

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-053-10

(UNFAIR LABOR PRACTICE)

TEAMSTERS LOCAL 223,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
CITY OF MEDFORD,)	AND ORDER
)	
Respondent.)	
_____)	

This case was submitted to this Board on stipulated facts. The record closed upon receipt of the parties' closing briefs on December 6, 2010.

Michael J. Tedesco and Anil S. Karia, Attorneys at Law, represented Complainant.

John R. Hutt, Attorney at Law, Medford City Attorney's Office, represented Respondent.

On October 27, 2010, Teamsters Local 223 (Union) filed this unfair labor practice complaint alleging that the City of Medford (City) unilaterally changed the *status quo* in violation of ORS 243.672(1)(e) by changing health insurance benefits and contribution levels for Union bargaining unit members.

On November 12, 2010, the parties moved to expedite processing of the unfair labor practice complaint under OAR 115-035-0068. This Board granted expedited consideration to the unfair labor practice complaint, and the parties submitted the case to this Board on stipulated facts.

On December 6, 2010, the City filed a timely answer to the Complaint.

The issue is: Did the City violate ORS 243.672(1)(e) by unilaterally changing Union bargaining unit members' health insurance benefits?

RULINGS

In its post-hearing brief, the City asks that we take official notice of the Written Plan the City submitted to the Jackson County Circuit Court on January 4, 2010 as part of the proceedings in the case of *Bova v. City of Medford and Michael Dyal*. In this plan, the City proposed changing the carrier for City employees' health insurance benefits from the Oregon Teamsters Trust (OTET) to City County Insurance Services (CIS).

An agency may take notice of "judicially cognizable facts." ORS 183.450(4). A judicially cognizable fact is one that is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 177 Or App 658, 663, 34 P3d 1197 (2001); ORS 40.065(2). It is appropriate to judicially notice the existence of a court record or entry and the information contained in such a document. *Id.* at 666 (citing *Petersen v. Crook County*, 172 Or App 44, 51, 17 P3d 563 (2001)). Accordingly, we will take official notice of the City's January 4, 2010 Written Plan, proposing to switch the carrier for City employees' insurance benefits from OTET to CIS.

On December 30, 2010, the City moved to supplement the record by adding the following documents the Jackson County Circuit Court issued on December 21, 2010: Opinion and Order on the Defendant's December 6, 2010 Plan, Opinion on Defendant's Objection to Proposed Judgments, and Second Limited Judgment for Contempt. The Union objected to the City's motion.

For the reasons stated above, we take official notice of these court records as judicially cognizable facts. We observe, however, that we take official notice of the existence of these documents and their contents. We do not, however, officially notice the truth of the records' contents. *Id.* at 665 (citing *Thompson v. Telephone & Data Systems, Inc.*, 130 Or App 302, 881 P2d 819, *adhered to as mod on recons* 132 Or App 103, 888 P2d 16 (1994)).

FINDINGS OF FACT¹

1. The Union is a labor organization as defined in ORS 243.650(13), and the exclusive bargaining representative of certain City employees. The City is a public employer as defined in ORS 243.650(20).

¹These Findings of Fact are based on the parties' fact stipulation which includes exhibits.

2. The Union and City are parties to four collective bargaining agreements that expired on June 30, 2010. Approximately 200 Union bargaining unit members are covered by these agreements.

The Union bargaining unit composed of police officers is strike-prohibited. The other three Union bargaining units, which include construction and maintenance employees, park employees, and municipal mechanics, are strike-permitted.

3. The parties are currently bargaining over successor collective bargaining agreements for the four bargaining units. As of November 10, 2010, the parties had not completed their bargaining obligations under ORS 243.712. One of the issues for bargaining is health insurance benefits and contribution levels.

4. The parties agree that under ORS 243.712(2)(d) and 243.672(1)(e), the City is obligated to maintain the *status quo* with respect to employment relations during bargaining, including the mandatory bargaining subject of health insurance benefits and contribution rates.

