

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-69-03

(UNFAIR LABOR PRACTICE)

IBEW, LOCAL 48 AND DISTRICT)	
COUNCIL OF TRADE UNIONS,)	
)	
Complainants,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
SCHOOL DISTRICT NO. 1J,)	AND ORDER
MULTNOMAH COUNTY,)	
)	
Respondent.)	
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The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) Vickie Cowan on November 23, 2004, following a hearing on July 1, 2004, in Portland, Oregon. The hearing closed on August 18, 2004, upon receipt of the parties' post-hearing briefs

John S. Bishop, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 N.W. Johnson Street, Portland, Oregon 97209, represented Complainants.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

On December 8, 2003, IBEW, Local 48 (IBEW), and the District Council of Trade Unions (DCTU) filed this unfair labor practice complaint against School District No. 1J, Multnomah County (District), alleging that the District violated ORS 243.672(1)(a), (b), (e), and (f) when it sold the KBPS radio station to the KBPS Public

Radio Foundation (Foundation). The District filed a timely answer in which it denied wrongdoing.

The issues presented for hearing were:

1. Did the District violate ORS 243.672(1)(f) by failing to give IBEW advance notice of the sale of KBPS, as required by ORS 243.698?
2. Did the District fail to give IBEW notice and provide IBEW with an opportunity to bargain the impacts of the sale, in violation of ORS 243.672(1)(e)?
3. Did the District violate ORS 243.672(1)(e) by misrepresenting the conditions under which KBPS employees would assume employment with the Foundation after the sale?
4. Did the District instruct KBPS employees not to discuss the proposed sale of KBPS prior to the District Board's resolution? If so, did such action by the District violate ORS 243.672(1)(a) and (b)?
5. Did the District's and the Foundation's direct communication with KBPS employees concerning the terms and conditions of employment after the sale violate ORS 243.672(1)(a) and (b)?
6. Did the District violate ORS 243.672(1)(a) and (b) by prohibiting IBEW representation during the November 6, 2003 meetings between KBPS employees and District representatives?
7. Is a civil penalty warranted?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. IBEW, through its affiliation with DCTU, was the exclusive representative of a bargaining unit comprised of all technicians, engineers, and on-air talent at KBPS radio, which was owned by the District, a public employer.
2. The District and DCTU were parties to a collective bargaining agreement (CBA) effective July 1, 1999 through June 30, 2004.

3. The District owned the AM and FM license and physical assets associated with radio station KBPS-FM—89.9 on the FM dial in Portland, Oregon. The FM station has an all-classical music format; the AM station is used by the District for educational purposes.

4. The Foundation is a nonprofit, private sector corporation, formed for the purpose of maintaining an all-classical radio station in Portland. The Foundation supported KBPS-FM and funded the station's operating expenses, including employee salaries and benefits.

5. In early 2002, the Foundation asked the District superintendent to enter into negotiations to sell KBPS's FM license to the Foundation. The Foundation was afraid that if the District was forced to offer the FM license for sale publicly, the new owners might change the station's format.

6. On July 12, 2002, the Foundation and District jointly commissioned a comparable market value appraisal for the sale of the FM license.

7. On or about August 21, 2002, the District received the appraisal which set a value on the FM license of \$5.5 million.

8. In late December 2002, KBPS Station Manager Suzanne White told KBPS employees that the District was considering selling the station and its FM license to the Foundation.

9. In early January 2003, White and Foundation Board President Roger Doyle met with the KBPS staff. Doyle confirmed that the District and Foundation were discussing the possible sale of the FM station. Doyle and White asked the employees to keep the discussion confidential because the Foundation was concerned that if the news became public, the District might be forced to competitively sell the station and the Foundation would lose the all-classical music format.

10. On February 5, 2003, the Foundation sent the District a formal written proposal to begin negotiations for the Foundation's purchase of the FM station's assets and the FCC license necessary for its operation. The Foundation's proposal included confidentiality provisions which the District, because of Oregon's public records law (ORS 192.001 et seq.), could not agree to. However, this document signified the beginning of the formal negotiation process.

11. On or about March 12, 2003, the Foundation made a formal offer to the District to purchase KBPS-FM for \$5.5 million. At the same time, the parties

began face-to-face negotiations regarding the sale of the station. District General Counsel Jollee Patterson and District Chief Financial Officer Heidi Franklin represented the District, and Marc Hand was the Foundation's chief negotiator.

12. By March 2003, KBPS employees were concerned and frustrated because they had little information about the possible sale. Employee Ron Ross decided to contact IBEW. He sent an e-mail to Mark Zadow, whom Ross thought was his IBEW representative. Unbeknownst to Ross, Zadow was no longer his representative. IBEW Representative Lee Duncan contacted Ross in the first part of April.

