EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-45-03

(AMENDMENT OF RECOGNITION)

YAMHILL SHERIFF'S EMPLOYEES ASSOCIATION / TEAMSTERS LOCAL #223, Petitioners, v. YAMHILL COUNTY SHERIFF'S OFFICE, Respondent.	ORDER AMENDING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On December 9, 2003, Yamhill Sheriff's Employees Association (Association) and Teamsters Local #223 (Teamsters) filed a petition under OAR 115-25-008 seeking to amend the Association's certification to reflect affiliation with Teamsters. The Association currently is the recognized bargaining agent for a unit of employees employed by the Yamhill County Sheriff's Office.

Attached to the petition was an "Election Notice" which was mailed to each Association member's home address outlining the complete election process. The notice stated that the Association was currently the certified collective bargaining representative for the bargaining unit and was affiliated with Teamsters. The notice further stated that members had requested an election to certify Teamsters as the certified collective bargaining representative. The notice also explained that if a majority of those voting cast their ballots in favor of affiliation with Teamsters, the Association would no longer exist and that they would be members of Teamsters. The notice explained that no change would occur in representation except that Teamsters would be the certified representative and would speak on behalf of the members in all aspects of collective bargaining. Also enclosed was a ballot with the choices of "Yamhill Sheriff's Employees Association" and "Teamsters Local #223."

Members were told to mark only one choice on the ballot, enclose the ballot in the envelope marked "ballot" for secrecy and seal the envelope. That envelope was then

to be placed into the return envelope provided with the notice and the voter was to print and sign their name to ensure that an eligible voter only voted once. The ballot envelopes were not opened until the counting began so that complete confidentiality could be maintained. Ballots were to be received no later than 5:00 p.m. November 14, 2003.

Results of the tally of ballots were: "Yamhill Sheriff's Employees Association" 4 votes, "Teamsters Local #223" 34 votes. Thirty-eight of the 61 members of the bargaining unit voted in the affiliation election.

The elections coordinator served the petition on Yamhill County Counsel. On December 18, the elections coordinator received a letter stating that the County and Sheriff were waiving objections to ERB's issuing an order clarifying the bargaining unit in the manner requested by Teamsters.

We conclude that the Association and Teamsters are labor organizations; the affiliation election was conducted in compliance with at least minimum due process requirements; and a majority of votes cast by the Association's bargaining unit members were for affiliation with Teamsters.

Based on the foregoing, this Board issues the following order:

ORDER

The Yamhill County Sheriff's Office's recognition of the Yamhill Sheriff's Employees Association is amended to reflect the Association's affiliation with Teamsters Local #223.

DATED this 12 day of January 2004.

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-38-03

(UNIT CLARIFICATION)

CLACKAMAS COUNTY, Petitioner, v. OREGON AFSCME COUNCIL 75, LOCAL 350, Respondent, and CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Incumbent.	)	DISMISSAL ORDER

David W. Anderson, Assistant County Counsel, Clackamas County, 906 Main Street, Oregon City, Oregon 97045-1881, represented Petitioner.

Susan Skites, Council Representative, Oregon AFSCME Council 75, 123 N.E. Third, Suite 505, Portland, Oregon 97232, represented Respondent.

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Incumbent.

Clackamas County (County) filed this OAR 115-25-005(3) unit clarification petition on September 24, 2003, asserting that AFSCME is the representative of employees formerly employed by the elected County surveyor who are now employed by the County in its Department of Transportation and Development (DTD).

On October 13, Clackamas County Employees' Association (CCEA) filed a timely objection to the petition. CCEA asserts:

(1) A CCEA grievance over a related issue is pending, so the petition should be dismissed;

(2) The County (which filed its petition under OAR 115-25-005(3)) does not have standing to file either an OAR 115-25-005(6) petition or an OAR 115-25-000(1)(d) redesignation petition, so it cannot obtain a transfer of employees between bargaining units;

(3) The affected employees' work remains unchanged, so they remain included in the CCEA bargaining unit;

(4) The affected employees oppose transfer from the CCEA bargaining unit to the AFSCME bargaining unit.

Contract terms. The County and CCEA are parties to a July 1, 2000-June 30, 2003 collective bargaining agreement; it remained in effect as of the date on which the County filed the subject petition. Article I of that agreement, "Recognition," provides that CCEA is the exclusive representative of all County employees, except certain categories. One category of employees excluded from the bargaining unit is "employees covered by other [collective bargaining] agreements." The contract contains a grievance procedure that ends in binding arbitration.

The County and CCEA agree that the CCEA bargaining unit, prior to January 2003, included a number of employees in the "land surveyor" classification (salary plan EA, pay grade 25, job code 001310, 37.5 hours per week, step 6 pay rate $27.9696).

The County and AFSCME are parties to a July 1, 2000-June 30, 2003 collective bargaining agreement; it remained in effect as of the date on which the County filed the subject petition. Article II of that agreement, "Recognition," provides that

AFSCME is the exclusive representative of "all employees of the County [DTD]," with certain inapplicable exclusions.

The AFSCME bargaining unit includes a number of different employees in the "land surveyor" classification (salary plan DTD, pay grade 25, job code 003310, 40 hours per week, step 6 pay rate $27.4767).

Background. Before January 2003, the County surveyor was an elected position. About 15 employees reported to the surveyor; CCEA represented those employees. The surveyor was the head of a department independent of the DTD. CCEA represented the 15 employees in the surveyor's office.

As of January 2003, the County surveyor became an appointed position, and the County designated the surveyor's office as one division within the DTD. With that change, the County considers the 15 employees in the surveyor's office to be included in a bargaining unit represented by AFSCME.

On January 15, 2003, CCEA filed a grievance challenging the County's "transfer" of surveyor employees from its bargaining unit to the AFSCME bargaining unit. CCEA argued that the County's action violated Articles I (Recognition), XXI(1) (Existing Conditions), or XXI(6) (Reorganization) of the 2000-2003 CCEA-County collective bargaining agreement. In the grievance, CCEA asserted that "[t]he duties, responsibilities, and location of [the affected employees] working for the Surveyor remain the same as before the 'transfer.'" The County does not challenge that assertion. To remedy the alleged contract violation, CCEA sought a rescission of the "transfer" and a make-whole remedy for the affected employees.

The County argues, in its petition, that CCEA's grievance "will not resolve the issue because a grievance under the CCEA agreement will not reach the issue presented by the recognition clause of the AFSCME agreement." In response to CCEA's objections, on October 21, the County reiterated that the pending *CCEA* grievance will not resolve the issue of whether the surveyor's employees are included in the *AFSCME* bargaining unit. In addition, the County argued that a Board decision of this unit clarification petition is required to avoid the "potential for inconsistent and mutually exclusive decisions by different arbitrators considering the language of different contracts, and drawing their authority from different contracts."

Further, on October 28, the County stated:

> "* * * An additional consideration is the practical problem of whether the CCEA will advance a grievance to arbitration if ERB dismisses the unit clarification petition. CCEA is not likely to advance the grievance to arbitration unless the County takes steps such as stopping remittance to CCEA of the union dues deductions from the affected employees, and beginning remittance of the dues to AFSCME instead. Any such steps will be disruptive and preferably would be undertaken only after a decision is made on the issue."

From that County statement, this Board infers that, as to the payment of dues and any fair share payments, the County continues to treat the surveyor's employees as being represented by CCEA.[1]

Board rule. OAR 115-25-005(3) states:

> "(3) When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that *the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.*" (Emphasis added.)

Discussion. The issue in this OAR 115-25-005(3) petition is whether the surveyor's employees—who were represented by CCEA up to January 2003—are or are not included in the AFSCME bargaining unit.

CCEA filed a grievance challenging the County's removal of the surveyor's employees from the CCEA bargaining unit. In the words of this Board's rule, an arbitrator's opinion and award "may resolve the issue" of whether the surveyor's employees are or are not included in the CCEA bargaining unit.

This Board will not speculate about what might happen after an arbitrator renders such an award. This Board's rule provides simply that the party filing an OAR

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[1] *Compare Yamhill County v. SEIU Local 503, OPEU and Yamhill County Employees Association*, Case No. RM-24-02, 20 PECBR 198 (2003), in which the public employer held such funds in escrow pending resolution of a question concerning representation.

115-25-005(3) petition must exhaust "any grievance in process that may resolve the [representation] issue [presented by the petition] * * *."

The CCEA grievance involves the issue presented by this petition; that grievance is pending. Under the circumstances, the County's petition is premature and untimely. If CCEA withdraws the grievance, or waives the grievance by failing to process it to arbitration, the County may re-file its petition.[2]

DATED this 9th day of February 2004.

Rita E. Thomas

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

[2]Upon the filing of a timely petition, this Board may apply the analysis recently used in *Marion County Law Enforcement Association v. Marion County*, Case No. UC-37-02, 20 PECBR 398 (2003).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-1-04

(UNIT CLARIFICATION—REDESIGNATION)

COOS COUNTY, Petitioner, v. OREGON AFSCME COUNCIL 75, LOCAL 2936, Respondent.	)	ORDER REDESIGNATING BARGAINING UNIT

On March 12, 1974, in Case No. C-147, the Board certified Local 502-A, Coos County Courthouse Employees, American Federation of State, County and Municipal Employees, AFL-CIO, Oregon Public Employees Council #75 as the exclusive representative for a bargaining unit of Coos County courthouse employees. On May 7, 1985, in Case No. UC-28-85, the Board amended the certification to reflect a change in local number. The name on the certification became AFSCME Local 2936, Council 75, AFL-CIO (Respondent). All of the members of the bargaining unit were strike-permitted at that time, including several classifications of parole and probation officers.

In 2003, the legislature enacted House Bill 2576, amending ORS 243.736, to make parole and probation officers strike-prohibited employees. The bill became effective January 1, 2004. On that date, the bargaining unit became a mixed unit containing both strike-permitted and strike-prohibited employees.

On January 12, 2004, Coos County (Petitioner) filed a Unit Clarification—Redesignation petition (UC petition) seeking to clarify the bargaining unit by redesignating the nonstrikeable parole and probation officers into a separate bargaining unit. The existing bargaining unit as described in the UC petition is: "All regular full-time and regular part-time employees set forth in Appendix A [of the parties'

collective bargaining agreement]." A copy of the collective bargaining agreement was attached to the UC petition. The UC petition seeks to amend Appendix A by deleting reference to the classifications of Probation Officer I, Probation Officer II, Probation Officer III, and Lead Probation Officer.

The elections coordinator served the UC petition on Respondent on January 15, 2004. On January 21, 2004, Petitioner posted notices of the proposed UC petition in the work areas of the affected employees. There were no objections filed to the UC petition.

The term of the parties' collective bargaining agreement was July 1, 2002, to June 30, 2003. The parties are currently negotiating a successor agreement. On January 28, 2004, before the end of the period for objections to the UC petition, Coos County Community Corrections Officers Association filed a representation petition (Case No. RC-5-04) seeking to represent the redesignated nonstrikeable bargaining unit described as "All Coos County Community Adult Parole and Probation Officers, *excluding* supervisory and confidential employees." The representation petition is currently being processed by the Board elections coordinator.

DISCUSSION

Board Rule 115-25-045 provides that we will conduct a hearing "[w]hen a valid petition has been filed and objections * * * have been timely filed * * *." In the analogous circumstances of representation petitions filed under Board Rule 115-25-000(1)(a) and (b) and unit clarification petitions filed under Board Rule 115-25-005, we generally grant the petition when a party has proposed a facially appropriate unit and the other party has not filed an objection.[1] This Board has not previously considered whether to apply a similar practice where a party has filed a petition for a redesignation under Board Rule 115-25-000(1)(d), and no objections have been filed. We conclude that it is appropriate to apply the same practice to such petitions.

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[1]*Compare Teamsters Local 223 v. City of Gold Hill*, Case No. RC-75-92, 14 PECBR 290 (1993) (election ordered where no valid objections filed by employer); *Teamsters Local 57 v. City of Bandon*, Case No. UC-47-91, 13 PECBR 225 (1991) (subject to results of self-determination election, unit clarification ordered where employer's objections were untimely); *Rainier Rural Fire Protection District v. IAFF Local 3651*, Case No. UC-41-96, 16 PECBR 773 (1996) (unit clarification ordered where the employer filed a petition and the labor organization did not object).

The UC petition proposes a facially appropriate unit. The recent amendment to ORS 243.736 resulted in this unit of strike-permitted employees becoming a mixed unit that includes both strike-permitted and strike-prohibited employees. The strike-prohibited parole and probation officers constitute 8 employees out of a bargaining unit of 168.

"* * * This Board has often designated units which mix a small number of strike-permitted workers with a large number of strike-prohibited workers, particularly if the employees have a strong community of interest. * * *" *Multnomah County v. Multnomah County Employees Union Local 88*, Case No. UC-4-92, 13 PECBR 689, 699 (1992). However, "[t]his Board has never permitted, *and will not maintain*, a bargaining unit which combines a small minority of strike-prohibited employees with a large majority of strike-permitted employees. We separate the two groups because of the difference in the dispute resolution process between the two groups. We will not permit a few strike-prohibited employees to deny the right to strike to a much larger group." *Multnomah County v. Multnomah County Employees Union Local 88*, 13 PECBR at 699-700 (1992) (footnote omitted, emphasis added).[2]

> "* * * [B]eginning with *Teamsters Local Union No. 223 v. City of Central Point*, Case No. C-195-79, 5 PECBR 2756 (1980), we have exercised a policy favoring the separation of work forces into units of exclusively strikeable and exclusively nonstrikeable employes. The difference in the final methods of dispute resolution for these two groups -- strike or interest arbitration --is a community of interest factor which strongly favors their separation. * * *" *AFSCME v. City of Seaside*, Case No. C-20-81, 6 PECBR 4783, 4786-4787 (1981).[3]

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[2]*See also AOCE v. State of Oregon, Department of Corrections and AFSCME, Council 75*, Case No. UC-24-99, 18 PECBR 441, 450 (2000) (the policy of the PECBA favors separate modes of dispute resolution for strike-permitted and strike-prohibited employees, and thus does not favor mixed units); *AOCE v. State of Oregon, Department of Corrections and AFSCME, Council 75*, Case No. UC-25-99, 18 PECBR 576, 587 (2000) (compelling reasons must exist to convert strike-permitted employees to strike-prohibited status through inclusion in a mixed unit).

[3]A lengthy history of bargaining is among the factors that, in general, weigh against redesignating a portion of an existing bargaining unit into a separate unit. *FOPPO v. Multnomah County*, Case No. RC-6-91, 13 PECBR 234, *recons denied*, 13 PECBR 286 (1991), *aff'd without opinion*, 122 Or App 636, 858 P2d 183 (1993) (parole and probation officers' status as members of a craft is outweighed by their history of inclusion in a county-wide unit, particularly because (continued...)

Because there are no objections to this petition, a hearing is not necessary. In view of our conclusion that this petition proposes a facially appropriate unit, we shall grant the requested redesignation. The Respondent continues to represent the redesignated units.[4]

Based on the foregoing, this Board issues the following order:

ORDER

1. The petition for redesignation is granted. The classifications of Probation Officer I, Probation Officer II, Probation Officer III, and Lead Probation Officer are removed from the existing bargaining unit represented by AFSCME Local 2936, Council 75, AFL-CIO. That bargaining unit description is amended to read as follows:

> "All regular full-time and regular part-time employees set forth in Appendix A of the parties' collective bargaining agreement; excluding adult parole and probation officers, as defined in ORS 243.736, supervisory and confidential employees."

2. The parole and probation officers are placed in an appropriate unit described as follows:

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[3](...continued)
all employees in that unit were strike-permitted [note that this case arose before parole and probation officers were made strike-prohibited]). However, the recent legislative action making the employees involved in this petition strike-prohibited is a statutory change of circumstances which outweighs the history of bargaining as a single unit. *See City of Salem v. AFSCME Council 75, Local 2067*, Case No. UC-119-87, 10 PECBR 603, 610 (1988) (severance of emergency telephone workers made strike-prohibited by legislative action was presumptively appropriate).

[4]*Phoenix-Talent School District #4 v. OSEA*, Case No. UC-16-94, 15 PECBR 544, 551, n. 4 (1995). As noted above, the collective bargaining agreement has expired and a petition seeking to represent the strike-prohibited employees is pending. Pending the outcome of that representation petition for the strike-prohibited employees, Respondent continues to represent the employees in both units. The changed circumstances due to the statutory change making the adult parole and probation officers strike-prohibited warrants a waiver to the certification bar under Board Rule 115-25-015(3)(d).

"All adult parole and probation officers, as defined in ORS 243.736, employed by Coos County, excluding supervisory and confidential employees."

AFSCME Local 2936, Council 75, AFL-CIO, represents this bargaining unit. Continuing representation for this redesignated strike-prohibited unit will be determined in Case No. RC-5-04.

DATED this 12th day of February 2004.

Rita E. Thomas

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-2-04

(REDESIGNATION)

JACKSON COUNTY, Petitioner, v. SEIU LOCAL 503, OPEU, Respondent.	)	ORDER REDESIGNATING BARGAINING UNIT

SEIU Local 503, OPEU (Respondent) is the recognized exclusive bargaining representative for a bargaining unit of Jackson County (Petitioner) employees described as:

> "Nonsupervisory employees of Jackson County, Oregon, who are employed on regular full-time or regular part-time basis in positions for more than 40 hours per pay period, but excluding Sheriff's Department personnel, department heads and other supervisors, confidential employees. Airport crash/fire rescue personnel, temporary employees, and employees hired for a limited term under a specific State or federal grant program."

The term of the contract is July 1, 2001, to June 30, 2004.

In 2003, the legislature enacted House Bill 2576, amending ORS 243.736, to make adult parole and probation officers strike-prohibited employees. The bill became effective January 1, 2004. On that date, the bargaining unit became a mixed unit containing both strike-permitted and strike-prohibited employees.

On January 20, 2004, Petitioner filed a Unit Clarification—Redesignation petition (UC petition). A copy of the contract was attached to the petition. The petition seeks to amend the bargaining unit description to specifically exclude all parole and probation officer classifications. The petition would create a separate bargaining unit for the strike-prohibited parole and probation officers.

The elections coordinator served the petition on Respondent on January 21, 2004. On January 26, the Petitioner posted notices of the proposed UC petition in the work areas of the affected employees. No objections to the UC petition were filed.

DISCUSSION

Board Rule 115-25-045 provides that we will conduct a hearing "[w]hen a valid petition has been filed and objections * * * have been timely filed * * *."

We recently concluded that we will grant a redesignation petition when the petition proposes a facially appropriate unit and there are no objections to the petition. *Coos County v. Oregon AFSCME Council 75, Local 2936,* Case No. UC-1-04, 20 PECBR 534 (2004). There are no objections filed here.

The proposed redesignation is facially appropriate. The strike-prohibited parole and probation officers constitute 24 employees in a unit of 672. If the parole and probation officers were to remain in the unit, the entire unit would be strike-prohibited. In such circumstances, we will not permit such a small number of strike-prohibited employees to deny the right to strike to the much larger group. *Coos County, supra; Multnomah County v. Multnomah County Employees Union Local 88*, Case No. UC-4-92, 13 PECBR 689, 699-700 (1992).

Because there are no objections to the petition, a hearing is not necessary. The petition proposes a facially appropriate bargaining unit. We shall grant the requested redesignation. Respondent continues to represent the redesignated units.

Based on the foregoing, this Board issues the following order:

ORDER

1. The petition for redesignation is granted. The recognition shall be amended to exclude all adult parole and probation officer classifications. The bargaining unit description is amended to read as follows:

"Nonsupervisory employees of Jackson County, Oregon, who are employed on regular full-time or regular part-time basis in positions for more than 40 hours per pay period, but excluding all adult parole and probation officers, as defined in ORS 243.736; Sheriff's Department personnel, department heads and other supervisors, confidential employees; airport crash/fire rescue personnel, temporary employees, and employees hired for a limited term under a specific State or federal grant program."

2. The adult parole and probation officers are redesignated into an appropriate unit described as follows:

"All adult parole and probation officers, as defined in ORS 243.736, employed by Jackson County, excluding supervisory and confidential employees."

3. SEIU Local 503, OPEU continues to represent both units as redesignated.

DATED this 12th day of February 2004.

Rita E. Thomas

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-39-03

(DECERTIFICATION PETITION)

BRIAN DON AND EMPLOYEES OF THE CITY OF ST. HELENS, Petitioners, v. OREGON AFSCME COUNCIL 75, AND THE CITY OF ST. HELENS Respondents.	)	DISMISSAL ORDER

Brian Don, 589 Summit View Drive, St. Helens, Oregon 97051, pro se.

Tom O'Dea, Oregon AFSCME Council 75, 123 N.E. 3rd Avenue, Suite 505, Portland, Oregon 97232, represented Respondent Oregon AFSCME Council 75 (AFSCME).

Candace Ludtke, Local Government Personnel Institute, 680 State Street, #180, P.O. Box 908, Salem, Oregon 97308, represented Respondent City of St. Helens (City).

On October 2, 2003, Brian Don and Employees of the City of St. Helens (Don) filed a petition to decertify the bargaining unit described as "[a]ll regular part-time and full-time employees [of the City] excluding supervisory employees, seasonal employees, and confidential employees." On October 28, 2003, Don, the City, and AFSCME signed a consent election agreement agreeing to the terms of the decertification election. This Board tallied the election ballots on December 5, 2003, and reported that a majority of votes (17) were cast for AFSCME, while 12 were cast for no representation. On December 15, Don filed an objection to the conduct of the election.

The case was assigned to Administrative Law Judge (ALJ) William Greer for processing. Upon Greer's retirement, the case was administratively transferred to ALJ B. Carlton Grew.

Board Rule 115-25-060(10) provides:

> "Objections to Conduct of Election or Conduct Affecting the Results of the Election. Within ten days after the tally of ballots has been furnished, any party of record may file with the Board * * * objections to the conduct of the election or conduct affecting the results of the election, which shall contain a clear and concise statement of the reasons therefor. * * *"

In *Employees of State of Oregon Motor Vehicles Division v. Oregon State Employees Association*, Case No. C-29-80, 5 PECBR 3069, 3073 (1980), this Board held:

> "Elections should not be set aside lightly, because to do so interferes with the orderly processes of labor relations. If it may reasonably be said that proscribed conduct at an election had an impact or reasonably could have been expected to have an impact on the outcome of the election, however, this Board shall set the election aside." (Footnotes omitted.)

Don's objection included a copy of a postcard concerning a proposed meeting regarding the election. The postcard stated, on one side, "Dinner for 29 at Sunshine Plaza." On the reverse, the card stated:

> "We hope to have your participation on Nov. 24, 2003. Sunshine Pizza from 6 - 9 p.m. for 100% election turnout!!
>
> "Pizza and drinks are provided.
>
> "Remember your ballots."

In his objection, Don stated that the card implied that employees were required to cast their ballots at the meeting, and that the card and meeting constituted misinformation, intimidation, and coercion.

By a letter dated January 26, 2004, ALJ Grew asked Don the following:

"I need more information in order to decide whether this matter should be taken to a hearing. Please advise me of whether the meeting in question took place, and of any additional facts you are aware of regarding the alleged misinformation, intimidation, and coercion in connection with the postcard and meeting.

"I do not believe that the Union's action of mailing of this postcard to bargaining unit members, without more, raises an issue of fact or law regarding the conduct of the election which would warrant a hearing. Mr. Don, unless you convince me to the contrary, or supply additional facts which raise such issues, I will recommend that the Board dismiss the objection. * * *"

Don responded in a letter dated February 5:

"* * * I was not an attendant in the referenced election meeting but I have received conformation [*sic*] that the meeting did indeed take place. One participant has indicated that no more than a dozen members of the bargaining unit attended. However, based on my experiences of attending previous meeting [*sic*] sponsored by the union, it is very clear that the intent of the invitation was to mislead the members of the bargaining unit to believe that they were required to bring their ballots to a common location so that they could cast their votes. The offer of free food and beverages is nothing more than a bribe to persuade votes in favor of union representation."

In *OPEU v. Judicial Department*, RC-13-95, 16 PECBR 17 (1995), *rev'd and remanded* 142 Or App 169, 919 P2d 1200, *rev den* 324 Or 487, 930 P2d 851, 852 (1996), the Oregon Court of Appeals reversed this Board's decision that had nullified an election. This Board's decision was based on the union's collection and delivery of ballots in a representation election. The court stated:

"* * * There was neither allegation nor evidence that [the union's] role was anything other than that of a carrier of sealed envelopes. There was no evidence that any employee felt pressured in any way, or that [the union] knew or could have known the vote that was cast in any of the ballot

> envelopes that it collected and delivered to ERB. Finally, there is no allegation, much less evidence, that [the union] tampered with or failed to deliver any ballot entrusted to it. Thus, it cannot 'reasonably be said that [the union's] proscribed conduct * * * had an impact or reasonably could have been expected to have an impact on the outcome of the election[.]'" 142 Or App at 180-181, *quoting Employees of Motor Vehicles, supra*, 5 PECBR at 3073 (footnote omitted).

For purposes of this dismissal order, we assume that all factual allegations in the complaint are true. *Pollan v. Tri-County Metropolitan Transportation District of Oregon,* Case Nos. UP-20/21-95, 16 PECBR 147 (1995) (Dismissal Order). The factual allegations, as stated by Don, are insufficient to state a claim that AFSCME's conduct affected the results of the election. *See Judicial Department, supra.*

ORDER

The objection to the conduct of the election is dismissed. The elections coordinator shall certify the election results as soon as practicable.

DATED this 2nd day of March 2004.

Rita E. Thomas

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-36-02

(UNFAIR LABOR PRACTICE)

BENTON COUNTY DEPUTY SHERIFF'S ASSOCIATION, Complainant, v. BENTON COUNTY SHERIFF'S DEPARTMENT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Board heard oral argument on September 18, 2003, upon Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) William Greer on May 28, 2003, following a hearing on January 10, 2003, in Corvallis, Oregon. The record closed on March 3, 2003, upon receipt of the parties' post-hearing briefs.

