

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-020-15

(UNFAIR LABOR PRACTICE)

TRI-COUNTY METROPOLITAN	)	
TRANSPORTATION DISTRICT OF	)	
OREGON,	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
AMALGAMATED TRANSIT UNION,	)	
DIVISION 757,	)	
	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Julie D. Reading on March 2 and 3, 2016, in Tualatin, Oregon. The record closed on April 19, 2016, following receipt of the parties' post-hearing briefs.

Adam S. Collier, Attorney at Law, Bullard Law, Portland, Oregon, represented Complainant Tri-County Metropolitan Transportation District of Oregon.

Gene Mechanic, Attorney at Law, Mechanic Law, Oregon, represented Respondent Amalgamated Transit Union, Division 757.

On July 23, 2015, the Tri-County Metropolitan Transportation District of Oregon (the District or TriMet) filed a Complaint alleging that the Amalgamated Transit Union, Division 757 (the Union or ATU) violated ORS 243.672(2)(b), (2)(d), and (2)(e). In an Amended Complaint filed July 6, 2015, the District alleges that the Union (1) attempted to repudiate an oral agreement to settle a grievance, violating ORS 243.672(2)(b) and (2)(e); (2) contradicted the current Working and Wage Agreement (Agreement or WWA) by announcing that Union officers have limited authority to settle grievances, violating ORS 243.672(2)(d); (3) refused to proceed with striking arbitrator names for grievances it had advanced to arbitration, violating ORS 243.672(2)(b) and (2)(d); and (4) failed to provide information responsive to the District's August 7, 2015 information request, violating ORS 243.672(2)(b) and 2(d).

The Union filed a timely answer, including affirmative defenses of timeliness, waiver, estoppel, and unclean hands.

The issues, as identified prior to hearing, are:

1. Did the Union attempt to repudiate a grievance settlement agreement and commit an unfair labor practice under ORS 243.672(2)(b)?
2. Did the Union attempt to repudiate a grievance settlement agreement and commit an unfair labor practice under ORS 243.672(2)(e)?
3. Did the Union contradict the Agreement by sending a July 6, 2015 letter announcing that Union officers have limited authority to settle grievances and violate ORS 243.672(2)(d)?
4. Did the Union refuse to proceed with striking arbitrator names for grievances it had advanced to arbitration and commit an unfair labor practice under ORS 243.672(2)(b)?
5. Did the Union refuse to proceed with striking arbitrator names for grievances it had advanced to arbitration and commit an unfair labor practice under ORS 243.672(2)(d)?
6. Did the Union fail to provide information responsive to the District's August 7, 2015 information request and commit an unfair labor practice under ORS 243.672(2)(b)?
7. Did the Union fail to provide information responsive to the District's August 7, 2015 information request and commit an unfair labor practice under ORS 243.672(2)(d)?

Based on the evidence and arguments presented, we conclude that the District has failed to meet its burden to prove the following: (1) that the Union attempted to repudiate a settlement agreement in violation of ORS 243.672(2)(b) and ORS 243.672(2)(e); (2) that the Union violated the Agreement by sending a July 6, 2015 letter announcing that Union officers have limited authority to settle grievances in violation of ORS 243.672(2)(d); and (3) that the Union violated the Agreement by refusing to proceed with striking arbitrator names for grievances it had advanced to arbitration in violation of ORS 243.672(2)(b) and ORS 243.672(2)(d). However, we do conclude that the District met its burden to show that the Union violated ORS 243.672(2)(b) and ORS 243.672(2)(d) when it did not respond to the District's information request.

### RULINGS

Prior to the hearing, the Union moved to have the District's claims that the Union repudiated a grievance settlement agreement held in abeyance, because that grievance had been advanced to arbitration. Specifically, the Union argued that the District would be asserting at arbitration that the grievance had already been settled, and in the present case, the District was arguing that the Union had violated a settlement agreement by advancing the grievance to arbitration.

The ALJ granted the Union's motion on October 2, 2015. On October 9, 2015, the District filed an interlocutory appeal to the Employment Relations Board (this Board). On October 21, 2015, this Board responded that there was insufficient evidence to determine whether the Union had met the criteria for pre-arbitration deferral. Specifically, we could not determine whether there was a pending grievance, and if the matters before this Board and the arbitrator assigned to that grievance had the same facts and congruent decisional standards. *See Service Employees International Union Local 503, Oregon Public Employees' Union v. State of Oregon, Department of Justice*, Case No. UP-057-13, 26 PECBR 276, 286 (2014), *recons*, 26 PECBR 354 (2015). Accordingly, we deferred the decision until after hearing.

The evidence presented in this case established that there is a pending grievance and the evidence addressed the basis of that grievance. However, the parties did not present additional evidence and argument bearing on whether the grievance arbitration would have the same facts and congruent decisional standards as this unfair labor practice complaint. Accordingly, without further information in support of the motion, the ALJ properly did not defer consideration on the grievance settlement counts and instead considered them in the Recommended Rulings, Findings of Fact, Conclusions of Law and Proposed Order.

The remaining rulings of the ALJ were reviewed and are correct.

