

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-069-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)
CORRECTIONS EMPLOYEES,)
))
Complainant,)
))
v.)
))
STATE OF OREGON,)
DEPARTMENT OF CORRECTIONS,)
))
Respondent.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

On November 17, 2011, this Board conducted an expedited hearing. The record closed on November 28, 2011, upon receipt of the parties' post-hearing briefs.

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Complainant.

Kathryn A. Logan, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On October 27, 2011, the Association of Oregon Corrections Employees (AOCE) filed an unfair labor practice complaint against the State of Oregon, Department of Corrections (State). The complaint, as amended, alleged that the State violated ORS 243.672(1)(e) by refusing to bargain with AOCE over AOCE's Health Engagement Model (HEM) proposal.¹ Respondent filed a timely answer.

¹In addition to the allegation addressed here, AOCE's original complaint alleged that the State violated ORS 243.672 (1)(e) when it implemented the HEM without first bargaining with the AOCE. This Board bifurcated the complaint and expedited that portion of the complaint which alleges that the State refused to bargain over the AOCE's HEM proposal. The unilateral change allegation has been assigned a new case number to be processed under our normal procedures.

The issue presented at hearing is: Did the State violate ORS 243.672(1)(e) when it refused to bargain over AOCE's October 27, 2011 Health Engagement Model (HEM) proposal?

RULINGS

The Board rulings have been reviewed and are correct.

FINDINGS OF FACT

1. AOCE is the exclusive representative of a bargaining unit of correctional employees employed by the State of Oregon, Department of Corrections, a public employer.

2. At all relevant times, AOCE and the State were parties to a collective bargaining agreement which expired on June 30, 2011. The parties recently ratified a new collective bargaining agreement which expires June 30, 2013.

3. On or about December 15, 2010, the parties began negotiating for a successor collective bargaining agreement.

4. Beginning in April 2011, the Public Employees Benefit Board (PEBB) began discussing implementation of a health engagement program that would encourage members to improve their health; the PEBB expected that implementing such a program would eventually reduce health care costs by improving members' health.

The PEBB considered two types of health engagement programs: 1) those that offered a financial incentive to members who participated; and 2) those that imposed a financial disincentive on members who did not participate. The PEBB consulted with Mikel Gray, a partner in Mercer Global Benefits. Gray explained that a successful health engagement program needed broad employee participation and that based on his experience, broad participation could best be obtained through a program that imposed a financial disincentive on non-participating employees.

5. At their July 2011 meeting, the PEBB adopted the HEM program. The purpose of the HEM is to encourage members to identify and address health issues and improve their health.

6. At their August 2011 meeting, the PEBB finalized the elements of the HEM program it planned to offer. The program included the following features and requirements:

a. During open enrollment, the period from October 15 through November 15, 2011, when PEBB covered employees selected benefit plans, members must choose whether they and their spouses or domestic partners want to participate in HEM.

b. Members and their spouses or domestic partners who chose to participate in HEM must:

- Take a confidential online questionnaire assessment to identify health risks.
- Complete two e-lessons that will address health issues identified by the employee's health assessment. The e-lessons will be customized for each employee. Depending on the results of the assessment, employees may also be required to take certain "action steps" to improve their health, such as participating in Weight Watchers.²

c. Beginning January 1, 2012, an employee who chooses not to participate in HEM will pay a \$20 monthly surcharge which will be deducted from the employee's salary. If an employee provides coverage for a spouse or domestic partner and the employee does not participate in HEM, the employee will pay a \$35 monthly surcharge.

d. An employee enrolled in HEM must complete the health questionnaire by February 15, 2012. An employee who does not complete the health questionnaire by this date must pay a \$25 monthly surcharge which will be deducted from the employee's paycheck; the surcharge will be \$45 if the employee provides coverage for a spouse or domestic partner.

e. An employee enrolled in HEM must complete two e-lessons by July 15, 2012. An employee who does not complete the e-lessons by this date must pay a \$60 monthly surcharge which will be deducted from the employee's paycheck; the surcharge will be \$105 if the employee provides coverage for a spouse or domestic partner.

f. An employee who enrolls in HEM but does not complete the requirements will pay a maximum surcharge of \$563.

7. During successor contract negotiations, AOCE informed the State that it would not agree to participate in the HEM and would not agree to any HEM surcharges.

²PEBB offers the Weight Watchers program at no cost to employees and their spouses or domestic partners.

8. By letter dated August 30, 2011, AOCE formally demanded to bargain over the HEM.

9. On August 31, 2011, the parties reached tentative agreement on a successor collective bargaining agreement with the exception of the HEM issue. The State agreed to maintain the *status quo* and not implement the HEM program while the parties attempted to resolve the issue.

The collective bargaining agreement is in effect from July 1, 2011 through June 30, 2013, and includes the following provision regarding health insurance benefits:

“Section 3. Plan Years 2012 – 2113.

“For the period of January 1, 2012 through June 30, 2013, the Employer will pay ninety five percent (95%) and the employee will pay five percent (5%) of the monthly premium rate as determined by the PEBB.

“For the period of December 1, 2011 through June 30, 2013, the Employer will pay an additional thirty dollars (\$30) monthly subsidy for employee’s monthly premium rate for employees with salary rates below two thousand six hundred and ninety six dollars (\$2696) per month.”

10. On October 4, 2011, the parties met to discuss the HEM issue. AOCE proposed that bargaining unit members who chose to participate in HEM would receive a monetary incentive; bargaining unit members who chose not to participate would not pay a surcharge. AOCE explained that it considered the State’s HEM program to be punitive because it imposes a salary reduction on bargaining unit members who do not participate.

11. By letter dated October 13, 2011, State Labor Relations Manager Craig Cowan responded to AOCE’s letter demanding to bargain about HEM. The letter stated, in pertinent part:

“After careful review and consideration, the Employer concludes that bargaining has either already occurred (bargained language that the Employer and employee monthly premium contribution are respectively 95%/5% on rates established by PEBB), or it involves a prohibited/permissive subject of bargaining.