Mark J. Makler, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97201, represented Complainant.

Barbara A. Bloom, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented Respondent.

The Benton County Deputy Sheriff's Association (Association) filed this unfair labor practice complaint on July 8, 2002. The complaint alleged that Benton County Sheriff's Department (County) violated ORS 243.672(1)(e) by submitting a last best offer (LBO) to interest arbitration that included a prohibited subject for bargaining. Specifically, the LBO included a "zipper clause" that would allow the County to modify any employment condition not covered by the agreement without any obligation to bargain over either the decision to make the modification or its impact on the bargaining unit. The Association alleged that this proposal is unlawful because it constitutes an "involuntary waiver" of its statutory bargaining

rights. The parties' interest arbitrator awarded the County's LBO, including the zipper clause. The Association further alleged that inclusion of the zipper clause renders the entire interest arbitration award unenforceable.

The complaint also alleged that the interest arbitrator failed to base his award on the statutory criteria, which rendered the award unenforceable. The Association withdrew this allegation at the hearing.

On August 12, 2002, the Association filed an amended complaint that added two further allegations. First, it alleged that the County implemented the entire new agreement except for the retroactive pay provisions, and that such partial implementation was unlawful. Second, it alleged that the County implemented the agreement without first presenting a draft of it to the Association for review or approval.

On November 12, 2002, the County filed an answer that admitted and denied portions of the amended complaint; asserted that the complaint failed to state a claim; and sought a civil penalty because the amended complaint was allegedly frivolous and filed to harass the County.

The issues are:

1. Did the County submit an unlawful proposal (Article 2.1 Zipper Clause) in its LBO, in violation of ORS 243.672(1)(e)?

2. Did the County implement a collective bargaining agreement that contained an unlawful proposal (Article 2.1 Zipper Clause), in violation of ORS 243.672(1)(e)?

3. Did the County implement only portions of the interest arbitration award, other than retroactive pay, in violation of ORS 243.672(1)(e)?

4. Did the County implement the collective bargaining agreement without first presenting a draft to the Association for review or approval, in violation of ORS 243.672(1)(e)?

5. Does the Association's pursuit of this complaint warrant a Board order directing the Association to pay a civil penalty to the County under ORS 243.676(4)(b)?[1]

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[1]The Association raised the third and fourth issues in its amended complaint. The ALJ inadvertently failed to include them in both his October 30, 2002 proposed statement of the issues and in his statement at the outset of the hearing. On January 21, 2003, after the hearing but before submission of the parties' post-hearing briefs, the ALJ presented an issue statement to the parties that included the third and fourth issues. The County objected to the addition of issues. The ALJ overruled the objection. The County then requested additional time to submit its brief, and the ALJ (continued...)

The ALJ recommended that this Board find that the County's zipper clause proposal concerned a prohibited subject for bargaining, and that the interest arbitration award therefore was not enforceable. He also recommended that this Board find that the County unlawfully implemented a collective bargaining agreement incorporating the zipper clause. He further recommended that this Board deny the Association's request for a civil penalty. For the reasons discussed below, we find that the County's zipper clause proposal concerns a mandatory subject for bargaining, and the interest arbitration award is enforceable. We also find that the County's implementation of the collective bargaining agreement containing that zipper clause was lawful. Finally, we find that a civil penalty is not warranted.

RULINGS

1. At hearing, the Association requested authorization to withdraw three paragraphs of its amended complaint in which it alleged that the interest arbitrator had failed to abide by the statutory criteria. The County did not object, and the ALJ correctly granted the Association's request. The County did, however, assert that the Association's last-minute withdrawal after the County had prepared to litigate the issue constituted further evidence to support its request for a civil penalty on the grounds that the complaint was frivolous. We treat this as a motion by the County to amend the allegations in its answer regarding its request for a civil penalty. We grant the motion to amend. Further, the ALJ correctly observed that this Board may consider such a late withdrawal of a pleading in its decision on the prevailing party's request for representation costs.

2. The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the County is a public employer. The Association is the exclusive representative of a bargaining unit of personnel employed by the County.

2. The Association and the County were parties to a 1998-2001 collective bargaining agreement. Article 2.1 of that agreement ("Zipper Clause") provided, in part: "[T]he County shall have the unqualified right to unilaterally modify any employment condition not covered by the terms of this agreement, and to do so without bargaining either the decision to do so or its impact on the bargaining unit."

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[1](...continued)
extended the parties' brief filing date. We note that the County filed an answer that specifically addressed these allegations, and that the parties fully litigated the issues. Upon review, we concur with the ALJ's ruling on the County's objection and with his statement of the issues. *AFSCME Council 75, Local 3940 v. Department of Corrections*, Case No. UP-9-01, 20 PECBR 1 (2002).

3. In 2001, the parties began negotiations for a successor agreement. Rhonda Fenrich was the Association's spokesperson. Candace Ludtke was the County's spokesperson, and Sheriff James Swinyard was a member of the County's bargaining team.

4. During negotiations and mediation, the parties exchanged proposals regarding Article 2.1, "Zipper Clause."

5. On March 27, 2002, after failing to reach agreement, the parties submitted their LBOs to interest arbitration.

6. The Association's LBO regarding Article 2.1, "Zipper Clause," provided, in part:

> "* * * The County shall have the right to modify any employment condition not covered by this agreement, subject to the statutory duties of notice and bargaining with the Association."

The County's LBO regarding Article 2.1 provided, in part:

> "* * * [T]he County shall have the unqualified right to unilaterally modify any employment condition not covered by the terms of this agreement, and to do so without bargaining either the decision to do so or its impact on the bargaining unit. The county agrees that for the initial implementation of the 'General Operating Manual' to bargain the mandatory subjects of bargaining and mandatory impacts." (Emphasis omitted.)[2]

7. The County's LBO regarding Article 16, "Wages and Salaries," provided, in part:

> "ARTICLE 16. WAGES AND SALARIES.
>
> "16.1. Wages. For the first year of this agreement, the salary schedule for positions in the bargaining unit shall be increased by ~~two and half (2.5%)~~ three percent (3%) across the board *effective the first pay period following signing of this agreement*. ~~For the second year of this agreement, the salary schedule for positions in the bargaining unit shall be across the board on June 17, 1999. For the~~

[2]The County asserts that the Association agreed to the County's version of Article 2.1 prior to the submission of LBOs. An LBO should address "unresolved" issues. ORS 243.746(3). The fact that the County submitted a zipper clause proposal in its LBO indicates it did not believe the parties had resolved the issue. We reject the County's current assertions to the contrary.

~~third year of this agreement, the salary schedules shall be subject to negotiations pursuant to Article 27.~~

"* * * * *

"In addition, for each member of the bargaining unit employed with the county as of the signing of this agreement, *an amount equal to* 3% of their old base semi-monthly salary times the number of pay periods worked since July 1, 2001 through the pay period immediately prior to the period in which the 3% salary adjustment takes effect, will be added to a payroll check *within 60 days of signing.* * * *

"* * * * *

"Additionally, for each member of the bargaining unit employed with the county as of the signing of this agreement, overtime paid during the period July 1, 2001 to date of signing will be recomputed on a case-by-case basis to include the retroactive 3.0% salary increase. *This retroactive payment will be made within 60 days if [sic] signing.*"(Underlining and strikeouts in original;[3] footnote omitted; italics added.)

8. During a May 7, 2002 bargaining session, Fenrich asserted that the County's Article 2.1, "Zipper Clause," proposal was unlawful. Ludtke asked Fenrich to support that assertion with citations to Board or court decisions. Fenrich cited ORS 243.698. During mediation, the Association again asserted that the County's zipper clause proposal was unlawful. In particular, the Association objected to the breadth of the County's zipper clause proposal. The Association never refused to bargain over the County's zipper clause proposal.

9. The dispute proceeded to interest arbitration. On June 9, 2002, Arbitrator R. Douglas Collins issued his interest arbitration opinion and award. In his consideration of Article 2.1, Arbitrator Collins recited the parties' proposals and then stated the following:

> "*Analysis:* In my judgment, the only statutory criterion that applies to this issue is the 'interest and welfare of the public.' Although the law dictates that this criterion be given 'first priority,' it does not attempt to define that phrase. However, the parties have thoroughly discussed the meaning of that term as refined by

[3]The County presented its LBO in a manner that compared its proposals to the prior agreement. The underlined words identify language it proposed to add to the prior agreement, and the struck words indicate language it proposed to delete from the prior agreement.

arbitrators in previous cases arising under the Act. It is therefore unnecessary to burden this decision with a lengthy discussion of that topic. Suffice it to say that arbitrators generally agree that the public's 'interest and welfare' is best determined by applying the remaining criteria specified in the Act. Where, as here, those factors are inapplicable or inconclusive, it is generally accepted by arbitrators that it is in the public's interest and welfare to adopt the proposal that best provides the public with affordable services that are of sufficient quality to ensure adequate protection of persons and property. In my view, that end is best achieved where the parties have a stable and predictable relationship that minimizes conflict and does not undermine employee morale.

"Zipper clauses are frequently included in collective bargaining agreements precisely because they are presumed to stabilize the parties' relationship by closing out bargaining and making the written contract the exclusive statement of the parties' rights and obligations. The County and the Association apparently accepted that proposition in the past as they included such a provision in their Agreement.

"The burden of proof in interest arbitration generally rests with the party that is seeking some change in the *status quo*, and absent persuasive evidence to justify some significant change, the proposal that most nearly continues the existing terms and conditions of the Agreement is preferred. In this instance, the County's proposal retains the existing language of Article 2, deleting nothing and adding only one sentence dealing with the obligation to bargain over the initial implementation of the General Operations Manual. In contrast, *it appears that the Association's proposal would fundamentally alter the zipper clause, removing the provision that permits the County 'to unilaterally modify any employment condition not covered' by the Agreement and instead requiring notice and bargaining before any such change can be made. In essence, the Association's proposal would unzip the zipper, rendering the provision essentially meaningless. While the Association's position is understandable, in my judgment it is not supported by the statutory criteria that are controlling here.*[1]

"I therefore find that the statutory criterion of the interest and welfare of the public tends to support the County's offer regarding Article 2.

> "[1] The Association argues that its position is supported by comparisons to other public agencies. However, I note that the statutory criterion concerning such comparisons is limited to compensation. Although comparisons of contractual language might arguably fall within the ambit of the 'other factors' criterion, the Act specifically precludes the use of such factors if, in the judgment of the arbitrator, the other statutory factors 'provide sufficient evidence for an award.'" (Emphasis added.)

After considering all of the parties' proposals and positions in light of the relevant statutory criteria, Arbitrator Collins awarded the County's LBO.

10. On June 27, 2002, the County wrote the Association about the new agreement. The County stated its position that the wage article of the contract by its terms "requires the parties' signatures on the contract before the County can release the retroactive pay to bargaining unit members. With this one exception, the County will implement the terms of the award which effectively 'executes' the contract in accordance with the arbitrator's award."

11. From June 27 to July 8, 2002, Sheriff Swinyard—a member of the County bargaining team—was on vacation and unavailable to assist in the County's effort to compile the 2001-2004 collective bargaining agreement. Some portions of the new contract were stored on his office computer. Other County personnel did not have access to that computer.

12. In mid-July 2002, before the parties signed a collective bargaining agreement, the County implemented what it contended were the parties' tentative agreements plus all terms of Arbitrator Collins' interest arbitration award. At that time, the County did not pay retroactive wages to bargaining unit members.

13. On July 23, 2002, the County gave the Association a draft of the parties' 2001-2004 collective bargaining agreement.

14. In October 2002, the parties signed their 2001-2004 collective bargaining agreement.

15. Later in October 2002, after the parties signed the agreement, the County paid retroactive wages to bargaining unit members.

CONCLUSIONS OF LAW

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

2. The County did not violate ORS 243.672(1)(e) when it submitted a mandatory proposal, Article 2.1, "Zipper Clause," to interest arbitration.

3. The County did not violate ORS 243.672(1)(e) when it implemented a collective bargaining agreement that contained the County's zipper clause proposal, as awarded in interest arbitration.

4. The County did not, in these circumstances, violate ORS 243.672(1)(e) when it implemented only a portion of the new agreement until such time as the parties signed the agreement.

5. The County did not violate ORS 243.672(1)(e) when it implemented the new agreement without first presenting a draft for Association review and approval.

6. Assessment of a civil penalty against the Association is not warranted.

DISCUSSION

The Public Employee Collective Bargaining Act (PECBA) mandates that a public employer has the duty to bargain in good faith over mandatory subjects for bargaining with the exclusive representative of a bargaining unit of public employees. ORS 243.672(1)(e).

At the end of the collective bargaining process for strike-prohibited employee bargaining units, the PECBA provides that disputes can be resolved through interest arbitration; ORS 243.742-243.762. In particular, ORS 243.746(4) states, in part, that "unresolved [proposals involving] *mandatory* subjects [of bargaining] submitted to the [interest] arbitrator in the parties' last best offer packages shall be decided by the arbitrator." (Emphasis added.)

COUNTY SUBMISSION OF NEGOTIATION WAIVER PROPOSAL TO INTEREST ARBITRATION

The Association asserts that the County bargained in bad faith by submitting an LBO that included a zipper clause that concerns a prohibited subject for bargaining. The arbitrator selected the County's LBO. The Association further asserts that the arbitrator's award is unenforceable because it includes the prohibited zipper clause.

The County responds that the Association waived its right to complain about inclusion of the zipper clause in its LBO submission and in the arbitrator's award because the Association failed to raise the issue in a timely and appropriate manner *prior* to the interest

arbitration proceeding.[4] The County further asserts that, in any event, the award is enforceable because the zipper clause concerns a mandatory subject for bargaining.

We conclude that the County's zipper clause proposal concerns a mandatory subject for bargaining, and the interest arbitration award is enforceable. It is therefore unnecessary to address the County's arguments regarding waiver.[5]

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[4]One of the County's proposed solutions in cases of this nature is for this Board to require the challenger to file a "blocking charge"; that is, a party that asserts the other has submitted a nonmandatory proposal to interest arbitration should be required to file a charge with this Board before the interest arbitration hearing is conducted, and this Board should then order the interest arbitration held in abeyance until it decides the issue. We reject this suggestion. We need not decide here whether a case-by-case consideration might reveal particular circumstances in which it would be appropriate to stay an interest arbitration proceeding until we can decide a charge. We hold only that we will not automatically stay an interest arbitration proceeding every time a party files a charge that raises scope of bargaining questions. We also note the potential for abuse if we were to give a party the power to unilaterally require the last-minute cancellation of a scheduled hearing by simply filing a complaint. This Board already has in place an expedited process for deciding scope of bargaining disputes. Board Rule 115-35-060.

[5]Our concurring colleague would overrule portions of *Springfield Police Association v. City of Springfield*, Case No. UP-17/20-97, 17 PECBR 260, *reconsid* 17 PECBR 319, *reconsid* 17 PECBR 368 (1997). That case announced, *inter alia*, that this Board would analyze claims that a party had "unlawfully pursued a permissive proposal," by determining:

> "* * * (1) if the proposal concerns a permissive subject of bargaining; (2) if the objecting party gave timely and adequate notice of the item's permissiveness and refused to bargain over the item; (3) if the proponent had an opportunity to amend or withdraw the proposal; and (4) if, after being advised of the permissive status of the item and of the other party's refusal to negotiate, the proponent continues to pursue (condition agreement upon) the permissive item.* * *" 17 PECBR at 273.

Although our colleague states that he would overrule only another portion of *City of Springfield* (that portion which refused to enforce an interest arbitration award containing a permissive subject even where the challenging party failed to make a timely and adequate objection), his concurrence would *sub rosa* overrule the quoted language above as well, by placing the first step at the end of the analysis. Those two steps together in some cases—those which, like *City of Springfield*, involve an arguably *permissive* item—have the potential to abbreviate and simplify the analysis, because a conclusion that the challenging party waived the arguably permissive item would resolve both the bad faith bargaining claim and the challenge to the interest arbitration award.

The changes urged in the concurrence would not have a similar effect in this case, which involves a claim that the County pursued a *prohibited* subject. This Board cannot enforce even an

(continued...)

ZIPPER CLAUSE

The duty to bargain does not end when the parties reach agreement on a contract. There is a continuing duty to bargain, upon demand, over mandatory subjects not covered by the agreement. A zipper clause attempts to eliminate this type of mid-contract bargaining. It "'seeks to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations.'" *Eugene School District No. 4J v. Eugene Education Association,* Case No. C-165-78, 4 PECBR 2403, 2407 (1979) (quoting *NLRB v. Tomco Communications, Inc.*, 97 LRRM 2660, 2664 (9th Cir 1978)).

This Board has held that a zipper clause is a mandatory subject for bargaining. *Eugene School District No. 4J,* 4 PECBR at 2408. The Association asserts that the zipper clause at issue here nonetheless concerns a prohibited subject for bargaining. A prohibited subject is one that would require a party to violate the law or public policy. *Eugene Police Employees' Association v. City of Eugene, affirmed* 157 Or App 341, 972 P2d 1191 (1998), *rev denied* 328 Or 418, 987 P2d 511 (1999).

The Association makes two separate arguments that this Board has not previously considered. The first is that the zipper clause is prohibited because it is contrary to ORS 243.698. The legislature added this provision to the PECBA in 1995 to give the parties an expedited procedure for bargaining that occurs during the life of a collective bargaining agreement. According to the Association, a zipper clause that purports to eliminate such bargaining is contrary to the statute and is therefore a prohibited subject of bargaining.

The plain words of the 1995 amendments contradict the Association's argument that the legislature meant thereby to prohibit zipper clauses. Under ORS 243.698, the

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[5](...continued)
agreement to include a prohibited subject. *Petition for a Declaratory Ruling Filed by the City of Portland,* Case No. DR-4-85, 8 PECBR 815, 8121-8122 (1985) (prohibited provision in existing contract unenforceable; proposed modification of that provision is also prohibited). Thus, here, as in any case where it is alleged that a party has pursued a *prohibited* subject and secured its inclusion in an interest arbitration award, it remains necessary to determine whether that subject is prohibited or mandatory for bargaining in order to resolve all the issues raised. The record and arguments in this case are sufficient to make that determination, as we have.

Two primary considerations militate against making this case the vehicle to address the broader questions raised in the concurrence, *i.e.*, whether *City of Springfield* either (a) erroneously sequenced the analytical steps, or (b) erroneously refused to enforce an interest arbitration award containing a permissive item. First, addressing those issues would not alter the ultimate conclusion because the case at hand does not involve an allegedly permissive subject. Second, and perhaps more importantly, no party has urged us to overrule any portion of *City of Springfield*, and we have not had the benefit of briefing or other argument on that point. For reasons of judicial economy, we will refrain from addressing issues beyond those presented in this case.

expedited procedure applies "[w]hen the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement * * *." The statute does not define the circumstances in which a mid-term bargaining obligation arises. It merely states that *if* such an obligation exists, then the parties must follow the procedure specified in the statute. We have stated that no bargaining obligation exists under ORS 243.698 when a party has contractually waived its right to mid-term bargaining. *Sandy Union High School District Declaratory Ruling,* Case No. DR-4-96, 16 PECBR 699, 704 (1996). This zipper clause attempts such a waiver.[6] It seeks to define by contract the circumstances in which an obligation for mid-term bargaining arises. We find nothing in such a proposal that is contrary to ORS 243.698.

The Association next argues that even if a zipper clause is generally a mandatory subject for bargaining, it nevertheless becomes a prohibited subject in the interest arbitration context. The Association's argument begins with the general principle that a waiver is the voluntary relinquishment of a known right. *OSEA v. Coos Bay School District 9,* Case No. C-159-84, 8 PECBR 8248, 8260 (1985). The Association then notes that interest arbitration, at least for the losing party, results in contract language to which it never voluntarily agreed. According to the Association, inclusion of the County's zipper clause proposal in the interest arbitration award compelled it to waive its right to bargain over mid-term changes in working conditions. The Association asserts that the waiver is unenforceable because it was not voluntary. We disagree.

Interest arbitration does not involve the type of offer and acceptance normally associated with contract formation. We have described agreements arrived at through interest arbitration as being formed "by operation of law." *Grants Pass Police Association v. City of Grants Pass,* Case No. UP-62-97, 17 PECBR 656, 661 (1998); *Marion County v. Marion County Law Enforcement Association,* Case No. UP-100-93, 14 PECBR 922, 923 (1993) (Order on Reconsideration). This does not mean, however, that an agreement formed through interest arbitration is somehow different from other agreements. To the contrary, the legislature intended interest arbitration to be an effective alternative to strikes. ORS 243.742(1). To further this policy, we will treat contracts formed through interest arbitration the same as those formed through any other bargaining procedure. This Board's analysis of a proposal as mandatory, permissive, or prohibited will not vary depending on whether the parties use the bargaining process for strike-permitted units or that for strike-prohibited units. Neither will it depend on the step the parties have reached in the bargaining process. As applied here, we hold that a zipper clause is a mandatory subject of bargaining for both strike-permitted and strike-prohibited employees, at all stages of bargaining.

To conclude otherwise would lead to anomalous results. The Association argues that the subject of zipper clauses is mandatory until the LBO stage, when it becomes

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[6]We express no opinion on whether this zipper clause language constitutes an effective waiver of bargaining over a particular subject or proposal.

prohibited. Under such a scenario, a union that opposed a zipper clause would gain a strategic advantage by refusing to reach agreement until after table bargaining and mediation concluded, at which point the union could avoid the zipper. This would run directly counter to the statutory goal of encouraging parties to settle their disputes at the earliest stage possible. We therefore reject the Association's notion of a "hybrid" proposal that begins as mandatory but becomes nonmandatory at the later stages of the bargaining process.

The Association's argument would also have implications for other contract provisions. The major premise of the Association's argument is that in interest arbitration, the losing party does not "agree" to the terms of the contract. If we were to apply this premise to other subjects, a number of basic contract provisions currently deemed mandatory for bargaining would become prohibited in interest arbitration. For example, this Board can compel a party to proceed to grievance arbitration, and we can enforce a grievance arbitration award, only if "the parties have *agreed* to accept such awards as final and binding." ORS 243.672(1)(g) (emphasis added). Similarly, a "fair share" provision requires an "agreement" between the employer and the exclusive representative. ORS 243.650(10).

If we were to accept the Association's argument that an interest arbitration award does not constitute an agreement, we would be compelled by the plain words of the statute to further conclude that we could not enforce grievance arbitration and fair share provisions if they entered the contract through the interest arbitration process. We find nothing in the text of the PECBA, its legislative history, or its policy underpinnings that would support such a conclusion.

We adhere to our earlier decisions that a zipper clause proposal concerns a mandatory subject for bargaining. Inclusion of such a clause in an interest arbitration award is lawful, and an award that contains such a clause is enforceable.

We will dismiss this portion of the complaint.

COUNTY IMPLEMENTATION OF INTEREST ARBITRATION AWARD

The Association's next claim is derivative of its earlier one. It asserts that the County acted unlawfully by implementing an interest arbitration award that is unenforceable because it contains an illegal zipper clause. We concluded that the zipper clause was not illegal and that the award is enforceable. It follows that the County's implementation of a collective bargaining agreement that contained the County's zipper proposal, as awarded in interest arbitration, did not violate ORS 243.672(1)(e). We will dismiss this portion of the complaint.

PARTIAL IMPLEMENTATION

The Association next alleges that the County implemented part of the contract but unlawfully delayed implementing the wage increase awarded by the interest arbitrator. The County answers that the award itself—reflecting one of the proposals in the County's

LBO—required the parties to sign the new collective bargaining agreement before paying the wage increase.

For *strike-permitted* bargaining units, ORS 243.712(2)(d) provides that, at the conclusion of negotiations, a public employer "may implement all or part of its final offer * * *."[7] For *strike-prohibited* bargaining units that conclude bargaining in interest arbitration, the legislature has not authorized partial implementation of the resulting interest arbitration award. We need not decide here whether such a partial implementation would be unlawful because, on these facts, we conclude that the County's implementation was not partial.

The wage proposal awarded by the interest arbitrator specifically stated that the wage increase would be "effective the first pay period *following signing of this agreement.*" (Emphasis added). It further stated that the County would pay retroactive raises and retroactive overtime payments *"within 60 days of signing."* (Emphasis added.) By withholding the wage increases and the retroactive payments until after the parties signed the agreement, the County was merely implementing the provisions as written. Indeed, the County may have violated the provisions of the award if it acted as the Association urges and made the payments before the parties signed the agreement.

We will dismiss this portion of the complaint.

IMPLEMENTATION OF AWARD WITHOUT ASSOCIATION REVIEW OR APPROVAL

The parties' tentative agreements and the terms of the interest arbitration award constitute the parties' collective bargaining agreement without the need for ratification by either party. *Marion County v. Marion County Law Enforcement Association*, 14 PECBR at 923-924. The Association alleges that the County did not provide the Association with an opportunity to review the new collective bargaining agreement before the County implemented it.

A public employer that implements a collective bargaining agreement arising out of interest arbitration without conferring with the exclusive representative does so at its peril: the exclusive representative can file an unfair labor practice complaint alleging that the implemented terms do not accurately reflect the interest arbitration award, and that the implementation therefore was unlawful.

The Association asserts that the implementation was inaccurate in two ways: (1) it included an unlawful zipper clause, and (2) it unjustifiably withheld wage increases and retroactive pay. We rejected both of those contentions above. The implemented terms are not

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[7]Prior to the 1995 amendments to the PECBA, this Board held that a public employer did not violate ORS 243.672(1)(e) by implementing only parts of its final offer. *Roseburg Education Association v. Roseburg School District*, Case No. UP-26-85, 8 PECBR 7938, 7958 (1985).

inaccurate in the manner the Association alleges. The County did not act unlawfully in implementing those terms. We will dismiss this portion of the complaint.

