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STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

For Board Use Only

UNFAIR LABOR PRACTICE COMPLAINT
Public Employment

Case No. UP-010-16

Date Filed MAR 28 2016

RECEIVED

MAR 28 2016

<p>COMPLAINANT Name, address, phone number, and e-mail address</p> <p>Brookings-Harbor School District 17C 629 Easy Street Brookings OR 97415 (541) 469-7443 seang@brookings.k12.or.us</p>	<p>COMPLAINANT'S REPRESENTATIVE Name, address, phone number, and e-mail address, if applicable</p> <p>Rebekah R. Jacobson Garrett Hemann Robertson PC 1011 Commercial Street NE Salem OR 97301 (503) 581-1501 rjacobson@ghrlawyers.com</p>
<p>RESPONDENT Name, address, phone number, and e-mail address</p> <p>Brookings-Harbor Education Association 3229 Broadway, Unit J & K North Bend OR 97459 (541) 756-5835</p>	<p>RESPONDENT'S REPRESENTATIVE Name, address, phone number, and e-mail address, if applicable</p> <p>Margaret S. Olney Bennett, Hartman, Morris & Kaplan, LLP 210 SW Morrison #500 Portland OR 97204 (503) 227-4600 olneym@bennetthartman.com</p>

Complainant alleges that Respondent has committed an unfair labor practice under ORS 243.672(1) (_____), ORS 243.672(2)(a), (b), and (d), or ORS 243.752 of the Public Employee Collective Bargaining Act. The following is a clear and concise statement of the facts involved in each alleged violation, followed by a specific reference to the section and subsection of the law allegedly violated. (For each claim, specific dates, names, places, and actions. Attach copies of main supporting documents referred to in the statement of claims.)

I certify that the statements in this complaint are true to the best of my knowledge and information.

By: Rebekah R. Jacobson
Signature of Complainant or Complainant's Representative

Attorney _____
Title

3/28/16
Date

1 Matthew Bennett, was a member of the Kalmiopsis Elementary staff at that time and received this
2 written communication.

3 4. On August 19, 2015, District Superintendent Sean Gallagher presented a report to
4 the District Board regarding the District's options to comply with state standards regarding
5 Instructional Time. The Board was presented with information indicating that the Board could
6 approve credits that can be used to count toward calculating minimum instructional time, by
7 counting recess, staff professional development, parent teacher conferences and emergency school
8 closures. The Association received the board packet discussing the District's need to increase
9 instructional time. The Association President was also present at the Board meeting.

10 5. On August 25, 2015, Principal Chirinian presented a PowerPoint to Kalmiopsis
11 Elementary staff regarding the 15-minute shift in the daily schedule.

12 6. On September 16, 2015, the District Board declined to exercise the option to count
13 recess, staff professional development, parent teacher conferences and emergency school closures
14 as instructional time, based on the Board's concern that student instruction was not occurring
15 during these times and such instructional time was needed to improve student achievement. The
16 Association received the board packet discussing the District's need to increase instructional time.
17 The Association President was also present at the Board meeting.

18 7. On September 21, 2015, Superintendent Gallagher met with the Association's
19 leadership team to discuss issues related to increasing instructional time to meet state standards.

20 8. On October 5, 2015, Brookings-Harbor High School Principal Lisa Dion sent a
21 written memo to all high school teachers regarding the state standards related to instructional time,
22 the current instructional and non-instructional time in the high school day and a survey regarding
23 how instructional time is used each day, the sufficiency of instructional time, and teachers'
24 "dream schedules."

25 9. On October 7, 2015, Superintendent Gallagher sent a memo to the Association
26 President stating that the District would need to make changes to instructional time by November

1 2, 2015 to avoid serious disruption to District operations related to a delayed implementation of
2 these changes.

3 10. On October 12, 2015, the Association was presented with written proposals from
4 Principal Chirinian and Principal Dion outlining proposed instructional time increases at
5 Kalmiopsis Elementary and Brookings-Harbor High School.

6 11. On October 19, 2015, the District received the Association's demand to bargain
7 dated October 15, 2015, which stated:

8 "BHEA has received your written notice that the District is increasing the
9 student contact time for the 2015-2016 school year as required by ORS
10 243.698(2). As president Matt Bennett is out of town for professional
11 development, he has asked me to file BHEA's demand to bargain over the
12 changes in student contact time in accordance with the statute. Please
13 accept this memo as BHEA's demand to bargain over the unilateral
14 increases in student contact time. When Matt returns, he will contact you
15 to establish bargaining dates as soon as possible. Please do not hesitate to
16 contact me should you have any questions."