## FINDINGS OF FACT

### The Parties and Agreements

1. The Union is a labor organization within the meaning of ORS 243.650(13).
2. The District is a public employer within the meaning of ORS 243.650(20).
3. The parties are subject to the Agreement extending from December 1, 2012 to November 30, 2016. The Agreement's Article 1, Section 3 addresses the adjustment of grievances and arbitration. Paragraph 3 of Section 3 states "[t]he persons handling grievances at each step for the District and the Union shall have the authority to finally resolve the grievance at that level, except no such settlement shall have any effect on or alter this Agreement." (Exh. J-1, p. 8.) This language was not included in prior agreements between the parties.
4. Article 1, Section 3, Paragraph 6 of the Agreement addresses arbitration scheduling and states "[i]f the expedited arbitration procedure is not selected by the parties, the District and the Union shall select an arbitrator from a list of seven (7) qualified arbitrators provided by the Federal Mediation and Conciliation Service. If possible, this selection will be completed within ten (10) days." (Exh. J-1, p. 8.)
5. On July 23, 2012, the parties entered into a Settlement Agreement regarding a pending unfair labor practice complaint unrelated to the matters in this case. In that Settlement Agreement, the parties agreed that, on an ongoing basis, "[n]either party will take more than 30 days in providing information for a request, unless the parties agree otherwise on a case-by-case basis." (Exh. C-27, p. 1.)

## Grievance Process

6. The District and Union attorneys collaborate in scheduling grievances that the Union has advanced to arbitration. Typically, because it is in the best interest of both parties, termination discipline grievances are prioritized. However, sometimes other types of grievances are advanced sooner because they are either expedited or grouped with other similar grievances.<sup>1</sup> Termination grievances are not subject to the expedited process.

7. When a grievance is not going to be expedited, the parties request a list of arbitrators from the Federal Mediation and Conciliation Service. Each party then takes turns striking a name off of the list until there is only one remaining. Once that final arbitrator is selected, the parties schedule the arbitration hearing with him or her.

8. As of February 23, 2016, there were approximately 140 grievances that the Union had advanced to arbitration, but had not yet been heard. In the majority of these cases, the list of arbitrators had been received as of that date, but names had not yet been struck. The oldest pending arbitration had an August 25, 2008 arbitration request date. Between August 25, 2008 and February 23, 2016, approximately five or six expedited arbitrations occurred and three or four full arbitrations occurred.

## The TL Grievance

9. On December 16, 2014, employee “TL” received a two-day suspension without pay due to his behavior toward another employee. TL was also required to complete a training course called Preventing Harassment and Promoting Diversity in the Workplace.

10. TL grieved the discipline using the Agreement’s grievance procedure (TL Grievance or Grievance 8869). TL stated that he had not previously received proper training. He requested that the discipline letter be removed from his file and that he receive pay for the two-day suspension. The grievance was assigned number 8869.

11. The District denied TL’s grievance and upheld the discipline at Step 1. TL pursued the grievance to Step 2. Rick Kindig, Manager, Maintenance of Way Operations, held a Step 2 grievance meeting on May 5, 2015 with TL and Union Liaison Officer, Joe Ruffin.

12. At the meeting, Kindig told TL and Ruffin that TL would get paid for the prior two-day suspension (in effect, reversing that part of the discipline). TL responded that the money was not as big of a concern as having the discipline letter removed from his file. TL requested that it either be removed immediately or after a period of no further discipline (a sunset clause). Kindig did not make a specific response, but instead made a general statement indicating that TL would be happy with the result.<sup>2</sup>

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<sup>1</sup>The evidentiary basis supporting this finding of fact is detailed in the Analysis section.

<sup>2</sup>The evidentiary basis supporting this finding of fact is detailed in the Analysis section.

13. On May 19, 2015, Kindig drafted a letter regarding the Step 2 meeting to then-Union President Bruce Hansen. Kindig then went on vacation, so he sent the draft to Christine Stevens, the District's Labor Relations Senior Manager, and her administrative assistant Lyn Jansen for finalization. Kindig did not talk to Stevens about the content of the letter.

14. In the process of finalization, Jansen phoned Ruffin and asked if the matter had been settled and if Kindig's letter could be sent. Ruffin agreed, however, he did not have a copy of the letter at that time.

15. The Kindig letter was finalized and sent to the Union, it summarized the background of the TL Grievance, and then stated:

"District's Response to Step 2 Request

"The grievance is resolved. [TL] has shown improvement in his interactions with co-workers and has taken a very pro-active approach to working with apprentices. I will have payment for his two day suspension reimbursed. However, his letter of suspension and all associated information pertaining to this discipline and grievance will remain in his personnel file. Once I receive notice that the ATU has accepted this decision and closed the grievance file, payment will be authorized.

"Appeal Procedure

"In accordance with the WWA, Article 1, Section 3, Paragraph 2, if you disagree with this finding and wish to move the issue to Step 3 (Arbitration), you must do so within thirty (30) days." (Exh. C-1, p. 2.)

16. On June 4, 2015, Hansen sent a letter to Labor Relations Director Evelyn Minor-Lawrence stating that the Union was moving the TL Grievance to arbitration.

17. On June 22, 2015, TL approached Union Vice President John Hunt and requested his assistance with the grievance. TL said he thought that Kindig had agreed to remove the discipline letter in his file under a sunset clause, but the letter did not reflect that. TL and Hunt went to Kindig's office. TL and Hunt told Kindig that they did not agree with Kindig's decision to not remove the discipline from TL's file. Following further discussion, TL and Hunt left that meeting believing that Kindig might be willing to do so, subject to approval from the Labor Relations office. Kindig believed he had effectively communicated that the grievance had already been settled.