CIVIL PENALTY

The County asserted that the complaint was frivolous and requested this Board to order the Association to pay a civil penalty. The complaint raised several novel issues, and the ALJ found in favor of the Association. Although we ultimately dismissed the complaint, we do not find that it was frivolous. We deny the County's request.

ORDER

1. The complaint is dismissed.

2. The County's request that this Board order the Association to pay a civil penalty is denied.

DATED this 19th day of March 2004.

Rita E. Thomas, Chair

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Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Gamson Concurring:

The majority has put the cart before the horse; the wedding before the marriage proposal; the pong before the ping. Its analysis is backwards. The majority issues a decision on the merits of the complaint without first determining whether the Association had waived its right to receive a decision on the merits. Under a proper analysis, the Association waived its right to a decision on one of its claims. The majority erred in deciding it.

Logic dictates that before this Board decides an issue, we must first determine whether that issue is properly presented to us for decision. We typically follow this logical order

of analysis. For example, we ask first if a claim is filed within the statute of limitations. If not, we dismiss the case without considering the merits.[1] Similarly, if a claim is moot, we dismiss it without deciding the merits.[2] More pertinent to this case, we decline to decide the merits of a case where the complaining party has waived its right to proceed.[3]

The majority skipped over the waiver issue and proceeded directly to the merits. It offers no justification for this analytical shortcut. Even though it would not change the outcome in this case, I believe such an abbreviated analysis does a disservice to parties and practitioners. This Board's decisions do more than decide the specific case before us. We are a precedent-based body. Our decisions also provide guidance for future actions. A full analysis would allow public employers and their employees to proceed with confidence the next time a similar issue arises. This would decrease litigation and promote stability in the workplace. I write separately with my analysis of the waiver issue to further these worthwhile goals.

BACKGROUND

The Association alleges that the County unlawfully pursued a proposal on a prohibited subject—a zipper clause—in its LBO. It further alleges that the interest arbitration award is unenforceable because it contains the allegedly unlawful zipper clause.

The Association never refused to bargain over the zipper clause. The first issue this Board should consider is whether the Association thereby waived its right to challenge the zipper clause. This Board has not previously provided a comprehensive review of the waiver issue in the final stages of interest arbitration. I do so below.

I conclude that the Association waived its right to object to the zipper clause in the LBO. The majority should have dismissed the claim without considering its merits. The majority instead dismissed the claim on its merits. I thus reach the same conclusion as the majority (dismissal of the charge), but for entirely different reasons.

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[1] *See Robert Ortez v. Washington County,* Case No. UP-121-93, 14 PECBR 919 (1993) (dismissing complaint as untimely without reaching the merits of the claim); *Oregon AFSCME Council 75 v. Morrow County,* Case No. UP-38-96, 17 PECBR 17 (1996), *adhered to on reconsideration* 17 PECBR 75 (1997) (same); *DCTU v. Portland School District No. 1,* Case No. UP-42-02, 20 PECBR 82 (2002) (same).

[2] *See Oregon Administrative Services Dept. v. OPEU,* Case No. UP-78-95, 17 PECBR 399 (1997) (dismissing case as moot without deciding the merits); *Portland Association of Teachers v. Portland School District No. 1*, 94 Or App 215, 764 P2d 965 (1988) (same).

[3] *See Tualatin Valley Bargaining Council v. Tigard School District 23J,* Case No. UP-120-87, 11 PECBR 42, *adhered to on reconsideration,* 11 PECBR 53 (1988) (dismissing case on grounds claim was waived, without deciding the merits).

I further conclude that there was no waiver of the challenge to the zipper clause in the interest arbitration award. The majority opinion properly considered the merits of this claim. I join the decision that the zipper clause is mandatory for bargaining. This charge was properly dismissed.

ANALYSIS

I. OVERVIEW

As a general rule, it is not unlawful for a party to make a proposal that concerns either a permissive or prohibited subject for bargaining. A party acts unlawfully only when it makes such a proposal a condition of agreement *over the other party's objection. Eugene School District No. 4J v. Eugene Education Association,* Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9486 (1987). A party that fails to make an adequate[4] and timely[5] objection waives its right to challenge the other party's pursuit of an allegedly permissive or prohibited proposal.

II. INCLUSION OF NONMANDATORY SUBJECTS IN AN LBO

We apply the same general rules to the pursuit of an issue in interest arbitration. Submission of a nonmandatory proposal to interest arbitration (*i.e.,* including it in an LBO) over the other party's objection constitutes bad faith bargaining. *City of Portland v. Portland Police Commanding Officers Association,* Case Nos. UP-19/26-90, 12 PECBR 424, 460-461 (1990). A party waives the right to challenge such a submission unless it makes a timely and adequate objection. *Springfield Police Association v. City of Springfield,* Case Nos. UP-17/20-97, 17 PECBR 260, 276-277, *reconsid* 17 PECBR 319, *reconsid* 17 PECBR 368 (1997). The objection requirement applies to the submission of proposals concerning either permissive or prohibited subjects. *See Eugene School District No. 4J,* 9 PECBR at 9486. Stated differently, we will dismiss

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[4]To be adequate, an objection must *both* identify the proposal as nonmandatory *and* refuse to bargain over it. These requirements apply to claims that a proposal is permissive as well as to claims that a proposal is prohibited. *Eugene School District No. 4J,* 9 PECBR at 9486. An objection must be specific enough to apprise the other side of the nature of and basis for the objection. The level of specificity required in the notice will vary with the length and complexity of the article. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4,* Case No. C-61-78, 5 PECBR 2771, 2775-2776 (1980).

[5]To be timely, an objection must allow the proponent of the language sufficient time to either withdraw the proposal or to rewrite it to make it mandatory. *OPEU v. State,* Case No. UP-64-87, 10 PECBR 51, 68 (1987); *Lincoln County Education Association v. Lincoln County School District,* Case No. C-64-78, 4 PECBR 2519, 2526 (1979). In the interest arbitration context, notice must be given far enough in advance of the submission of LBOs to allow the proponent of the language a reasonable opportunity to exercise its options. *See* ORS 243.742(3) (LBOs must be submitted 14 days before the interest arbitration hearing, and they can be altered only during the 24-hour period after submission).

a party's complaint alleging that an LBO contains a prohibited or permissive subject unless the challenging party has preserved the claim of error by making a timely and adequate objection that gives the proponent of the language a fair opportunity to correct the error.

III. INCLUSION OF NONMANDATORY SUBJECTS IN AN INTEREST ARBITRATION AWARD

If the interest arbitrator subsequently chooses the package that contains the allegedly nonmandatory proposal, we are faced not only with an issue regarding the legality of the submission of the proposal, but also with the further issue of whether to enforce an interest arbitration award that contains it. The question is whether a party must make a timely and adequate objection in order to preserve its right to challenge the enforceability of an interest arbitration award on grounds that it contains a nonmandatory subject. The answer depends on whether the offending proposal is alleged to be permissive or prohibited.

A. Permissive Items in an Interest Arbitration Award

Parties can agree to include permissive items in their contract, and we will enforce such provisions. *Coos Association of Deputy Sheriffs v. Coos County Board of Commissioners,* Case No. C-261-80, 6 PECBR 4626, 4633, n. 4 (1981). Failure to make a timely and adequate objection waives the right to challenge an interest arbitration award on grounds that it contains a permissive subject. *IAFF, Local 696 v. City of Astoria,* Case No. C-72-84, 8 PECBR 6604, 6608 (1984).

This Board reached a different result in *Springfield Police Association v. City of Springfield,* 17 PECBR 260, 319, 368. There, we refused to enforce an interest arbitration award that included a permissive item, even though the party challenging the award failed to make a timely and adequate objection. This holding is out of step with the history, policy, and text of the PECBA. This Board should take the first available opportunity to overrule that portion of the *City of Springfield.*[6]

The better rule is that a party waives its right to challenge an interest arbitration award on grounds that it contains a permissive subject unless the challenging party makes a timely and adequate objection to the proposal. We should not decide whether an interest arbitration award includes a permissive subject unless the challenging party preserved its claim of error by meeting the objection requirements. This rule would give parties a fair opportunity to correct any problems in their proposals, and it could eliminate the time and expense of conducting a second interest arbitration proceeding.

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[6]I would disavow only the portion of *City of Springfield* that refused to enforce an interest arbitration award that contains a permissive subject even though the challenging party failed to make a timely and adequate objection. I would adhere to all other portions of the decision.

Our reasoning in the *City of Springfield* was faulty. We concluded that Senate Bill 750 (SB 750) required the result. A closer examination of the statute reveals that it contains no such requirement.

The statute, as amended by Senate Bill 750 (SB 750), states that "unresolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator." ORS 243.746(4). In *City of Springfield*, we interpreted this language to mean that "an interest arbitrator may *only* issue a final and binding award concerning mandatory subjects of bargaining." 17 PECBR at 279 (emphasis added). Inclusion of the word "only" in this interpretation resulted in a decision that the arbitrator lacked authority to decide a nonmandatory subject, even if there was no proper objection.

The problem, of course, is that the word "only" is not in the statute and is not reasonably derived from its context. The statute says the arbitrator "shall" decide "unresolved mandatory subjects." It does *not* say the arbitrator may resolve "only" unresolved mandatory subjects, nor does it say the arbitrator is prohibited from resolving any other issue (*i.e.*,unresolved nonmandatory subjects) submitted by the parties.

We may neither omit anything from, nor add anything to, the words of the statute. *Simpson Timber Co. v. Dept. of Revenue,* 326 Or 370, 374, 953 P2d 366 (1998); ORS 174.010. This Board ignored this admonition in *City of Springfield.* It added the word "only" to the statute. The statute's plain text does not support this Board's conclusion. Properly read, the statute *requires* an interest arbitrator to decide "unresolved mandatory subjects" presented by the parties, but it does not foreclose the arbitrator from deciding other issues presented by the parties. This Board plainly erred in *City of Springfield* when we concluded otherwise.

I also reviewed the legislative history of the change. I found nothing to indicate that the legislature intended to overturn our long-standing rule—in place since at least the *City of Astoria* decision in 1984—that a party waives its right to challenge an interest arbitration on grounds that it contains a permissive subject, unless the party raises a timely and adequate objection. We should not entertain an allegation that an award contains a permissive subject unless we first conclude that the challenger has properly preserved the question.

This rule is appropriate because it helps accomplish the intended purposes of interest arbitration. The legislature directed us to "liberally construe[]" the interest arbitration provisions so that they provide an "expeditious, effective and binding procedure for the resolution of labor disputes * * *." ORS 243.742(1). These goals are promoted by requiring a party to give timely and adequate notice if it believes the other side has made a proposal which, if awarded by the interest arbitrator, would render the arbitration award unenforceable. This rule gives the proponent of the language an opportunity fix any problems and thereby insure that the resulting arbitration award will be binding. It also increases the effectiveness of the process by making it less likely that a second interest arbitration will be necessary. Fairness and equity do not allow a party to remain silent in the face of a potentially fatal error in the proceedings and then attempt to use that error as its basis for seeking a second bite of the apple

if it loses. Such "sandbagging" is contrary to the purposes underlying binding interest arbitration, and it is repugnant to the obligation of good faith that permeates all negotiations that occur under the PECBA.[7]

B. Prohibited Items in an Interest Arbitration Award

An interest arbitration award that contains a prohibited subject for bargaining raises different concerns. A prohibited subject is one that would require a party to violate the law or public policy. *Eugene Police Employees' Association v. City of Eugene, affirmed* 157 Or App 341, 972 P2d 1191 (1998), *rev denied* 328 Or 418, 987 P2d 511 (1999). We will not enforce a prohibited provision in a contract. That is, we will not enforce a contract provision that requires a party to violate the law or public policy. This is true regardless of whether the challenging party gives timely notice of its view that the proposal is prohibited. Indeed, this Board has refused to enforce a contract provision concerning a prohibited subject even when the parties mutually agreed to include the provision in their agreement. *See Petition For a Declaratory Ruling Filed by the City of Portland,* Case No. DR-4-85, 8 PECBR 8115, 8121-8122 (1985).

The same rules apply to interest arbitration. A party does not need to object in order to preserve its right to challenge the inclusion of a prohibited subject in an interest arbitration award. *City of Astoria,* 8 PECBR at 6609.

A contrary holding would have the potential to create and enforce an unlawful contract. The interest arbitration award forms part of the parties' contract. If we were to find that a party waived its right to challenge a prohibited subject in the award, we might end up enforcing an agreement that contains an unlawful provision. This Board will not require the parties to violate the law.

I add a cautionary note. Even though raising an objection is not legally required, it continues to be the preferred practice. A timely objection will give the proponent of the language a fair opportunity to correct any errors. It may avoid the need for this Board to overturn an interest arbitration award and order the process to be repeated. A party that fails to timely reveal its position that a proposal concerns a prohibited subject for bargaining, and later raises a challenge on that basis, may be guilty of bad faith under ORS 243.672(1)(e) or (2)(b). In addition, if we cannot enforce the arbitration award, we may assess the cost of a second arbitration proceeding against a party that failed to make a timely and adequate objection.

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[7]I also note that we awarded a remedy in *City of Springfield* (overturning an interest arbitration award) without first finding that a party committed an unfair labor practice. This Board does not typically grant relief unless we first determine that a party engaged in some wrongdoing. *See* ORS 243.676(2).

V. APPLICATION TO THIS CASE

I apply these rules to the Association's complaint. It first asserts that the County bargained in bad faith by including an allegedly prohibited subject (zipper clause) in its LBO. The Association did not refuse to bargain over the proposal. The majority should have dismissed this claim because it was not properly preserved. It instead dismissed the claim on its merits. I concur with the majority because it reached the right result (dismissal of the claim), even though it did so for the wrong reasons.

The Association's second claim challenges the enforceability of the interest arbitration award because it contains the County's zipper clause proposal, an allegedly prohibited subject for bargaining. No objection is needed to preserve a claim that an interest arbitration award contains a prohibited subject. The Association is entitled to a decision on the merits of this claim. On the merits, for the reasons described in the majority opinion, the zipper clause is not a prohibited subject for bargaining.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-02

(UNFAIR LABOR PRACTICE)

LINCOLN COUNTY EDUCATION ASSOCIATION,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
LINCOLN COUNTY SCHOOL DISTRICT,	)	
Respondent.	)	

The Board[1] heard oral argument on November 19, 2003, on Complainant's and Respondent's objections to a recommended decision issued by Administrative Law Judge (ALJ) William Greer on September 24, 2003, following a hearing on February 21, 2003, in Newport, Oregon. The record closed on April 11, 2003, upon receipt of the parties' closing arguments.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent at oral argument; Paul A. Goodwin, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, represented Respondent before the ALJ.

[1]Member Gamson did not participate in the hearing or in the deliberations on this matter.

The Lincoln County Education Association (Association) filed this unfair labor practice complaint on May 22, 2002, alleging that the Lincoln County School District (District) had violated ORS 243.672(1)(g) by refusing to arbitrate a retiree/spouse medical insurance coverage grievance and by refusing to provide a vested benefit to retirees, as required by the parties' 1992-1995 and 1995-2000 collective bargaining agreements.

On July 24, 2002, the District filed an answer in which it asserted several affirmative defenses and requested this Board to order the Association to pay a civil penalty and reimburse the District's filing fee. The ALJ set the hearing for November 8.

On October 28, 2002, the Association moved to amend the complaint. In its first amended complaint, the Association also alleged that the District had deducted some insurance premium costs from retirees' stipends and had disqualified one retiree who became covered by Medicare. The District objected to the amendment, in part due to the pendency of the November 8 hearing date. The ALJ allowed the amendment and set over the hearing to December 19.

The District subsequently requested additional time beyond December 19 to process related Association grievances. The ALJ canceled the December 19 hearing, and the parties agreed to a time frame in which the District would respond to the grievances and the Association, if appropriate, would amend its complaint.

On December 30, 2002, the Association filed a second amended complaint, alleging, in addition, that the District had refused to arbitrate grievances over the retiree disputes, in violation of ORS 243.672(1)(g). The Association also requested this Board to order the District to pay a civil penalty to the Association. On January 9, 2003, the District filed an amended answer. The ALJ conducted the hearing on February 21, 2003.

The issues are:[2]

[2]In his prehearing order, the ALJ identified several other issues. We address them in our Rulings and in deciding the primary issues.

1. Did the District violate ORS 243.672(1)(g) by refusing to arbitrate medical insurance grievances regarding: (a) retiree spouse coverage; (b) termination of coverage for White and her spouse; and (c) retiree premiums?

2. Did the District violate ORS 243.672(1)(g), and the parties' 1992-1995, 1995-2000, or 2000-2005 collective bargaining agreements, by: (a) terminating medical insurance benefits for retirees' spouses over age 65; (b) terminating medical insurance coverage for White and her spouse; and (c) failing to provide fully paid medical insurance to certain retirees?

3. Is a Board order warranted that orders the District or the Association to pay a civil penalty or reimburse the other party's filing fee?

Summary. On the first issue, we hold that the District's refusal to arbitrate the Association's three medical insurance grievances violated ORS 243.672(1)(g).

On the second issue, the ALJ recommended that we reach the merits of the alleged contract violation and find that the District violated ORS 243.672(1)(g) when it stopped providing certain retiree medical benefits. For the reasons set forth below, we will follow our normal practice of deferring cases of this nature to arbitration to determine the parties' intent.

Finally, we conclude that a Board order directing the District to pay a civil penalty to the Association and to reimburse the Association's complaint filing fees is not appropriate.

RULINGS

1. **Motion to bifurcate hearing**. On February 13, 2003 (eight days before the scheduled hearing date), the District filed a motion to bifurcate the hearing on the arbitrability of the Association's grievances and the underlying merits asserted in those grievances. Later on February 13, the Association objected that the motion was late and stated that the Association was not seeking a Board order directing the District to arbitrate the grievances. On February 14, the ALJ sustained the Association's objections and denied the motion. OAR 115-10-045 contemplates that motions may be made as late as the hearing. As discussed below, this Board's policy is to send grievances raising arguably arbitrable matters to an arbitrator to determine the parties' intent. On the District's motion, the ALJ should have limited the scope of the hearing

and excluded evidence related to the merits of the grievance in this case, as the Board Agent did when such evidence was offered in *Luoto v. Long Creek School District 17*, 9 PECBR 9314 (1987), *aff'd* 89 Or App 34, 747 P2d 370 (1987), *rev den* 305 Or 576, 753 P2d 1382 (1988). We therefore conclude this ruling was erroneous.

2. **District motion to supplement the record**. On March 17, 2003, the District moved to supplement the record with an arbitration opinion and award issued on March 9, 2003, by Arbitrator R. Douglas Collins in a dispute between the parties. Earlier, at hearing, the Association offered and the ALJ received a copy of the underlying grievance and the parties' arbitration briefs. The ALJ received the document offered by the District. We conclude that this award does not assist in resolving the dispute before us. However, we express no view regarding whether the award would be relevant in any future arbitration proceeding.

3. **Association motion to supplement the record**. On July 14, 2003, the Association moved to supplement the record with an arbitration opinion and award issued on June 27, 2003, by Arbitrator Howell Lankford in a dispute between Hood River Education Association and Hood River School District. In addition, the Association attached to its post-hearing brief a copy of an arbitration opinion and award issued on July 6, 2002, by Arbitrator Gary Axon in a dispute between Southern Oregon Bargaining Council and the Jackson County School District No. 6, Central Point School District. The ALJ received those documents. We conclude that neither award assists in resolving the dispute before us. However, we express no view regarding whether either award would be relevant in any future arbitration proceeding.

4. **Other rulings**. The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by the District. The District is a public employer.

COLLECTIVE BARGAINING AGREEMENTS

2. The parties' collective bargaining agreements have included the following terms in Article 24, "Early Retirement."

1989-1992 Contract:

"A. In order to qualify for the early retirement program, a teacher must have reached the age of 58 and be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.

"B. Early retirement benefit. The District shall pay the premiums for medical insurance coverage only for the early retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. *The coverage shall commence the first month after the teacher retires and shall continue until and including the month in which the teacher reaches the age of 65 years.* In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years.

"C. This program will commence during the second year of this Agreement, 1990-91. In order to be eligible for the early retirement benefit during that year or during the following school year, 1991-92, the teacher must notify the District by March 1 of the year preceding the year of early retirement.

"D. *The District and the Association expressly agree that this early retirement benefit will only be in effect during the term of the 1989-92 collective bargaining agreement. While the benefits will continue per the above provisions for any teacher who has properly opted for the program during the life of this Agreement, the program and any new teacher eligibility shall terminate on June 30, 1992.* The parties expressly agree that subsequent to the termination of this 1989-92 Agreement, the District will be under no

status quo obligation to maintain this Article. This provision is intended to be given effect by the Employment Relations Board and expresses the agreement of the parties that *the above early retirement program terminates with the termination of this agreement.*" (Emphasis added.)

1992-1995 Contract

"A. In order to qualify for the early retirement program, a teacher must be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.

"B. The District shall provide monthly payments equal to one and one-half percent (1½%) of the yearly salary the retiree would have received if fully employed the following year. Such compensation shall be provided for 60 months or until age 62, whichever occurs first.

"C. Early retirement benefit. The District shall pay the premiums for medical insurance coverage only for the early retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. *The coverage shall commence the first month after the teacher retires and shall continue until and including the month in which the teacher reaches the age of 65 years.* In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years." (Emphasis added.)

This language resulted from an interest arbitration in which the arbitrator adopted the Association's proposal which, *inter alia*, deleted the language that had been section D in the prior Agreement.

1995-2000 Contract. The parties continued sections A, B, and C with no change. They added section D, which varied the percentage of the stipend provided in section B depending on the school year in which the teacher retired.

3. **2000-2005 Contract.** In negotiations for a 2000-2005 contract, the parties met, wrote bargaining session notes, exchanged offers, memorialized their communications in writing, and issued newsletters. The parties eventually reached a tentative agreement and ratified it. The final agreement was fully signed as of October 23, 2001.

During the negotiations, the District proposed changes that were designed to reduce the cost of–and eventually eliminate–the early retirement program. The parties changed the title of Article 24 from "Early Retirement" to "Retirement" and modified the language to read:

> "A. In order to qualify for the retirement program, a teacher must be qualified for retirement under PERS rules and regulations. Additionally, the teacher must have completed at least ten (10) consecutive years of full-time teaching experience with the Lincoln County School District.
>
> "B. The District shall provide monthly payments equal to 1% of the yearly salary of the retiree on the date of retirement. Such compensation shall be provided for 60 months or until age 62, whichever occurs first.
>
> Effective the date of execution of this Agreement, this stipend will be discontinued.
>
> "C. Retirement benefit. The District shall pay up to the 'cap,' as set by the provisions of Article 20, Fringe Benefits and Other Allowances, then in effect for the retiree at the time of retirement for medical insurance coverage only for the retiree and spouse on the medical insurance program then in effect for the members of the bargaining unit. This District contribution will not change for the balance of the retiree's retirement. The coverage shall commence the

first month after the teacher retirees [*sic*] and shall continue until and including the month in which the teacher reaches the age of 65 years. In the event the teacher dies before reaching the age of 65 years, the surviving spouse will continue to receive the District's insurance payment (for single coverage) until the time the deceased teacher would have reached the age of 65 years or until the surviving spouse reaches 65 years, whichever occurs first. This insurance contribution for retirees will be prorated for retirees who were part-time teachers at the time of retirement.

"The teacher must notify the District at least six months prior to the time of retirement.

"This Retirement Benefit (insurance) will cease as of June 30, 2005, and will not be considered to be part of the status quo. However, nothing prevents the Association from proposing supplemental retirement proposals for the successor collective bargaining agreement.

"D. Effective July 1, 2000, no provision of this Article will be applicable to bargaining unit members hired on and after July 1, 2000.

"E. Notwithstanding the provisions of section C, above, members of the bargaining unit who have at least a full ten years of continuous and contiguous bargaining unit service to the District on July 1, 2002, and who retire under full PERS benefits within ten years from July 1, 2002, will be eligible for the following benefit:

"The District shall pay up to the contribution rate then in effect on the date of the retiree's retirement for the retiree for medical insurance coverage only for the retiree and spouse on the medical insurance program then in effect for the members of the

bargaining unit. This District contribution amount, or rate, will not change for the balance of the retiree's retirement. The coverage shall commence the first month after the teacher retires and shall continue for up to seven years or until and including the month in which the teacher reaches the qualifying year for Medicare whichever occurs first. * * *" (Underlining in original.)

4. **Medical insurance plan.** Before the 2000-2005 contract became effective, the District provided medical insurance coverage through a trust sponsored by JBL&K, an insurance broker. That plan was a "direct write," customized plan, with terms agreed upon by the District and the Association. The JBL&K plan did not exclude from coverage a member whose spouse was over 65 or a member who became eligible for Medicare.

5. During negotiations for the 2000-2005 contract, the Association proposed switching to a health insurance plan sponsored by the Oregon School Boards Association (OSBA), the Red Book plan. That plan has standard terms that cannot be altered by a particular insured. Blue Cross/Blue Shield Marketing Representative Peg Honyak met several times with the District and Association bargaining teams to discuss the possible switch. She provided them with booklets that described the Red Book plan and several other health insurance plans offered by Blue Cross/Blue Shield.

6. The District ultimately agreed to the Association's proposal to switch from the JBL&K plan to the Red Book plan. Article 20 of the 2000-2005 contract provided that this switch would occur "effective as soon as practicable after execution of this Agreement."

7. The Red Book plan, when compared to the JBL&K plan, is less expensive, covers fewer services and expenses, has a higher deductible, and has a higher employee stop-loss.

8. The OSBA Red Book plan provides:

"<u>When You Lose Retiree Eligibility</u>
"If **you** are retired, **your** coverage will end on the last day of the monthly period that **you** turn 65, or on the first day of

the monthly period that **you** become eligible for Medicare, whichever happens first.