“ORS 243.125 provides that the Public Employees Benefit Board shall ‘...**design benefits**, devise specifications, analyze carrier responses to advertisements for bids and decide on the award of contracts....’. (emphasis

added). To bargain with the Association would require the Employer to bargain on a subject for which it has no authority to bargain. PEBB retains the exclusive statutory authority to design benefits and plans that meet the criteria in ORS 243.135(1).

“Based on the above, we respectfully refuse to bargain on the Association’s bargaining demand.” (Emphasis in original.)

12. On October 15, 2011, open enrollment began for employees eligible for PEBB coverage. During open enrollment, employees select the plans in which they wish to participate and choose the eligible dependents whom they wish to enroll. In regard to medical plans, full-time employees have a choice of four different plans: PEBB Statewide PPO, Providence Choice, Kaiser HMO, and Kaiser Deductible.³ Employees also choose the level of coverage they want: employee only, employee and spouse or domestic partner, employee and children, or employee and family. The cost to the employee for medical plans varies, depending on the plan and level of coverage selected.

Employees received detailed descriptions of the various available plans, and information comparing the premium costs of, and the coverage offered by, each of the medical plans.

13. The open enrollment form each employee was required to fill out included the following section:

“4. PEBB Health Care and Cost Containment Programs Benefits offered by the Public Employees’ Benefit Board include programs to improve employee health and contain costs. You must select your status in the following programs:

“4.a Health Engagement Model (HEM) Program. Employees who participate in this program will pay less for their health care benefit. Spouse or domestic partner participation status is attached to the employee’s status (see the HEM Agreement on page 7).

“4.b Tobacco Use Program. Employees and spouses or domestic partners who don’t currently use tobacco will pay less for their heath [*sic*] care benefit.

³Kaiser plans are available only to employees in the plan service area.

“4.c Other Employer Group Coverage Program. Employees will pay less for their health care benefit if their spouse or domestic partner enrolls in other employer group coverage if it’s offered by the spouses’ or domestic partners’ non Oregon state agency employer.”

14. In regard to the HEM program, the open enrollment forms stated:

“4.a Select your Status in the HEM Program

“When you elect to participate in the HEM Program, you agree to statements in the HEM Agreement (see the HEM agreement on p. 7).

“When you elect not to participate in the HEM Program, the following amounts will be deducted from your pay every month for the 2012 plan year:

- “• Employee Only: \$20
- “• Employee and Spouse or Domestic Partner: \$35”

15. The following “Health Engagement Model (HEM) Program Agreement” was included in the open enrollment forms given to employees:

“1. I will complete the Health Assessment for my health plan, either Kaiser or Providence, within 45 days of my coverage effective date. I will complete two e-lessons within 195 days of my coverage effective date.

“2. I understand that answers from my Health Assessment may be shared with my primary care provider with my approval.

“3. I understand that my Health Assessment will include recommendations customized for me that may include the following required standards:

“If my waist circumference exceeds a certain number of inches, I will participate in Weight Watchers or nutritional counseling or a program of physical activity or an assessment and action plan appropriate for me developed by my provider. The number for women is 35 inches – excluding pregnant women and women within 24 months after giving birth. The number for men is 40 inches.

“If I am a tobacco user, I will participate in a tobacco cessation program, e.g. Quit for Life, or other therapy recommended by my provider.

“If my Health Assessment identifies stress, alcohol use or substance abuse as risks to my health, I will contact the employee assistance program or complete an e-lesson on reducing the risk, or work with my provider to develop a plan of action.

“If a licensed medical professional from Kaiser or Providence calls me about a diagnosed chronic condition or other illness based on information submitted by my provider, I will accept or return the call to learn about potential support services for managing my condition.

“4. I will review Decision Points information as available on my health plan’s website prior to non-emergency surgeries or medical tests [web site addresses omitted].

“5. I will document the actions I take (and, if applicable, those taken by my spouse or domestic partner) on the HEM log or in a similar form. My documentation will include dates of completing the Health Assessment and e-lessons, contacts with a case or disease manager, and participation in program requirements.

“6. If I am enrolling my spouse or domestic partner for coverage, I have informed my spouse or domestic partner that he or she must individually complete our health plan’s Health Assessment and two e-lessons within the given time frames and comply with the recommendations of the HEM Agreement in 3-5, above.

“7. If a medical condition or disability makes it unreasonably difficult for me (or my spouse or domestic partner) to achieve a standard described in 3 (above), or if attempting to do so is medically inadvisable, a reasonable alternative to the standard will be provided.

“8. I understand that I will pay a monthly HEM surcharge if either I or my spouse or domestic partner misses deadlines for completing the Health Assessment and two e-lessons.”⁴

16. The open enrollment form required the employee to choose whether to participate in the HEM program and specify whether the employee covered a spouse or domestic partner. The form also gave the employee the choice of opting out of PEBB medical plans and avoiding the HEM surcharge.

⁴The forms and information given to employees during open enrollment did not specify the amount of the monthly surcharge for an employee’s (or an employee’s spouse or domestic partner’s) failure to comply with these requirements.

17. In regard to the "Tobacco Use Program," the open enrollment form required employees to specify whether the employee or the employee's spouse or domestic partner currently used tobacco. The form explained that if the employee or the employee's spouse or domestic partner was a current tobacco user, a surcharge of \$25 or \$50 would be deducted from the employee's monthly paycheck during the 2012 plan year. The form gave employees the choice of opting out of the PEBB medical plans and avoiding the tobacco surcharge.

18. In regard to the "Other-Employer Group Coverage Program," the open enrollment form required employees to specify if the employee's spouse or domestic partner was eligible for PEBB coverage, or was eligible for coverage under another employer's health care plan. The form then required the employee to specify whether the spouse or domestic partner waived PEBB or other employer coverage. The form explained that if the employee's spouse or domestic partner waived medical coverage available to them through a non-Oregon-state-agency employer, \$50 would be deducted from the employee's monthly paycheck during the 2012 plan year. The form gave the employee the choice of avoiding this surcharge by opting out of PEBB medical plans or by refusing to enroll a spouse or domestic partner in the employee's PEBB plan.