18. On July 6, 2015, Hunt sent an email to Kindig, stating "[i]n order to resolve this outstanding grievance the union would be willing to agree to the two days back pay and all document kept on file for 3 months if no other issue come up then remove documents and sunset." (Exh. R-2, p. 1.) No further communications occurred.<sup>3</sup>

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<sup>3</sup>Kindig testified that he had a brief conversation with Ruffin about TL and Hunt's visit to his office and Ruffin expressed surprise and "felt that grievance was resolved also." (Tr. p. 34, ll. 17-20.) However, Kindig was not specific as to what Ruffin stated and Ruffin disputes that any such conversation occurred.

## Advancement of Other Grievances

19. In September 2014, the Union advanced Grievance 8552 to arbitration. The parties received a list of arbitrators on approximately September 24, 2014. Neither party immediately sought to select an arbitrator by striking names. In May 2015, the Union moved Grievance 8856 to arbitration. The parties received arbitrator names on May 7, 2015. Neither party immediately sought to strike arbitrator names. In April 2015, the Union moved Grievance 8890 to arbitration. The parties received arbitrator names on April 27, 2015, but neither sought to strike names. All of these grievances were disciplinary grievances involving an employee termination.

20. On August 4, 2015, Stevens sent three letters regarding Grievances 8552, 8856, and 8890 to Union President Shirley Block. In those letters, Stevens said that the Union had moved the grievances to arbitration, the parties had received arbitrator lists, and it was time to strike arbitrator names. Stevens directed Block to contact District Deputy General Counsel, Senior Britney Colton no later than August 14, 2015 to set up a time to strike names. Stevens advised that if Block failed to do so, the District would “assert to the arbitrator that the ATU delayed proceeding with this arbitration and that any back pay award will be limited to that incurred from the date of termination to August 14, 2015.” (Exh. C-18, C-19, and C-20.)

21. Grievances 8552, 8856, and 8890 were the oldest pending arbitrations involving terminations with the exception of Grievance 8535 involving Diana Santry. Stevens did not include Santry because she did not believe that Santry could be contacted.

22. Block responded on August 5, 2015. Block stated that the District’s letters had violated the Agreement because there was a longstanding and well-established practice to schedule grievances to arbitration in the rank order that they were moved to arbitration. Block stated that, therefore, the Union would not be responding to the District’s deadline to strike arbitrator names.

23. On August 7, 2015, Stevens responded to Block. Stevens stated the District was unaware of any past practice regarding the order of having arbitrations heard. Stevens asked that Block provide her with documentation to support Block’s assertion. Specifically, Stevens requested:

“Any and all documents and agreements that support the ATU’s position that grievances are arbitrated in the order in which they were moved to arbitration.

“Any and all documents that support that it is a violation of the WWA to hear grievances outside the order in which they were moved to arbitration.” (Exh. C-23.)

24. Block responded with a letter on August 11, 2015, but did not provide any supporting documentation. Block wrote “[w]e appreciate the fact that you are unaware of past practice dealing with grievances as you have limited history and knowledge of the issues. Only

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Accordingly, we find Kindig’s non-specific testimony insufficient to support a finding of fact that Ruffin and Kindig had this discussion.

when both parties agreed has a grievance been moved to arbitration ahead of those earlier moved.” (Exh. C-24.)

25. Stevens has worked for the District since 2004, serving various roles in the Labor Relations and Human Resources department including Labor Relations Manager, Workforce Development Manager, and Human Resources Manager. Since starting with the District, Stevens has been extensively involved with individual grievances and the grievance procedure generally.

26. Between September 8 and 15, 2015, Colton and Union Counsel Krista DeLisle engaged in extensive email correspondence, attempting to schedule several grievances. On September 15, Colton wrote to DeLisle, stating that the District believed that the termination grievances should be prioritized because they had the highest stakes. DeLisle responded “[t]he Union agrees that we should strike for terminations first. In accordance with past practice, we insist that we strike the arbitrations from oldest to newest.” (Exh. C-30, p. 2.)

27. On September 23, 2015, Colton wrote to DeLisle. Colton mentioned two termination grievances that had been at the arbitration level for several months, and requested that the parties strike arbitrator names. DeLisle responded that she was being directed to proceed with the past practice of strictly striking in the order of oldest to newest.

#### Correspondence Regarding Local Officer Authority

28. Block became Union Present on July 1, 2015, replacing Hansen. On July 6, 2015, Block sent a letter to Neil McFarlane, the District’s General Manager. In that letter, Block explained that Union members must vote on any changes affecting member rights as established under the Agreement, past practice, regulations, and statutes. Block continued by stating:

“[t]he local property officer’s authority is similarly limited. They have no authority to bind the Union with regard to any diminishing of member rights. Furthermore, while they can settle grievances at the first step, they can do so only with the acquiescence of the grievant, only on a non-precedent setting basis and only after notice to the Union.” (Exh. C-9, p. 1.)

29. This language was identical to language Hansen had previously included in a letter to McFarlane in 2012, shortly after Hansen assumed office. On July 8, 2015, Randy Stedman, Executive Director of Labor Relations and Human Resources, responded to Block’s July 6 letter. Stedman stated that he realized Block’s letter contained boilerplate language from 2012, but that the Agreement had changed and now Article 1, Section 3, Paragraph 3 provided that union officials handling grievances at each step had authority to settle grievances. Stedman asked Block to clarify as to whether she intended to honor that language from the Agreement.

