negotiations, the school district’s economic proposals included a two-day cut in the school year and language requiring each employee to contribute approximately \$20 per month toward the cost of health benefits. On March 29, the school district made a revised proposal that included a five-day cut in the school year and language requiring either no employee out-of-pocket costs for health benefits or an approximate monthly cost of \$112 per employee. We analyzed the employer’s modified proposal as a factor in the totality of circumstances that might indicate bad faith bargaining: “The question is whether the modification in the District’s position was so unreasonable as to compel the conclusion that the District had no intention of reaching agreement.” *Id.* at 716. We held that the District’s bargaining stance was not unreasonable, because a serious financial crisis justified the change in its proposals. At a March 17 meeting, the district school board voted to cut the school year by five days and reduce employee health and welfare trust reserves by \$5,000,000. We concluded:
(...continued)

We turn next to the Association's contention—that the District engaged in bad faith bargaining by making allegedly regressive proposals on April 10 and June 4, when table bargaining ceased and the parties were in mediation. The Association contends that making a regressive proposal in mediation is “tantamount to raising a new issue in mediation.” (Association Post-Hearing Brief, p. 15). According to the Association, we should hold that making a regressive proposal in mediation is *per se* bad faith bargaining for the same reasons we have held that making a proposal on a new issue in mediation is bad faith bargaining. We disagree, because we conclude that the District's allegedly regressive proposals were not made in mediation.

ORS 243.712(2)(a) and OAR 115-40-0000(1)(a), the only statute and rule referring to mediation required after the parties complete 150 days of good faith negotiations, state that either party to a bargaining dispute may declare an impasse “[a]ny time after 15 days of mediation.” No statute or rule, however, explains how to

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“The rationale for offering the new proposals was reasonable and consistent with the position the District had taken from the beginning of bargaining. Despite the modifications, the District continued to express its desire to resolve the contract. District negotiators were willing to continue bargaining. Considering the circumstances, the District's less favorable economic proposals were more the result of hard bargaining on difficult issues than of an intransigence in resolving the contract.” *Id.*

Here, the District's rationale for changing its April 10 proposal was reasonable. Given the conflicting DOE figures regarding the 2009-2011 SSF allocation, the District's use of a conservative SSF figure in its budget was justified. In addition, other Jackson County school districts shared Superintendent Vanikiotos' pessimism, and based their budgets on a less generous SSF allocation. The District's decision to budget a large ending fund balance for 2009-2010 was based on past experience. In 2008, the District avoided budgetary cuts necessitated by a state revenue shortfall by spending down its ending fund balance. Nor did the District act unreasonably in assuming decreased student enrollment. Even if the spring 2009 decline in student enrollment was temporary (as the Association contends), District student enrollment had been steadily declining since 2000.

As in *Portland School District*, the justification for the District's allegedly regressive change in its proposal was based on reasonable assumptions about the District's 2009-2010 financial situation. In addition, the District willingly continued bargaining by participating in mediation and post-mediation negotiations. Accordingly, it is unlikely we would hold that the District's allegedly regressive June 4 proposal is a significant indicator of bad faith bargaining under the totality of circumstances.

determine when this 15-day period of mediation begins or ends, and we have never addressed this issue in our cases. Thus, our task is to examine ORS 243.712(2)(a) to define the meaning of the phrase “15 days of mediation.”

In interpreting a statute, we must discern the legislature’s intent by analyzing the statute’s text and context. We also consider any legislative history offered by the parties.²³ If the legislature’s intent is still unclear after this analysis, we then apply standard maxims of statutory construction. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