19. On October 20, 2011, the Association filed a petition to initiate binding interest arbitration, its cost summary, and its final offer. The final offer, as amended on October 27, 2011 states:

"Section 7. Health Engagement Model (HEM)

"Effective and retroactive to January 1, 2012 employees may voluntarily elect to participate in the HEM program offered through PEBB. Employees not electing to participate and employees who voluntarily participate but are later deemed 'non-compliant' shall not be subject to the involuntary wage reduction imposed as the HEM surcharge. Any surcharges imposed as of January 1, 2012 to the date of the interest arbitration award shall be reimbursed to employees."

20. Money that PEBB collects from the the HEM surcharge will be placed in a "Stabilization Fund," a subaccount of PEBB's Revolving Fund. ORS 243.167(1) authorizes the creation and operation of the Revolving Fund and lists the acceptable uses of the fund's assets:

"There is created the Public Employees' Revolving Fund, separate and distinct from the General Fund. The balances of the Public Employees' Revolving fund are continuously appropriated to cover expenses incurred in connection with the administration of ORS 243.105 to 243.285 and 292.051. Assets of the Public Employees' Revolving Fund may be retained

for limited periods of time as established by the Public Employees' Benefit Board by rule. Among other purposes, the board may retain the funds to control expenditures, stabilize benefit premium rates and self-insure. The board may establish subaccounts within the Public Employees' Revolving Fund."

PEBB plans to use the money collected from the HEM surcharges and placed in the "Stabilization Fund" to provide the reserves needed to self-insure two of PEBB's medical plans.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The State did not unlawfully refuse to bargain about AOCE's October 27, 2011 HEM proposal.

Introduction

In an effort to increase State employees' willingness to improve their health and control rising healthcare costs, the PEBB decided to implement the HEM program in 2012. HEM requires employees to take certain steps to assess and improve their personal health. If an employee or the employee's spouse or domestic partner chooses not to participate in the program, or chooses to participate but does not fulfill the program's requirements, a surcharge will be deducted from the employee's monthly salary.

Although AOCE and the State reached agreement on a successor contract, they could not agree on HEM and attempted to resolve the issue separately. The parties' discussions were not successful. On October 27, 2011, AOCE proposed that participation in the HEM program be voluntary, and that employees who chose not to participate pay no monthly surcharge. AOCE charges that this proposal concerns a mandatory subject of bargaining and that the State violated its good faith bargaining duty under ORS 243.672(1)(e) by refusing to negotiate about the proposal.

Under the Public Employee Collective Bargaining Act (PECBA), public employees have the right to "collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. "Employment relations" include "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." ORS 243.650(7)(a). An employer is obligated to negotiate about subjects included in the statutory definition of "employment relations." *Service Employees Int'l Union Local 503 v. DAS*, 183 Or App 594, 597, 54 P3d 1043 (2002). Any subject which is not mandatory is permissive; parties

may only bargain over permissive subjects if they mutually agree to do so and if the permissive subject is not prohibited by law. ORS 243.650(4). A subject prohibited for bargaining “is one which is specifically contrary to statute or would require a party to act contrary to statute.” *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 17 PECBR 299, 304 (1997), *aff’d*, 157 Or App 341, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999).

AOCE contends that under ORS 243.650(7)(a), the State must bargain about its HEM proposal. AOCE argues that HEM affects health insurance benefits, a subject both parties agree is an indirect monetary benefit. In addition, AOCE asserts that HEM affects a direct monetary benefit because employees who choose not to participate in HEM (or who choose to participate but do not comply with the program requirements) will have their salaries reduced.

The State, however, asserts that the legislature has given PEBB responsibility to design, select, and implement health benefit plans for State employees. According to the State, AOCE’s HEM proposal proposes a change in the contents of the health benefit plans offered by PEBB. The State argues that such a change conflicts with PEBB’s exclusive statutory authority to design benefit plans and therefore concerns a subject prohibited for bargaining.

Standards for Review

We begin our analysis of the parties’ arguments by reviewing cases in which we have determined the State’s obligation to bargain about a subject over which a State agency has statutory authority. In *AFSCME Local Union 328 v. State of Oregon, Executive Department*, Case Nos. UP-78/79/80/81/89/90/91/92/93/94-92, 14 PECBR 180 (1992), several unions proposed changes in the plans offered by PEBB’s predecessor—the State Employees Benefit Board (SEBB).⁵ The changes proposed were: an increase in the dollar amounts paid by SEBB plans for mental health, orthodontia, and vision benefits; the addition of domestic partners to the list of dependents eligible for coverage; and a guarantee that benefits would remain unchanged during the life of the contract. The State refused to negotiate over these proposals, contending that they concerned subjects prohibited for bargaining. We agreed with the State and dismissed the unions’ complaints.

⁵Prior to 1998, benefits to State employees were provided by two different entities—SEBB and the Bargaining Unit Benefits Board. Effective January 1, 1998 the legislature abolished these boards and created PEBB as their successor. Or Laws 1997, ch 222.

We noted that the legislature charged SEBB with the duty and responsibility to design and provide benefit plans to a group of State employees and to “make benefit plan decisions based on the welfare of *both* the State and its employees.” *Id.* at 190 (emphasis in original). We concluded that this statutory mandate could not be reconciled with the purposes and the policies of the PECBA:

“On the one hand, SEBB is charged with deciding what is ‘best’ for both the State and its employees. On the other, the PECBA contemplates an essentially adversarial process to arrive at, not what is *best* for both sides, but what both will be required to abide.” *Id.* (Emphasis in original.)

We found further incompatibility between SEBB’s statutory authority and the PECBA in the requirement that SEBB give primary consideration to cost containment principles when designing benefit plans. We concluded that benefit plans which were produced through the collective bargaining process were

“antithetical to the cost containment principles underpinning SEBB’s responsibilities. Even more directly at odds with cost containment would be benefit packages bargained individually with the scores of state bargaining units, thus reducing the size of covered groups and concomitantly increasing provider risk and therefore premium rates.” *Id.* at 191 (footnote omitted).