5. The *status quo* with respect to health insurance benefits and contribution rates for police department employees is defined by Article 21.1 of the expired collective bargaining agreement as follows:

“Insurance. Employees shall be covered by the following Teamster insurance plans:

- “1. Medical F/W (until 8/31/2007); Medical G/W effective 9/1/2007
- “2. Dental D-6
- “3. Vision V-4

“The City shall contribute up to \$875.00 monthly per employee for the cost of the Teamsters insurance plans from July 1, 2007, through December 31, 2007. For January 1, 2008 – December 31, 2008; insurance cap shall be \$875 per month. For January 1, 2009 – December 31, 2009; insurance cap shall be \$950 per month. For January 1, 2010 – June 30, 2010; insurance cap shall be \$1,000 per month.

“In event the premium rate increase [*sic*] over the cap the difference shall be split 50/50 between the City and members of the bargaining unit until December 31, 2008. Beginning January 1, 2009, the premium cap in this section shall be considered the maximum city health insurance

contribution, and any premium amount above that shall be paid by the employee. Employee portions shall be deducted from the employee's paycheck effective as of the date of such increases."

6. The *status quo* with respect to health insurance benefits and contribution rates for construction and maintenance employees, park employees and municipal mechanics is defined by Article 14.1 of the respective collective bargaining agreements as follows:

"Insurance – Employees shall be covered by the following Teamster insurance plans:

- "1. Medical F/W until December 31, 2007 (effective January 1, 2008 Medical G/W)
- "2. Dental D-6
- "3. Vision V-4

"The City shall contribute up to \$875 monthly per employee for the cost of the Teamsters insurance plans from July 1, 2007, through December 31, 2009. Effective January 1, 2010, the insurance cap shall be \$925.

"In event the premium rate increase [*sic*] over the cap the difference shall be split 50/50 between the City and members of the bargaining unit. Employee portions shall be deducted from the employee's paycheck effective as of the date of such increases."

6. On April 7, 2008, plaintiff Joseph Bova filed a complaint against the City and Michael Dyal² in Jackson County Circuit Court. On November 20, 2008, the Circuit Court certified a class for some of the claims for relief in the complaint. The class consisted of all current City employees who had been employed for at least three years prior to the date of the court's order and who had City-provided health insurance that did not include an option to continue coverage when the employee retired.

7. On July 10, 2009, the Jackson County Circuit Court filed an Opinion and Order on Plaintiffs' Motion for Summary Judgement which held that the City violated ORS 243.303(2) by failing to provide City employees with health insurance plans that included an option to elect to continue coverage after retirement.

²Dyal is City manager.

8. On December 7, 2009, the Circuit Court filed a Limited Judgment on the First Claim for Relief which ordered the City, *inter alia*, to create a Written Plan for compliance with ORS 243.303 by January 2, 2010, and to implement the Written Plan by March 15, 2010.

On January 4, 2010, the City submitted a written plan to the Circuit Court. The plan proposed that the City purchase insurance from CIS Plan V-B if the City was unable to obtain a stay of the court's earlier judgment.³ The Written Plan did not mention any attempt to bargain with the Union about the change in insurance plans.

9. On July 28, 2010, the City filed a Motion for Approval of Purchase of Insurance with the Circuit Court. The court conducted evidentiary hearings on the motion.

On October 25, 2010, the court issued an Order on Motion for Contempt and an Opinion and Order on Motion for Purchase of Insurance. In the Order, the court found the City in contempt of court for failing to comply with the court's orders and judgement. The court ordered the City to change its insurance carrier and plan to CIS Plan V-B. (The current insurance carrier and provider of plan benefits for Union bargaining unit members is OTET). The court ordered the City to submit a plan explaining how it will compensate class members and class members who have retired since the class was certified for increased premium costs and out-of-pocket financial costs that class members incurred because of the change in health insurance benefits.

10. On October 25, 2010, the City notified CIS that it intended to purchase insurance through CIS. CIS confirmed that it would provide coverage to the City.

11. On October 26, 2010, the City notified the Union that to comply with the Circuit Court's Order, it will change health insurance plans from the OTET FW and GW insurance plans, as set forth in the expired collective bargaining agreements, to a CIS Plan V-B insurance plan. The City told the Union that it will make this change as soon as possible, but no later than January 1, 2011.

12. On October 29, 2010, the City gave the required 60-day notice to OTET that the City was ending its contract with OTET.