13. Employees asked Station Manager White about the status of the potential sale. White gave them no details, but indicated that negotiations were nearing conclusion. She told the employees that the District wanted to present the proposal to the School Board on June 16, 2003. When employees asked White about their jobs after the sale, White told them to talk to the Foundation.

14. On June 3, 2003, KBPS employees requested to meet with Foundation President Roger Doyle to discuss outstanding questions and to insure that all current KBPS-FM staff members would be transferred in the sale.

15. On June 5, 2003, Doyle responded to the employees' request by e-mail. He declined to meet with them, explaining that it would be both imprudent and counterproductive to meet until all details of the agreement were fully settled by the parties. He went on to say that staffing and job descriptions would not be included in the proposal because they were not germane to the transfer of physical assets and the license to broadcast. He advised the employees to contact White with any future questions, stating:

"By definition the governance of KBPS-FM proceeds from the Foundation Board to the Station General Manager. Thus, it is the Station General Manager to whom you should address all questions about staffing and job descriptions. It is the Board's function to advise and consent to the recommendations of the Station General Manager."

16. On June 5, 2003, KBPS employees met with IBEW Representatives Lee Duncan and Clif Davis. The employees told IBEW representatives about the proposed sale and that they were frustrated because the Foundation offered no assurance of continued employment at their current rate of pay or benefits. IBEW representatives told the employees that they would meet with the District and demand that provisions be placed in the sale contract to address the employees' concerns. They also suggested

that they try to block the sale at the June 16 School Board meeting. The employees did not want to block the sale. They did not want the KBPS sale forced to public auction and risk a change of station format.

17. By letters dated June 5 and June 6, 2003, the District formally notified Portland Federation of Teachers and Classified Employees (PFTCE), DCTU, and IBEW of the proposed sale. Those notices stated:

“We were recently informed that talks are underway regarding the potential sale of the KBPS-FM license to the KBPS Foundation. The proposed transaction will be presented to the Board on June 16th for a vote. The sale is contingent upon the Board’s approval. The sale will not be final until the FCC approves it and the information we have been given indicates October 2003 as the earliest possibility.

“At this time, we do not have any more specific information regarding the impact on employees. We will, however, ensure that employees and I.B.E.W. Local 48 are given detailed information as it becomes available. We will be scheduling a meeting next week with the KBPS employees to help answer questions. We will let you know when the meeting is scheduled, and you are welcome to attend.”

18. On June 9, 2003, the District set up a meeting with KBPS employees and invited IBEW Representatives Clif Davis, Lee Duncan, and Val Jack. During the meeting, Heidi Franklin described the proposed FM station sale. She explained that the sale was contingent upon the vote of the School Board scheduled for June 16 and the receipt of FCC approval. Davis asked whether the District intended to put any guarantees of future employment or severance in the sale documents. Franklin responded that she did not think that was legally possible due to FCC regulations. In response to questions from Davis and others about the future of the employees, Franklin explained that she did not know what plans the Foundation had for the employment of current FM employees. Franklin indicated that she would attempt to get answers from the Foundation and get back with them on or about June 13, 2003. IBEW representatives made no formal oral or written demand to bargain.

19. On June 10, 2003, the School Board’s finance and operations committee held a public hearing. IBEW’s representatives, along with several KBPS employees, attended the meeting. Representatives of the Foundation also attended. During the meeting, the Foundation representatives indicated it was the Foundation’s

intent to offer employment to current KBPS employees at their same salary in addition to a reasonable benefits package. IBEW representatives did not verbally demand to bargain or file a written demand to bargain.

20. At its June 12, 2003 meeting, the Foundation Board approved the following resolution:

“Resolved that it is the intent of the KBPS Public Radio Foundation to offer the current staff of KBPS-FM employment at current salaries and a reasonable package of benefits upon consummation of the acquisition of the KBPS-FM license.”

21. Based upon the Foundation’s resolution, the employees canceled the June 13 meeting with the District and met, instead, with Foundation representatives. Several KBPS employees, including Station Manager White¹ and IBEW Representatives Davis and Duncan, met with Foundation representatives Roger Doyle and Carl Widing. The Foundation reassured the employees that they would continue to be employed at their current salaries and that the Foundation was going to form an ad hoc human relations committee to look into benefits to make sure everything remained equal. The parties also discussed the possibility of future IBEW representation.

22. On June 16, 2003, the School Board voted to approve the sale of the FM station to the Foundation contingent upon receiving FCC approval. IBEW representatives did not attend the meeting.