"When Your Dependents Lose Eligibility If You Are Retired
"If **you** are retired, coverage for **your** spouse will end *on the last day of the monthly period that he or she turns 65*, is granted a decree of divorce, *or on the first day of the monthly period that he or she becomes eligible for Medicare*, whichever happens first." (Bold in original; emphasis added.)

9. While the 1992-1995 and 1995-2000 contracts were in effect, the District paid the full medical insurance premiums for *retirees*, while *active employees* were required to pay premiums above the caps established in the respective contracts.

10. **Grievance procedure**. In Article 11, "Grievance Procedure," of the parties' 1992-1995, 1995-2000, and 2000-2005 contracts, the parties stated that the grievance procedure was to secure solutions to grievances "affecting teachers and their rights."

The parties defined "grievance" as "a claim by a teacher *or the Association* that the terms of the Agreement have been misinterpreted, inequitably applied or violated." (Emphasis added.) They defined "grievant" as "[a] teacher, group of teachers *or the Association* making the claim or presenting the grievance." (Emphasis added.) And the contracts define a "party in interest" as "the person or persons making the claim and any person who might be required to take action * * *."

DISTRICT IMPLEMENTATION OF THE RED BOOK PLAN UNDER THE 2000-2005 CONTRACT

11. In October 2001, to comply with Article 24 of the 2000-2005 collective bargaining agreement, the District provided retired teachers with the opportunity to enroll for coverage in the new OSBA Red Book plan that applied to currently-employed teachers. Neither retired teachers nor active teachers had the option to remain covered by the former JBL&K plan.

12. Some early retirees who enrolled in the Red Book plan were married to individuals who were over age 65. At least one retiree was eligible for Medicare.

13. Under the JBL&K plan, medical insurance coverage for retirees and their spouses continued until the *retiree* reached 65. In a January 2002 memo, the District notified early retirees that the Red Book plan covered a spouse only until the *spouse* reached 65, as follows:

> "There is another change in the current medical plan that the District was made aware of after the plan was put into effect and we want to make sure that you, as retirees, are also aware of this change. Health benefits for your spouse will end when they turn 65 - not when the retiree turns 65 as it has been previously. * * *"

14. Upon District request, the Red Book plan carrier granted coverage to retirees affected by that change until the end of February 2002 to give them the opportunity to seek other coverage. At that point, coverage ceased for about 21 retiree spouses who were 65 or older.

RETIREE/SPOUSE COVERAGE GRIEVANCE

15. Former bargaining unit teacher Barbara Utterback retired in June 1999, when she was 57 and her husband was 67. She retired while the 1995-2000 collective bargaining agreement was in effect. The District paid the medical insurance premiums for her and her spouse from the date she retired until this dispute arose.

In January 2002, after Utterback's Red Book plan coverage became effective, the District told her that her spouse's coverage would end as of February 28, 2002, because he was over age 65. His coverage did end on that date. Utterback and her

husband obtained other, lesser coverage for him at their own expense.[3] Other retirees affected had similar circumstances.

16. On March 20, the Association filed a grievance asserting that the District violated Article 24 by failing to provide medical insurance coverage "to District retired [*sic*] and spouses 'until and including the month in which the teacher reaches the age of 65 years.'"[4] (Underlining in original.) On April 1, the District denied the grievance, asserting that the Association, retirees, and retirees' spouses were not proper grievants; the District also denied the grievance on the merits.

17. On April 29, the District refused to arbitrate the grievance, again asserting that the Association, the retirees, and retirees' spouses were not proper grievants.

COVERAGE FOR RETIREES ELIGIBLE FOR MEDICARE–WHITE GRIEVANCE

18. Former bargaining unit member Janice White retired from District employment, due to a disability, effective July 1, 1996. She retired under the terms of the parties' 1995-2000 collective bargaining agreement. The District provided her with medical insurance coverage as of the date of her retirement.

19. In April 1998, after a required two-year waiting period, White began to be covered by Medicare. For about four years, her medical expenses were paid by the coordination of her Medicare and District medical insurance.

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[3]The Association asked Utterback about the effect on her of losing her husband's coverage. The District objected, stating that any financial impact was an issue for a compliance hearing, not the evidentiary hearing. The Association responded that the question was aimed at establishing that the loss of coverage had an egregious effect on Utterback and related to the Association's request for a civil penalty. The civil penalty statute, ORS 243.676(4)(a), provides that this Board can order a respondent to pay a civil penalty upon a Board determination that "the action constituting the unfair labor practice was egregious * * *." The ALJ correctly disallowed the question, ruling that the civil penalty statute involves the question of whether the *unfair labor practice violation* (in this case, the District's refusal to arbitrate or refusal to provide coverage) was egregious, as a matter of law and Board precedents, not whether the *effect of the violation on an individual* was egregious, as a matter of fact.

[4]The Association grievance quoted language that appeared in Article 24 of the parties' 2000-2005, 1995-2000, 1992-1995, and 1989-1992 collective bargaining agreements.

20. Effective October 1, 2002, after the Red Book plan became effective, the carrier terminated coverage for White and her husband.[5] At that time, White's husband was not covered by Medicare. White and her husband obtained other coverage, at their expense.

21. In October 2002, the Association filed a grievance alleging that the termination of White's medical insurance coverage violated Article 24 of the contract. The District denied the grievance, stating that White did not have standing to file a grievance; the 2000-2005 contract's Red Book plan provided that a retiree's insurance coverage terminates when an individual is eligible for or covered by Medicare; and White was covered by Medicare.

On October 28, the Association processed the grievance to the next step. In November and December 2002, the District denied the grievance, stating that neither the Association nor White, as a retiree, was a proper grievant.

22. By letter dated December 4, the Association moved the grievance to arbitration. On December 20, the Association contacted the District about selecting an arbitrator for the White grievance. On December 23, the District refused to arbitrate the White grievance, asserting that the Association and White, as a retiree, were not proper grievants.

RETIREE MEDICAL INSURANCE PREMIUM CAP GRIEVANCE

23. The District pays early retirement stipends to retirees in the amounts specified by the collective bargaining agreement in effect at the time of their respective retirement dates.[6]

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[5]The Association offered testimony about how the termination of District insurance coverage affected White, and the District objected. Because we will not consider the merits of this complaint, we reject the ALJ's ruling to allow an offer of proof on this issue.

[6]Those stipends were: 1992-1995—1½ percent of salary; July 1, 1996-June 30, 1997—1.3 percent; July 1, 1997—1.25 percent; July 1, 1998—1.15 percent; July 1, 1999—.0 percent; and up to October 23, 2001 (the effective date of the 2000-2005 contract) 1.0 percent. As noted in the contract language quoted in Finding of Fact 2, over the years the parties changed the base salary on which the stipend was calculated.

24. On September 26, 2002, the District informed early retirees that: (a) Article 24 of the 2000-2005 contract provided that the District would pay up to the medical insurance premium in effect at the time of their retirement; (b) the premiums for their 2002-2003 medical insurance coverage had increased by certain amounts from the premiums for their 2001-02 coverage; and (c) the District would deduct such amounts from the early retirement stipend checks payable to the retirees, depending upon the individual's coverage, unless individual retirees chose to pay such amounts by separate checks.

25. Some early retirees retired under the terms of the parties' 1992-1995 and 1995-2000 collective bargaining agreements. One such retiree sent a letter to the District protesting that, in the contract in effect when she retired, the District had agreed to pay the insurance premiums in full; she also signed a "premium only election form," under protest, agreeing to have amounts deducted from her stipend check pending resolution of the dispute. Acting on behalf of a number of early retirees, that retiree later submitted a letter to the school board and appeared at a school board meeting to pursue a claim that the District's failure to continue paying insurance premiums in full for early retirees violated the contract.

26. In November and December 2002, the District denied the grievance. The District based its decision on its position that the Association and the retirees were not proper grievants. The District also denied the grievance on the merits, stating that the parties were bound by the terms of the Red Book plan.

27. On December 4, the Association moved the retiree insurance cap grievance to arbitration. On December 20, the Association contacted the District about selecting an arbitrator for that grievance. On December 23, the District refused to arbitrate the insurance cap grievance, asserting that the Association, retirees, and retirees' spouses were not proper grievants.

OTHER GRIEVANCES

28. In addition to the grievances that give rise to this dispute, two other grievances over the Red Book plan have arisen under the 2000-2005 agreement. One involved coverage for an active teacher; the other involved coverage for teachers who retired during the term of the 2000-2005 agreement. Both grievances went through the grievance process and concluded in arbitration.

CONCLUSIONS OF LAW

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

2. The District's refusal to arbitrate the Association's three retiree medical insurance grievances violates ORS 243.672(1)(g).

3. We will defer to arbitration the question of whether the District's failure to provide coverage and pay medical insurance premiums for Association bargaining unit retirees and their spouses violated the terms of the parties' 1992-1995 and 1995-2000 collective bargaining agreements.

4. A Board order directing the District to pay a civil penalty to the Association and to reimburse the Association's complaint filing fees is not appropriate.

DISCUSSION

REFUSAL TO ARBITRATE

The Association first alleges that the District violated ORS 243.672(1)(g) by refusing to arbitrate medical insurance grievances filed by the Association regarding coverage of retirees' spouses, the termination of White's coverage, and premiums that retirees were required to pay.

Standing. The District argues that the Association does not have standing to pursue a grievance that the District violated the parties' collective bargaining agreement by failing to provide certain retiree medical insurance coverage. For the reasons that follow, we find that argument without merit.

We considered a similar argument in *Portland Fire Fighters' Association v. City of Portland*, 18 PECBR 723 (2000), *rev'd and remanded* 181 Or App 85, 45 P3d 162, *rev den* 334 Or 491, 52 P3d 1056, *order on remand* 20 PECBR 48A (2002). As in this case, the City asserted the Association had no standing to process or arbitrate grievances on behalf of retirees or their spouses. Similar to this case, the grievance procedure in *Portland* permitted a grievance to be filed by the Association or by "the aggrieved employee." A majority of this Board concluded that retirees were not "employees," and thus that a grievance regarding retirement provisions was not arbitrable. It further held

that the City's refusal to arbitrate that grievance therefore did not violate ORS 243.672(1)(g).

On review, the Court of Appeals disagreed with the Board majority and noted that the collective bargaining agreement's stated purpose was to establish terms for "members of the bargaining unit" and also that the parties had agreed that the grievance procedure was "the sole procedure" for resolving "*any* grievance or complaints" arising out of the application of the contract. 181 Or App at 92. The court expressed concern that, "if the Association could not grieve retiree health insurance disputes, there would be no remedy under the CBA for a violation of the city's obligation to 'make available to a retired employee * * * the same medical, dental and vision coverage offered to active employees.'" 181 Or App at 93. The court further observed, "The CBA's primary focus on the rights of active employees does not necessarily mean that the parties did not intend to permit the Association to grieve any other type of dispute arising out of the CBA, regardless of whom it affects." 181 Or App at 94. The court quoted a maxim that, where the arbitrability of a contract provision is at issue, this Board must order arbitration unless it can say "'with *positive assurance* that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" 181 Or App at 96. The court concluded that the *Portland* contract arbitration provision was ambiguous and that "the ambiguity as to the arbitration provision's coverage demonstrates an absence of positive assurance that the dispute is *not* arbitrable, and, thus, it *is* arbitrable." 181 Or App at 96. (Emphasis in original.) On remand from the Court of Appeals, this Board concluded that the grievance was at least arguably arbitrable and ordered the City to arbitrate the grievance.

This Board's initial decision in *Portland* rested on our earlier decision in *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District*, Case No. UP-78-94, 16 PECBR 107 (1995) (*McMinnville I*). In that case, we determined that, while a grievance filed by individual retirees was not arbitrable, the Association, as a party to the contract, had the right to enforce its terms by filing a complaint under ORS 243.672(1)(g). In particular, we stated that a breach of a contract "constitutes an 'injury' to a contracting party that is actionable under ORS 243.672(1)(g) or (2)(d)." 16 PECBR at 124.[7] Here, as in *Portland,* the Association, which

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[7]*See also Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274 (2003), in which this Board ruled that the exclusive (continued...)

negotiated the collective bargaining agreement, now seeks to enforce its terms. Thus, even if we concluded the grievance was not arbitrable, under *McMinnville I,* the Association would still have standing to seek a remedy for the asserted breach of contract. The Court of Appeals decision in *Portland* strengthens that conclusion.

Scope of grievance procedure and the positive assurance test. The Association filed grievances and claimed that the District violated terms of the parties' 1992-1995 and 1995-2000 contracts, alleging that the terms of those agreements continue to apply to retirees.[8]

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations *including an agreement to arbitrate* * * *." (Emphasis added.)

We analyze refusal-to-arbitrate complaints filed under ORS 243.672 (1)(g) with a broad test which we articulated in *Long Creek School District.* There we wrote:

> "The emphasis in applying the positive assurance test is whether the arbitration clause is or is not susceptible to an interpretation that covers the dispute.* * * Where a contract contains what the [C]ourt in AT&T Technologies calls a 'broad' arbitration clause, application of the positive assurance test leads the mind to search for an express provision excluding the particular grievance from arbitration. If such an express exclusion is not found, and barring other 'most forceful evidence of a purpose to exclude the claim,' arbitration will be ordered." 9 PECBR at 9329. (Footnotes omitted. Underlining in original.)

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[7](...continued)
representative of a bargaining unit had standing to challenge the employer's requirement that successful applicants for bargaining unit employment, ***before*** being hired, sign a training cost agreement that operated ***after*** personnel left County employment.

[8]In other words, the Association alleged that certain terms of the 1992-1995 contract applied, during its term, to individuals *as active employees*, while other terms continued to apply to those same individuals past the term of that contract, if they retired during the term of that contract, *as retirees*.

> "The question presented in [refusal to arbitrate complaints] is whether the parties agreed in their collective bargaining contract to submit the * * * grievance to arbitration. Because of the presumption of arbitrability, we must order arbitration unless we can say with positive assurance that the arbitration provision is not susceptible to an interpretation that covers the asserted dispute." 9 PECBR at 9331.
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> "* * * [I]n a refusal-to-arbitrate case, this Board's jurisdiction is limited to determining the extent of the parties arbitration agreement. We only decide, using the positive assurance test, whether the parties intended to arbitrate concerning the language at issue. We do not decide what the parties intended that language to mean." 9 PECBR at 9333.

Here, the District argues that the retirees' disputes are not arbitrable under the parties' grievance procedure, and argues that *Portland* is distinguishable from this case. The District notes that the definition of "grievance" in *Portland* was broadly phrased as "any grievance or complaints" arising out of the application of the contract. 18 PECBR at 727. The District contends that the broad language in *Portland* would encompass disputes about retiree benefits. In contrast, the District argues that the parties in this case defined "grievance" in their collective bargaining agreements more narrowly: "a claim by a teacher or the Association that the terms of the Agreement have been misinterpreted, inequitably applied or violated."[9]

The parties' 1992-1995 and 1995-2000 contract grievance procedures contain no terms that we could interpret, with positive assurance, to exclude retiree grievances from the process. The parties agreed to arbitrate claims that the Agreement's terms had been "misinterpreted, inequitably applied or violated." The retirement provisions are among the Agreement's terms. We therefore conclude the Association's grievances regarding the District's compliance with the retirement provisions are arguably arbitrable. The District's refusal to arbitrate those grievances violated ORS 243.672(1)(g).

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[9]The grievance procedure is phrased with identical words in the 1992-1995, 1995-2000, and 2000-2005 contracts; Finding of Fact 8.

THE MERITS OF THE ALLEGED CONTRACT VIOLATION

The Association has withdrawn its request for a Board order directing the District to arbitrate and instead requests this Board to decide the dispute under ORS 243.672(1)(g). The District argues that if it had a duty to arbitrate the grievances, this Board should follow longstanding case law and order the parties to arbitration rather than reach the merits. The ALJ recommended that we reach the merits of these grievances. We will follow our longstanding practice of deferring such disputes to arbitration, for the reasons that follow.

This Board does have jurisdiction to interpret and enforce both collective bargaining contracts and arbitration agreements. In deciding whether we will compel arbitration or determine the merits of a grievance under an ORS 243.672(1)(g) complaint, we apply four basic principles derived from the U.S. Supreme Court in the *Steelworkers Trilogy:*[10]

> "* * * (1) [A]rbitration is a matter of contract, (2) the question of arbitrability is an issue for this Board, not the arbitrator, (3) this Board, however, in deciding whether arbitration must be ordered, does not rule on the merits of the underlying claim, and (4) arbitration will be ordered unless we can say with positive assurance that the underlying dispute is not arbitrable. The positive assurance test creates a 'presumption of arbitrability' that can be overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration."

Oregon School Employees Association v. Camas Valley School District, Case No. UP-59-86, 9 PECBR 9367, 9376 (1987).

In *Coos Association of Deputy Sheriffs v. Coos County, Board of County Commissioners and Coos County Sheriff's Department*, Case No. C-261-80, 6 PECBR 4626

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[10]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574, 46 LRRM 2416 (1960); *Steelworkers v. American Mfg. Co.*, 363 US 564, 46 LRRM 2414 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 46 LRRM 2423 (1960).

(1981), this Board denied the union's request that it decide the question raised by a grievance upon finding an unlawful refusal to arbitrate. We stated as a general policy:

> "* * * [I]t has been long established that grievances raising arguably arbitrable matters will be sent to an arbitrator, in conformance with the parties' agreement to have disputes submitted to arbitration. This Board will not generally rule on the merits of an arguably arbitrable grievance." 6 PECBR at 4632, n. 2.[11]

Consistent with that policy, this Board held in *Long Creek School District 17*, 9 PECBR at 9315:

> "It has long been the Board's policy to require parties to resolve breach of contact issues by their agreed-upon contractual grievance arbitration procedure where such procedures are available and where the employer has not repudiated the procedure itself but only contends that a particular grievance is not arbitrable under the contract. In such cases, the Board has determined whether the grievance was arguably arbitrable and, if so, ordered the employer to proceed to arbitration on the merits."

This Board further held that a contractual agreement to arbitrate grievances "amounts to a waiver of the parties' right to have this Board adjudicate contract violations, * * *" 9 PECBR at 9321, n. 2.[12] In *McMinnville I*, this Board decided the merits only because

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[11]*Compare, Oregon Nurses Association v. Polk County*, Case No. C-133-82, 6 PECBR 5450 (1982) (County notified Association it was terminating the contract, then delayed arbitration by refusing to process clearly arbitrable grievances over unilateral rollback and wage freeze. Because the refusal to arbitrate was based on specious grounds, rather than a bona fide question of arbitrability, this Board ordered arbitration and, as an affirmative remedy, reinstatement of the status quo retroactively; it noted the union could still go to an arbitrator "in order to get a definitive interpretation of the language at issue or because the union believes an arbitrator may award some further relief.").

[12]*Compare, OSEA Chapter 115 v. Pendleton School District 16R*, 8 PECBR 8223, 8230-8231 (1985), *on remand from* 73 Or App 624, 699 P2d 1155 (1985), *aff'd* 85 Or App 309, (continued...)

the grievance filed by individual retirees was not arbitrable. Thus, the parties had not waived the right to have this Board decide the alleged contract violation raised by the grievance. Here, however, the Association's grievances are arguably arbitrable. The Board would undermine the parties' agreement were it to decide the merits of these grievances.

In *West Linn Education Association v. West Linn School District*, Case No. C-151-77, 3 PECBR 1864 (1978), this Board stated that it excuses a labor organization's exhaustion of a grievance procedure when the employer repudiates the grievance procedure. In those circumstances, this Board will decide a complainant's ORS 243.672(1)(g) contract violation complaint. However, a mere refusal to arbitrate a particular grievance does not constitute repudiation of the grievance procedure. The facts in this case do not establish that the District has repudiated the grievance arbitration procedure, either in general or as applied to the Red Book plan.[13] On the contrary, the District has processed two other grievances through arbitration, involving benefits for active or recently-retired employees under the Red Book plan.

For all the above reasons, we will order arbitration of the grievances.

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[12](...continued)
736 P2d 204 (1987), *rev den* 304 Or 55, 742 P2d 1186 (1987) (where parties' agreement did not include an internal process for resolving contract disputes, "they in effect agreed to allow this Board to function as the 'arbitrator' of grievances arising under the contract.").

[13]We note that here the District attempted to have arbitrability of the grievances determined by filing a motion to bifurcate the hearing between arbitrability and the merits of the grievances.

CIVIL PENALTY AND FILING FEE REIMBURSEMENT

The Association requests that this Board order the District to pay a civil penalty and reimburse the Association's filing fee, pursuant to ORS 243.676(4),[14] and ORS 243.672(3),[15] and OAR 115-35-075.[16]

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[14]ORS 243.676(4) states:

"(4) The board may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate amount of up to $1,000 per case, without regard to attorney fees, if:

"(a) The complaint has been affirmed pursuant to subsection (2) of this section and the board finds that the person who has committed, or who is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious; or

"(b) The complaint has been dismissed pursuant to subsection (3) of this section, and that the complaint was frivolously filed, or filed with the intent to harass the other person, or both."

[15]ORS 243.672(3) states:

"(3) An injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice. For each unfair labor practice complaint filed, a fee of $250 is imposed. For each answer to an unfair labor practice complaint filed, a fee of $100 is imposed. The Employment Relations Board may, in its discretion, order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith."

[16]OAR 115-35-075 states:

"(1) The Board may award a civil penalty of up to $1,000 to a prevailing party in an unfair labor practice case when as a result of a hearing:

"(a) The Board finds that the party committing an unfair labor practice did so *repetitively*, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was *egregious*; or

(continued...)

In paragraph 58 of its amended complaint, the Association's request for a civil penalty states: "The District's refusal to arbitrate the three grievances in this case has no reasonable basis in law or fact. * * * The refusal to arbitrate in this case is in violation of clear law and is thus egregious. ERB should award a civil penalty and filing fees given the District's knowing, egregious, and repetitive unlawful behavior." In paragraph 8 of the remedies sought in its amended complaint, the Association asserts that "the ERB has found the District to be in violation of the PECBA within the past 12 months and this ULP involves multiple actions of unlawful conduct."

The ALJ recommended that this request be denied, based on the requirement in OAR 115-35-075(2) that a request for a civil penalty must contain a "statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement." We agree with the recommendation to deny the request, but we do so because we conclude the proven violation does not rise to the level required for an award of a civil penalty.

The Association argues that OAR 115-35-075(2) requires only "notice pleading" and that its amended complaint met that standard. It further argues that this Board should amend this rule to require an opposing party to object to a proposed civil penalty if it wishes to preserve the objection.[17] Finally, it argues that this Board's prior

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[16](...continued)

"(b) The Board dismisses a complaint and finds that the complaint was frivolously filed or was filed with the intent to harass the prevailing party.

"(2) Pleadings. Any request for a civil penalty must be included in a party's complaint or answer. The request must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement. A party may move to amend its complaint or answer to request a civil penalty at any time prior to the conclusion of the evidentiary hearing.

"(3) Filing fee reimbursement. The Board may order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith. A request for filing fee reimbursement must comply with the procedure established in subsection (2) of this rule." (Emphasis added.)

[17]The Administrative Procedures Act, ORS 183, governs the process for amending administrative rules. This unfair labor practice proceeding does not provide the notice and (continued...)

decisions do not provide sufficient guidance regarding the standard for granting or denying such a request.

The Association argues the District's conduct was "knowing, egregious and repetitive." The District, however, had a colorable defense, based on this Board's decisions in *McMinnville I* and *Portland,* that the grievance procedure language in this contract was not broad enough to reach grievances regarding retiree benefits under expired contracts. The fact that this Board rejects that defense here does not render the District's refusal to arbitrate a "knowing" violation in the narrow, legal sense in which that term is used in the statute and our rules. The thrust of this Board's decisions involving civil penalties is that "egregious" offenses are those which tend to undermine the very nature of the collective bargaining process.[18] A refusal to arbitrate three closely-related grievances, without more, does not meet this standard. A civil penalty based on "repetitive" violations is most likely where the later violation is related to the earlier violation.[19] That is not the case here. We therefore conclude that a civil penalty is not warranted.

Turning to the request for an order to reimburse the Association's filing fee, OAR 115-35-075(3) provides that we may order reimbursement of the filing fee to the prevailing party "in any case in which the complaint or answer is found to have

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[17](...continued)
opportunity for comment required for such an amendment to the rules. We therefore will not address the merits of this suggestion.

[18]*See, e.g., Monroe Elementary Education Association v. Monroe School District No. 25J*, Case Nos. UP-49/56-90, 13 PECBR 54 (1991) (statement interfering with an employee's protected right to join a union, without which "PECBA becomes superfluous"); *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9195, n. 14 (1986) (distinguishing "near total disregard for well-established statutory and case law" from violations arising from "ignorance * * * or because of a belief that the law did not apply to their particular case").

[19]*See, e.g., Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County,* Case No. UP-83-87, 10 PECBR 667, 674 (1988) (refusal to furnish information less than a month after this Board found such a refusal to be unlawful). *Compare McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District*, Case No. UP-4-97, 17 PECBR 539 (1998) *(McMinnville III)* (request for civil penalty and filing fees denied; factual scenarios in prior cases within the past year involving retiree benefits were distinct)

been frivolous or filed in bad faith." The record in this case does not demonstrate that the District's answer was either frivolous or filed in bad faith. We therefore will not order reimbursement of the Association's filing fee.

ORDER

1. The District shall cease and desist from refusing to arbitrate grievances filed by the Association regarding retiree/spouse medical insurance coverage.

2. The District shall, as soon as is practicable, proceed with the selection of an arbitrator.

3. The Association's request for a civil penalty and reimbursement of its complaint filing fee is denied.

DATED this 7th day of April 2004.