30. On July 13, 2015, Stedman again wrote Block. Stedman stated that he recently learned that the Union had knowingly violated Article 1, Section 3 by refusing to honor the Step 2 settlement agreement of the TL Grievance entered into between Ruffin and Kindig and instead moved the grievance to arbitration.

31. On July 17, 2015, Block responded to Stedman, stating “[r]egarding grievance 8869, the Union Executive board officer Joe Ruffin and grievant disagree with the written resolution prepared by the manager. In other words, the written decision did not accurately reflect what was agreed to.” (Exh. C-13.)

32. Stedman responded to Block the same day. Stedman stated that TL, Ruffin, and Kindig had reached a settlement agreement on the TL Grievance and the agreement was reduced to writing in Kindig’s Step 2 response letter. Stedman requested that Block explain on what terms she believed the parties had agreed to settle.

33. On July 20, 2015, Block responded to Stedman. Block stated that the past practice between the parties was for the responsible District manager to draft a letter reflecting his or her understanding of the agreement between the parties, and if the Union and grievant do not agree that it properly reflects the resolution, then the Union advances the grievance to the next step.

34. On February 16, 2016, Block wrote to Stedman, stating that she agreed that local officers have authority to settle grievances under the Agreement as long as the settlement does not alter the terms of the Agreement. She explained that she did not mean to suggest otherwise in her July 6, 2015 letter.

35. Stedman responded on February 19, 2016, challenging Block’s assertions in the February 16, 2016 and other letters. Stedman stated that the Union had failed to honor Article 1, Section 3 by advancing settled grievances to arbitration.

36. On February 23, 2016, Block responded to Stedman. She explained how her July 6, 2015 and February 16, 2016 letters were reconcilable, and stated she was perplexed that Stedman would adamantly assert that grievances had been settled in step meetings when he was not actually present at them.

37. Stedman responded to Block on February 25, 2016, generally continuing the ongoing argument, and asking Block to retract her July 6, 2015 letter. Stedman also stated that Article 1, Section 3’s language regarding local officer authority to settle grievances was added because under a prior agreement, the District had issues with the Union claiming local officers did not have settlement authority.

### CONCLUSIONS OF LAW

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

### STANDARDS OF DECISION

#### ORS 243.672(2)(e)

ORS 243.672(2)(e) makes it an unfair labor practice for a labor organization to refuse to reduce an oral agreement with an employer to writing, and sign it. Its analogue, ORS 243.672(1)(h), makes it an unfair labor practice for an employer to refuse to reduce an

agreement to writing and sign it. In analyzing the claims under either of these provisions, this Board applies an objective standard to decide whether an agreement was reached and what that agreement comprehends. *AFSCME Local 3786 v. City of Forest Grove*, Case No. UP-72-97, 18 PECBR 157 (1999); *Redmond Education Association v. Redmond School District 2J*, Case No. C-5-78, 4 PECBR 2086, 2091 (1978), *aff'd* 42 Or App 523, 600 P2d 943, *rev den*, 288 Or 173 (1979).

#### ORS 243.672(2)(b)

ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization to refuse to collectively bargain in good faith with a public employer. The statute mirrors ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to refuse to collectively bargain in good faith with a labor organization. Bad faith bargaining charges typically arise out of the context of bargaining negotiations with claims such as regressive contract proposals and surface bargaining. However, bad faith bargaining claims can also occur in the interim between negotiations. For example, a public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013). Additionally, as part of their statutory duty to bargain in good faith, employers and labor organizations have a duty under ORS 243.672(2)(b) and (1)(e) to provide relevant information to each other upon request if the information sought is of probable or potential relevance to a grievance or other contract administration issue, or if the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal. *Union-Baker ESD Association v. Union-Baker Education Service District*, Case No. UP-2-05, 21 PECBR 286 (2006).

#### ORS 243.672(2)(d)

It is an unfair labor practice under ORS 243.672(2)(d) for a labor organization to violate the provisions of any written contract with respect to employment relations. ORS 243.672(2)(d) is an analogue to ORS 243.672(1)(g), which prohibits employers from violating contracts with labor organizations. In analyzing a violation of contract claim under either provision, we first determine whether or not the language is ambiguous. Unambiguous collective bargaining agreements are enforced according to their terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. When that is the case, we ascertain the intent of the parties and construe the contract consistent with that intent. In order to do this, we examine any available extrinsic evidence of the contracting parties' intent. If after that, the ambiguity persists, we resolve it by using the appropriate maxims of contractual construction. *Jackson County School District #9 v. Eagle Point Education Association/OEA/NEA*, Case No. UP-26-12, 25 PECBR 746 (2013).

#### ANALYSIS

2. The District has failed to prove that there was a settlement agreement that the Union repudiated. Therefore, the Union did not violate ORS 243.672(2)(b) or ORS 243.672(2)(e) in advancing the TL Grievance to arbitration.

The District asserts that the Union repudiated a settlement agreement of the TL Grievance, and in doing so violated ORS 243.672(2)(b) and ORS 243.672(2)(e). ORS 243.672(2)(b) makes it an unfair labor practice for a labor organization to refuse to bargain in good faith with a public employer. ORS 243.672(2)(e) makes it an unfair labor practice for a labor organization to refuse to reduce an agreement to writing and sign it. The question of whether the parties have actually reached an agreement that must be embodied in a signed contract must be determined on the facts of each case. The Complainant must prove by a preponderance of the evidence that Respondent's conduct objectively indicated that the parties had reached an agreement that Respondent refused to sign, notwithstanding the Respondent's contention it had not subjectively had agreed to the matters in dispute. *Redmond Education Association*, 4 PECBR at 2091.