In *Oregon State Police Officers Assn. v. State of Oregon*, 127 Or App 144, 871 P2d 1018 (1994), the Court of Appeals affirmed our conclusion that the State did not violate its good faith bargaining duty under ORS 243.672(1)(e) by refusing to bargain about the impacts of the sale of a State-owned parking structure. The sale resulted in an increase in the rates State employees paid for parking. The Court agreed with our conclusion that the Department of General Services (DGS)

“has statutory authority to operate and dispose of parking facilities, and its exercise of that authority is not subject to bargaining under the Public Employee Collective Bargaining Act.” *Id.* at 146.

Finally, in *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections Employees*, Case No. UP-91-93, 14 PECBR 832, 875 (1993), *AWOP*, 133 Or App 602, 892 P2d 1030 (1995), *rev den*, 321 Or 268, 895 P2d 1362 (1995), we considered the State Department of Corrections’ obligation to bargain about a proposal that would require the State to provide all union bargaining unit members with uninsured and underinsured motorist coverage up to a limit of \$1,000,000. We noted that under ORS 278.405(1) and (2), DGS was required “to purchase insurance policies, develop and administer self-insurance programs, or any combinations thereof, as may be

in the best interest of the state” and provide insurance coverages it determined to be “necessary or desirable for the efficient operation of state operation.” We held that the Department of Corrections’ “obligations under its organic law are incompatible with the processes required under the PECBA as discussed generally in *AFSCME Local Union No. 328 v. State of Oregon, Executive Department*, Case No. UP-78-92, 14 PECBR 180, 190 (1992).” *Association of Oregon Corrections Employees*, 14 PECBR at 875.

We derive the following rule from these cases: if a proposal concerns a subject over which a State agency has statutory authority, we decide if the agency’s statutory mandate is compatible with the State’s PECBA bargaining obligation. If the bargaining obligation cannot be reconciled with the agency’s mandate, we will conclude that the proposal concerns a subject prohibited for bargaining.

PEBB’s Statutory Mandate

PEBB’s statutory duties and obligations are very similar to those of SEBB. Like SEBB, PEBB provides benefit plans to “[e]ligible [State] employee[s].” ORS 243.105(4). The nature and extent of PEBB’s authority to provide these plans is described in ORS 243.125:

“(1) The Public Employees’ Benefit Board shall prescribe rules for the conduct of its business. The board shall study all matters connected with the providing of adequate benefit plan coverage for eligible state employees on the best basis possible with relation both to the welfare of the employees and to the state. The board shall design benefits, devise specifications, analyze carrier responses to advertisements for bids and decide on the award of contracts.

“(2) In carrying out its duties under subsection (1) of this section, the goal of the board shall be to provide a high quality plan of health and other benefits for state employees at a cost affordable to both the employer and the employees.”

PEBB is required by law to provide employees with “high quality” benefit plans “at a cost affordable to *both* the employer and the employees.” ORS 243.125(2) (emphasis added). Coverage provided by PEBB must be selected “on the best basis possible with relation both to the welfare of the employees and to the state.” ORS 243.125 (1). In choosing appropriate plans, PEBB must consider factors such as “[a] competitive marketplace;” “[c]reativity and innovation;” and “[t]he improvement of employee health.” ORS 243.135(1)(b), (f), and (h). These obligations and considerations are incompatible with the State’s bargaining obligation under the PECBA. As we explained in *AFSCME Local Union No. 328*, the PECBA bargaining process is not designed to produce the “best” plans for both the employer and employee, or plans that

address cost containment issues because they are “affordable” to the employer. The process is even less likely to result in implementation of plans that improve employee health, demonstrate “creativity or innovation,” or reflect a “competitive marketplace.” Thus, we conclude that PEBB’s statutory powers and duties are incompatible with the State’s PECBA bargaining duty.

AOCE’s HEM proposal addresses a particular feature included in the medical plans offered by PEBB. The contents and design of these plans are matters over which the legislature has given PEBB exclusive authority. Because the State cannot bargain about the HEM proposal without contravening PEBB’s statutory mandate, we conclude that the proposal concerns a prohibited subject for bargaining.⁶

PEBB’s Authority to Impose HEM Surcharges

AOCE argues that PEBB cannot lawfully “design the HEM with conditions that unilaterally impose a monetary surcharge on employees who refuse to voluntarily join or who become non-compliant.” AOCE asserts that by law, PEBB has no authority to impose a surcharge. According to AOCE, there is therefore no conflict between PEBB’s statutory mandate and the State’s bargaining obligation and the State can and must bargain about HEM. AOCE cites a number of statutes which it claims prohibit PEBB from deducting a surcharge from the salaries of employees who do not participate in HEM, or who agree to participate in HEM but fail to complete the program’s requirements. We consider each of these statutes in turn.

ORS 243.135(4) permits payroll deductions for the cost of PEBB insurance benefits not covered by the State “upon receipt of a signed authorization from the employee indicating an election to participate in the plan or plans selected and the deduction of a certain sum from the employee’s pay.” According to AOCE, this statute permits a deduction only when an employee elects to participate in a plan, but does not permit a salary deduction for an employee who chooses *not* to participate in a plan such as HEM. AOCE’s argument is not well-founded.

Employees make an “election to participate” in a PEBB plan when they sign up for PEBB coverage during open enrollment. Employees are not required to accept PEBB benefits; they can decline PEBB coverage and refuse to enroll in any PEBB plans. Oregon Administrative Rules 101-020-0018. Once the employee decides to accept PEBB coverage, the employee has a number of choices to make regarding plan benefits and

⁶Although the State is prohibited from bargaining about the contents of plans offered by PEBB, it is obligated to bargain about the amount it will contribute toward the costs of these plans.

levels of coverage. Participation in the HEM program is simply one of the choices an employee who elects PEBB coverage must make; as with other choices required of the employee, it affects the amount the employee pays for health care.⁷

AOCE argues that any salary deductions PEBB will make for employees or their spouses or domestic partners who fail to complete the requirements of HEM will also violate ORS 243.135(4). AOCE observes that during open enrollment, employees who chose to participate in HEM were required to review and agree to certain conditions of the program. One of these conditions was the imposition of a monthly surcharge, to be deducted from the employee's salary, if the employee (or employee's spouse or domestic partner) failed to meet deadlines for completing the requirements of HEM. The materials given to employees during open enrollment do not specify how much will be deducted from the employee's salary for non-compliance with HEM. The Union notes that ORS 243.135(4) only permits "deduction of a *certain sum* from an employee's pay." (Emphasis added.) Since the amount of the surcharge for HEM non-compliance is not certain, the Union argues that PEBB exceeded its statutory authority by requiring employees to agree to this type of salary deduction. We disagree.