23. The Foundation subsequently established an ad hoc human relations committee consisting of two KBPS employees, Station Manager White, and two Foundation representatives.

24. In early July 2003, at the Foundation’s request, Davis made a presentation to the ad hoc human relations committee regarding IBEW’s benefit package.

¹When asked on direct examination whether there was anyone from the District at this meeting, Davis replied: “You know, I can’t specifically recall anybody being there because the conversations were with the Foundation at this point.” When asked if Suzanne White was there, Davis replied: “Yes. I’m sorry, I associate the District as the District Office.”

25. From June 9, 2003 to November 2003, IBEW did not request or pursue any meeting with the District.

26. In early October, the FCC approved the license transfer from the District to the Foundation.

27. On October 30, 2003, the District set up a brief meeting with KBPS employees and IBEW representatives and informed them of the time line for the transition. The District informed the employees and IBEW that they would meet with individual employees the following week to determine whether the employees wished to remain with the District or transfer to the Foundation.

28. On November 6, 2003, District representatives met with individual employees, explained their contractual rights and current benefits, compared them to what the Foundation was offering, and asked the employees whether they wished to stay with the District or transfer to the Foundation. IBEW Representative Davis sat in with the first few employees. After meeting with District representatives, the employees then met with Foundation representative Widing and Station Manager White. Davis accompanied the first employee, Robert McBride, to the meeting. When they arrived, Widing informed Davis that he could not sit in on the meetings. Davis insisted. Widing then told Davis that the meetings with employees would be canceled if IBEW insisted on attending them. Davis then went to the next District exit interview. While Davis was meeting with the District, McBride chose to meet with Widing and White, as did the remaining employees. Davis finally left.²

²When questioning Davis on cross-examination regarding the meeting with the Foundation, District counsel asked the following questions:

“Q The subsequent meeting that was going to be with Carl Widing was to meet with the Foundation and what it would do as the new employer, correct?”

“A Yes.

“Q There were no representations intended from the District at that second meeting, correct? This was all what the Foundation was intending to do?”

“A Well, Suzanne White was there.

“Q But the meeting was for determining what the Foundation was willing to do?”

“A Yes.

29. On December 2, 2003, IBEW Business Manager Grant Zadow sent a letter to District Superintendent James Scherzinger stating: "I write to renew Local 48's prior demand to bargain over the decision to sell KBPS - FM, as well as the effects of that decision."

30. The District did not respond to Zadow's letter, and IBEW filed this unfair labor practice complaint on December 8, 2003.

31. On December 16, 2003, the Foundation assumed the KBPS-FM station along with all its employees.

CONCLUSIONS OF LAW

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

2. The District did not refuse to bargain in violation of ORS 243.672(1)(e) and (f).

3. The District did not violate ORS 243.672 (1)(a) and (b) by asking employees to refrain from discussing the sale, directly communicating with employees, or prohibiting IBEW representation in the November 6 meeting.

DISCUSSION

This case presents an unusual set of circumstances. The District, a public sector entity, announced its intent to sell a portion of its assets to the Foundation, a private sector entity. The two entities have been entwined for several years in an effort

"Q But not anything else, correct?"

"A Yes.

"Q And you knew that Suzanne was going to be the new station manager with the Foundation?"

"A Yes

"Q And she subsequently was, wasn't she?"

"A Yes."

to maintain an all-classical radio station in Portland. The Foundation has essentially supplied the funding for the station, and the District has supplied the employees. Negotiations for the sale also involved both entities. Our task is to sort out those acts attributable to the District. Because the Foundation is a private entity, it is not covered by the Public Employees Collective Bargaining Act (PECBA), and we thus lack jurisdiction over those acts attributable to the Foundation.³

(1)(e) and (f) allegations

IBEW alleges that the District violated ORS 243.672(1)(e) and (f) by refusing to bargain with IBEW over the impacts of the District's decision to sell the KBPS radio station to the Foundation.⁴ IBEW argues that the District failed to give IBEW timely and adequate notice of the sale sufficiently in advance to allow a reasonable time—at least 90 days—for bargaining. In the alternative, IBEW argues that even if it received timely and adequate notice, it was nevertheless relieved of the obligation to demand bargaining because the District's actions were a *fait accompli*.

The District argues that it gave IBEW timely and adequate notice of the proposed sale, but that it had no further bargaining obligation because IBEW did not make a timely demand to bargain. We agree.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to refuse to negotiate in good faith with the employees' exclusive representative over mandatory subjects of bargaining.