17 12. On October 23, 2015, Superintendent Gallagher met with the Association
18 President to clarify what issues the Association's demand to bargain encompassed.
19 Superintendent Gallagher followed up this meeting with a memo (**Exhibit 1**) which stated in
20 relevant part:

21 "Thanks for a quick meeting today, this memo is simply to follow up our
22 conversation to verify exactly what you are wanting to bargain on
23 regarding the notification to bargain memo dated 10/15/2015 and received
24 by the district office on 10/19/2015. From my understanding after our
25 conversation today, BHEA is wanting to bargain on the 15 minute
26 schedule shift at Kalmiopsis Elementary School changing the work day
that requires teachers to have their doors open from 7:45 AM to 8:00 AM
to supervise students as they enter the building with class starting at
8:00AM.

From our conversation, you have indicated that BHEA wants to bargain on
the instructional time change to be implemented November 2, 2015 that
increases student contact time at BHHS by 5" and at Kalmiopsis
Elementary School by 15", but is okay with the district starting this
implementation on November 2, 2015 to avoid any delays & come into

1 compliance with Oregon law. BHEA agrees not to file a grievance or
2 Unfair Labor Practice (ULP) on the Nov 2nd implementation.

3 I need a written response from you confirming this is the agreement so I
4 can move the negotiations process and instructional increase change
5 forward. Thank you for your clarification.”

6 13. The Association President responded via email (**Exhibit 2**) stating in relevant part:

7 “This is the conversation that I had with Mr. Gallagher and **the BHEA**
8 **agrees** to allow the district to start implementation on November 2, 2015
9 as long as the 5" and the 15" in the second paragraph are being referred to
10 as ‘Minutes.’ If this is the case, then **BHEA agrees** with this memo as
11 presented.

12 Sincerely,
13 Matthew Bennett
14 **BHEA President”**

15 **(Emphasis added)**

16 14. Of the written agreements (e.g. resignation agreements and memoranda of
17 understanding) agreed to by the Association and the District since 2012, all of the agreements
18 have been entered into by the Association President or Co-President, with the exception of one
19 agreement, entered into by the Oregon Education Association (OEA) UniServ Consultant, Susan
20 Anderson.

21 15. The District implemented the increases to student contact time at Brookings-
22 Harbor High School and Kalmiopsis Elementary School pursuant to this written agreement with
23 the Association on November 2, 2015.

24 16. The District and Association met to bargain the impact of these changes to
25 instructional time on November 11, 2015. The Association’s bargaining representative, Susan
26 Anderson, presented the Association’s proposal explaining that such a proposal included any
settlement of potential unfair labor practices the Association intended to file against the District.
When the District’s bargaining representative, Rebekah Jacobson, requested clarification given
the District and BHEA’s agreement that an unfair labor practice would not be filed regarding the

1 District's November 2, 2015 implementation, Ms. Anderson stated in relevant part:

2 "This one is a little murkier because there's some communication between
3 the parties. But what we looked at was trying to be reasonable while still
4 protecting the potential DFR problems we have on this side of the table for
5 what these people would have been owed under a hearing from the
6 Employment Relations Board. So, what we've kind of got here is a
7 bargaining proposal mixed into a potential settlement of any case that
8 might be filed. Rebekah and I worked together for a little while but not
9 that long. I've been doing this for 25 years. I've never ever filed a ULP
10 without giving the administration a chance to resolve it, and I'm not going
11 to start now. I'm too old to start a new practice. I just don't think its good
12 business. I think the parties need to be able to deal with each other fairly
13 and openly and resolve issues.

14 * * *

15 "I can, but I would rather not, get into the conversation about why the
16 change in attitude because these folks made it clear they needed to have
17 conversation with me and we're told, "Oh, no, you don't, this is a local
18 thing, just agree to not file a case." The problem is now they've opened
19 themselves up to a lawsuit from all their membership. Because they really
20 didn't have the authority to waive those rights. And what we're trying to
21 do is put a proposal together saying, look, we don't know if we're going to
22 file or not, we're still in those conversations, but this is a way of resolving
23 all of it up front, less costly than if the district were to lose it and there's no
24 guarantee on that."