Our examination of the text of ORS 243.712(2)(a) provides guidance regarding the meaning of the terms used in this statutory provision. In addition to specifying that parties may declare impasse after “15 days of mediation,” ORS 243.712(2)(a) states that “[m]ediation shall be provided by the State Conciliation Service as provided by ORS 662.405 to 662.455.” ORS 662.405 through 662.455 establishes the State Conciliation Service as a part of this Board, and describes when and how these services will be offered. ORS 662.425(1), “Mediation Services,” states that when a party notifies the State Conciliation Service “that a labor controversy exists or is imminent, the conciliator * * * shall immediately set a time and place for a mediation conference and invite the parties to attend to participate in mediation of their differences.” Thus, the unambiguous language of ORS 243.712(2)(a) defines mediation as the process that occurs at a mediation conference scheduled by the State Conciliation Service. Given this statutory provision, we conclude that 15 days of mediation begins when the parties meet for their first conference with the mediator. Because the District made its April 4 and June 10 proposals before the parties’ first mediation session in July, it did not make these proposals in mediation.²⁴

²³Here, because neither party has offered any legislative history, we need not consider it. *State v. Gaines*, 346 Or at 166 (a court may limit its consideration of legislative history to what is offered by the parties, and need not independently research a statute’s legislative history).

²⁴The Association admits that under ORS 243.712(a), the 15-day period to determine when a party may declare impasse begins at the parties’ first scheduled meeting with the mediator. The Association contends, however, that “it does not make sense to apply that same rule to determine whether a new issue has been raised in mediation.” (Association Post-Hearing Brief, p. 25). According to the Association, a proposal on a new issue in mediation is unlawfully made if it is a proposal “that is made after the mediation process has been initiated and after the parties have ceased table bargaining.” *Id.* Essentially, the Association asserts that the statute establishes two periods of mediation—one that begins at the first mediation session and another that begins when table bargaining ends. This Association position is contrary to the clear language of ORS 243.712(2)(a), which refers to a single 15-day period of mediation.

The District did not engage in bad faith bargaining in violation of subsection (1)(e) when it made its April 4 and June 10 proposals. We will dismiss this allegation of the complaint.

3. The District did not violate ORS 243.672(1)(e) by submitting a proposal on a new issue in mediation.

As discussed above, a party engages in *per se* bad faith bargaining if it makes a proposal on a new issue in mediation. The Association alleges that the District engaged in bad faith bargaining by offering a proposal on a new issue in mediation concerning the use of expedited bargaining procedures under ORS 243.698 to negotiate about SIF.²⁵ We begin our analysis of the Association's claim by reviewing our definition of a new issue.

An "issue" is a general subject matter of bargaining. It is new only if it is one which was not "reasonably comprehended within" or does not logically evolve from prior discussions of bargaining positions. *Blue Mountain Community College*, 21 PECBR at 757, quoting *Roseburg School District*, 8 PECBR at 7957, n 8.

Here, the parties discussed the issue of SIF for several months. At a July 13, 2009, mediation session, the Association offered a solution that included a provision requiring the parties to negotiate about SIF. On July 24, 2009, the District proposed that the parties use expedited bargaining procedures under ORS 243.698 to negotiate about SIF. The District's proposal regarding the use of expedited bargaining procedures was directly responsive to the Association position that the parties should bargain about SIF. As such, the District SIF proposal was reasonably comprehended within and logically evolved from the parties' prior discussions.²⁶ Accordingly, the District's proposal did not introduce a new issue in mediation in violation of subsection (1)(e). We will dismiss this claim.

²⁵In its complaint, the Association alleged that the District made several new proposals in mediation. In its post-hearing brief, however, the Association presented argument regarding only one allegedly new proposal in mediation—the use of expedited bargaining procedures to negotiate about SIF. Because the Association chose not to pursue its contentions regarding any other allegedly new proposals, we will not consider them.

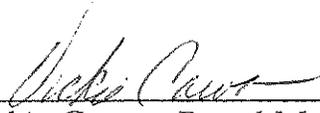
²⁶The fact that the Association offer to bargain about SIF came as part of a solution, and not a proposal, does not affect our analysis. Even if we accept the Association's argument—that under IBB, solutions belong to neither party—it is clear from this record that the parties discussed negotiating about SIF during mediation. Under the *Blue Mountain* definition, an issue is not new if it logically evolves from or is reasonably comprehended within the parties' prior discussions.