By choosing to participate in PEBB medical plans and agreeing to participate in HEM, an employee authorizes all appropriate payroll deductions. Among the conditions to which an employee choosing HEM must agree is the statement that "I understand that I will pay a monthly surcharge if either I or my spouse or domestic partner misses deadlines for completing" the requirements of HEM. By agreeing to this statement, the employee authorizes deductions of a "certain sum" to be determined by PEBB if the employee fails to comply with the requirements of the HEM program. In other words, the employee who agrees to all the conditions of HEM also agrees that PEBB can decide how much will be deducted from the employee's pay for non-compliance with HEM. The proposed surcharge for failing to meet HEM's requirements does not violate ORS 243.135(4).⁸

⁷We also note that during 2011 open enrollment, PEBB required employees to "select [their] status" in two programs other than HEM that affected their monthly salaries. Open enrollment forms required employees to specify whether they or their spouses or domestic partners were currently using tobacco. If the employee (or the employee's spouse or domestic partner) uses tobacco, a monthly deduction of \$25 or \$50 will be taken from the employee's paycheck. The forms also required employees to specify if their spouses or domestic partners waived "enrollment in other-medical employer group coverage to them from a non-Oregon -state-agency." If the spouse or domestic partner waives enrollment, \$50 will be deducted from the employee's monthly salary. AOCE has not challenged either of these plans.

⁸AOCE argues that the HEM surcharge violates statutory provisions which permit salary deductions only if: the deductions are "authorized in writing by the employee" and "are for the (continued...)

PEBB's Authority to Require Medical Testing of Employees

AOCE contends that the HEM program requires employees to provide personal and confidential medical information and to submit to “invasive medical testing.” According to AOCE, the HEM program significantly intrudes into employee privacy and, therefore, concerns a mandatory subject for bargaining. In support of its contention, AOCE cites *Federation of Oregon Parole and Probation Officers v. State of Oregon, Department of Corrections*, Case No. UP-117-89, 14 PECBR 693 (1993), where we held that the employer violated its good faith bargaining duty under ORS 243.672(1)(e) when it required an employee to submit to a drug test.

We do not hold that PEBB's 2012 HEM program involves the type of medical testing—urinalysis—that we held was mandatory in *FOPPO* because it affected considerations of employee privacy and test reliability. *Id.* at 705. The personal

(...continued)

employee's benefit” (ORS 652.610(3)(b)); “[t]he employee has voluntarily signed an authorization for the deduction of any other item, provided that the ultimate recipient of the money withheld is not the employer” (ORS 652.610(3)(c)); or the “deduction is authorized by a collective bargaining agreement to which the employer is a party.” (ORS 652.610(3)(d)). AOCE contends that the HEM surcharge violates all three of these provisions.

Contrary to AOCE's assertion, an employee provides written authorization for the HEM surcharge when the employee declines to participate in HEM during the open enrollment process. The decision not to participate in HEM and accept a salary deduction is voluntary. In addition, the deduction benefits the employee: the employee need not participate in a program the employee dislikes. Accordingly, the HEM surcharge does not violate ORS 652.610(3)(b). The other provisions cited by AOCE are inapplicable to the facts of this case.

AOCE also contends that PEBB's plan to place money collected from HEM surcharges in its Revolving Fund violates ORS 243.285(2), which requires that any deductions made from employees' salaries for PEBB health benefits must “be paid over promptly to the carriers or persons responsible for payment of premiums to carriers.” (Subsection a.) AOCE contends that this law requires that PEBB use money collected through salary deductions only to pay insurance premiums, and that PEBB will act unlawfully if it places money collected through the HEM surcharge in its Revolving Fund. AOCE's arguments are not well founded.

Under ORS 243.285(2), PEBB may pay money deducted from employee salaries to *either* to the insurance carriers to pay for premiums (subsection a), *or* “[w]ith respect to self-insurance benefits, in accordance with rules, procedures and directions of the Public Employees' Benefit Board.” (Subsection b.) PEBB has chosen to self-insure two of its medical plans, and has also decided, consistent with its authority under ORS 243.165(1), to use some of the money in its Revolving Fund to provide reserves for these self-insured plans. PEBB's intended use of the money received through HEM surcharge deductions is lawful.

information to which AOCE objects is the employee's waist measurement, which the HEM "Program Agreement" requires the employee to divulge. Such a disclosure does not involve highly personal information or submitting to an uncomfortable, unpleasant, or intrusive procedure. Nor is there likely to be a problem with the reliability of a waist measurement; obtaining the measurement is simple and straightforward. Finally, we note that in *FOPPO*, an employee's failure to submit a urine sample for a drug test resulted in discipline and possible discharge. *Id.* at 697. Refusal to participate in HEM has no employment-related consequences for an AOCE bargaining unit member. HEM is designed to encourage employees' interest in improving their health; it is not a tool to regulate employees' behavior in the workplace. The State's 2012 HEM program does not affect employee privacy to such an extent that it concerns a mandatory subject for bargaining.

Conclusion

For the reasons stated above, we conclude that AOCE's HEM proposal concerns a prohibited subject for bargaining. We will dismiss the complaint.