Rita E. Thomas

Rita E. Thomas, Chair

*

Paul B. Gamson, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Gamson has recused himself from this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-15-03

(UNFAIR LABOR PRACTICE)

LANE COUNTY PUBLIC WORKS ASSOCIATION, LOCAL 626,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
LANE COUNTY,	)	
Respondent.	)	

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) William Greer on October 30, 2003, following a hearing on June 12, 2003, in Eugene, Oregon. The hearing closed on June 27, 2003, upon receipt of the parties' post-hearing briefs.

Gary K. Jensen, Attorney at Law, 626 "B" Street, Springfield, Oregon 97477, represented Complainant.

David B. Williams, Assistant County Counsel, Lane County Courthouse, 125 E. 8th Avenue, Eugene, Oregon 97401, represented Respondent.

Lane County Public Works Association, Local 626 (Association or 626) filed this complaint on March 27, 2003, alleging that Lane County (County) had violated ORS 243.672(1)(a), (b), and (c) by threatening two shop stewards with discipline. The ALJ granted the County's motion to make the complaint more definite and certain, and the Association filed an amended complaint on May 7. The County filed an answer on June 5, admitting and denying allegations in the amended complaint.

The issues are:

1. Did the County threaten Association Shop Stewards Lalich and Wood with discipline because of, or in the exercise of, their protected activity, in violation of ORS 243.672(1)(a) and (c)?

2. Did that County action violate ORS 243.672(1)(b)?

3. Is County payment of a civil penalty warranted?

We conclude that Starr's e-mail was not a threat to discipline the stewards in or because of their exercise of protected activity, and the e-mail did not actually affect the Association as a labor organization. We dismiss the complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by the County, a public employer.

BACKGROUND

2. The County is organized into departments. One of the departments is Public Works. There are five divisions within Public Works, one of which is Parks.

Craig Starr was, at all material times, the assistant director of the County's Department of Public Works. He was responsible for two of the divisions within the Department, including the Parks Division. Starr supervised Rich Fay, the director of the Parks Division.

3. The Association represents about 150 full-time employees and seasonal employees who work more than 520 hours per year. Its bargaining unit includes the park maintenance and senior park maintenance employee classifications. Parks employees are divided into three zones and work at various locations throughout the County.

4. The Association has officers, a chief steward, and 15 shop stewards. Rick Lalich and Dan Wood are Association shop stewards.

5. The parties' collective bargaining agreement includes the following provision: "Work historically performed by bargaining unit members shall not normally be performed by non-bargaining unit employees."

6. In the past few years, two full-time Parks maintenance employees retired. Due to budget limitations, the County did not replace those two individuals.

7. In 2002, the County used volunteers to maintain and improve some of the property administered by the Parks Division. Without volunteers, the County would not perform that work.

8. On February 12, 2003, Division Director Fay conducted a meeting of all division employees. During the meeting, Association Shop Steward Wood asked whether the County, in the coming year, planned to use seasonal employees and whether it planned to fill the two full-time Parks maintenance vacancies. Fay responded that the County would hire seasonal employees, as it had done in 2001 and 2002, and had no intention of filling the full-time positions.

Wood replied that the Association had a problem with the County hiring seasonal employees instead of filling the full-time vacancies, and said he would talk with Association President Brad Rusow and Chief Steward Ted Bushek about the possibility of filing a grievance over the issue. Fay informed his supervisor, Craig Starr, about the concerns Wood expressed at the meeting and about the possibility that the Association might file a grievance on the issue.

MARCH 2003 COMMUNICATIONS

9. On March 3, the Parks Division volunteer coordinator, Loralyn Osborne, asked Association Steward Lalich to provide tools for volunteers to clear a trail in one of the County's parks. Lalich told Osborne that he was willing to work with the volunteers, but said that he wanted to talk with Fay about filling the two full-time Parks maintenance vacancies.

Parks Division Superintendent Todd Winter (not a member of the Association bargaining unit) was also present during Lalich and Osborne's discussion of volunteers. Winter suggested to Osborne that the County and the Association could address the bargaining unit work issue by entering a memorandum of understanding. Later, Osborne told Fay about that conversation and asked him to talk directly with Lalich. Osborne told Fay that he and Lalich needed to come to some agreement about Lalich's concerns.

10. Fay was concerned that Lalich may have been hinting to Osborne that Association-represented employees would refuse to work with volunteers. On March 3, 2003, at 3:31 p.m., Fay sent an e-mail to his supervisor, Assistant Department Director Starr, about the Lalich-Osborne conversation, stating:

> "* * * When [Osborne] discussed the arrangements with the maintenance staff today Rick Lawlich [*sic*] informed [Osborne] that they, 626 [the Association], considered this work bargaining unit work and would require a MOA prior to planning or working with her on arrangements for the work day. This is the first time we have had a MOA on this work - but in the larger picture Rick implied they would oppose a wide range of volunteer work days and projects. * * * Before taking any action I would like your view of this situation."

11. Upon reading Fay's e-mail, Starr was concerned that Lalich's comment was part of an Association effort to force the County to fill the two full-time Parks maintenance vacancies, even though the Association knew that the County had a budget shortfall. An hour after Fay's e-mail, Starr responded to Fay in a manager-to-manager e-mail:

> "I think that you and/or [Parks Division Superintendent] Todd [Winter] should have a talk with your crew about this business. For my part, I'd tell them that you fully intend to use volunteers in the same manner as Parks always has and that it is unacceptable for them to *obstruct* such activities. I don't know how far you would want to take it, but *I could clearly see discipline resulting if they continue to act out improperly in this regard.*
>
> "I generally consider myself to be a fairly easy-going person on most labor-management issue [*sic*], but *the kind of deliberate obstructionist behavior that Dan Woods* [*sic*] and, *now, Rick Lalich seem to be implying is totally unacceptable to me.*[1] Faced with the kind of comment that you've indicated from Rick, I'd probably ask him point blank if he is refusing to work with Loralyn on arrangements for the work day. If he said 'yes', I'd give him a direct order that he is required to do so. If he still refuses, I'd probably tell him to go home because he's not willing to do the

[1]Fay, Osborne, and Winter established at hearing that the stewards' conduct was not "deliberately obstructive."

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[1]Fay, Osborne, and Winter established at hearing that the stewards' conduct was not "deliberately obstructive."

work that he's been assigned to do and that'll [*sic*] he'll hear from me on some pretty serious disciplinary charges.

"I'll contact [Association President] Brad [Rusow] about this and see if it's possible to work on it from the other end. If 626 intends to push it, I'll suggest that they file a grievance and take it to arbitration before, rather than after, one of their members risks [his] employment." (Underline in original; emphasis added.)

12. About 30 minutes after Starr sent his e-mail to Fay, Starr sent a separate e-mail to Association President Rusow about the controversy. He entitled it "Heads Up - Parks Problem." Starr wrote:

"I've heard that Dan Woods [*sic*] recently made a comment about grieving any hiring of seasonal or extra-help staffing this year if we haven't first filled the two (2) permanent PM-2 positions. Now, I've heard that Rick Lalich has objected to working on a project involving volunteers. I don't know the basis of Rick's comments for sure, but I suspect that they go to the same issue as Dan's comments.

"Just so you know, Rick's comments as they were reported to me start to go toward an area - insubordination - where I don't think he should go. The grievance process is always available under the contract if Dan, Rick, other park staff or union representatives feel that we've done something that violates the contract. However, acting out by refusing to accomplish legitimate (or even disputed) work assignments is not acceptable and leaves the individual at risk of discipline. Personally, I think that your members in Parks would do better to wait for a grievable action on our part and go through you (the union) to pursue the matter than to take matters into their own hands and risk their County employment. Or, if you think a basis for a grievance already exists, let's get on with it rather than have your people in Parks be at risk.

"If you want to talk about this, let me know." (Underline in original.)

13. The Association opened Starr's e-mail the next morning, March 4, 2003. Association President Rusow and Association Chief Steward Bushek discussed it, and

Rusow drafted a response which he sent at about 10 a.m. Rusow asked Starr whether Lalich or Wood had ever refused to perform their duties or had been insubordinate. Rusow asserted that the stewards' actions were protected by law and that Starr's e-mail to Rusow involved "a threat to their job security and [is] illegal under state law."

At about 3 p.m. that day, Starr responded. Starr assured Rusow that he had no concern about Wood's comments in regards to filing a grievance; he also stated his view that Lalich had not been insubordinate. Starr explained that Lalich's "reported comments could imply an intent by individual members of the Parks staff to stage individual work actions with respect to projects to be carried out by volunteers. Should that occur following direction otherwise, I think that kind of action could be insubordination."

SHOP STEWARDS' REACTION

14. On the morning of March 4, Fay called Lalich into his office. Lalich was not yet aware of Starr's e-mail to Rusow. Fay asked whether Lalich was willing to assist Osborne. Lalich responded that the Association might need a formal agreement with the County regarding the use of volunteers to do bargaining unit work. Fay asked whether Lalich was refusing to work with Osborne if there was no such formal agreement. Lalich replied that he was not refusing to work.

15. Later on March 4, Bushek told Lalich about Starr's e-mail to Rusow. Lalich was surprised, shocked, and frightened about that e-mail. He returned to Fay's office and spoke with Fay about it.

16. Fay told Lalich that he was not upset with Lalich and said he was sorry about any misunderstanding. In response to a question from Lalich, Fay said that Lalich had been singled out because he was a shop steward.

17. Wood was on vacation until March 5, 2003. When Wood returned, Bushek told him about Starr's March 3 e-mail to Rusow. Wood was upset and later spoke with Fay. Wood stated that he had done nothing wrong. Fay responded that he would not apologize for the contents of Starr's e-mail to Rusow.

Fay also pointed out to Wood that Starr's e-mail to Rusow did not state that Wood had been insubordinate. Fay stated his position that it was appropriate for Wood to discuss Association issues and file grievances.

18. Wood then went to Starr's office and said that he remained upset and felt someone in County management owed him an apology.

19. Wood thought that Starr's e-mail to Rusow stated that Wood's County employment was at risk due to Wood's Association-related comments in the February 12, 2003 meeting. Starr later conceded to Wood that it appeared that Starr was singling out Wood due to Wood's comments in the February meeting.

20. Lalich and Wood believed that Starr, in his March 3 e-mail to Rusow, suggested that their actions in representing the Association's interests amounted to insubordination. Because of the above events, Lalich and Wood considered resigning as Association shop stewards. As of the hearing date, they had not resigned.

STARR-FAY COMMUNICATION REGARDING STEWARDS' RIGHTS

21. On March 5, Starr sent an e-mail to Fay stating that stewards are entitled to discuss the filing of grievances. In addition, he stated:

> "In re-reading my message [Finding of Fact 12, March 3, 5:04 p.m. e-mail to Rusow], I noticed a mistake regarding my reference to Dan Woods [*sic*]. As I understand it, his comments in the staff meeting a couple of weeks ago referred to having 626 file a grievance if you hire seasonal help without first filling the two vacant PM-2 positions. I don't have any problem with Dan's comments because his remedy (filing a grievance) is consistent with the labor agreement if he (and 626) think we've done wrong. I shouldn't have mentioned Dan in conjunction with my concerns about the comments that Rick made and I can only assume that my mistake was the result of my haste to get a message back to you before the end of the day.
>
> "My advice [the March 3, 5:04 p.m. e-mail] was intended for dealing with an employee who refuses a direct work assignment because it involves working with volunteers. That is, it would apply to an employee who takes an individual action that is outside of the labor agreement. That kind of <u>unsanctioned</u> action by individual employees is what should not be tolerated. However, on re-reading your initial message, I'm not even sure now that's what Rick was suggesting although I thought it was at the time I wrote my earlier message." (Emphasis in original.)

22. At hearing, Starr established that he understands that an Association steward's use of the grievance procedure does not amount to deliberate obstruction of County operations.

CONCLUSIONS OF LAW

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

2. Starr's March 3, 2003 e-mail communication to Rusow did not violate ORS 243.672(1)(a), (b), or (c).

Starr's e-mail specifically mentioned two Association shop stewards, Rick Lalich and Dan Wood. Wood had suggested at a staff meeting that the Association might file a grievance if the County hired seasonal employees without first filling two vacant full-time positions. On a separate occasion, Lalich had objected to the County's use of volunteers without first filling the vacancies. Assistant Department Director Starr wrote an e-mail to Association President Rusow about the activities of Wood and Lalich. (*See* Finding of Fact 12.)

The Association alleges that when Starr sent the March 3 e-mail to Rusow, the County violated ORS 243.672(1)(a), (b), and (c). We conclude that the County did not engage in unfair labor practices as alleged, and we will dismiss the complaint.

ORS 243.672(1)(A) CLAIMS

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

Subsection (1)(a) creates two separate violations. It prohibits employer actions that interfere with, restrain, or coerce employees "because of" their exercise of protected rights; it also prohibits employer actions that interfere with, restrain, or coerce employees "in the exercise of" protected rights. *Portland Association of Teachers and Bailey v. Multnomah County School District #1,* Case No. C-68-84, 9 PECBR 8635, 8646 (1986). The Association alleges that the County violated both prongs of (1)(a).

Allegation that County threatened discipline "because of" union activity. We have developed a test for determining whether a public employer has violated the "because of" prong of subsection (1)(a). *See Portland Association of Teachers and Poole v. Multnomah School District*, Case No. UP-72-96, 19 PECBR 284, 294-295 (2001) (Order on Remand); and *ATU v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780 (1998). We ask whether the employer took action "because of" the employee's exercise of rights protected

by the Public Employee Collective Bargaining Act (PECBA). *Portland Association of Teachers and Poole,* 19 PECBR at 294.

We need not apply that test here because the County did not actually discipline or take other action against either of the Association's stewards. We generally analyze allegations of unlawful threats, where there is no accompanying employer action, under the "in the exercise of" prong of ORS 243.672(1)(a). *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). We will dismiss the Association's claim under the "because of" prong of (1)(a).

Allegation that County threatened employees "in the exercise of" their protected rights. In evaluating an employer's allegedly threatening statements or conduct under the "in" prong of (1)(a), this Board applies "the objective standard of the probable effect of the statements in [question] upon employes under the totality of the circumstances." *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 7999 (1985) (employer unlawfully threatened not to promote officers if sergeants remained in the bargaining unit), citing *IAFF Local 1308 v. City of The Dalles*, Case No. C-25-76, 2 PECBR 759 (1976). We ask "whether the natural and probable effect of the employer's conduct would tend to interfere with employes' exercise of protected rights." (Footnote omitted.) *OPEU and Termine,* 10 PECBR at 521.

In the late afternoon of March 3, Starr sent the subject e-mail to Association President Rusow. This amounted to publication of the e-mail to Association members Lalich and Wood. Starr's e-mail stated:

> "I've heard that Dan Woods [*sic*] recently made a comment about grieving <u>any</u> hiring of seasonal or extra-help staffing this year if we haven't first filled the two (2) permanent PM-2 positions. Now, I've heard [from Fay] that *Rick Lalich has objected to working on a project involving volunteers*. I don't know the basis of Rick's comments for sure, but I suspect that they go to the same issue as Dan's comments.
>
> "Just so you know, *Rick's comments as they were reported to me start to go toward an area - insubordination - where I don't think he should go*. The grievance process is <u>always</u> available under the contract if Dan, Rick, other park staff or union representatives feel that we've done something that violates the contract. However, acting out by refusing to accomplish legitimate (or even disputed) work assignments is not acceptable and leaves the individual at risk of discipline. Personally, I think that your members in Parks would do better to wait for a grievable action

> on our part and go through you (the union) to pursue the matter than to take matters into their own hands and risk their County employment. Or, if you think a basis for a grievance already exists, let's get on with it rather than have your people in Parks be at risk.
>
> "If you want to talk about this, let me know." (Underline in original; emphasis added.)

The two italicized portions of Starr's e-mail are central to the Association's complaint. First, Starr stated his understanding that Lalich had "objected to working on a project involving volunteers.* * *" An employee could pursue an objection to a work assignment in a number of ways: the employee could refuse to work, file a grievance, or do nothing other than report to work. Of these possibilities, only a refusal to work might permit the County to lawfully impose or threaten to impose discipline against the employee.[2] Starr did not state that Lalich had refused to work or actually had been insubordinate. The day after Starr sent the e-mail to Rusow, he assured Rusow that he did not consider either Wood or Lalich to have been insubordinate. No sanction was imposed on Wood or Lalich.

Second, Starr indicated that the County might discipline an employee who chooses not to perform assigned work. Oregon recognizes the principle of "work now, grieve later." *Whitney v. Employment Division*, 280 Or 35, 41-42, 569 P2d 1078 (1977). A public employer generally has the right to discipline an employee who, instead of filing a grievance, refuses to perform lawfully-assigned work. Starr's statement expressed the County's intent to exercise its legal rights.

An employer does not violate ORS 243.672(1)(a) by stating its lawful intended response to certain activity. In particular, this Board has previously determined that a public employer does not violate subsection (1)(a) by stating its intention to exercise its rights under the law. In *OPEU v. Jefferson County*, Case No. UP-55-98, 18 PECBR 109, 125-127, *reconsid* 18 PECBR 199 (1999), this Board determined that the public employer's statements to bargaining unit employees amounted to an accurate statement of the law, and therefore did not violate ORS 243.672(1)(a).

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[2]There are, of course, some circumstances in which an employer cannot lawfully take action against an employee who refuses to perform assigned work. For example, an employee who refuses to perform work as part of a lawful strike under ORS 243.726 is engaged in protected activity and cannot suffer or be threatened with consequences as a result of that activity. Similarly, there are some recognized exceptions to the "work now, grieve later" rule. *See Whitney v. Employment Department*, 280 Or 35, 42, 569 P2d 1078 (1977). The Association does not argue, and we do not find, that any such circumstance exists here.

In *Jefferson County*, we cited *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78, 5 PECBR 2991, 3000 (1980). In *Klamath County*, this Board stated:

> "* * * We conclude that [the employer statement to employees] was not a coercive communication because we find nothing in the [PECBA that] would, in fact, prevent an employer from [engaging in the conduct it stated to employees]. Thus, this communication must be viewed as a lawful factual statement of District legal rights, rather than as an unlawful threat of reprisal against [employees] or a promise of benefits." 5 PECBR at 3000.

We also stated in *Jefferson County* that, because the employer had the PECBA right to do what it said it might do, "there was nothing inherently unlawful about telling employees that it planned to exercise that right, provided that it did not communicate that information in a hostile or threatening manner." 18 PECBR at 126.

Finally, we explained:

> "* * * The facts in this record do not establish that the [employer's] statements were hostile or threatening. The statements were factual and conveyed the [employer's] plans.
>
> "* * * Communicating factual and accurate information about the County's legal rights would not have the natural and probable effect of interfering with, restraining, or coercing a reasonable person in the exercise of protected rights. This element of the complaint will be dismissed." 18 PECBR at 126-127.

Applying those principles, Starr's comments were not a threat to discipline Wood or Lalich if they engaged in *protected activity*.[3] Instead, Starr notified the Association

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[3]Wood's statement that he might file a grievance is protected activity. An employer's threat to discipline an individual for filing or threatening to file a grievance would violate ORS 243.672(1)(a): "An employer interferes with protected activity when it intervenes in any way in an employe's consideration of whether or not to file a grievance or complaint." *Sandy Education Association and Davey v. Sandy Union High School District*, Case No. UP-42-87, 10 PECBR 389, 397 (1988). In this case, however, Starr *encouraged* and *invited* the Association to grieve any aspect of the seasonal or volunteer employee work disputes that the Association contended violated the parties' (continued...)

of his position that Wood, Lalich, and other employees could be disciplined if they *refused to perform assigned work*. This was a factual statement of the County's legal rights. The statement was not hostile or threatening.

Starr's e-mail to Rusow would not have the natural and probable effect of interfering with, restraining, or coercing employees in the exercise of rights protected by ORS 243.662. We will dismiss the ORS 243.672(1)(a) element of the complaint.

ORS 243.672(1)(c) CLAIM

ORS 243.672(1)(c) provides that it is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization."

We give a broad construction to "membership" as that term is used in subsection (1)(c). It includes "union activity of any nature." *Schreiber v. Oregon State Penitentiary,* Case No. UP-124-92, 14 PECBR 313, 319 (1993). We consider whether the public employer engaged in discrimination that was "intended to affect the exercise of protected rights, and which does so or would have the natural or probable [effect] of doing so." *AFSCME Council 75, Haphey and Bondietti v. Linn County*, Case No. UP-115-87, 11 PECBR 631, 650 (1989).

Applying these standards, we find no (1)(c) violation. First, there was no discriminatory action. The County did not actually discipline the two job stewards. Second, the contents of Starr's e-mail would not have the natural and probable effect of influencing a reasonable employee's decision about exercising protected rights. We will dismiss the ORS 243.672(1)(c) element of the complaint.

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[3](...continued)
contract.

Similarly, Lalich's objection to the use of volunteers is protected activity. *See Central School District 13J v. Central Education Association,* 155 Or App 92, 962 P2d 763 (1998) (asserting rights under a collective bargaining agreement is protected activity). A threat to discipline Lalich for the objection would violate (1)(a). Here, however, Starr did not threaten Lalich based on his objection to the use of volunteers. We read Starr's e-mail to say that *if* the matter goes beyond an objection and escalates into a refusal to work, then discipline may result.

ORS 243.672(1)(B) CLAIM

ORS 243.672(1)(b) provides that it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist the formation, existence or administration of any employee organization."

In deciding a subsection (1)(b) claim, we determine whether the employer's action amounted to "actual" domination, interference, or assistance that has a "direct effect" on a labor organization. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 351, *reconsid* 20 PECBR 388 (2003), citing *Klamath County Peace Officers Association v. Klamath County*, Case No. UP-18-97, 17 PECBR 515, 526, *reconsid* 17 PECBR 579 (1998).

The Association failed to prove it suffered any actual harm as a result of Starr's e-mail. Although Lalich and Wood considered resigning their positions as shop stewards, they did not do so. The absence of this critical element leads us to conclude there is no (1)(b) violation, so we need not proceed with the rest of the (1)(b) analysis. We will dismiss the ORS 243.672(1)(b) element of the complaint.[4]

ORDER

The complaint is dismissed.

DATED this 13th day of April 2004.

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

[4]Because we dismiss the complaint, we will not order the County to pay a civil penalty to the Association.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-15-04

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75, Petitioner, v. CITY OF JUNCTION CITY, Respondent.	)	ORDER CLARIFYING BARGAINING UNIT

On January 27, 2004,[1] Oregon AFSCME Council 75 (Petitioner) was certified as the exclusive representative of a bargaining unit of the City of Junction City (Respondent) employees described as:

> "All regular full and part-time employees for the City of Junction City, *excluding* managers, supervisors, and confidential employees and employees in the Police bargaining unit."

On March 9, 2004, Petitioner filed this OAR 115-25-005(3) unit clarification petition seeking a determination of whether the positions of City Librarian and Recreation Supervisor/Coordinator are included in Petitioner's bargaining unit, based upon the terms of the certification language. Petitioner states in the petition that the two positions were challenged during the elections process.

On March 11, this Board served the petition on Respondent by certified mail. Respondent certified, on a certificate of posting signed March 16, that notices of

[1]The year of certification was incorrect on the original certification. To correct this error, an Amended Certification of Representative was issued April 2, 2004.

the pending unit clarification petition were posted that day. Respondent filed no timely objection to the petition.

DISCUSSION

OAR 115-25-045 provides that a hearing will be conducted "[w]hen a valid petition has been filed and objections * * * have been timely filed * * *."

When a labor organization proposes a facially appropriate unit clarification petition and the employer does not file an objection, the petition is generally granted.[2]

Because there are no objections to the petition, a hearing is not necessary, and we shall grant the requested clarification.

ORDER

The bargaining unit is clarified to include the City Librarian and Recreation Supervisor/Coordinator.

DATED this 16th day of April 2004.

Rita E. Thomas, Chair

Paul B. Gamson, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

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[2]*Compare Teamsters Local 223 v. City of Gold Hill*, Case No. RC-75-92, 14 PECBR 290 (1993) (election ordered where no valid objections filed); *Teamsters Local 57 v. City of Bandon*, Case No. UC-47-91, 13 PECBR 225 (1991) (subject to results of self-determination election, clarification ordered where employer's objections were untimely).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-44-03 and UP-48-03

(UNFAIR LABOR PRACTICE COMPLAINTS)

BEND POLICE ASSOCIATION, Complainant, v. CITY OF BEND, Respondent. Case No. UP-44-03	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
CITY OF BEND, Complainant, v. BEND POLICE ASSOCIATION, Respondent. Case No. UP-48-03	)	

An expedited Board hearing was held before B. Carlton Grew (Board Agent) on September 30, 2003, in Bend, Oregon.[1] The record closed on October 15, 2003, upon receipt of the parties' post-hearing briefs.

[1]The Board contracted with Mr. Grew to make it possible for the hearing to be held in Bend rather than Salem, to accommodate the number of witnesses and the staffing needs of the City's Police Department.

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, 747 S.W. Mill View Way, Bend, Oregon 97702, represented the City of Bend.

John Hoag, Attorney at Law, The Law Office of John Hoag PC, P.O. Box 42021, Eugene, Oregon 97404, represented the Bend Police Association.

On August 13, 2003, the Bend Police Association (Association) filed an unfair labor practice complaint against the City of Bend (City), alleging that the City bargained in bad faith when it (1) introduced an insurance proposal after representing that there would be no proposals on insurance; (2) violated bargaining ground rules by making a new proposal on health insurance after the second bargaining session; (3) included language in its final offer which differed from the language the City had submitted in bargaining with the Association; and (4) refused to select an interest arbitrator and proceed to arbitration. This Board granted expedited consideration and scheduled a hearing for September 17, 2003; that hearing date was changed to September 30, 2003, by agreement of the parties.