ORDER

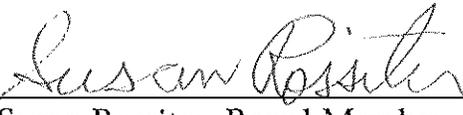
The complaint is dismissed.

DATED this 8 day of June, 2010.

**Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

**Chair Gamson, Concurring

I agree with the majority's decision to dismiss the Association's complaint. I write separately because I disagree with the majority's reasons for dismissing it.

The parties voluntarily agreed to a bargaining process that differs from the statutory scheme.²⁷ Parties are free to establish any bargaining process they want. If they put their process in writing, we will enforce it. ORS 243.672(1)(g) and (2)(d). But that is not the issue here.²⁸ Instead, the parties agreed to a process outside of the statute,

²⁷The parties called their process Interest Based Bargaining (IBB). The IBB process can be valuable and successful when properly used. Here, there was no evidence that the parties were trained in the process or that they used a trained facilitator to run their meetings.

²⁸The Association took the position that the District had no right under their agreement to terminate the IBB process. The Association did not, however, raise the issue as a separate claim in its complaint, and we do not reach it. One of the fundamental problems with this case is that the parties' agreement omits some basic provisions. For example, it fails to articulate the standards of conduct that apply to the process, how and when the IBB process would end, how

without articulating any standards of conduct that apply to it, and the Association now asks us to apply the statutory standard of good faith to the parties' process. In my view, we should decline. It is not this Board's job to impose new conditions or add new standards to the parties' agreed-upon bargaining process.

This case exemplifies the type of difficulties that can arise when we try to apply statutory standards to a bargaining process conducted outside of the statute. The Association's complaint asserts two claims: (1) that the District made regressive bargaining proposals, and (2) that the District raised new issues for the first time in mediation. A proposal can be regressive or new only in relation to other proposals. Thus, both of the Association's claims require us to compare later proposals to earlier ones to see if they are regressive or new. The problem is that, under the parties' agreed-upon process, neither side made proposals. There is nothing we can use for the required comparison.

Even if we were to determine that the District unilaterally withdrew from the alternate process and made contract proposals shortly before mediation, it did not make those proposals within the process contemplated by the statute. Under ORS 243.712(1), the 150-day period of table bargaining starts when the parties exchange proposals. Here, the Association never offered any proposals, and the District proposals were few and made late in the process. As a result, the record is largely devoid of the type of evidence we would normally expect under the statutory process. We don't have the typical string of proposals and counter-proposals that we can trace to see if a later proposal is regressive or raises a new subject.

In my view, the majority is misguided in its attempts to graft statutory standards onto a bargaining process conducted outside of the statute. If the parties wanted statutory standards to apply to their agreement, they could have said so. They did not. I question this Board's authority to add new provisions to the parties' agreement.

In addition, the majority raises and decides several issues of first impression under the PECBA.²⁹ I believe we should refrain from making such important decisions about

the parties would proceed if the IBB process failed, and how they would transition to the statutory process.

²⁹The majority decides, for the first time, that a regressive proposal does not constitute *per se* bad faith under the PECBA. It also decides that, for purposes of determining if a proposal was made in mediation, the process begins when the parties meet for their first mediation session.

the PECBA bargaining process when, as here, the record is based on a process different from the one prescribed by the PECBA. These are the wrong conditions for deciding novel issues and making new law.

My overarching concern is for the integrity of the statutory bargaining process and our decisions that interpret and clarify it. I would dismiss the complaint on grounds that the statutory standards do not apply to a bargaining process such as this one which was conducted outside of the statute. In my view, the majority erred when it applied the statutory standards to the parties' dispute. I therefore concur in the majority's decision to dismiss the complaint but not in its reasons for doing so.

A handwritten signature in black ink, appearing to read 'P. B. Gamson', written over a horizontal line.

Paul B. Gamson, Chair