The District has failed to meet its burden to show that there was an agreement between the parties to settle the TL Grievance. Therefore, the claims under both statutes fail. First, the testimony regarding the events of the Step 2 meeting does not strongly support an oral agreement between the parties. Specifically, the District presented Kindig's testimony at hearing. Kindig testified that he told TL and Ruffin that the District would repay the suspension, but the discipline would remain in the file. According to Kindig's testimony, he believed that the grievance was then settled. However, he was not able to recall any statements made by either TL or Ruffin that would indicate their affirmation or acquiescence. Rather, Kindig stated he believed the grievance was settled based on his recollection that they did not explicitly disagree with his proposal. This is insufficient to support the District's claims.

Because Kindig's testimony itself does not establish that there was a settlement, there is no need to make a specific credibility determination. However, we still note that TL and Ruffin's testimony conflict with Kindig's. They both testified that TL explained that the two-day suspension pay was not his primary concern, and instead he wanted the disciplinary letter removed from his record either immediately or in a few months if he had no further discipline. TL and Ruffin both testified that they understood Kindig to be agreeing to this, but they also were not able to relate specific statements by Kindig sufficient to support a finding he agreed to both the suspension reimbursement **and** disciplinary letter removal. Thus, Kindig's already unpersuasive testimony was contradicted by TL and Ruffin's.

Additionally, the District has failed to present any documentary evidence of an agreement. Kindig's written response stated:

**“The grievance is resolved. [TL] has shown improvement in his interactions with co-workers and has taken a very pro-active approach to working with apprentices. I will have payment for his two day suspension reimbursed. However, his letter of suspension and all associated information pertaining to this discipline and grievance will remain in his personnel file. Once I receive notice that the ATU has accepted this decision and closed the grievance file, payment will be authorized.**

“Appeal Procedure

**“In accordance with the WWA, Article 1, Section 3, Paragraph 2, if you disagree with this finding and wish to move the issue to Step 3 (Arbitration), you must do so within thirty (30) days.”** (Exh. C-1, emphasis added.)

The District presented credible testimony that Kindig’s Appeal Procedure language was derived from a template used for all grievance responses. Even so, however, Kindig also references the Union accepting or not accepting the decision, indicating that any agreement was subject to the Union’s acceptance. Therefore, we conclude that the letter is not sufficient evidence to establish that there was a settlement agreement of the grievance.

We note that Kindig does begin the letter by stating that “[t]he grievance is resolved.” (Exh. C-1.) At the most, this shows that there was likely a miscommunication between the parties and Kindig may have subjectively believed that an agreement had been reached. However, we are not convinced based on the total facts in this case that one was. Therefore, Kindig’s letter is insufficient to establish the District’s claim that the Union repudiated a settlement agreement of the TL Grievance.

Additionally, the other evidence presented by the parties regarding the TL Grievance does not provide any additional compelling proof to establish that there was a settlement agreement. Jansen credibly testified that she discussed the Step 2 response letter with Ruffin and he said he believed the matter to be settled. However, she also indicated that Ruffin would not have had a copy of the letter at that time. Further, Ruffin’s testimony indicates he believed that it was settled, just with different terms. Finally, the testimony of TL, Hunt, and Kindig regarding their follow-up meeting just provided further vague and conflicting testimony. However, we do note that both TL and Hunt testified that TL approached Hunt for assistance after Kindig’s letter was issued. This indicates that TL had not agreed to the terms as described by Kindig, and the Union did not attempt to unilaterally repudiate an agreement that the grievant himself desired. Therefore, the District has failed to meet its burden to prove that the Union has committed an unfair labor practice in violation of ORS 243.672(2)(e) or 243.672(2)(b), we dismiss these claims.

3. The Union did not violate the Agreement when it sent a July 6, 2015 letter announcing that Union officers have limited authority to settle grievances, and therefore did not violate ORS 243.672(2)(d).

The District asserts that the Union violated the Agreement’s Article 1, Section 3 when Block sent McFarlane a letter asserting that local officers can only settle at the first grievance step, do not have authority to bind the Union with regard to any diminishing of member rights and can only settle grievances with the acquiescence of the grievant, on a non-precedent setting basis, and after notice to the Union. This same letter had been sent to the District’s General Managers by prior Union Presidents when they took office.

The Union makes several arguments in response. First, the Union argues that Block’s letter was not intended to convey that local officers cannot settle grievances, but rather that they cannot settle any that would impact members’ rights as a whole (thereby effecting or altering the

Agreement); and thus, they are required to provide notice to the Union so the Union can review settlement terms for that possibility. Accordingly, the Union asserts that its practice of requiring officers to provide notice to the Union of settlement agreements is consistent with Section 3's language. Second, the Union notes that, on February 16, 2016, Block told Stedman that the Union had been, and intended to continue to, following the language in Article 1, Section 3. Third, the Union asserts that it has not failed to honor any grievance settlements because the local officers lacked authority and therefore, this claim is moot and not ripe for judicial review. For example, with the TL Grievance, the Union asserts it took it to arbitration because they did not believe there was a settlement, not because Ruffin lacked authority to enter into one.