DATED this 30 day of December 2011.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member



Vickie Cowan, Board Member

*Member Gamson Dissenting

AOCE made a bargaining proposal concerning the amount of money bargaining unit members must pay out of their own pockets towards a new monthly surcharge on their health insurance premiums. The State refused to bargain over it. The issue before the Board is whether AOCE's proposal concerns a mandatory subject for bargaining. If it does, the State has an obligation to bargain over it, and it violated ORS 243.672(1)(e) when it refused to do so. In my view, the amount of money employees must pay out of their pockets towards insurance premiums concerns "direct or indirect monetary benefits" which are mandatory under ORS 243.650(7)(a). The majority concludes the

proposal concerns a prohibited subject for bargaining rather than mandatory one. It holds that the State's PECBA bargaining obligation irreconcilably conflicts with other statutes, and it dismisses the complaint. In my view, the majority mischaracterizes AOCE's proposal, misinterprets the relevant statutes, applies the wrong analysis, and thereby reaches the wrong conclusion.

I

The proper analysis requires three steps. First, we must determine the subject of the proposal, and second, we must decide whether that subject is mandatory for bargaining under the PECBA. *International Association of Firefighters, Local 314 v. City of Salem*, Case No. C-61-83, 7 PECBR 5819, 5824-5827 (1983), *aff'd*, 68 Or App 793, 684 P2d 605, *rev den* 298 Or 150 (1984). If the proposal is non-mandatory, the analysis ends and we dismiss the complaint. If it is mandatory under the PECBA, we proceed to the third step and determine whether the proposal is nevertheless prohibited for bargaining because it would violate a constitutional provision or statute outside of the PECBA. *SEIU Local 503 v. State of Oregon, Department of Administrative Services*, Case No. UP-12-01, 19 PECBR 325, 332 (2001), *aff'd*, 183 Or App 594, 54 P3d 1043 (2002).

Accordingly, I begin by determining the subject of AOCE's proposal. To determine the subject of a proposal, we look at both its specific language and the evidence about it. *International Association of Firefighters, Local 314 v. City of Salem and Dearborn, Personnel Director*, 7 PECBR 5819, 5824 (1983).

Some brief background provides context for understanding the proposal. By statute, PEBB designs the health insurance plans available to State employees and enters contracts with insurance carriers to provide the benefits. PEBB establishes the amount of the premium, but it has never designated how much the State contributes towards that premium amount and how much the employees pay out of their pockets. Prior to 1997, the State's contribution was established by statute. That statute was repealed in 1997, and since that time, the State's contribution amounts have always been determined through collective bargaining.

PEBB's most recent plan design includes a feature it calls the Health Engagement Model (HEM). As the majority describes in greater detail, HEM requires all participants to complete a health assessment and take steps to reduce or eliminate certain risky lifestyle choices. Employees who choose not to participate, or who agree to participate but do not follow through, are assessed a monthly premium surcharge which is automatically deducted from their paychecks. AOCE's proposal concerns this premium surcharge.

AOCE's proposal states:

“Effective and retroactive to January 1, 2012 employees may voluntarily elect to participate in the HEM program offered through PEBB. Employees electing not to participate and employees who voluntarily participate but are later deemed ‘non-compliant’ shall not be subject to the involuntary wage reduction imposed as the HEM surcharge. Any surcharges imposed as of January 1, 2012 to the date of the interest arbitration award shall be reimbursed to employees.”

We interpret provisions of a labor agreement by first examining its text in the context of the document as a whole. If the text and context are ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. If the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005).

My colleagues fail to follow this analytical template. They quote the proposal in the findings of fact, but they make no attempt to analyze it.

AOCE's proposal contains three parts. First, it would make participation in HEM voluntary. That does nothing more than recite one of the provisions of HEM. Under HEM, employees can voluntarily opt out and face the surcharge, or they can decline PEBB insurance benefits altogether and not be subject to HEM. Since neither the State nor the majority has identified any conflict with a statutory provision or offered any other reason why this portion of the proposal is non-mandatory, I will not discuss it further. *See East County Bargaining Council v. Centennial School District No. 28JT*, Case No. C-185-82, 8 PECBR 6776 (1985) (Order After Remand) (a proposal that would require an employer to comply with statutory provisions is mandatory for bargaining). The real crux of AOCE's proposal is not about employees exercising the right to opt out of HEM, but instead concerns the monetary consequences of doing so. Those consequences are addressed in the second and third parts of the proposal.

The second part of AOCE's proposal requires the State to reimburse employees for any premium surcharges they incur between January 1, 2012 and the date of the interest arbitration award. The amount an employer contributes towards the employees' insurance premium is a “direct or indirect monetary benefit” under ORS 243.650(7)(a) and thus concerns a mandatory subject for bargaining. Neither the State nor the majority contend otherwise.

The third part of AOCE's proposal would apply after the date of the interest arbitration award. It states that employees who choose not to participate in HEM “shall

not be subject to the involuntary wage reduction imposed as the HEM surcharge.” The intent of this portion of the proposal is not clear on its face. “A contract is ambiguous if it can reasonably be given more than one plausible interpretation.” *Portland Fire Fighters’ Ass’n v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, rev den 334 Or 491, 52 P3d 1056 (2002). Logically, there are a variety of ways in which an employee could “not be subject to the involuntary wage reduction imposed as the HEM surcharge.” The contract proposal does not on its face specify how this will be accomplished. One possibility would be for PEBB to withdraw the HEM provision as it applies to employees in the AOCE bargaining unit who choose not to participate. The majority apparently adopts this interpretation, although it never explains why. But there is at least one other way to relieve employees of the surcharge—the State could pay it (by, for example, reimbursing employees after the surcharge is deducted from their paychecks, or giving employees a raise in an amount equal to the surcharge). These are both plausible interpretations of the proposal, so we move to the second step of the analysis and examine external evidence of the parties’ intent.

AOCE President Michael Van Patten testified without objection and without contradiction that the union’s primary concern is the cost of the surcharge to its members and that AOCE wanted to bargain with the State about the cost. Similarly, on the other side of the bargaining table, Craig Cowan, the State’s lead negotiator, clearly understood that AOCE wanted to bargain over the amount the State would contribute towards the surcharge. One of the reasons he gave for refusing to bargain over AOCE’s proposal was that the parties had already bargained over the subject of the State’s premium contribution: according to Cowan, the parties’ collective bargaining agreement contains “language that the Employer and employee monthly premium contribution are respectively 95%/5% on rates established by PEBB.” Thus, both parties understood that the issue raised in AOCE’s proposal concerned the amount the State would contribute towards the premium surcharge.