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to refuse or fail to comply with any provision of the PECBA, including ORS 243.698. ORS 243.698 provides for a 90-day expedited bargaining process when the employer wishes to make a change in employment relations during the term of the collective bargaining agreement. To begin the 90-calendar day negotiation period, the employer

³The Foundation is not named as a respondent, and in any event, it is a private sector entity that is not subject to PECBA jurisdiction. The complaint alleges only violations of the PECBA. Thus, we need not decide whether the Foundation would be subject to this Board's private sector jurisdiction under ORS Chapter 663.

⁴IBEW alleged in its complaint that the District had a duty to bargain both the *decision* and the *impact* of that decision prior to implementation. IBEW concedes in its closing brief, however, that based on this Board's decision in *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, *on reconsideration* 20 PECBR 388 (2003), the District had a duty to bargain only over the *impact* of its decision.

must notify the exclusive representative in writing of anticipated changes that impose a duty to bargain. ORS 243.698(2). Within 14 calendar days after the employer's notification is sent, the exclusive representative may file a demand to bargain.⁵ If a demand to bargain is not filed within 14 days, the exclusive representative waives its right to bargain over the decision or the impact of the change identified in the notice. ORS 243.672(3).

IBEW and the District were parties to a collective bargaining agreement which was in effect at the time the District decided to sell the radio station to the Foundation. The District's decision to sell the station had the potential to impact the employees' wages, hours, and working conditions, all of which are mandatory subjects of bargaining. An employer is prohibited from unilaterally altering employment relations that are mandatory subjects of bargaining without first notifying the exclusive representative and completing the bargaining process. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89, *supplemental order* 19 PECBR 317 (2001). An employer is relieved of these duties only in limited circumstances. One such circumstance is the union's failure to make a timely demand to bargain. That is what occurred here.

On June 5 and 6, 2003, the District notified IBEW, in writing, that it was considering selling the radio station to the Foundation and that the sale could potentially impact the employees' wages, hours, and working conditions. The District's decision to sell was contingent upon the results of the School Board's vote on June 16, and the receipt of FCC approval, which was expected sometime in October.⁶

The parties subsequently met on June 9 to discuss the potential sale. The District set up the meeting to speak with its employees, and it invited three IBEW representatives to attend. This was not a bargaining session. At that meeting, the employees, along with the IBEW representatives, asked that language be added to the sales contract guaranteeing employment for the employees or providing for a severance agreement. The District said it could not do that legally, but agreed to find out what

⁵ORS 243.698 expressly requires the employer's notice of anticipated changes to be in writing. It states that the exclusive representative may then "file" a demand to bargain. The statute does not define "file." We need not decide here whether the demand must be in writing. At the very least, it would be the better practice to put the demand in writing. In this way, the parties could avoid time-consuming disputes and proof problems like the ones here over whether and when IBEW made a demand to bargain.

⁶The 90-day bargaining period began on June 6, 2003, and would have ended on September 4, 2003.

plans the Foundation had for the employees. Subsequently, the Foundation committed to hire all the employees at their current salary and provide a reasonable benefit package. IBEW did not pursue the issue further. Nothing in this record establishes that IBEW ever demanded to bargain, either verbally or in writing, until December 2, 2003, when it sent a letter purporting to "renew" its demand to bargain. There was, however, never an initial bargaining demand to be renewed. The first demand was on December 2.

Even if IBEW's June 9 questioning of the District could be construed as a demand to bargain, IBEW did not pursue the matter further. The next contact IBEW had with the District regarding this matter did not occur until November when it met with the employees and District representatives to go over the employees' contractual rights and benefits, and determine whether the employees wished to stay with the District or transfer to the Foundation. By this time, the 90-day bargaining period had ended.

In unilateral change cases, the burden of pursuing bargaining falls on the exclusive representative. Once timely notice is given, a union's failure to demand *and pursue* bargaining will result in a waiver of its right to bargain. *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff*, Case No. UP-67-93, 15 PECBR 11 (1994); and *Molalla Union High School Association of Classified Employees/OACE/OEA v. Molalla Union High School District No. 4*, Case No. C-149-82, 7 PECBR 6244 (1984). The District provided timely notice; IBEW did not demand to bargain and did not pursue bargaining. On these facts, IBEW waived its right to bargain.