The District has failed to meet its burden to show that these actions were related and constituted a contractual violation of the Agreement. As discussed above, the District has failed to show that the Union repudiated a settlement agreement of the TL Grievance. Additionally, there is no evidence in the record that the Union advanced the TL Grievance to arbitration because Ruffin lacked authority to enter into settlement. Rather, the Union did not agree with the settlement terms as stated by Kindig's letter. Further, there is no evidence in this case of the Union disavowing any other grievance settlements based on a lack of a local officer's authority. Accordingly, while the language in Block's form letter could arguably be read to be contrary to Section 3,<sup>4</sup> we find no reason to analyze it more thoroughly when there is no evidence that the Union has actually violated Section 3 by any actions it has taken. This Board will only consider a complaint under the PECBA that presents a controversy that is ripe for resolution. *Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-38/41-08, 23 PECBR 972 (2010); ORS 243.676(1)(b). Here there is no violation of the Agreement, rather Block sent a letter containing recycled language that could reasonably be interpreted to contradict the Agreement. This is not sufficient to establish a violation of the Agreement. Therefore, we determine that the Union did not violate ORS 243.672(2)(d).

4. The Union did not commit an unfair labor practice under ORS 243.672(2)(b) and ORS 243.672(2)(d) when it refused to proceed with striking arbitrator names for grievances it had advanced to arbitration as demanded by the District.

The District argues that the Union violated ORS 243.672(2)(b) and ORS 243.672(2)(d) when Block did not meet Stevens' demand to strike arbitrator names within 10 days and instead asserted that there was a past practice of scheduling arbitrations in the order in which they were advanced to arbitration. The Union responds that the District has failed to show that there was a violation of the Agreement and has failed to prove an established past practice that Block violated in not capitulating to Stevens' demand. We address each below.

#### ORS 243.672(2)(d)

It is a violation of ORS 243.672(2)(d) for a labor organization to violate the provisions of any written contract with respect to employment relations. The District argues that the Union violated the Agreement by insisting that arbitrations be scheduled (requiring that arbitrator names

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<sup>4</sup>We note that Block admitted that her letter contradicted the Agreement with respect to the fact it suggested that Union officers could settle grievances only at Step 1 and not at Step 2. (Tr., p. 210, ll. 1-6.) However, the issue in this case is limited to the Union's actions with respect to the Step 2.

be struck) in order of oldest to newest. Specifically, on August 4, 2015, Stevens sent three letters regarding termination grievances to Block. In each of those letters, Stevens said that the Union had moved the grievance to arbitration, the parties had received an arbitrator list, and it was time to strike arbitrator names. Stevens advised that if Block failed to respond within 10 days, the District would “assert to the arbitrator that the ATU delayed proceeding with this arbitration and that any back pay award will be limited to that incurred from the date of termination to August 14, 2015.” (Exh. C-18, C-19, and C-20.)

Block responded that Stevens’ demands had violated the Agreement because there was a longstanding and well-established practice to schedule grievance arbitrations in the rank order that they were moved to arbitration. The District argues that Block’s letter and refusal violated Article 1, Section 3, Paragraph 6 which states “[i]f the expedited arbitration procedure is not selected by the parties, the District and the Union shall select an arbitrator from a list of seven (7) qualified arbitrators provided by the Federal Mediation and Conciliation Service. If possible, this selection will be completed within ten (10) days.” (Exh. J-1, p. 8.)

There is not sufficient support in the record for concluding that the Union violated the language in Article 1, Section 3, Paragraph 6. First, and most importantly, the provision does not address the order in which grievances are to be scheduled for arbitration. Second, neither party has been adhering to, or attempting to enforce, the requirement to select arbitrators within 10 days. For example, the Union moved Grievance 8552 to arbitration in September 2014, and the parties received a list of arbitrators on approximately September 24, 2014. However, it was not until August 2015, that Stevens sent a letter demanding that arbitrator names be struck. Accordingly, any violations of this provision would be equally due to the collective actions of both parties, and not the basis of a proper claim against only one of them.

#### ORS 243.672(2)(b)

A public employer violates its duty to bargain in good faith under subsection (1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject for bargaining. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575 (2013). We have never held that a union has a parallel duty to negotiate in good faith when it changes the *status quo* regarding matters that are mandatory subjects. *See AFSCME Council 75, Local #2503 v. Hood River County*, UP-11-08, 23 PECBR 287, 300 (2009). However, because grievance procedures are typically jointly administered by employers and unions, a union could also conceivably violate ORS 243.672(2)(b) by violating a grievance past practice. As the Union does not argue that the duty applies only against employers, we will assume without deciding that it may also apply against a Union in a grievance administration case.

To determine whether a party has made a unilateral change, we analyze the following factors in the appropriate order for each case: (1) identify the *status quo* and determine whether a party changed it; (2) decide whether the change concerns a mandatory subject for bargaining; (3) examine the record to determine whether the parties completed their bargaining obligations before deciding to make the change; and (4) consider any affirmative defenses. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-09-13, 26 PECBR 225 (2014).