This evidence resolves any ambiguity. Both parties understood that AOCE’s proposal concerns the State’s contribution towards the HEM premium surcharge. Further, both the State (Respondent’s Pre-Hearing Memorandum at 3) and the majority (slip opinion at footnote 6) acknowledge that the amount an employer contributes to PEBB insurance premiums is a mandatory subject for bargaining under the PECBA. ORS 243.650(7)(a). We thus know the subject of the proposal and that the subject is mandatory for bargaining under the PECBA.

II

I turn to the final question in the analysis, which is the real nub of this case: is the State’s PECBA obligation to bargain over its contributions to the HEM surcharge incompatible with the PEBB statutes? The majority finds the two statutes incompatible. I disagree.

I begin with some general principles. An interpretation of statutes that makes them incompatible is disfavored. ORS 174.010 provides that “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” Whenever possible, courts construe statutes on the same subject as “consistent and in harmony with one another” and in a way that gives “effect to all.” *State v. Langdon*, 151 Or App 640, 645, 950 P2d 410 (1997), *aff’d*, 330 Or 72, 999 P2d 1127 (2000). A conflict between statutes is established only when there is a “plain, unavoidable, and irreconcilable repugnancy.” *State v. Shumway*, 291 Or 153, 162, 630 P2d 796 (1981). *See also State v. Guzek*, 322 Or 245, 266, 906 P2d 272 (1995). Thus, if there is any plausible interpretation of the statutes that makes them compatible, we should adopt it.

To determine if there is an irreconcilable conflict, we need to compare the PECBA and PEBB statutes. As discussed above, the PECBA requires bargaining over proposals concerning the amount of money the State will pay towards health insurance premiums. I turn to the PEBB statutes (ORS 243.061 to 243.302) to determine whether any of its provisions plainly and unavoidably prohibit such bargaining. I conclude they do not.

The goal when interpreting a statute is to determine what the legislature intended. ORS 174.020(1)(a); *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995). The best indication of legislative intent is the language it chose. I therefore begin by examining the PEBB statutory language in context. *State v. Gaines*, 346 Or 160, 165 206 P3d 1042 (2009).⁹

Neither the State nor the majority have identified, and I have not found, any provision of the PEBB statute that expressly prohibits bargaining over the amount of money the State contributes to employee health insurance premiums.¹⁰ In my view, this alone is sufficient to establish that the PEBB statutes are not plainly and irreconcilably repugnant to the PECBA duty to bargain over the employer contribution to employee health insurance premiums.

Context confirms that there is no conflict between the statutes. Context includes other provisions of the same statute. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997). Various provisions in the PEBB statutes regulate other aspects of employer contributions to insurance premiums. *E.g.*, ORS 243.170 (permits employees to share

⁹*Gaines* also directs us to consider legislative history. We need to consider only the legislative history provided by the parties. ORS 174.020(3). Neither party has offered any legislative history.

¹⁰ORS 243.105(7) defines “premium” as “the monthly or other periodic charge for a benefit plan.” The State concedes that the HEM surcharge is a premium.

a job, but specifies that the State need not contribute more for health insurance premiums than the amount it would have to contribute if only one employee was in the position); ORS 243.252 (prohibits the State from paying any part of the cost for insurance available to retired State employees); ORS 243.275 (permits PEBB to contract to provide insurance benefits in addition to those required by statute, and specifies the State can contribute to the cost of such benefits); and ORS 243.291 (requires PEBB to make long-term care insurance available, but specifies that employees are responsible for the cost). These provisions demonstrate that the legislature was aware of the issues regarding employer contributions and knew how to regulate the contributions when it wanted to. The absence of a provision expressly regulating the State's premium contributions in the circumstances here indicates the legislature did not intend one. *Jordan v. SAIF*, 343 Or 208, 217, 167 P3d 451 (2007) (the legislature's use of a term in one provision but not another indicates a purposeful omission).

Context also includes prior versions of the statute. *Krieger v. Just*, 319 Or 328, 876 P2d 754 (1994). Former ORS 243.175 established the amount the State was required to contribute to the cost of employee health insurance premiums.¹¹ In 1997, the legislature repealed ORS 243.175. 1997 Or Laws ch 222, § 54. As a result, there is now no provision in the PEBB statutes regulating the State's contribution to employee health insurance premiums. Permitting the parties to address the issue in collective bargaining under the PECBA would harmonize the statutes and is therefore the interpretation we should adopt.

That outcome is bolstered even further by ORS 240.321(2), which provides that State employees in a recognized or certified bargaining unit "shall have *all* aspects of their wages, hours and other terms and conditions of employment determined by collective bargaining agreements" negotiated under the provisions of the PECBA. (Emphasis added.) Given the breadth of this statute ("*all* aspects of their wages * * * and other terms and conditions of employment"), coupled with the PEBB statutes' silence, it seems clear that the legislature intended the State to collectively bargain over its contribution to the premium cost of employee health insurance.

For all of these reasons, the State's PECBA bargaining obligation concerning the amount of its contribution to employee health insurance premiums is not repugnant to

¹¹In 1971, the statute required the State to contribute the entire cost of full family health insurance, up to \$10 per employee per month. 1971 Or Laws ch 527, § 8(1). In 1973, the legislature increased the State payment cap to \$15 per employee per month, 1973 Or Laws ch 225, § 1 (2), and in 1975, it raised the cap again to \$30 per employee per month, 1975 Or Laws ch 667, § 3 (2). Then, in 1977, the legislature adopted a different approach. It eliminated the reference to a dollar amount, and instead required the State to pay either the full cost of health insurance for employees and their families, or the amount appropriated by the legislature, whichever is less. 1977 Or Laws ch 570, § 3(2).

the PEBB statutes. I can draw only one conclusion—the State acted in bad faith, in violation of ORS 243.672(1)(e), when it refused to bargain with AOCE over a mandatory proposal concerning the amount of the State’s contribution to the HEM premium surcharge.