15 17. The Association's first proposal (**Exhibit 3**) included the following provisions in
16 summary:

- 17 1. A payment of \$277.83 (exclusive of taxes and PERS) to each Kalmiopsis
18 Elementary School teacher supervising students between 7:45 and 8:00 a.m..
- 19 2. A payment of \$39.69 (exclusive of taxes and PERS) to each Kalmiopsis
20 Elementary School teacher related to the instructional time increase.
- 21 3. Cessation of 7:45 a.m. start for Kalmiopsis Elementary School teachers
22 effective November 16, 2015.
- 23 4. Pay bus drivers for drive time being paid prior to November 1, 2015.
- 24 5. Remedy unrelated issue related to prep time on Wednesdays at Kalmiopsis
25 Elementary School.

26 The estimated additional cost to the District of this proposal is \$13,544.

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18. The Association's second proposal (**Exhibit 4**) on November 11, 2015 reduced the demand for each Kalmiopsis Elementary School teacher supervising students between 7:45 and 8:00 am to \$150, among other changes. The estimated additional cost to the District of this proposal is \$8,091.

19. The District's proposal (**Exhibit 5**) at the end of the November 11, 2015 bargaining session contained the following provisions:

- “1. Regular route bus drivers that lost fifteen (15) minutes of drive time will be held harmless for the 2015-16 school year and will continue to work this fifteen (15) minute time period. This means that regular route bus drivers impacted by the November 2, 2015 increase to instructional time will continue to report at times established at the beginning of the 2015-16 school year.
2. Kalmiopsis Elementary teaching staff will each receive a one-time lump sum payment of \$90.00.
3. The District will provide written notice to the Association President of changes to working conditions as required by and pursuant to ORS 243.698. In the event the Association President is unavailable, written notice will be provided to the UniServ representative.
4. BHEA agrees that it will not file a grievance or unfair labor practice regarding the increases to instructional time implemented on November 2, 2015 or the change to the 2015-16 Kalmiopsis Elementary School Schedule. BHEA is not waiving its ability to file a grievance related to preparation time provided on Wednesdays at Kalmiopsis Elementary School.
5. The parties agree that this Agreement is non-precedent setting.”

The estimated additional cost to the District of this proposal is \$3,839.

20. The parties met again on December 10, 2015 to continue negotiations. The Association's first proposal (**Exhibit 6**) at that session included the following provisions:

“Return to previous schedule effective the beginning of the next semester. In order to meet the instructional time increases, the District will add two days to the school year and add two days of daily rate to the salary schedule.

OR

1 Continue the current instructional schedule. Kalmiopsis staff will be paid
2 an additional \$5.67 per day for the entire year to cover the additional
3 supervision of students in the morning that was able to be used for
preparing for class, working with students and meeting with parents that all
must be done outside the work day.

4 High School teachers shall be paid for six minutes per day at the base
5 hourly rate (\$.47 Mon., Tues., Thurs. & Fri. and \$5.67 for Wednesdays)
6 beginning November 12, 2015 and Kalmiopsis staff shall be paid for
7 fifteen minutes (\$5.67) per day effective November 2, 2015 for the
remainder of the 2015-16 school year. Beginning with the 2016-20)17
school year, two days will be added to the student year with the equivalent
daily rates added to the salary schedule.”

8 The estimated additional cost to the District of the first proposal is \$76,950 in salary costs as
9 proposed or \$153,900 in salary costs as necessary to meet state minimums. These estimates do
10 not include operational costs. The estimated cost of the District of the second proposal is \$43,469.

11 21. The parties were unable to reach an agreement at the December 10, 2015
12 negotiation session.

13 22. On January 28, 2016, the District implemented its final proposal, as presented on
14 December 10, 2015.