The primary controversy in this case is whether the Union changed an existing *status quo*. Therefore, we need only briefly discuss the other elements. First, if the subject in dispute is specifically included in the definition of “employment relations” under ORS 243.650(7)(a), then the subject is mandatory for bargaining. Under ORS 243.650(7)(a), employment relations “includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.” Accordingly, grievance procedures are mandatory subjects. Second, it is clear that the parties did not engage in bargaining to determine the order of processing grievances. Therefore, next we determine whether there has been a change in the *status quo*. To determine the *status quo*, we consider whether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition. In doing so, we look to a variety of sources, starting with the terms of a current or an expired collective bargaining agreement, and then to work rules, policies, and finally, the parties’ past behavior or practices. *Amalgamated Transit Union, District 757 v. Tri-County Metropolitan Transportation District of Oregon*, UP-037-12, 25 PECBR 848 (2013).

The Union argues that the District failed to prove that there was a past practice. In *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726 (1981), we established a method for determining whether a particular action constitutes a binding past practice. First, we consider whether the alleged practice is an appropriate subject for bargaining. Next, we consider whether the alleged practice is clearly established. To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the circumstances under which the past practice was created, and the existence of mutuality. Mutuality concerns the question of whether a practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or whether the practice arose from choices made by the employer in the exercise of its managerial discretion without any intention of future commitment. *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, UP-22-04, 20 PECBR 987, 993 (2005).

When the employment condition is based upon past practice, the party alleging the past practice has the burden of proving its establishment. *Id.* In this case, the burden is on the District. As explained below, we conclude that the District has failed to establish that there was a past practice. In closing briefing, the District focuses on the Union’s actions in refusing to strike arbitrators in the grievances that it had advanced. However, it failed to make an explicit arguments about what it believed the past practice to be and what evidence was available to show that such a practice was clear and consistent, occurred repetitively over a long period of time, and was mutually acceptable to both parties. As the Union correctly asserts, “TriMet cannot prove that the [U]nion violated PECBA simply by claiming that the [U]nion’s view of past practice is incorrect.” (Respondent’s Brief, p. 17.)

However, although the District failed to explicitly assert a *status quo*, the District’s arguments imply that there was a past practice to schedule termination arbitrations before others and the Union violated the practice by refusing to strike arbitrator names in the oldest termination grievances in the timeframe demanded by the District. Therefore, we will review the evidence to determine if the Union violated a past practice by not striking arbitrator names as demanded by the District in its August 4, 2015 letters.

The evidence presented establishes that the District and Union attorneys work together in scheduling grievances that the Union has advanced to arbitration. Because it is typically in the best interest of both parties, termination discipline grievances are prioritized. However, the testimony shows that this was a preference, but not as an established rule. Specifically, Stevens testified that “we **prefer** to do the terminations as early as possible. (Tr. p. 73, ll. 24-25, emphasis added.) Shelly Lomax, the District’s Executive Director of Transportation testified that the parties “**try** to have terminations go before other matters because it involves loss of livelihood.” (Tr. p. 118, ll. 23-25, emphasis added.) Jon Hunt testified that “**it depends, but traditionally** terminations could take precedence over regular grievances.” (Tr. p. 185, ll. 2-3, emphasis added.)

We also note that Colton described prioritizing terminations as a “past practice” in her testimony. (Tr. p. 91, ll. 18-20.) However, her email communications with DeLisle show that in the scheduling of arbitrations, the parties tend to prioritize terminations, but do not follow an established rule of order. Sometimes grievances other than termination grievances are prioritized because they are expedited or because they are grouped with others of a similar nature. Therefore, we do not give significant weight to her characterization.

Based on the above, the evidence in this case establishes that, in scheduling grievances for arbitration, the parties have manifested a mutual preference for prioritizing termination discipline grievances above others. And typically, the oldest termination grievances are prioritized over the newer ones. Following termination grievances, other grievances typically have been scheduled in the order they were moved to arbitration. However, there have been a number of exceptions. Further, some grievances are handled as expedited and follow a different process. Accordingly, these facts prevent us from determining that there is a clear and consistent practice that has occurred repetitively over a long period of time. Accordingly, without being able to establish a past practice, the District cannot prove that the Union violated ORS 243.672(2)(b). As such, we dismiss this claim.

5. The Union’s failure to respond to the District’s August 7, 2015 information request was an unfair labor practice under ORS 243.672(2)(b) and ORS 243.672(2)(d).

The District charges that the Union committed an unfair labor practice under ORS 243.672(2)(b) and ORS 243.672(2)(d) because Block did not respond to Steven’s August 7, 2015 request that Block provide documentation to prove her assertion that arbitrations were always scheduled in order of oldest to newest. First, the District argues that the Union violated the Settlement Agreement, and hence ORS 243.672(2)(d), when it did not provide the requested documentation within 30 days. Second, the District argues that the Union violated its statutory duty to bargain in good faith under ORS 243.672(2)(b), which requires a party to provide relevant information upon request if the information sought is of probable or potential relevance to a grievance or other contract administration issue, or if the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal. *See Union-Baker ESD Association*, 21 PECBR at 286.

The Union’s duty to provide information within 30 days under the Settlement Agreement will only be applicable if it had a duty to provide it at all. This Board considers four factors in reviewing an alleged refusal to provide information under ORS 243.672(2)(b): (1) the reason given

for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested; and (4) the history of the parties' labor-management relations. *Ashland Police Association v. City of Ashland*, Case No. UP-50-05, 21 PECBR 512, 518 (2006). These requirements were first developed in *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982) where we explained that “[t]he extent to which a party must supply the information requested and the length of time the party may take to do so are dependent upon the totality of circumstances present in the case \* \* \*.” *Id.* at 5031. Further, a response to a request for information is required, and that response must include a definitive statement about the intended disposition of the request—even if the statement is simply to assert that all documents sought have been provided. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 674 (2004).