On September 2, 2003, the City filed an answer, affirmative defense, and counterclaim. This Board decided to treat the counterclaim as a separate complaint, UP-48-03, but to hear and decide the complaints together. The City admitted and denied certain of the allegations and raised affirmative defenses. It alleged as a counterclaim that the Association engaged in a course of bad faith conduct with the intent of avoiding meaningful bargaining on fundamental issues (i.e., wages, health insurance, and PERS) and included proposals on permissive subjects of bargaining in its last offer.

On September 11, 2003, the parties were notified that the Board Agent would conduct the hearing in Bend and produce the Findings of Fact for this Board; and that this Board would consider those Findings of Fact, along with the parties' arguments, and issue a final Order.

The Association amended its complaint to seek representation costs, without objection, on September 18, 2003, and the parties agreed that the City's previous answer would be considered the City's answer to the amended complaint.

The Board Agent's Findings of Fact were transmitted to the parties on October 31, 2003. The Association objected to an error in describing the "final offer" as a "last best offer" at one point in the Findings; no other objections were filed.

ISSUES

The issues are:

1. Whether the Association committed the acts or engaged in the conduct alleged, and whether such acts violated ORS 243.672(2)(b) and (c).

2. Whether the City failed to negotiate in good faith, in violation of ORS 243.672(1)(e), by submitting an insurance proposal in its proposed last offer.[2]

3. Whether the City violated a ground rule and refused to select an interest arbitrator, in violation of ORS 243.672(1)(e).

For the reasons set forth below, we conclude that the City violated ORS 243.672(1)(e) and that the Association did not violate ORS 243.672(2)(b) and (c). We will order the parties to proceed to interest arbitration.

RULINGS

The City offered evidence regarding the major issues in the negotiations that led to the previous collective bargaining agreement. The Association objected to the introduction of evidence of matters outside the negotiations at issue here. The Board Agent properly received the evidence. It is relevant insofar as it demonstrates that the same issue which divides the parties here—employee payment for health insurance premiums and costs—was the issue which divided the parties in bargaining for the previous collective bargaining agreement and led to its resolution through interest arbitration.

The City also sought to introduce testimony regarding the content of the Association's last offer regarding insurance. The Association objected. The Board Agent properly received the evidence. It is relevant to the Association's understanding of the unwritten bargaining ground rules that the Association claims the City violated.

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[2]The words "final offer" have a specific meaning under ORS 243.650(11) and ORS 243.742. Under the statute a final offer is submitted after the completion of mediation. We find the parties did not enter the "final offer" stage of bargaining under the law. Therefore, we will use the terms "last offer" when writing about the parties' current proposals.

The Board Agent's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of all nonsupervisory and nonconfidential police department employees of the City, a public employer.

2. In 2000, the City and Association arrived at a collective bargaining agreement through binding "last best offer" arbitration. Employee payment for health insurance premiums and costs was the most important issue in the process that led to that agreement. The 2000 agreement covered the period July 1, 2000, through June 30, 2003.

3. The parties met to bargain a successor agreement on four occasions: (1) November 26, 2002; (2) February 23, 2003; (3) March 17, 2003; and (4) June 10, 2003.

4. Both parties proposed to continue the prior contract terms except for their proposed additions or deletions. The parties exchanged their initial written proposals prior to the first negotiation session. Although the parties discussed possible changes to their initial proposals during their negotiation sessions, neither party submitted written changes to those proposals between the first negotiating session and the date the last offers were submitted.

5. Counsel for the parties, Bruce Bischof for the City and John Hoag for the Association, were present at the first and third bargaining sessions.

FIRST NEGOTIATION SESSION (NOVEMBER 26, 2002)

6. The parties intended that the first negotiation session would be tape recorded. Through inadvertence or mechanical error, the recording did not take place.

7. At the first session, the parties discussed ground rules. The parties verbally agreed that they would not submit "new proposals" after the end of the second negotiation session. The parties had different, but unexpressed, understandings of this verbal ground rule. The parties did not execute a written ground rules agreement. Hoag's bargaining notes (as typed with abbreviations replaced) stated that the ground rules were as follows:

> "Agreed for ground rules:
> 1. TAs will have to recommend ratification and approval.

2. TAs will be initialed and signed.
3. Initially set 3rd meeting is cut off for new proposals. Changed that to 2nd meeting * * *."

8. At the first negotiation session, Human Resources Manager Janice Grady discussed the City's written contract proposals. Grady told Association representatives that the City was not proposing to change the insurance provision, Section 30, except to add a requirement that the Association participate in the City's employee-City health insurance committee.[3] The City's proposed addition to Section 30 read:

> "* * * The Association agrees to actively participate in the City of Bend Employee Insurance Committee with the goal of identifying and incorporating into the City of Bend health insurance policies, provisions that help control costs while providing adequate health insurance coverage." (Underlining omitted.)

9. The Association's first set of proposals would add the following to Section 30: (1) a statement that "[t]he City shall work with the Association to attempt to increase benefits for diabetics" (underlining omitted); (2) raise the amount of life insurance for employees from $50,000 to $100,000; and, (3) provide that the cost of life and medical insurance would be paid wholly by the City, instead of the existing language whereby the City paid 95 percent of the premiums and the employees paid the remaining 5 percent.

10. The City's first set of proposals included a wage freeze and a one-year agreement. The Association sought a three-year agreement.

SECOND NEGOTIATION SESSION (FEBRUARY 23, 2003)

11. Bischof and Hoag were not present at the second negotiation session. Grady told Association representatives that the City did not have the funds for a wage

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[3]The Association already had permanent representatives on the insurance committee, although no contract language discussed that committee or called for the Association's participation in it. In 2000, the Association objected to a proposed change in insurance policies that had been recommended by that committee. The recommended change was not made for this bargaining unit.

increase. In response, Association negotiator John Carlon responded that the parties might as well proceed to arbitration.

12. During the second session, the City verbally presented proposed changes to the retirement provisions (Section 32). Those proposed changes were not reduced to writing.

13. During the second session, the City and Association signed tentative agreements on two contract items.

THIRD NEGOTIATION SESSION (MARCH 17, 2003)

14. Bischof and Hoag were present at the third (March 17) negotiation session, which was tape recorded. The transcript of that recording was introduced into evidence.

15. At the third session, the City withdrew its verbal proposals to modify the retirement provisions (Section 32). The City declined to sign tentative agreements with the Association retaining existing language from the prior collective bargaining agreement on articles as to which there were no outstanding proposals, including Section 32.

16. At the third session, the Association verbally offered to withdraw its proposal that health insurance be fully paid by the City, and further offered to tentatively agree to the prior contract language in Section 30 which provided that the City would pay 95 percent of health insurance costs. The City declined this offer. The Association then verbally offered to include all of the City's proposed new language in Section 30 except for the phrase "and incorporating into the City of Bend health insurance policies." The City declined this offer.

17. At the third session, the parties also discussed the issues of comparability of Association wages and benefits with those of other communities, and the duration of the agreement.

FOURTH NEGOTIATION SESSION (JUNE 10, 2003)

18. At the fourth negotiation session, the City presented a comprehensive package to settle the contract.[4] City officials believed that package was the most generous the City could offer, and that further negotiations and arbitration could be avoided if the Association accepted the package. Accordingly, the City negotiating team asked Police Chief Andy Jordan to present the package. This was the only negotiation session that Chief Jordan attended.

19. In the course of presenting the June 10 package to the Association, Chief Jordan stated that if the Association refused that package, the City would not use that package as its last offer for the purpose of binding arbitration. Grady told the Association representatives that if the Association rejected that package, the City would need an opportunity to present another offer, and the package being presented that day would not be the offer the City would take to arbitration.[5] Neither party raised the issue of the impact of the ground rules in response to these comments from Chief Jordan and Grady. The Association representatives agreed to present the City's package to the membership for a vote.

20. The time required to complete the Association membership vote on the City's package would consume most of the remainder of the 150-day period for bargaining provided in ORS 243.712(1). The parties agreed in the June 10 session to waive mediation and file their final offers with this Board if the Association rejected the City's package.

21. In a telephone conversation later on June 10, Grady told Church that the City would agree to waive mediation but would not agree to waive the final offer process.[6] She stated that if the Association rejected the package presented that day by

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[4]The parties agreed that nothing which took place regarding the City's offer in this fourth negotiation session would be used in any unfair labor practice proceedings. The content of that offer is not in the record of this case.

[5]Association negotiator Carlon's recollection was that "we agreed or that we heard from them that they would be free to craft a new proposal." Association representative Buck Church's recollection was that "obviously both sides would craft or draft a final offer, but it would have to stay within the parameters of the ground rules that we started at the first meeting."

[6]It is not clear the process the parties intended to use after waiving the mediation stage of the final offer process. Mediation and the final offer are part of one process. The parties did not (continued...)

Chief Jordan, the City would craft an offer that would differ from what it had offered before. Church does not assert that he objected or raised the issue of the impact of the ground rules in response to this information.

POST-BARGAINING ACTIVITY

22. Association Attorney Hoag recommended that Association members reject the City's June 10 package, which they did.

23. On July 3, 2003, the State Conciliator wrote to the parties: "* * * In order for ERB to take any action in this matter, you need to provide me with a written confirmation of the process to which you have agreed, signed by both parties. Specifically, I need to know the time lines and steps of your modified process. * * *" On July 8, the State Conciliator received a response to her letter from the Association, but it only indicated that the parties intended to proceed to interest arbitration "in accordance with Oregon law."[7]

24. The City's last offer, filed with the Board in July 2003, included proposed changes in the language of Section 30 that had not been presented at the bargaining table. It read as follows:[8]

> "E. ~~The cost of the health and dental insurance described above shall be paid 95% by the City and 5% by the employee.~~

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[6](...continued)
respond to the State Conciliator's request that the parties notify her of their timelines and process for the interest arbitration they had agreed to. "Final offer," as defined in ORS 243.650(11),"* * * means the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse." ORS 243.742(2) directs parties to initiate binding arbitration for strike-prohibited employees by filing a final offer and petition for initiating interest arbitration with the mediator after mediation has not culminated in a contract.

[7]For voluntary interest arbitration under ORS 243.712(2)(e) and OAR 115-40-015(3), we require the parties to submit to this Board a request to initiate arbitration "accompanied by a copy of the agreement to arbitrate." The parties have stipulated to include in this record the communications in the State Conciliator's file regarding waiver of mediation, the parties' request for interest arbitration, and the State Conciliator's initiation of interest arbitration.

[8]The struck language indicates a proposal to delete the current language; the underlined language is an addition to the current language.

Effective the month after the signing of this agreement, the City will contribute the first $900 of the monthly premium for full family medical, vision, and dental insurance coverage. Each Police Association member shall pay the portion of the premium that exceeds $900.

"F. The City may offer more than one medical, vision, and/or dental insurance plan with differing benefit levels and differing premium costs. Each employee can choose among the plans offered. Regardless of the plan selected by the employee, the City contribution will not exceed $900 per month.

"G. Employee Health Insurance Committee. The Police Association will appoint two members to represent the Police Association on the City of Bend Employee Health Insurance Committee. This committee will be composed of two representatives of each participating City of Bend bargaining unit, two employees representing the non-represented employee group and an equal or lesser number of City management staff members. It is the charge of the Employee Health Insurance Committee to look at cost control through plan design and/or investigating different insurance carriers. The committee will strive to maintain a plan that is substantially equal in the insurance benefits to the current benefits.

"The committee will schedule regular meetings to review insurance usage and discuss employee health insurance issues. Should the current insurance become unavailable, the committee will evaluate alternatives and recommend a course of action. If the committee cannot reach a consensus, then a report summarizing the positions of the committee members shall be given to the City Manager and the ruling board of each participating bargaining unit. If any or all parties, the City Manager or the bargaining unit, reject the recommendation of the committee, or cannot reach agreement to change the insurance plan or carrier, then the parties will immediately commence bargaining."

25. According to Church, the $900 cap was "probably" sufficient to meet all employee insurance costs at the current level.[9] The City also counter proposed an option to reopen wages and insurance in the second and third years of the three-year contract it proposed in the last offer. The City's initial proposal had been for a one-year contract, while the Association had proposed and vigorously advocated a three-year contract term.

26. After receiving the City's last offer, Association counsel Hoag wrote City counsel Bischof, objecting that the City's health insurance proposal violated the ground rule agreement of the parties and, in his view, also violated the procedure specified by this Board in *City of Madras v. Madras Police Employees Association*, Case No. UP-63-02, 20 PECBR 258 (2003). Hoag's letter requested written assurances that proposed paragraphs (e) and (f) of Section 30 would be withdrawn, and stated the Association's intent to file an unfair labor practice complaint if those provisions were included in the City's Last Best Offer.

27. Bischof wrote a letter on behalf of the City, responding to Hoag's letter, in relevant part, as follows:

> "It is the City's understanding that the parties agreed that in the event the settlement offer was rejected, either or both parties would be free to craft a final or last best offer which differed from previous negotiations or discussions. The City clearly would not have agreed to waive mediation in the absence of reserving the right to craft a last best offer different than what had been informally discussed during the abbreviated bargaining process. In other words, the City intended to draft a final offer prior to the mediation session scheduled for June 16 in order to conform to ERB's case law. Since no mediation session was held, the City specifically reserved the right to modify its final proposal if the settlement package was rejected by the Association.
>
> "Therefore, on behalf of the City of Bend, I am asking you to reconsider your threat of an unfair labor practice and allow the parties to proceed to arbitration based on the final offers * * *.

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[9]The Association does not argue that the City's proposal was regressive or unresponsive to the Association's initial proposal for 100 percent paid insurance coverage.

> If not, I will be advising the City to rescind its written waiver to the State Mediator which resulted in the cancellation of the June 16 mediation session. The City will then ask the State Conciliator to reschedule the mediation session based on the disagreement between the parties as to the conditions which resulted in the waiving of the mediation process."

28. The Association did not thereafter withdraw its threat to file a complaint and did not secure the appointment of an interest arbitrator or proceed to interest arbitration in the absence of the City based on the last offers the parties submitted. The City did not thereafter seek to rescind its written waiver of mediation or request that the State Conciliator schedule a mediation session.

29. The City made no effort to bargain the revised insurance proposal with the Association after submitting the revised proposal as part of its last offer. The Association made no effort to bargain regarding insurance after receipt of the City's last offer. No evidence exists that the City communicated its rationale underlying the revised insurance proposal to the Association, nor that the Association inquired into the rationale.

30. The City's answer to the allegation that it refused to select an interest arbitrator or proceed to interest arbitration reads as follows:

> "* * * [T]he City has not refused to schedule interest arbitration and is fully prepared to do so when the unfair labor practice litigation provides the parties with a dispositive road map as to what shall be contained in the "last best offers." The City has informed the Association that it is willing to proceed to interest arbitration as soon as the Employment Relations Board rules on the current uncertainty of what the content of the "last best offers" to the Arbitrator shall be. Based on the recent City of Madras and Madras Police Association litigation, the City of Bend maintains that it is in the best interest of all parties, including the Arbitrator, to ensure that the decision ultimately rendered will not be vacated as in the City of Madras."

31. The Association's last offer included proposed modifications to the seniority and hours of work articles. All of the proposed language changes were also part of the Association's initial written proposals. The City did not object to those proposals in bargaining.

32. After submission of last offers, the City informed the Association for the first time that it considered the proposed modifications of the seniority and hours of work articles in the Association's last offer to address permissive subjects of bargaining. The Association withdrew those items from its last offer.

CONCLUSIONS OF LAW

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

2. The Association did not violate ORS 243.672(2)(b) and (c).

3. The City violated ORS 243.672(1)(e) when it refused to proceed to interest arbitration. The City did not breach a bargaining table promise in violation of ORS 243.672(1)(e), did not violate the law regarding unwritten ground rules, and did not unlawfully submit an insurance counter proposal in its last offer.

DISCUSSION

THE (1)(E) ALLEGATIONS

The Association has charged that the insurance proposal in the City's last offer violated ORS 243.672(1)(e) in three respects: that it (1) breached a promise not to make a proposal on insurance; (2) violated an unwritten ground rule by introducing a new proposal after the second negotiation session; and (3) included language in a last offer that had not previously been offered to the Association in bargaining. The City responds that (1) it opened the subject of insurance in its initial proposals; (2) the unwritten ground rule related to new subjects, not new language on open subjects, and it fully expected to be able to modify its proposals and make counter proposals on open subjects; and (3) the parties agreed on June 10, 2003, as part of the waiver of mediation, that both would be free to craft a final offer or last best offer to an interest arbitrator without restrictions.

As discussed below, we conclude that (1) the City made no promise not to propose a change in insurance, and thus did not breach such a promise; (2) the parties did not negotiate or sign written enforceable ground rules that would preclude modifying language or making counter proposals on subjects that were opened by either party. Therefore, the City's modification and counter proposal on health insurance did not violate a ground rule; (3) the City's inclusion of a modified health insurance proposal in its last offer did not breach the duty to bargain in good faith; and, (4) the City did violate

the duty to bargain in good faith when it refused to proceed with interest arbitration after the parties agreed to waive mediation and proceed to interest arbitration.

1. Alleged Breach of a Promise Not to Propose Insurance Changes

This Board has previously deemed "problematic" the question of whether a breach or repudiation of an oral agreement is actionable as bad faith under ORS 243.672(1)(e). *See Portland Police Association v. City of Portland*, Case No. UP-34-91, 13 PECBR 371, 372, n. 1 (1991), where we found that the association failed to prove the city had repudiated an oral agreement. There, this Board concluded that we did not need to decide whether the alleged conduct violated ORS 243.672(1)(e). We are presented with a similar situation here in that the Association has failed to prove that the City promised not to propose changes to the health insurance article.

The Association alleges that the City promised that it would make no proposals to change the insurance article. However, the record shows that the City did open the insurance article to propose that the Association participate in the City's employee-City health insurance committee. Consistent with this stated intent, and inconsistent with the promise the Association asserts was made, the City's initial proposals included that change in the health insurance article.

The City's last offer also addressed the proposed requirement of Association participation in the insurance committee and added a counter proposal to increase the City's payment of health insurance premiums up to a cap that was "probably" enough to pay the full premium at the current level. The Association opened the subject of premiums by proposing to remove the 5 percent employee contribution to insurance premiums from the contract.[10] We therefore conclude that the City did not bargain in bad faith, in violation of ORS 243.672(1)(e), by making a proposal on premiums after the Association opened that subject. We will dismiss this charge.

2. The Alleged Violation of Ground Rules

The parties did not reduce their ground rules to writing. The Association argues that the City's alleged breach of an unwritten ground rule constituted bad faith

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[10]Both parties agreed to an abbreviated bargaining process including a fourth bargaining session which seemingly set the stage for waiving mediation. On the issue of the City's last insurance proposal, the Association has not shown that the City's proposal was not responsive to the Association's initial proposals and the bargaining process.

bargaining in violation of ORS 243.672(1)(e). This Board will enforce *written* ground rules under ORS 243.672(1)(g) and (2)(b).[11] It is unnecessary in this case to reach the question of whether a breach of an *unwritten* ground rule would constitute bad faith bargaining because the Association has not shown that the parties agreed to the form of the ground rule it now posits.[12]

No evidence exists that the parties discussed the meaning of the phrase "no new proposals" when they verbally agreed to a ground rule prohibiting "new proposals" after the second bargaining session. That phrase is susceptible to two interpretations. One interpretation—that offered by the City—is that the parties agreed not to open new subjects after the second bargaining session.[13] The alternative interpretation—that offered by the Association—would freeze the language, as well as the subject matter, of proposals after the second bargaining session. Hoag's cryptic bargaining notes do not provide a basis for choosing between these two plausible interpretations,[14] and the participants in that discussion differ in their understanding of the resulting ground rule.

When faced with ambiguous language, this Board prefers the plausible interpretation which advances good faith bargaining. This preference favors the City's interpretation of this unwritten ground rule. Once a subject has been opened, it is almost self-evident that agreement on that subject is unlikely unless one or both parties modify

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[11]*City of Salem v. IAFF, Local 314*, Case No. C-152-80, 5 PECBR 4237, 4242 (1980).

[12]It is also unnecessary to decide whether such a breach or repudiation would violate other portions of the Public Employee Collective Bargaining Act (PECBA) not cited in the Association's complaint.

[13]This concept has been articulated clearly by parties in other cases. *See, e.g., City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 430 (1990) ("8. All new proposals must be made by the next session after the 5th mutual exchange of proposals between the parties. This deadline shall not restrict counter proposals or revisions to proposals on issues already identified in bargaining."); and *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80, 5 PECBR 4237, 4238 (1980) ("'All items for negotiations shall be presented no later than the second negotiating session. This does not preclude the parties from modifying their position on items already presented. Wholly new items may be allowed subsequent to the second negotiations session only by written mutual agreement between the chairpersons.'" (Emphasis in original omitted.)

[14]This Board uses the term "new proposal" as a term of art, not in its colloquial sense. However, here Hoag's notes were made in the real world of table bargaining, where parties do not necessarily speak in technical Board terms.

their proposals to meet the concerns and interests on that subject expressed in bargaining. Discussions and proposals that lead to responsive modifications are at the heart of good faith bargaining.[15] Under the interpretation offered by the Association, it is difficult to envision a scenario in which agreement could be reached unless the parties found mutually agreeable language by the second bargaining session. Absent such fortunate draftsmanship, later bargaining sessions would be largely futile, and here would have stopped the parties from making counter proposals by the second bargaining session.

In view of the above considerations, we interpret the ambiguous phrase "no new proposals" to refer to proposals on subjects which had not been opened by either party by the second session. The Association thus has not proven that the parties agreed to freeze the language of their proposals as of the second bargaining session. We therefore conclude the City did not violate ORS 243.672(1)(e) by modifying its proposal on an open subject after agreeing to an unwritten ground rule that limited the time in which to make "new proposals." We will dismiss this charge.

3. The Change in the City's Insurance Proposal in its Last Offer and Waiver of Mediation

Our review of the truncated bargaining followed by these parties leads us to a similar conclusion regarding the question of whether the City's last offer improperly departed from its earlier insurance proposal. On the record before us, that last offer was not a "final offer" within the meaning of ORS 243.650(11), 243.712(2)(b), and 243.742(2), and OAR 115-40-000(1). As discussed below, it was just an offer in the course of the negotiation. The offer was not made at impasse and the agreement was not conditioned on its acceptance.

The PECBA provides a process by which parties who have not resolved all outstanding issues in bargaining receive assistance in arriving at the terms of a collective bargaining agreement. *Roseburg Education Association v. Roseburg School District*, Case No.

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[15] *ATU, Division 757 v. Rogue Valley Transportation Dist.*, Case No. UP-80-95, 16 PECBR 559, 586, *adhered to on recons* 16 PECBR 707 (1996); *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985) ("Even though this Board, like the NLRB, '* * * cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union * * *' if the bargaining duty prescribed by the PECBA and the NLRA '* * * is to be read as imposing any substantial obligation at all.'" [citing *NLRB v. Reed & Prince Mfg. Co.*, 205 F2d 131, 32 LRRM 2225, 2228 (CA 1, 1953), *cert denied* 346 US 887, 33 LRRM 2133 (1953); emphasis in original]).

UP-26-85, 8 PECBR 7938, 7956 (1985). For strike-prohibited units, that assistance consists of a series of carefully structured steps, beginning with bargaining; continuing with mediation, the declaration of impasse, and final offers; and concluding, if necessary, with interest arbitration under ORS 243.742(2) and 243.746.[16]

ORS 243.742(2) articulates a statutory guideline for parties to utilize mediation and the impasse/final offer process for narrowing bargaining differences. These guidelines assure that the parties and this Board can discern when they have bargained to impasse before moving to interest arbitration. In this case, the parties did not utilize mediation or the final offer process; instead, they waived that process, presumably under ORS 243.712(e). But they have not provided an agreed-upon understanding to the State Conciliator of what that waiver entailed.[17] In doing this, they took their unresolved bargaining issues outside of the articulated statutory process for strike-prohibited units without taking care to establish the specific terms of the alternative bargaining process they intended. The Association now seeks to have this Board apply the legal principles for the latter stages of the PECBA dispute resolution process as if this dispute were in the midst of the statutory guidelines articulated for the strike-prohibited bargaining process.

The parties' disagreement about what their agreement to waive mediation entailed makes problematic any attempt to determine which principles from the PECBA strike-prohibited unit dispute resolution process they meant to apply despite that waiver. It is well established that a waiver of a statutory right must be made in "clear and unmistakable language." *Riddle Association of Classified Employees v. Riddle School District*, Case No. UP-114-91, 13 PECBR 654, 664 (1992); *In the Matter of a Petition by the City of Gresham for a Ruling Concerning ORS 243.742*, Case No. C-126-84, 8 PECBR 6710, 6713 (1984); *Corvallis School District 509J v. OSEA*, Case No. C-82-82, 6 PECBR 5409, 5412 (1982). A strong public policy interest exists in affording "an alternate, expeditious, effective and binding procedure for the resolution of labor disputes." ORS 243.742(1). In

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[16]However, ORS 243.712 (2)(e) allows for an agreement to proceed to interest arbitration at any time.

[17]As noted, the State Conciliator's request for more information on the timelines and steps of their process generated only a cryptic response from the Association that the parties would proceed to interest arbitration "in accordance with Oregon law." They did not inform her whether or in what circumstances there would first be a formal declaration of impasse; they did not indicate whether they would submit "final offers" at some point prior to "last best offers" or, if so, on what timeline they would do so. They thus left it unclear at what point they intended to have the statutory procedures and timelines for interest arbitration come into play.

view of that interest, we deem it at least equally important to have clarity in any waiver of the dispute resolution steps provided in the PECBA. That clarity did not exist here.