15 23. On February 8, 2016, the Association filed an unfair labor practice complaint with
16 the State of Oregon Employment Relations Board. **(Exhibit 7 [Case No. UP-005-16 without**
17 **exhibits])** The Complaint alleged, in relevant part, that the District violated the duty to bargain in
18 good faith by increasing “student contact time at the elementary school at the beginning of the
19 year without bargaining. It then increased instructional time at both the elementary school and
20 high school on November 2, 2015 without bargaining.” (Exhibit 7, p. 4-5)

21 VIOLATION OF ORS 243.672(2)(a):

22 INTERFERENCE WITH EMPLOYEE RIGHTS BY ASSOCIATION

23 24. The actions of the OEA UniServ Consultant, Susan Anderson, in threatening
24 members of the Association with potential lawsuits from the membership for appropriately
25 exercising rights as the local Association President, constitute a violation ORS 243.672(2)(a). The
26 actions of Ms. Anderson interfered with, restrained or coerced the local Association President in

1 and/or because of the exercise of a right guaranteed under PECBA. This conduct constitutes an
2 injury to the District because it interferes with the ability of the District to conduct its business
3 with the Association if the Association leadership is falsely instructed by OEA that he or she has
4 no authority to resolve issues on behalf of its members. OEA's conduct directly undermined the
5 likelihood of a "harmonious and cooperative relationship[] between government and its
6 employees[.]" ORS 243.656(1). The District will suffer a direct and substantial injury as a
7 consequence of this unfair labor practice when Association leadership refuse to enter into
8 agreements with the District, as has been the parties' practice for years, based on this false threat
9 of litigation if they do so.

10 VIOLATION OF ORS 243.672(2)(b):

11 REFUSAL TO BARGAIN IN GOOD FAITH

12 25. The Association's proposals at the first bargaining session included economic
13 demands totaling, at most, \$13,544. At the second bargaining session, the Association presented a
14 proposal, which included economic demands four and five times the amount of the initial
15 proposal. The Association's conduct violated the intent of the PECBA bargaining and dispute
16 process, which is designed "to encourage parties to narrow their differences with the goal of
17 reaching an agreement on a contract." *IAFF, Local 2285 v. Douglas County Fire Dist. #2*, 20
18 PECBR 235, 241, 2003. The Association's regressive bargaining tactics constitute a refusal to
19 bargain in good faith in violation of ORS 243.672(2)(b).

20 VIOLATION OF ORS 243.672(2)(d):

21 REFUSAL TO BARGAIN IN GOOD FAITH; VIOLATION OF WRITTEN CONTRACT

22 26. The Association and the District entered into an agreement, memorialized in
23 writing, on October 23, 2015 regarding the subject of the expedited bargaining. The District
24 agreed to negotiate with the Association regarding the impact of the Kalmiopsis Elementary
25 School schedule shift, despite its position that the Association did not provide a timely demand to
26 bargain, in exchange for the Association's agreement not to file an unfair labor practice regarding

1 the implementation of the instructional time changes prior to the conclusion of the expedited
2 bargaining. The District relied upon the apparent authority of the BHEA President to enter into
3 such an agreement based on the parties' past practice; the BHEA President or Co-President signed
4 all but one agreement between the parties since 2012. The Association's action in filing an unfair
5 labor practice despite this written agreement constitutes a refusal to bargain in good faith in
6 violation of ORS 243.672(2)(b) and violates a written agreement in violation of ORS
7 243.672(2)(d).

8 WHEREFORE, the District requests the following immediate relief:

- 9 1. An Order declaring that the Association has violated ORS 243.672(2)(a)(b) and
10 (d) and that it immediately cease and desist from such unlawful acts.
- 11 2. An Order for the Association to post a notice that states:
 - 12 a. The Association violated its agreement with the District in filing an unfair
13 labor practice against the District related to the implementation of
14 instructional time changes;
 - 15 b. The Association engaged in regressive bargaining during the expedited
16 bargaining session on December 10, 2015.

17 This notice is to be published for a reasonable period of time and in the same manner as
18 the Association's has published statements to its individual members and to the media.

- 19 3. An order awarding civil penalty in the amount of \$1,000.00;
- 20 4. An order awarding reimbursement of the District's filing fee;
- 21 5. An order awarding all reasonable representation costs to the District pursuant to
22 ORS 243.676(2)(d) and OAR 115-035-0050; and

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24 ///
25 ///
26 ///

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6. Any other relief deemed just and equitable by the Employment Relations Board.

DATED this 28 day of March, 2016.

Respectfully submitted,

GARRETT HEMANN ROBERTSON P.C.



Rebekah R. Jacobson
(OSB No. 063024)
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Of Attorneys for Complainant
Brookings-Harbor School District 17C