Stevens requested the following:

“Any and all documents and agreements that support the ATU’s position that grievances are arbitrated in the order in which they were moved to arbitration.”

“Any and all documents that support that it is a violation of the WWA to hear grievances outside the order in which they were moved to arbitration.”  
(Exh. C-23.)

Stevens stated that the reason for the request was that she was unaware of any past practice requiring the District and the Union to schedule arbitrations in the order the grievances were advanced. Block’s reply was simply to reiterate her erroneous position regarding arbitration scheduling and state that Stevens was “unaware of past practice dealing with grievances” due to Stevens’ “limited history and knowledge of the issues.” (Exh. C-24.) Accordingly, Block failed to provide a response including a definitive statement about the intended disposition of the request, including that she had nothing to provide. As established above, Block’s assertion about the parties’ past practice was incorrect. Therefore, if she could not provide information supporting her position, she should have admitted it was erroneous, which would have allowed for the parties to more quickly resolve the issue of proper grievance arbitration scheduling. Therefore, we determine that the Union violated its statutory duty to bargain in good faith under ORS 243.672(2)(b).

Because Block failed to meaningfully respond to the document request, Block also violated the parties’ July 23, 2012 Settlement Agreement regarding a pending unfair labor practice complaint unrelated to the matters in this case. In that Settlement Agreement, the parties agreed that on an ongoing basis “[n]either party will take more than 30 days in providing information for a request, unless the parties agree otherwise on a case-by-case basis.” (Exh. C-27.) As such, Block also violated ORS 243.672(2)(d). However, we note that Block credibly testified that she was not aware of the Settlement Agreement terms at the time, therefore, we do not conclude that this was a deliberate violation.

## Remedy

We have broad authority to fashion an appropriate remedy under the circumstances of each particular case to effectuate the purposes of PECBA. *See, e.g., Elvin v. OPEU*, 102 Or App 159, 164, 793 P2d 338 (1990), *aff'd*, 313 Or 165, 832 P2d 36 (1992); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, Case No. UP-22-00, 19 PECBR 437 (2001). The District makes several remedy requests, however, we limit our discussion to the ones associated with the violations associated with the Union's failure to respond to the District's document request.

### Cease and Desist Order

Since we have determined that the Union violated ORS 243.672(2)(b) and ORS 243.672(2)(d), we order that the Union cease and desist in its unlawful practices.

### Notice Posting

The District has requested that we require the Union to post a notice of its wrongdoing. We generally order such a posting if we determine a party's violation of the PECBA was: (1) calculated or flagrant, (2) part of a continuing course of illegal conduct, (3) committed by a significant number of the respondent's personnel, (4) affected a significant number of bargaining unit employees, (5) significantly (or potentially) impacted the designated bargaining representative's functioning, or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP* 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).

Here we do not find Block's failure to respond to the District's document request meets this criteria. Block likely did not have anything to provide given that there was not a history of the parties scheduling arbitrations in order and the District would have been aware of that fact. Block's failure to respond likely further delayed the arbitration processing between the parties. However, this process already largely stalled by the parties' poor relationship. Additionally, this situation was not committed by, and did not involve, a significant number of employees. It also did not involve a strike, lock-out, or union activity elected discharge. Therefore, we decline to order the posting of a notice.

### Civil Penalty

In its amended complaint, the District sought the award of a civil penalty based on what it perceived as egregious conduct. Actions are egregious only if they were "taken in knowing disregard of the law." *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93, 15 PECBR 347, 362 (1994). Here, while the parties have both displayed poor communication with one another, Block credibly testified she was not aware of the Settlement Agreement and generally, failure to provide a response to the document request does not warrant a civil penalty.

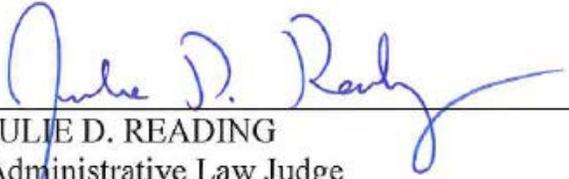
## Make-Whole Remedy

“[T]he goal of a make whole order is to restore an injured party to the status that existed before the violation occurred.” *Central Education Association and Alfonso Vilches v. Central School District 13J*, Case No. UP-74-95 17 PECBR 93, 94 (1997), *aff’d* 155 Or App 92, 962 P2d 763 (1998). The District has requested that the Union be required to respond to the document request and be ordered to comply with the Settlement Agreement. While it is likely, based on the facts and conclusions in this case that the Union does not have anything to provide, we agree that it is appropriate to order the Union to make some response confirming or denying the existence of any such documents.

### PROPOSED ORDER

1. The Union shall cease and desist from violating ORS 243.672(2)(b) and ORS 243.672(2)(d).
2. The Union shall appropriately respond to the District’s August 7, 2015 information request.

DATED July 6, 2016.

  
\_\_\_\_\_  
JULIE D. READING  
Administrative Law Judge

NOTE: The Employment Relations Board’s rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The “date of filing objections” means the date objections are received by this Board; “the date of service” of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. The objections must be mailed, faxed or hand-delivered to this Board – not sent electronically. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. This Board does not accept electronic filing of objections (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)