³The City appealed the Circuit Court's January 9, 2010, judgment to the Oregon Court of Appeals and moved the Circuit Court for a stay of the judgment pending appeal. The Circuit Court denied the request for a stay. The City renewed its request for a stay with the Oregon Court of Appeals and on February 19, 2010, the Court of Appeals issued a temporary stay. On July 21, 2010, the Court of Appeals lifted the temporary stay and denied the City's request for a stay pending appeal.

13. On December 6, 2010, the City submitted its written plan to the Jackson County Circuit Court. On December 21, 2010, the Circuit Court approved the plan with some modification.

14. The plaintiffs in *Bova v. City of Medford and Dyal* filed proposed judgments and the Circuit Court heard oral argument on the City's objections to these proposed judgments. On December 21, 2010, the Circuit Court issued a Second Limited Judgment for Contempt and an Opinion on the City's objections to the Judgment. In the Opinion, the court denied the City's objections. In the Judgment, the court, *inter alia*, ordered the City to pay a fine of \$100 per day beginning on November 1, 2010 and continuing until all class members and class members already retired are offered the election to enroll in a policy that complies with ORS 243.303, and held that Bova and the class were prevailing parties entitled to costs, disbursements, prevailing party fees, and attorney fees under Oregon Rules of Civil Procedure 68.

15. Under the Circuit Court's October 25 Order, the City is obligated to pay the entire increase in cost of the CIS plan, along with any out-of-pocket expenses incurred by Union bargaining unit members as a result of the switch to CIS. The City is only obligated to pay such costs during calendar year 2011.

16. The Union is not a party to the proceedings in *Bova v. City of Medford*. In those proceedings, the City did not represent the Union, and the City argued that the Circuit Court had no jurisdiction over health insurance benefits, a mandatory subject of bargaining under the Public Employee Collective Bargaining Act (PECBA).

17. The increased monthly cost of providing insurance through CIS rather than OTET is approximately \$247 for each municipal mechanic department employee, \$297 for each construction and maintenance and parts department employee, and \$519 for each police department employee.

It is estimated that it will cost the City approximately \$75,000 monthly, or \$902,000 annually, to change the insurance carrier for all Union bargaining unit members from OTET to CIS. The change to CIS will result in reduced benefits for Union bargaining unit members, a change in the manner in which Union bargaining unit members' insurance claims will be processed, and a change in the pool of covered employees for experience ratings for health care insurance.

18. As a result of the Circuit Court's October 25 Order, the City will be unable to fund other areas of employee salaries and wages due to a large increase in health insurance costs.

19. In bargaining, the Union does not and has not proposed to change the *status quo* in regard to the current health care provider and benefit plan.

20. The City and Union agree that health insurance plan composition is a mandatory subject of bargaining under ORS 243.650 *et seq.* The parties also agree that the impact of the Circuit Court's October 25 Order on mandatory subjects of bargaining such as wages and other benefits will be significant given the increased cost of the CIS insurance plan.

21. The Jackson County Circuit Court's October 25 Order forced the City to change the health insurance coverage for Union bargaining unit members outside of the collective bargaining process.

22. The Union and City agree that by virtue of the Circuit Court's October 25 Order, the City cannot maintain the *status quo*. But for the Court's Order, the City would negotiate with the Union before changing health care benefits.

CONCLUSIONS OF LAW

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

2. The City did not unilaterally change Union bargaining unit members' health insurance benefits in violation of ORS 243.672(1)(e).

The Union alleges that the City violated ORS 243.672(1)(e) when it unilaterally changed Union bargaining unit members' health insurance benefits and contribution rates. According to the Union, the City's actions constituted an unlawful change in the *status quo* because the City made the change before it completed its good faith bargaining obligation.