IBEW argues, in the alternative, that it is excused from filing a demand to bargain because the sale of the FM station was a *fait accompli*. There is no requirement that a union demand to bargain when the employer has already made a unilateral change. *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93, 16 PECBR 267, 274 (1995). IBEW contends that June 16, 2003, the date the School Board voted on whether to pursue the sale, is the applicable date. Here, where only impact bargaining is at issue, we do not find IBEW's argument convincing.⁷

In the context of impact bargaining, an employer must notify the exclusive representative of its intent to make a change that will impact mandatory subjects of

⁷IBEW's argument might have been more availing if decision bargaining were at issue. "[T]he employer must bargain about the decision before it can lawfully even make the decision." *FOPPO v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654 (1983). IBEW concedes there was no duty to bargain the decision, so the District was entitled to make the decision (*i.e.* take the vote on June 16). The District could not, however, implement that decision until it fulfilled any obligation to bargain over the impacts.

bargaining, and it must do so sufficiently in advance of the expected *implementation* date to allow a reasonable time for bargaining to occur. *Molalla, supra*; and *FOPPO v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654 (1983). The key word is "implementation." The District notified IBEW of the proposed sale on June 5 and 6, 2003. The sale was not final until all of the contingencies were met, *i.e.*, School Board approval and FCC approval. Implementation did not occur until December 16, 2003, well beyond 90 days following the District's initial notice to IBEW.

The District gave notice far enough in advance to allow bargaining to be completed before implementation. IBEW was not presented with a *fait accompli* that would relieve it of its duty to demand bargaining.

(1)(a) and (1)(b)

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to interfere with, restrain, or coerce employees *in or because* of the exercise of rights guaranteed in ORS 243.662. "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662

ORS 243.672(1)(b) makes it is an unfair labor practice for a public employer to dominate, interfere with, or assist in the formation, existence, or administration of any employee organization. When deciding a subsection (1)(b) claim, this Board determines whether the employer's actions *actually* dominated, interfered with, or assisted the labor organization, and whether its actions had a direct effect. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, *on reconsideration* 20 PECBR 388 (2003).

IBEW first asserts that the District violated subsections (1)(a) and (b) when it instructed employees not to discuss the proposed sale of the station. In December 2002, and January 2003, Station Manager White told the employees of the potential sale of the FM station to the Foundation. White asked the employees to keep the information confidential for fear that if the knowledge became public, the District might be forced to competitively sell the station and the classical format would be lost. On June 5, 2003, the District formally notified the respective unions of the potential sale. The District subsequently met with the employees on June 9, 2003.

IBEW filed this unfair labor practice complaint on December 8, 2003. There is a 180-day statute of limitations on such complaints. ORS 243.672(3). Claims concerning actions prior to June 11, 2003 are untimely. Because the complained-of

District actions all occurred prior to June 11, 2003, they are untimely and cannot form the basis for an unfair labor practice.

IBEW next argues that the District dealt directly with employees and prohibited IBEW representation in the November 6, 2003 meeting. The record, however, does not support either of IBEW's allegations.

The District did not engage in unlawful direct dealing with its employees. After the Board approved the sale on June 16, the Foundation formed an ad hoc human relations committee to write a personnel manual. Station Manager White was a member of the committee. IBEW argues that because White was still a District employee at the time, the District is responsible for her actions. We find that White was actually working for both the District and the Foundation. On June 5, Foundation President Roger Doyle sent an e-mail to KBPS employees directing them to contact Station Manager White about their continued employment at the station after the Foundation took over. According to the e-mail, White would then make recommendations to the Foundation's Board. White continued her position as station manager for the Foundation after the sale was implemented. Regardless of which entity employed her, White was acting at that time as an agent of the Foundation. If she acted unlawfully, her actions are the responsibility of the Foundation alone. (*Compare STEA v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228, 250, *ruling on motion to stay* 19 PECBR 339 (2001), *AWOP* 188 Or App 112, 70 P3d 903 (2003), *rev den* 336 Or 509, 87 P3d 1136 (2004).)

White was also acting as the Foundation's agent on November 6, 2003. The employees first met with District representatives along with their IBEW representative. Only when they left the District meeting to attend a meeting with Foundation representatives were they denied IBEW representation. IBEW bases its allegation of District responsibility for this allegedly unlawful action on the fact that White was still employed as a District employee. As stated above, we find that White was acting on behalf of the Foundation, not the District, and therefore, any unlawful actions are attributable to the Foundation alone.

In summary, the District complied with its legal obligations. It gave IBEW timely notice of the potential sale. IBEW waived its right to bargain. The District paid the employees their contractually established wages and benefits until the day they formally became Foundation employees. Any dispute over the wages and benefits received after they became Foundation employees is attributable to the Foundation, over which we have no jurisdiction.

For these reasons, we conclude that IBEW failed to carry its burden of proving that the District violated the PECBA. We will therefore dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

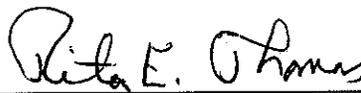
DATED this 30th day of December 2004.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member



Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.