ORS 243.742(2) prescribes mediation as one step of the PECBA dispute resolution process because it is an effective tool in guiding parties toward mutually acceptable compromises. Particularly where, as here, the parties have met for bargaining only a few times in the current round of bargaining, mediation provides the forum to explain the rationale behind proposals, explore alternative means of resolving concerns, and resolve language discrepancies before the parties submit final offers to the mediator and then last best offers for interest arbitration. It is designed to culminate in an agreement or a clear understanding of the issues over which the parties are at impasse. Mediation may be lengthy or quite abbreviated; the mediator may declare impasse at any time, and the parties may do so after 15 days of mediation. Such a declaration of impasse provides clear notice that, absent agreement, the parties will move to the later phases of the PECBA dispute resolution process.[18]

Parties who devise their own extra-statutory dispute resolution process should articulate the terms of that process clearly. In this case, the parties left it unclear which, if any, of the statutory principles would apply in their alternative process. This uncertainty would have been of little moment if that process ultimately had resulted in a collective bargaining agreement.[19] However, when a dispute arose under their alternative process, it was premature to apply the legal principles for later stages of the PECBA

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[18]We note that the 1995 amendments to the PECBA made significant changes in the strike-prohibited dispute resolution process. Final and last best offer definitions were added and the process expanded to clarify the steps that the parties follow to reach impasse and interest arbitration. In 1995, ORS 243.712(2)(e) was modified to remove language which formerly allowed voluntary arbitration to supersede mediation, but the language in that section providing for submitting all disputed issues to final and binding arbitration at any time was not changed.

[19]For this reason, we see no reason to alter our historic practice of providing a list of interest arbitrators whenever the parties request arbitration and file a copy of their agreement to arbitrate as called for by OAR 115-40-015(3), regardless of whether the bargaining unit consists of strike-permitted or strike-prohibited employees. This step may be an effective means of reaching closure on a collective bargaining agreement in either kind of bargaining unit. However, the ministerial act of providing such a list should not be interpreted as a finding by this Board that the parties in any particular case are otherwise following an articulated PECBA dispute resolution process. The parties can voluntarily agree to their own bargaining process, but we have no authority or road map to enforce a collective bargaining dispute resolution process other than the PECBA or one clearly described by the parties in a written agreement.

dispute resolution process to parties who had not followed the earlier stages. These parties have agreed to waive mediation and the parties have submitted proposals to this Board and requested appointment of an interest arbitrator. The State Conciliator sent the parties a letter to initiate interest arbitration. This is all we know about where the parties are in their mutually agreed upon bargaining process. We do not know if they consider that they are at impasse. We do not know if they intend to craft last best offers that are different than the proposals submitted to the State Conciliator.

Here, the City's last offer is not a "final offer" within the meaning of ORS 243.742(2). As a result, the applicable legal analysis involves the question of whether the City's modified insurance proposal evidences bad faith table bargaining, not whether that proposal conditions the agreement on its acceptance as final or last best offer.[20] In view of our conclusion that the parties have not submitted final offers under the law, we will address only the question of whether the City's modification of its insurance proposal constituted bad faith bargaining in a pre-mediation context.

The obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." ORS 243.650(4). Parties in collective bargaining must make reasonable efforts to reconcile their differences. *ATU, Division 757 v. Rogue Valley Transportation Dist.*, 16 PECBR at 586; *Lane Unified Bargaining Council v. McKenzie School District No. 68*, 8 PECBR at 8198. In this case, the City's modification of its insurance proposal evidences an effort to reconcile the parties' differences in two regards.

Looking first at the modified language describing the proposed Association participation in the City-wide insurance committee, that language addressed concerns expressed by the Association in the third bargaining session. In that session, the Association offered to accept the City's insurance proposal with the exception of the phrase "and incorporating into the City of Bend health insurance policies." The Association's offer reflected an expressed concern that the Association would be bound by changes recommended by the City-wide insurance committee. The expanded language later proposed by the City addressed that concern by clarifying the committee's role. This

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[20]For this reason, cases such as *City of Madras, supra*, which concern proposals that have not been subjected to the "crucible of bargaining" are inapposite. *City of Madras*, and its progenitors, involve the end stages of the PECBA dispute resolution process when parties are conditioning an agreement on the proposed language. This most often happens after bargaining and mediation have concluded and impasse has been declared. Here, the parties did not enter mediation.

modification in the City's proposal fleshed out the earlier proposals and discussions. It was another path toward the ends discussed in bargaining, and dealt with concerns and interests raised by the Association.

Turning to the City's proposal for a hard dollar cap on premiums, this modification of the City's insurance proposal would "probably" give the Association the fully-paid health insurance it sought, at least at the time, with the possibility of reopening negotiations to address future premium increases. It thus represented a counter proposal to the Association's initial proposal that the City pay 100 percent of the premiums. On this record, this proposal addressed a subject raised in bargaining and was a possible step toward narrowing the gap between the parties.

Both of these modifications in the City's insurance proposal came shortly after the Association's members rejected a package whose terms are not in evidence. The City's modifications were, on this record, a move toward the Association's proposals which reasonably attempted to reconcile the parties' differences. We therefore conclude the City did not violate ORS 243.672(1)(e) by including a modified insurance proposal in what the parties termed its "final offer," and we will dismiss this charge.

4. The Refusal to Select an Interest Arbitrator or Proceed to Arbitration

The Association further charges the City violated ORS 243.672(1)(e) by refusing to select an interest arbitrator or proceed to arbitration. We interpret the City's answer to the unfair labor practice complaint to be a refusal to select an interest arbitrator or proceed with interest arbitration at this time.

The parties agreed to waive mediation and intended to proceed to interest arbitration with some form of the proposals they submitted to this Board when requesting appointment of an arbitrator. Although the parties did not explain the process or timelines they have agreed upon, it is evident from their communications with the State Conciliator that both parties intended to be in the interest arbitration phase of the dispute resolution process. In this regard, the duty to select an interest arbitrator and proceed to arbitration had matured when the City refused to select an arbitrator.

We understand the City's desire to have clarity about whether its proposal would be found to violate this Board's logically evolved bargaining proposal standard, and whether we would find that promises or ground rules had been broken in violation of the law. That clarity may have been found in the mediation process. But when the City was

notified by the Association of its concerns about the City's offer, it made no effort to withdraw its waiver of mediation or its agreement to proceed to arbitration.

We conclude the City violated ORS 243.672(1)(e) when it refused to select an arbitrator and proceed to arbitration.

THE (2)(B) AND (C) ALLEGATIONS

1. Surface Bargaining

The City charges that the Association's bargaining overall demonstrated bad faith, in violation of ORS 243.672(2)(b) and (c). We find no merit to these charges. On this record, the Association engaged in substantive discussions of wages, insurance, and pensions—all of which were subjects in dispute in these negotiations. In the third bargaining session, the Association expressed a willingness to agree to the City's initial insurance proposal with one modification and proposed tentative agreements on the other articles that had been opened (including pensions, where the parties were in agreement that there would be no change). The Association's conduct in this regard cannot be described as bad faith bargaining, and we therefore will dismiss this charge.

2. Taking Permissive Proposals to Impasse

The City further alleged that the Association violated ORS 243.672(2)(b) and (c) by including permissive subjects in its last offer. We have found above that the parties' last offers in this case were not "final offers" under ORS 243.712(2)(b) and 243.742(2). For the reasons discussed above regarding the City's modified insurance offer, the Association's proposals also were subject to the standards for table bargaining, not for "final offers" which are submitted when the parties reach impasse.

Relatedly, it is not *per se* unlawful to make proposals on permissive subjects. A party acts illegally in this regard only if it conditions settling the agreement over a permissive subject and over the other party's objection. *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9486 (1987). No evidence exists that the Association persisted in conditioning the settlement on the disputed proposals over the City's objections; on the contrary, the Association withdrew the disputed proposals upon the City's objection to the language in its last offer.

Based on the facts here, it is unnecessary to determine whether the disputed proposals were, indeed, permissive.[21] We conclude the Association did not violate ORS 243.672(2)(b), and we will dismiss this charge.

ORDER

The City is ordered to proceed in selecting an arbitrator and to proceed to interest arbitration.[22]

The rest of the complaints are dismissed.

DATED this 19th day of April 2004.

Rita E. Thomas

Rita E. Thomas, Chair

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Paul B. Gamson, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Gamson Concurring:

I agree with the result reached by the majority, but disagree with much of its reasoning. It would serve little purpose to offer a separate analysis of each issue in the

[21]We deem it unnecessary to address cases such as *Benton County Deputy Sheriff's Association v. Benton County Sheriff's Department*, Case No. UP-36-02, 20 PECBR 551 (2004), cited by our colleague, which involved parties who reached the end stage of the PECBA dispute resolution process with proposals still on the table that were alleged to be either permissive or prohibited subjects for bargaining.

[22]We urge all parties to establish timelines and define for the State Conciliator the process they intend to use for the final steps of the pre-interest arbitration process when they select voluntary arbitration under ORS 243.712(2)(e).

case. Instead, I write separately to emphasize several points that may give practical guidance to parties or practitioners.

ASSOCIATION COMPLAINT

1. This Board unanimously ordered the parties to proceed to interest arbitration. So there is no confusion or mistake, the City can lawfully pursue its most recent insurance proposal to interest arbitration. That is, the City would not act in bad faith if it were to include its current insurance proposal in the last best offer (LBO) it submits to the interest arbitrator; and if the arbitrator were to select the City's package, we would not refuse to enforce the award on grounds that it contains the City's insurance proposal.

2. I concur with my colleagues that parties can lawfully agree to bypass one or more steps of the PECBA dispute resolution process, and proceed instead directly to interest arbitration. In my view, such an agreement must (1) be mutual, (2) be in writing, (3) contain a clear and unmistakable agreement to proceed directly to binding interest arbitration, and (4) be submitted to the State Conciliator along with a request to initiate arbitration. The parties here met all of these requirements.

I do not, however, share my colleagues' view that the agreement should contain the timelines and procedures the parties will follow. This requirement is not derived from case, statute, or rule, and it is unnecessary because the timelines and procedures are dictated by statute. ORS 243.712(2)(e)[1] permits parties to agree "at any time" to proceed to binding interest arbitration. The statute further specifies that "[t]he arbitration shall be scheduled and conducted in accordance with ORS 243.746." ORS 243.746 contains detailed procedures and timelines for interest arbitration. There is thus no reason for the parties to list them in their agreement or send them to the State Conciliator. The procedures and timelines the parties must follow are set forth in the statute.

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[1]ORS 243.712(2)(e) states:

> "Nothing in this section shall be construed to prohibit the parties at any time from voluntarily agreeing to submit any or all of the issues in dispute to final and binding arbitration. The arbitration shall be scheduled and conducted in accordance with ORS 243.746. The arbitration shall supercede the dispute resolution procedures set forth in ORS 243.726 [strikes] and 243.746 [interest arbitration]."

CITY COMPLAINT

The City's cross-complaint alleges that the Association engaged in surface bargaining and unlawfully pursued permissive proposals.

1. Surface Bargaining

In my view, the City's allegation of surface bargaining verges on frivolous. I agree with the majority that the parties discussed the issues separating them, made proposals and counter proposals, and reached some tentative agreements.

Perhaps more importantly, it seems inconsistent for the City to complain about the quality or quantity of bargaining while at the same time agreeing to waive mediation. If the City believed there was further need to discuss the issues separating the parties, it could have insisted on proceeding to mediation. It would be a rare case in which we find surface bargaining when the complaining party has agreed to skip one or more of the steps in the PECBA dispute resolution process. This is not one of those rare cases.

2. Pursuit of Permissive Proposals

I agree with the majority that a party acts unlawfully if it insists on pursuing a permissive proposal over the other party's objection. I further agree that there is no proof here of unlawful pursuit, and thus no need to decide whether the proposals are permissive.

The members of this Board have previously disagreed on the proper order of analysis to apply in a dispute that alleges the unlawful pursuit of a nonmandatory proposal. *See Benton County Deputy Sheriff's Association v. Benton County Sheriff's Department,* Case No. UP-36-02, 20 PECBR 551 (2004). Here, all three Board members agree on an analysis that first asks whether a party has insisted on pursuing a proposal over the other's objection. If that has not occurred, this Board will, as it did here, dismiss the allegation without deciding whether the proposal is permissive.

Paul B. Gamson, Board Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UC-12/13/14-04

(AMENDMENT OF RECOGNITION)

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 2285 AND IAFF/ DOUGLAS COUNTY PROFESSIONAL FIRE FIGHTERS LOCAL 2091, Petitioners, v. DOUGLAS COUNTY FIRE DISTRICT #2, Respondent, Case No. UC-12-04;	ORDER AMENDING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 2285 AND IAFF/ DOUGLAS COUNTY PROFESSIONAL FIRE FIGHTERS LOCAL 2091, Petitioners, v. SUTHERLIN FIRE DEPARTMENT, Respondent, Case No. UC-13-04;	

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 2091 AND IAFF/ DOUGLAS COUNTY PROFESSIONAL FIRE FIGHTERS LOCAL 2091,	)
Petitioners,	)
v.	)
WINSTON-DILLARD FIRE DISTRICT,	)
Respondent,	)
Case No. UC-14-04.	)

International Association of Fire Fighters (IAFF) Local 2285 currently represents two bargaining units of fire fighters, one employed by the Douglas County Fire District (Douglas County) and a second employed by Sutherlin Fire Department (Sutherlin). IAFF Local 2091 currently represents a bargaining unit of fire fighters employed by Winston-Dillard Fire District (Winston-Dillard).

On March 4, 2004, IAFF Local 2285, IAFF Local 2091, and IAFF/Douglas County Professional Fire Fighters filed separate petitions under OAR 115-25-009 seeking to amend their certifications to reflect an affiliation/merger that would combine these three groups into one. The petitions were filed in anticipation of a consolidation of the Sutherlin, Winston-Dillard, and Douglas County Fire Departments.

If these petitions are granted, IAFF/Douglas County Professional Fire Fighters will merge with Local 2285 and Local 2091 to form a new entity called IAFF/Douglas County Professional Fire Fighters Local 2091. This new entity will become the exclusive representative for the three former bargaining units, and will assume management of the existing labor contracts and will negotiate and manage all future labor contracts.

We consolidated these cases for processing and decision.

MINIMAL DUE PROCESS

With its petitions, each petitioner provided a copy of the ballot for the merger/affiliation vote. Each petitioner also provided minutes of a November 13, 2003 meeting in which the parties discussed the merger, and then passed a motion to contact the international office of the IAFF and proceed with the merger.

On March 15, at the Election Coordinator's request, Petitioners also provided a document signed by the presidents of Local 2285 and 2091 stating that balloting occurred after an initial announcement in September of the merger/affiliation. This was followed by three combined meetings in October, November, and December in which the subject of affiliation/merger was announced prior to the meetings and the topic was openly discussed on the floor during the meetings. The document further provides the results of the secret ballot vote. Local 2091, which represents Winston-Dillard, voted 15 yes, 0 no; Local 2285, which represents both Douglas County and Sutherlin together, voted 32 yes, 2 no, with 8 abstentions.

On March 12, the Elections Coordinator served the petition on Douglas County, Winston-Dillard, and Sutherlin. On March 17, Douglas County and Winston-Dillard certified that they had posted the "Notice - Unit Amendment Requested." On March 25, Sutherlin also certified that it had posted the required notice.

Respondents filed no objections to the petitions and did not contest the election process.

We conclude that Local 2285 and Local 2091 are labor organizations. The affiliation/merger election complied with at least minimal due process, and a majority of votes cast by the three bargaining units were for affiliation/merger.

Based on the foregoing, this Board issues the following order:

ORDER

1. The petitions are granted as follows:

A. Douglas County Fire District #2's recognition of IAFF Local 2285 is amended to reflect the Association's affiliation with the IAFF/Douglas County Professional Fire Fighters Local 2091.

B. Sutherlin Fire Department's recognition of IAFF Local 2285 is amended to reflect the Association's affiliation with the IAFF/Douglas County Professional Fire Fighters Local 2091.

C. Winston-Dillard Fire District's recognition of Local 2091 is amended to reflect the Association's affiliation with IAFF/Douglas County Professional Fire Fighters Local 2091.

DATED this 5th day of May 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-25-04

(PETITION FOR CERTIFICATION OF REPRESENTATIVE)

YAMHILL COUNTY EMPLOYEES ASSOCIATION (YCEA),	)	
Petitioner,	)	
v.	)	
YAMHILL COUNTY,	)	ELECTION ORDER
Respondent,	)	
and	)	
SEIU LOCAL 503, OPEU/YCEA LOCAL 915,	)	
Incumbent.	)	

On April 12, 2004, the Yamhill County Employees Association (Petitioner) filed a petition to become the exclusive representative for a bargaining unit of employees of Yamhill County (Respondent). The bargaining unit is currently represented by an affiliation of SEIU Local 503, OPEU with Yamhill County Employees Association Local 915 (YCEA) (Incumbent). The result of the petition would be to end the affiliation and make Petitioner the exclusive representative.

The petition describes the proposed bargaining unit as:

> Yamhill County Employees Association: Exclusive representative for all Yamhill County employees, other than those employees specifically covered by other collective bargaining agreements. Yamhill County Employees Association seeks to be the exclusive representative for this bargaining unit

and cease any affiliation with SEIU or other labor organization.

On April 14, 2004, Respondent was served with the petition. On April 19 and 20, Respondent certified that it had posted the "Notices Representation Election Has Been Requested." The election coordinator's letter to Respondent stated: "Note that you have 14 days from the date of the notice (until May 4, 2004) to file specific written objections to the petition." (Emphasis in original.) On April 26, Respondent filed its response to the petition stating that it had no objection to the proposed unit or petition, as long as it was understood that the description contained in the petition related only to recognition and not to the scope of the bargaining unit

By letter dated April 14, the election coordinator notified the Incumbent that, "If you have no objections to the proposed unit and no other objections to an election being conducted, please call and I will prepare a consent election agreement for signature by all parties." Incumbent filed no objections to the petition or to the proposed bargaining unit. OAR 115-25-030(4) states, in part: "Interested persons may notify the Board Agent of their specific objections. Such objections must also be served on the petitioner.* * *"

In addition, both letters provided that if no valid objections were filed and any party refused to sign a consent election agreement, the Board would deem the parties to have waived their right to a hearing and would order an election.

On April 27, the elections coordinator notified the parties that the showing of interest supporting the petition was adequate. Her letter stated that the bargaining unit description should reflect the scope of the unit as set out in Incumbent's collective bargaining agreement. She further informed the parties that unless she heard to the contrary, she would use that description when preparing the consent election agreement. Neither Petitioner nor Incumbent responded to the letter.

The elections coordinator prepared a consent election agreement on May 5 and faxed it to the parties. Petitioner and Respondent signed the agreement and faxed it back to the Employment Relations Board (ERB). Incumbent refused to sign the agreement.

Incumbent insists that its name be listed on the consent election agreement and on the ballot as "Yamhill County Employees Association/SEIU Local 503, OPEU" to preserve the fact that this is an affiliation and that the affiliation would continue after the election. This proposed listing has the potential to confuse voters because it would require them to choose between two groups that have "Yamhill County Employee Association" as part or all of their name. To reduce this potential for confusion, the elections coordinator suggested that the consent election agreement and the ballot reflect a choice of either

Yamhill County Employees Association (Petitioner), or SEIU Local 503, OPEU/YCEA Local 915 (Incumbent).

FINDINGS OF FACT

1. Yamhill County Employees Association and SEIU Local 503, OPEU/YCEA are labor organizations, and Yamhill County is a public employer, all within ORS 243.650.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over these parties and this subject matter.

2. Petitioner has presented a question of representation requiring an election.

3. An appropriate bargaining unit is:

> "All non-supervisory employees of Yamhill County, *excluding* elected officials, supervisory employees, confidential employees, persons appointed to serve on boards and commissions, irregular part-time employees and part-time employees normally working less than 20 hours per week, seasonal employees hired for summer employment, employees hired for a limited term under specified state and federal grants, and all employees represented by other bargaining units."

No valid objections have been raised to the petition, so there is no issue of fact and/or law necessitating a hearing.

ORDER

1. An appropriate bargaining unit is:

> "All non-supervisory employees of Yamhill County, *excluding* elected officials, supervisory employees, confidential employees, persons appointed to serve on boards and commissions, irregular part-time employees and part-time employees normally working less than 20 hours per week, seasonal employees hired for summer employment, employees hired for a limited term under specified state and federal grants, and all employees represented by other bargaining units."

2. The elections coordinator shall conduct a secret mail ballot election for employees in the bargaining unit to express their desires for representation by Petitioner or Incumbent, for the purposes of collective bargaining. Eligible voters shall be those employees employed on the date of this Order and still employed at the time of the closing of the election. The choices and order of choices on the ballot shall be:

(1) Yamhill County Employees Association,
(2) SEIU Local 503, OPEU / YCEA Local 915, and
(3) No Representation.

3. Respondent has provided this Board with an alphabetical listing of names, home addresses, and position titles together with mailing labels of all eligible employees.

4. The dates for the election shall be as follows:

May 27, 2004	Employer to post election notices and return certification of posting to ERB.
June 10, 2004	ERB to mail ballots to eligible voters.
June 24, 2004	Ballots due in ERB offices by no later than 5:00 p.m.
June 25, 2004	Tally of ballots in ERB offices at 10:00 a.m.

DATED this 12 day of May 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-14-99

STATE TEACHERS EDUCATION ASSOCIATION/OEA/NEA AND CHAR ANDREWS, ET AL., Complainants, v. WILLAMETTE EDUCATION SERVICE DISTRICT AND STATE OF OREGON, DEPARTMENT OF EDUCATION, Respondents.	FINDINGS AND ORDER ON COMPLAINANTS' AND RESPONDENT DEPARTMENT OF EDUCATION'S PETITIONS FOR REPRESENTATION COSTS

This Board issued an Order in this case on May 7, 2001. Respondent Department of Education (ODE) filed a petition for representation costs on May 24, 2001. Complainants filed a petition for representation costs on May 25, 2001, and objections to Respondent ODE's petition on June 8, 2001. Respondent Willamette Education Service District (WESD) filed objections to Complainants' petition on June 11, 2001.

Respondent WESD and two of the individual Complainants (Lucien Loiseau and Jake Hurlbert), whose complaints had been dismissed, filed petitions for judicial review. While those matters were pending, Complainants filed a motion for compliance with this Board concerning Respondent WESD's employment offers. Complainants also filed another unfair labor practice complaint, Case No. UP-10-02, against Respondent WESD.

In August 2002, Complainants notified this Board that the parties had reached a settlement. Among the terms of the settlement, Complainants would withdraw the unfair labor practice complaints in Case Nos. UP-14-99 and UP-10-02, Respondent WESD would withdraw its petition for judicial review of the Order and would pay representation costs as ordered by this Board.

Following that notice, we issued a representation cost Order on November 4, 2002. On November 8, 2002, Complainants notified us that the earlier notification had incorrectly indicated that Case No. UP-14-99 had been withdrawn. Complainants did not withdraw that case because the two individual complaints that had been appealed were not

included in the agreement, and their appeal continued. By letter dated November 15, 2002, this Board withdrew the representation cost Order issued on November 4, 2002.

On June 5, 2003, the Court of Appeals affirmed the Order without opinion. The Supreme Court denied review of that Order on March 23, 2004. The final appellate judgment was issued on April 7, 2004. It is now appropriate to re-issue the representation cost order.

RESPONDENT ODE'S PETITION

1. Respondent ODE is a prevailing party.

2. Both Respondent ODE's petition for representation costs and Complainants' objections to the petition were timely.

3. Respondent ODE requests an award of $3,500, the maximum allowed under the rules in most circumstances. The request is based on 257 hours of legal services billed at $90 an hour.

4. This was an unusually complex case involving 12 individual Complainants, each with unique circumstances. The hearing lasted 11 days, and the parties filed post-hearing briefs and appeared for oral argument before this Board. The hourly rate is below the average charged, and the number of hours is reasonable given the length of the hearing.

5. The complaint charged Respondent ODE with refusing to provide references for Complainants, giving Respondent WESD negative information about Complainants, and using administrators with an anti-union bias in the hiring process for positions with Respondent WESD. We concluded that the evidence did not support the claim that the refusal to provide references was in retaliation for Complainants' protected activity, or that Respondent ODE's negative views about Complainants was communicated to Respondent WESD, or that Respondent ODE was responsible for the decisions of the administrators in the hiring process. We dismissed the charges against Respondent ODE. In reviewing the evidence, we found that an average award would be appropriate.[1]

COMPLAINANTS' PETITION

6. Complainants are the prevailing parties.

7. Complainants' petition for representation costs and Respondent's objections to the petition were timely.

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[1]The affidavit of Respondent ODE's counsel establishes that Respondent ODE was billed $34,341 for this case. Using our typical formula, that would mean that an award of $11,447 would be reasonable. That amount is above the $3,500 limit, and the circumstances under which we waive the limit are not present.

8. Complainants requested an award of $3,500, based on 410 hours of legal services billed variously at $125, $120, $115, $85, $75, $58, and $55.

9. The hourly rates are within the average for similar cases. The number of hours claimed is reasonable under the circumstances.

10. The complaint charged that Respondent WESD unlawfully refused to hire the individual Complainants for teaching positions when Respondent WESD began operating the educational program at two ODE schools. We concluded that the evidence established that Respondent WESD's refusal to hire five of the named Complainants was due to their protected activity and was therefore unlawful. For policy reasons, we typically award larger than average awards in such cases because the violations impact core rights under the Public Employee Collective Bargaining Act (PECBA). However, given the amount of Complainants' total costs, even an average award would exceed the $3,500 limit, and the factors that lead us to waive that limit are not present.

Having considered the appropriate charges for services, our awards in similar cases, and the policies and purposes of the PECBA, this Board awards Respondent ODE representation costs of $3,500 and awards Complainants representation costs of $3,500.

ORDER

1. Complainants shall remit $3,500 to Respondent ODE within 30 days of the date of this Order.

2. Respondent WESD shall remit $3,500 to Complainants within 30 days of the date of this Order.

DATED this 12th day of May 2004.