III

The majority follows a different analytical path. It concludes there is an irreconcilable conflict between PECBA and the PEBB statutes. As explained above, I believe this conclusion is analytically unsound, and I disagree with it. But even if we assume for the sake of argument that the majority is correct and there is an irreconcilable conflict between the statutes, that is not the end of the matter. We still need to determine which of the conflicting statutes to follow.

I find the majority’s reasoning on this issue particularly troubling. It reviews several cases and “derives the * * * rule” that when the PECBA’s bargaining obligation is incompatible with another state agency’s statutory mandate, the other agency’s statute will prevail. The cases clearly do not announce such a sweeping “rule,” and the majority provides no basis in law or reason for such a blanket statement. Why does the majority relegate PECBA’s bargaining obligations to such a low status that it will *always* lose out whenever there is a conflict? Why shouldn’t the PECBA prevail over another statute in at least some circumstances? The majority offers no answers.

In addition, the majority’s “rule” ignores several familiar requirements of statutory construction designed to resolve such conflicts. For example, ORS 174.020(2) provides: “When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.” Similarly, when two statutes are in irreconcilable conflict, the courts may determine that the newer statute impliedly amends or repeals the older one. *Balzer Mch. v. Klineland Sand & Gravel Co.*, 271 Or 596, 601, 533 P2d 321 (1975). The majority ignores these statutory and caselaw directives. It does not examine which statute is general and which is particular, and it does not determine which statute was enacted later. These standards require a case-by-case consideration. The majority instead announces its own “rule” which ignores the individual circumstances of each case and declares that the PECBA bargaining obligation will always be subservient whenever there is a conflict. For these reasons, I strongly disagree with the majority’s newly-announced rule.

I offer a few further observations on the majority order. It relies heavily on cases that do not apply here. *Oregon State Police Officers Assn. v. State of Oregon*, 127 Or App 144, 871 P2d 1018 (1994) deals with the sale of a state-owned parking

structure, not with state contributions to employee health insurance premiums.¹² Similarly, *Association of Oregon Corrections Employees v. Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 875 (1993), *AWOP*, 133 Or App 602, 891 P2d 1030 (1995), *rev den*, 321 Or 268 (1995) concerns uninsured motorist coverage, a matter not within PEBB's jurisdiction.

The majority relies most heavily on *AFSCME Local Union No. 328 v. State of Oregon, Executive Department*, 14 PECBR 180 (1992). In that case, the union proposed additions to and changes in the benefits offered by PEBB's predecessor. The majority of the Board there held that the proposal was prohibited for bargaining because it encroached on the statutory authority of PEBB's predecessor. Even if that case is correctly decided (and I believe it is not for the reasons compellingly set forth in Member Hein's dissent), it has no bearing here. Plan design and benefits, which were the core of the proposal in *AFSCME*, are expressly delegated to PEBB. The amount of the State's contribution to the premium, which is the core subject of the proposal here, is not a decision statutorily delegated to PEBB. The majority errs in treating the *AFSCME* case as controlling because it deals with a statutory conflict which does not exist here.

I also note that both the State and the majority continually point out that PEBB has authority to establish premium rates. Even if that is true, it is irrelevant. AOCE's proposal does not concern the amount of the premium; it concerns how much of that premium the State will pay, a matter not covered by the PEBB statutes.

IV

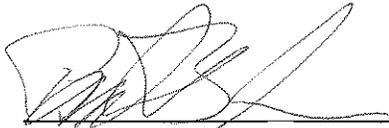
In the long run, the majority's actual holding in this case—that AOCE's particular proposal concerns a prohibited subject for bargaining—will probably matter very little, if at all, to the parties. Once this Order is issued, AOCE can promptly modify its proposal to specify that the State will pay for all (or part) of the HEM premium

¹²The majority reads too much into the Court of Appeals opinion. The opinion is brief, just three paragraphs. It notes that this Board based its decision on two separate and independent grounds. The union challenged only the second of those grounds on appeal. The court dismissed the appeal because the union did not challenge the first basis for the decision, which was that the employer did not change the *status quo*. Thus, even if the union prevailed on the issue it raised on appeal, the outcome would remain the same under the Board's *status quo* reasoning. The court held that the union "fails to present a basis for reversal." Thus, although the court affirmed the outcome, the majority incorrectly asserts that the court agreed with the Board's reasoning in the case.

surcharge.¹³ Then, pursuant to ORS 243.746(3), AOCE can submit that modified proposal in its “last best offer.” That modified proposal, and not the one rejected here by the majority, will be the proposal considered by the interest arbitrator. ORS 243.746(4). Significantly, both the State and the majority concede that the parties must bargain over contributions towards the premium costs established by PEBB. *See* Respondent’s Pre-Hearing Memorandum at 3 (“A collective bargaining agreement, however, could establish the contribution amounts to be paid by the employer and the employees for the plans designed by PEBB.”); and slip opinion at footnote 6 (“Although the State is prohibited from bargaining about the contents of plans offered by PEBB, it is obligated to bargain about the amount it will contribute toward the costs of these plans.”).

Even though the specific holding in this case may be of little moment, I fear that the precedent established in the majority’s analysis will lead to errors not only here but in future cases. In my view, the majority has adopted the wrong analytical framework at every turn—when interpreting AOCE’s proposal, when analyzing the relevant statutes, and in adopting a “rule” that makes the PECBA bargaining obligation subservient whenever it conflicts with a statute regarding the authority of another state agency.

For all of these reasons, I believe the majority errs in deciding that AOCE’s proposal is prohibited for bargaining. I would hold that AOCE’s proposal is mandatory and that the State violated ORS 243.672(1)(e) when it refused to bargain over it. I therefore dissent.



Paul B. Gamson, Board Member

This Order may be appealed pursuant to ORS 183.482.

¹³There are undoubtedly many ways for AOCE to accomplish its goal. For example, it could propose that the State reimburse bargaining unit members for any surcharge amounts taken from employee paychecks; or it could propose that employees subject to the surcharge get a pay raise equal to the amount of the surcharge. The precise form the proposal takes is up to AOCE and its members.