It is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). Ordinarily, an employer's good faith bargaining duty under subsection (1)(e) includes the obligation to maintain the *status quo* during the hiatus period between collective bargaining agreements by maintaining conditions of employment which are mandatory subjects for bargaining. The hiatus period occurs after the parties' collective bargaining agreement has expired and before the parties have completed their bargaining obligation for a new agreement under the PECBA. *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No UP-32-05, 22 PECBR 108, 139 (2007); ORS 243.756. A public employer is not, however, required to bargain about a change in a mandatory subject of bargaining over which it has no control. *Clackamas County Employees Association v. Clackamas County*, Case No. UP-38-03,

20 PECBR 905, 915 (2005); *Bend Firefighters Association v. City of Bend*, Case No. UP-55-95, 16 PECBR 378 (1996); *Oregon State Police Officers Assn. v. State of Oregon*, 127 Or App 144, 871 P2d 1018 (1994), affirming 14 PECBR 530 (1993); *Oregon State Police Officers Association v. State of Oregon and the Oregon Department of State Police*, Case No. UP-79-88, 11 PECBR 332 (1989); *Federation of Oregon Parole and Probation Officers v. Dept. of Corrections*, 322 Or 215, 905 P2d 838 (1995), affirming 14 PECBR 739 (1993).

In *Clackamas County*, 20 PECBR 905, we held that the employer was not obligated to bargain over who would provide services under a federal grant because under federal law, an entity other than the employer was designated to make that determination. In *Bend Firefighters Association v. City of Bend*, 16 PECBR 378, we concluded that the city was not obligated to negotiate about a requirement that employees contribute 6 percent of their salary to a retirement system because a new law required them to do so. In *Oregon State Police Officers Assn. v. State of Oregon*, 14 PECBR 530 and *Oregon State Police Officers Association v. State of Oregon and Oregon Department of State Police*, 11 PECBR at 341, we held that the state was not required to bargain about employees' parking fees because a separate state agency had exclusive statutory authority to establish parking rates. In *Federation of Oregon Parole v. Dept. of Corrections*, 322 Or at 223, the Oregon Supreme Court held that the state was not obligated to negotiate the decision to transfer employees from the state to the county, or bargain about post-transfer employment terms and conditions for the affected employees. The Supreme Court reasoned that by law, the county had sole authority to make the transfer decision and to negotiate the transferred employees' terms and conditions of employment. The rule we derive from these cases is that an employer need not bargain about mandatory working conditions over which it has no control.

Here, the City had no control or authority over changes in a subject that the parties agree is mandatory for negotiations—insurance benefits for Union bargaining unit members. The City changed benefit plans because the Jackson County Circuit Court ordered it to do so. We conclude that the City did not violate its good faith bargaining duty under subsection (1)(e) by making a unilateral change it could neither control nor countermand.⁴

⁴The Union contends that the City, and not solely the Jackson County Circuit Court, bears responsibility for the order requiring the City to change insurance plans for Union bargaining unit members. According to the Union, the City submitted a January 4, 2010 Written Plan to the Court that included no mention of any bargaining obligation. The Union contends that the Court's failure to order the City to bargain resulted from the City's failure to address this issue in its Written Plan.

Both the City and Union ask that we conclude that the Jackson County Circuit Court exceeded its jurisdiction by ordering the City to make an unbargained change in a mandatory subject for negotiations. The parties contend that such matters are subject to the exclusive jurisdiction of this Board. They urge us to order the City to cease and desist from changing Union bargaining unit members' insurance benefits, and to petition the appropriate Circuit Court to enforce our order under ORS 243.766(4). We decline to do so. We do not believe it would further the parties' interests or the interests of justice to issue an order requiring the City to act contrary to the Circuit Court's Order. If either party believes the Circuit Court Order is wrong, its recourse is to the Oregon Court of Appeals.⁵

ORDER

The complaint is dismissed.

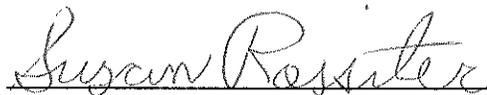
DATED this 14 day of January, 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

We find nothing in this record to support the notion that the City somehow invited the court's Order. To the contrary, the City appears to be as unhappy about the Order as the Union, although for different reasons. We refuse to speculate about the motives for, or the reasoning behind, the Court's October 26, 2010 Order. Instead, we look to the clear and unambiguous language of that Order, and conclude that the City's actions to comply with the Order do not constitute an unlawful unilateral change.

⁵We observe that the Circuit Court enforced ORS 243.303, a statute outside the PECBA. In general, public employers are not required to bargain before they can comply with the law.