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Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

*Chair Gamson has recused himself from this case.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-44-03 and UP-48-03

(UNFAIR LABOR PRACTICE COMPLAINTS)

BEND POLICE ASSOCIATION, Complainant, v. CITY OF BEND, Respondent. Case No. UP-44-03 CITY OF BEND, Complainant, v. BEND POLICE ASSOCIATION, Respondent. Case No. UP-48-03	RULING ON COMPLAINANT'S MOTION FOR RECONSIDERATION

This Board issued an Order on April 19, 2004, in which we concluded that the City violated ORS 243.672(1)(e) when it refused to proceed to interest arbitration. We dismissed all other complaints from both the City and Association which alleged a refusal to bargain in good faith. On May 3, 2004, the Association filed a motion for reconsideration and requested oral argument. The City filed no response to the

Association's motion. We grant reconsideration to address one of the issues raised by the Association.[1] We deny the request for oral argument.

The Association asserts that this Board penalized the parties for waiving mediation when we concluded that the offers in dispute did not meet the criteria for "final offers" under ORS 243.650(11), 243.712(2)(b), 243.742(2), and OAR 115-40-000(1). We did not intend this conclusion as a penalty. We recognize that ORS 243.712(2)(e) permits the parties to voluntarily agree to proceed directly to interest arbitration at any time in the bargaining process. The parties here did not proceed directly to interest arbitration as permitted by statute. Instead, they attempted to bypass some, but not all, of the steps that precede interest arbitration. The parties submitted what they characterized as "final offers" without first going through the mediation and impasse process. The Association then brought bad faith bargaining charges which asserted that the City's insurance offer had not been bargained to impasse in accordance with the Public Employee Collective Bargaining Act (PECBA). We found no merit in those charges.

PECBA's dispute resolution process for strike-prohibited employees requires the parties to participate in a number of steps before they reach interest arbitration. The parties begin with table bargaining and then proceed to mediation, impasse, and the final offer. If the parties have failed to reach agreement, they proceed to binding interest arbitration. Although the PECBA permits parties to dispense with the remaining steps and proceed directly to interest arbitration, they should not expect this Board to enforce bits and pieces of the statutory process that they have chosen. If the parties here had answered the mediator's request for a clear written statement of the process they were using, that process may have been enforceable.

But here, we know only that the parties agreed to skip part of the mediation process and to submit offers to the mediator, which they characterized as "final offers," before proceeding to interest arbitration. A dispute then arose over the so-called "final offers," and the parties asked us to apply statutory standards to a set of proposals that clearly were not final offers under the PECBA. We refused this request as a matter of law, not as a penalty to the parties. We adhere to our conclusion that the City's insurance proposal did not violate ORS 243.672(1)(e).

A number of the Association's arguments in its request for reconsideration duplicate those we rejected in our original decision. We will not address those arguments

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[1]This case was heard on an expedited basis by this Board. In such circumstances, we generally grant reconsideration, if requested. We do not address all of the arguments raised in a request for reconsideration. We discuss only those matters, if any, that warrant additional consideration and require clarification and/or modification of our original Order.

again in this Order. The Association's request for reconsideration also presents new theories and arguments for a violation of ORS 243.672(1)(e). Those theories and arguments are untimely,[2] and we will not address them.

RULINGS

Reconsideration is granted. We adhere to our Order of April 19, 2004, as explained and clarified.

DATED this 4 day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

[2]The Association did not plead, present, or argue that the City violated ORS 243.672(1)(e) when it refused to sign tentative agreements for contract sections in which neither party proposed a change. In its complaint, the Association mentioned this issue only as background information leading up to four alleged violations and not as a separate charge. Relatedly, while many arguments may be implicit in a (1)(e) charge, we will not reach a decision on an issue, such as regressive bargaining, unless it is specifically pled, presented, and argued. That was not done here.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-41-04

(UNIT CLARIFICATION)

LABORERS' LOCAL 483, MUNICIPAL EMPLOYEES,	)	
Petitioner,	)	
v.	)	DISMISSAL ORDER
CITY OF PORTLAND,	)	
Respondent.	)	

On May 19, 2004, Laborers' Local 483, Municipal Employees (Petitioner), filed a unit clarification petition seeking to add a newly created classification to the existing bargaining unit of City of Portland (Respondent) employees Petitioner represents. The petition stated that the new classification of Parking Collection Technician was posted for hiring on May 5, 2004, without prior notice, and that there are currently no incumbents.

The petition was filed under OAR 115-25-005(4). OAR 115-25-005(4) states, in part, that "* * * the petition must be supported by a 30 percent showing of interest among the unrepresented employees sought to be added to the existing unit. * * * " No showing of interest was filed with this petition.

On May 20, the elections coordinator wrote to Petitioner's representative stating that the petition needed to be supported by a 30 percent showing of interest and since there were no incumbents in the position, obtaining such a showing would be impossible at this time. She also stated she could not proceed with the petition without the showing of interest. She gave Petitioner until June 1 to convince her why she should not dismiss the petition. Petitioner did not reply. Accordingly, we will dismiss the petition.

ORDER

The petition is dismissed.

DATED this 9th day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-01

COOS COUNTY BOARD OF COMMISSIONERS AND AFSCME LOCAL 2936, Complainants, v. COOS COUNTY DISTRICT ATTORNEY AND STATE OF OREGON, Respondents.	)	FINDINGS AND ORDER ON COMPLAINANTS' PETITIONS FOR REPRESENTATION COSTS

This Board issued an Order on December 12, 2002, and a Ruling on Petition for Reconsideration on February 7, 2003. Both Complainants filed petitions for representation costs on January 2, 2003. Respondent State of Oregon filed objections on January 23, 2003. Pursuant to OAR 115-35-055, this Board makes the following findings:

1. Complainants are the prevailing parties.

2. Complainants' representation cost petitions were timely filed. Respondent's objections were timely filed.

3. Complainant Coos County Board of Commissioners ("Complainant County") requests an award of $36,925.76. That total is based on 220.60 hours of

service valued at $170, $150, $130, $100, and $85 per hour,[1] plus $2,079.01 in costs.[2] Complainant AFSCME Local 2936 ("Complainant Union") requests an award of $12,334. That total is based on 97.7 hours of service valued at $75, $90, and $130 per hour.[3]

4. This case involved one day of hearing, post-hearing briefs, and oral argument before this Board. The number of hours requested by Complainant County is more than four times the average number for one day of hearing, argument, and briefing. The billing records submitted by Complainant County include time spent on claims that could be heard only in other forums, *e.g.*, workers' compensation claims and claims before the Bureau of Labor and Industries. Some of those entries mingle activities related to proceedings before this Board with activities related to proceedings in other forums. This Board allows costs only for "services directly connected with prosecuting" the complaint. OAR 115-5-055(1)(c)(B). While we cannot be certain of the number of hours spent on such other matters, it appears the total approximates 20 of the 220.60 hours requested. After exclusion of those hours, the number of hours requested by Complainant County still remains approximately four times the average number of hours requested for a one-day hearing. This is a factor we consider in making cost awards. The hourly range includes some rates considerably higher than the average rate, a factor we also consider in making cost awards.

Complainant County contends the extra hours are justified because of the egregiousness of Respondents' egregious conduct; its own possible exposure to liability had it not acted; its right to seek common law indemnity from Respondents; Respondents' persistence in unlawful conduct despite being advised of controlling legal precedent; the impact of its legal fees on this small community; and the flagrant nature of the violations. It argues this Board should recognize the true costs of legal representation and permit prevailing parties to receive the full measure of expenses incurred in cases where this Board finds a civil penalty appropriate. It argues that doing this will discourage violations of the law and provide an incentive to resolve cases short of litigation. Finally, it argues Respondent State of Oregon has a duty under ORS

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[1]The detailed billing records submitted with Complainant County's request do not summarize the number of hours billed at each of these hourly rates.

[2]Photocopying, clerical, mileage, postage, and telephone costs are not included in representation cost awards. *AFSCME Local 2746 v. Clatsop County*, Case No. UP-59-95, 16 PECBR 664 (Rep. Cost Order, June 1996); *OSEA Ch. 7 v. Salem School Dist.*, Case No. C-271-83 (Rep. Cost Order, November 1984).

[3]The breakdown is 107.5 hours at $130 per hour, 4.8 at $90 per hour, and 4.0 at $75 per hour.

30.285 to defend and indemnify Respondent Coos County District Attorney, and therefore will be liable for those costs.

The number of hours requested by Complainant Union is about twice the average number of hours requested for a one-day hearing. The hourly rates are reasonable.

Complainant Union argues that an award of full representation costs would discourage egregious or repetitive violations. It further argues that Respondents refused Complainants' reasonable efforts to keep the costs of litigation down, by refusing to agree to a stipulation of facts and denying factual allegations at the heart of the case, requiring massive efforts to adduce facts Respondents could not controvert. It asserts that litigating only the legal defenses would have required half the effort and costs. It further argues Respondents should be liable for a greater share of costs because some defenses were questionable or arguably frivolous. It further argues that Respondents' "scattershot" approach to their legal defense required more legal research and writing, and that Respondents should bear the expense required by their "extensive (and perhaps unnecessary) arguments."

Respondent State of Oregon ("Respondent State") objects to both Complainants' petitions for representation costs. It argues this case presented multiple issues of first impression. It asserts Respondent Coos County District Attorney ("Respondent DA") has no source of funds to pay representation costs other than his own personal resources. In this regard, it notes that the only funding from the State of Oregon is for Respondent DA's salary and benefits. It asserts that the doctrine of "respondent supervisor" [*sic*] is inapplicable in that this Board did not find Respondent DA was the agent of the State of Oregon "for purposes of PECBA obligations *vis a vis* a county employee."[4] It asserts that cases cited by Complainant Union in support of its request for an award in excess of $3,500 "involved awards that were less than the $3,500 cap on representation fees."[5] It argues that it could have petitioned for reconsideration

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[4]Respondent State does not explain its representation of Respondent DA if the person holding that office is not an agent of the State, nor did it argue why Respondent DA would not be held harmless under ORS 30.285. The State is a Respondent on this record.

[5]Contrary to this assertion, in the first such case, *ECBC v. David Douglas School Dist.*, Case No. UP-84-86, 9 PECBR 9438 (Rep. Cost Order, April 1987), we awarded $4,333 in representation costs, the full amount requested. More recently, in *Salem Education Association v. Salem-Keizer School District 24J*, Case No. UP-132-93, 15 PECBR 519 (Rep. Cost Order, December 1994), we awarded less than the full amount requested because the number of hours (continued...)

of the civil penalty but did not because it could not afford to continue litigation.[6] It argues Complainant County should not recover through representation costs an amount it failed to recover in damages.

5. Respondents were charged with violations of ORS 243.672(1)(a) and (1)(g). We concluded that Respondent DA was bound as a joint employer with Complainant County to the collective bargaining agreement between Complainants. We further found that Respondent DA failed to abide by Complainant County's decision resolving a grievance under that collective bargaining agreement, and that his failure to do so was contrary to the terms of the contract and thus violated ORS 243.672(1)(g). We also found that, by repudiating the contractual grievance procedure, he interfered with and restrained employees in their use of the grievance procedure in violation of ORS 243.672(1)(a). Because of Respondent DA's flagrant disregard of the contract, flagrant violation of ORS 243.672(1)(a), and the impact of the violation on the ongoing employment rights of an employee, we ordered the posting of a notice. We also granted both Complainants' requests for a civil penalty.

Several of the issues litigated in this case were matters of first impression. This Board typically makes smaller than average awards in matters of first impression, so as to avoid discouraging litigation of such matters. *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (Rep. Cost Order, June 1999); *OSEA v. Coos Bay School District*, Case No. C-159-84, 9 PECBR 8585 (Rep. Cost Order, March 1986). On the other hand, we typically issue larger than average awards in cases alleging a violation of ORS 243.672(1)(a) because such violations strike at core Public Employee Collective Bargaining Act (PECBA) rights. *Vilches & Central Education Association v. Central School District*, Case No. UP-74-95 (Rep. Cost Order, October 1998). We also typically issue larger than average awards where we have found the violations were flagrant. *Lincoln County Deputy Sheriff's Association v. Lincoln County*, Case No. UP-31-02 (Rep. Cost Order, October 2002). To further the policy of the PECBA which favors the arbitration of contract disputes, we also typically issue a substantial award where a party refuses to go to arbitration; *OPEU v. Linn County*, Case No. UP-19-87, 10 PECBR 190 (Rep. Cost Order, August 1987); or refuses to comply with an arbitration award; *Hanna and Portland Association of Teachers v. Portland School District*, Case No. UP-64-99 (Rep. Cost Order, July 2002). A refusal to comply with a grievance resolution reached short

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[5](...continued)
claimed was somewhat greater than average, but nonetheless awarded $5,250 in representation costs. In both cases, as here, the $3,500 limit did not apply because a civil penalty had been awarded. OAR 15-35-055(1)(a).

[6]Respondent State nonetheless re-argues the civil penalty issue in its opposition. That argument is improper and will not be considered.

of arbitration raises similar policy issues favoring the voluntary resolution of contract disputes. On balance, an award somewhat larger than average is appropriate here. Further, in view of the fact that we ordered a civil penalty, an award in excess of the usual $3,500 limit is also appropriate.

After adjusting for the number of hours claimed and, in the case of Complainant County, the hourly fees, the total fees amount to around $8,500 for Complainant County and $7,000 for Complainant Union. Our usual practice is to award approximately one-third of the adjusted fees claimed in most cases. *Oregon Nurses Association v. Oregon Health Sciences University*, Case No. UP-3-02 (Rep. Cost Order, May 2002). However, in view of our conclusion that a higher than average award is warranted, and the fact that we ordered a civil penalty, we will award half the total fees to each Complainant.

Having considered the appropriate amounts for services rendered, our awards in similar cases, and the policies and purposes of the PECBA, this Board awards Complainant County representation costs in the amount of $4,250 and awards Complainant Union representation costs in the amount of $3,500.

ORDER

Respondents are ordered to remit $4,250 to Complainant County and $3,500 to Complainant Union within 30 days of the date of this Order.

DATED this 14th day of June 2004.

*

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-02

HILLSBORO EDUCATION ASSOCIATION, Complainant, v. HILLSBORO SCHOOL DISTRICT, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS

This Board issued an Order on December 19, 2002, and a Ruling on Motion to Stay on March 23, 2003. Complainant filed a petition for representation costs on January 8, 2003. Respondent filed objections on January 22, 2003. Pursuant to OAR 115-35-055, we make the following findings:

1. Complainant's petition for representation costs was timely filed. Respondent's objections were timely filed.

2. Complainant is the prevailing party.

3. Complainant requests an award of $3,500, the maximum allowed in most cases. According to affidavit of counsel, Complainant was billed$19,810 for 156.2 hours of service at rates ranging from $90 to $130 per hour.

4. This case involved one day of hearing, post-hearing briefs, and oral argument before this Board. The number of hours requested by Complainant is approximately three times the average number for one day of hearing, argument, and briefing, a factor we consider in making cost awards. The hourly rates are reasonable.

Complainant asserts that the case was unusually complex and fact intensive and involved unusual pre-hearing disputes as well as lengthy and complex proceedings before this Board. It argues that a substantial award is warranted to encourage employers to honor their bargaining obligations. Respondent argues Complainant seeks reimbursement for an excessive number of hours, and that evidentiary disputes, research, and pre-hearing argument are not unique and do not support Complainant's request. It asserts that an award of the full $3,500 allowed by law is reserved for lengthy cases or cases involving special circumstances. It argues

the case was not a matter of first impression, nor one involving egregious or repetitive violations.

5. This Board found Respondent violated ORS 243.672(1)(e) when it made decisions concerning mandatory subjects of bargaining, and took significant steps in implementing those decisions, without fulfilling its good faith bargaining obligation.

We typically make an average award in unilateral change cases. *OSPOA v. Dept. of State Police*, Case No. UP-24-00 (Rep. Cost Order, February 2002); *FOPPO v. Washington County*, Case No. UP-70-99 (Rep. Cost Order, October 2001). Respondent correctly notes that this case did not involve matters of first impression. A novel case or one presenting issues of first impression would lead to a smaller than average award to avoid discouraging litigation of such matters. *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (Rep. Cost Order, June 1999); *OSEA v. Coos Bay School District*, Case No. C-159-84, 9 PECBR 8585 (Rep. Cost Order, March 1986). The absence of that factor supports an average award. There are no other factors arguing strongly for either an enhanced or reduced award. We therefore conclude that an average award is appropriate.

Our usual practice is to award approximately one-third of the adjusted fees claimed in most cases. *Oregon Nurses Association v. Oregon Health Sciences University*, Case No. UP-3-02 (Rep. Cost Order, May 2002). Having considered the appropriate amounts for services rendered, our awards in similar cases, and the policies and purposes of the Public Employee Collective Bargaining Act, this Board awards Complainant representation costs in the amount of $2,200.

ORDER

Respondent is ordered to remit $2,200 to Complainant within 30 days of the date of this Order.

DATED this 14th day of June 2004.

*
Paul B. Gamson, Chair

Rita E. Thomas
Rita E. Thomas, Board Member

Luella E. Nelson
Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-02

LINCOLN COUNTY EDUCATION ASSOCIATION, Complainant, v. LINCOLN COUNTY SCHOOL DISTRICT Respondent.	)	FINDINGS AND ORDER ON BOTH PARTIES' PETITIONS FOR REPRESENTATION COSTS

This Board issued an Order on April 7, 2004.[1] Both parties filed petitions for representation costs on April 27. Respondent filed objections on April 27; Complainant filed objections on May 18. Pursuant to OAR 115-35-055, we make the following findings:

1. Both parties filed timely petitions for representation costs. Each filed timely objections to the other party's petition.

2. Complainant is a prevailing party. Respondent is not a prevailing party.

Representation costs are available to a party that prevails on an unfair labor practice complaint. ORS 243.676(2)(d) and (3)(b); OAR 115-35-055(1). Where this Board upholds one or more charges and dismisses one or more charges in a complaint,

[1]All dates are 2004 unless stated otherwise.

"each party may be regarded as a prevailing party" for purposes of representation costs where the charges in question meet a two-part test. "Separate charges * * * [1] are based on clearly distinct and independent operative facts; i.e. the charges could have been plead and litigated without material reliance on the allegations of the other(s), and * * *[2] concerned the enforcement of rights independent of the other(s)." OAR 115-35-055(1)(b)(A).

Each party in this case asserts that it is a prevailing party. Respondent does not dispute that Complainant is a prevailing party, but argues it prevailed on a portion of the complaint and is thus entitled to have the award offset. *See Lane Unified Bargaining Council [LUBC] v. McKenzie School District*, Case No. UP-14-85 (Rep. Cost Order, January 1986) (where both parties prevail, this Board will determine the percentage won by each and offset the percentages for purposes of the award). In the alternative, Respondent argues that the petitions for representation costs should be held in abeyance until the conclusion of arbitration proceedings ordered by this Board.

3. The complaint charged Respondent with violations of ORS 243.672(1)(g) by refusing to arbitrate grievances concerning retiree health insurance benefits and refusing to provide vested benefits to retirees as required by the parties' current and prior collective bargaining agreements. We found Respondent violated ORS 243.672(1)(g) by refusing to arbitrate the grievances. We denied Complainant's request that this Board decide the merits of the alleged contract violations under ORS 243.672(1)(g), and instead ordered the parties to arbitrate the grievances.

Complainant argued that this Board should decide the merits of the grievances because of Respondent's violation of ORS 243.672(1)(g) by refusing to arbitrate those grievances. The alleged contract violations could not have been pled or litigated without material reliance on the alleged refusal to arbitrate. We conclude that Respondent did not prevail on a "separate charge" and is not a prevailing party under OAR 115-35-055(1). We will dismiss Respondent's petition.

4. Respondent objects to Complainant's petition because (1) the case is novel and presents issues of first impression, and (2) Complainant has not prevailed on the "underlying facts." It asserts that, to prevail in arbitration, Complainant will have to seek an award which exceeds the arbitrator's jurisdiction and public policy.

A case that is novel or presents issues of first impression does not preclude an award of representation costs; it merely warrants a smaller than average award so as

not to discourage litigation of such matters. *Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97, 18 PECBR 95 (Rep. Cost Order, June 1999); *OSEA v. Coos Bay School District*, Case No. C-159-84, 9 PECBR 8585 (Rep. Cost Order, March 1986). The policy favoring arbitration of contract disputes is of equal force regardless of the intrinsic merits of the underlying grievance. We therefore deny Respondent's request to hold Complainant's petition for representation costs in abeyance pending arbitration of the grievances.

5. Complainant requests an award of $3,500, the maximum allowed under the rules in most cases. According to affidavit of counsel, Complainant was billed $14,967 for 119.2 hours of service at rates ranging from $125 to $135 per hour.

6. This case involved one day of hearing, post-hearing briefs, and oral argument before this Board. The number of hours requested by Complainant is approximately twice the average number for one day of hearing, argument, and briefing, a factor we consider in making cost awards. The hourly rates are reasonable.

Some of the issues litigated in this case were matters of first impression. While this case was pending, a decision of this Board on remand from the Court of Appeals in a similar case[2] substantially altered the analysis of the central issue of the arbitrability of the retiree health insurance grievances. As discussed above, this Board typically makes smaller than average awards in matters of first impression. On the other hand, to further the policy of the Public Employee Collective Bargaining Act (PECBA) that favors the arbitration of contract disputes, we typically issue a substantial award where a party refuses to go to arbitration; *OPEU v. Linn County*, Case No. UP-19-87, 10 PECBR 190 (Rep. Cost Order, August 1987). On balance, an average award would be appropriate.

After adjusting for the number of hours claimed, the total costs amount to around $7,500 for Complainant. Our usual practice is to award approximately one-third of the adjusted fees claimed in most cases. *Oregon Nurses Association v. Oregon Health Sciences University*, Case No. UP-3-02 (Rep. Cost Order, May 2002).

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[2]*Portland Fire Fighters' Association v. City of Portland*, 18 PECBR 723 (1000), *rev'd and remanded* 181 Or App 85, 45 P3d 162, *rev den* 334 Or 491, 52 P3d 1056, *order on remand* 20 PECBR 48A (2002).

Having considered the appropriate amounts for services rendered, our awards in similar cases, and the policies and purposes of the PECBA, this Board awards Complainant representation costs in the amount of $2,500.

ORDER

Respondent is ordered to remit $2,500 to Complainant within 30 days of the date of this Order.

DATED this 14th day of June 2004.

*

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-40-04

(AMENDMENT OF RECOGNITION)

THREE RIVERS EDUCATION ASSOCIATION AND SOUTHERN OREGON BARGAINING COUNCIL/OEA/NEA, Petitioners, v. THREE RIVERS/JOSEPHINE COUNTY SCHOOL DISTRICT, Respondent.	)	ORDER AMENDING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On May 14, 2004, Three Rivers Education Association (Association) and Southern Oregon Bargaining Council/OEA/NEA (SOBC) filed a petition under OAR 115-25-008 seeking to amend the recognition of the Association to reflect its affiliation with SOBC. The Association currently represents a bargaining unit of employees of Three Rivers/ Josephine County School District (Respondent). The recognition clause of the current contract is:

> "* * * [A]ll certificated teachers whether under written contract or on leave employed by the [Respondent]. Such representation shall cover all teachers assigned to newly created certificated positions unless the parties agree in advance that such positions are principally supervisory and administrative. Further, it is recognized that all other employees of the [Respondent], including, but not limited to, administrators, supervisors, confidential employees and substitute teachers, except temporary teachers employed sixty (60) or more consecutive days in one school year, are specifically excluded from the bargaining unit * * *."

A letter accompanying the petition set out the affiliation procedures followed by the Association and SOBC. The Association was originally recognized approximately 30 years ago under the name "Josephine County Education Association" at a time when Respondent was named "Josephine County School District." Respondent's name was changed in 1994 following a school district consolidation; the Association changed its name soon after to reflect the new District's name.

SOBC is an Oregon Education Association (OEA) affiliate that is a coalition of local associations in Southern Oregon, primarily in Josephine and Jackson counties. SOBC acts as the collective bargaining representative for its member associations, although the local associations continue to perform the functions of contract administration in their respective districts.

In November 2003, the Association began exploring the possibility of affiliation with SOBC. On November 12, an OEA consultant attended a meeting of Association representatives (including officers and building representatives) and explained what affiliation with SOBC would mean for the Association and outlined the affiliation process. At a December 10 meeting, the Association representatives discussed the pros and cons of affiliation with SOBC. The group voted in favor of affiliation, a decision which was then referred to the membership for a vote. A copy of the minutes of the meeting was provided as an appendix to the petition.

On January 7, 2004, the Association executive committee reviewed the proposed affiliation process, decided on voting procedures, and put together a timeline for an election. The committee decided to conduct a secret ballot election at each of 16 buildings in order to facilitate the participation of all bargaining unit members. A copy of the minutes of the meeting was provided as an appendix to the petition.

On January 12, the Association president attended a SOBC meeting to make an official request for the Association to affiliate with SOBC. SOBC voted at the meeting to accept the Association as an affiliate. A copy of the minutes of the meeting were provided as an appendix to the petition.

In February, the Association provided each building representative with materials for the purpose of conducting a building meeting on the affiliation issue. These materials included a written explanation of the affiliation process, a script for leading a discussion, a list of bargaining unit members at the site, and a sufficient number of ballots for the unit members in the building. A copy of the script and ballot were provided as appendices to the petition. Each representative scheduled a building meeting to occur later in February using the standard notification procedure (hand-distributed flyers or e-mail messages). During the last two weeks of February, each representative conducted an on-site meeting for all bargaining unit members and explained what SOBC was and what affiliation would mean. Members in attendance had an opportunity to ask questions and discuss the

issue. Paper ballots were distributed and cast at all of the meetings, except at the high school. Ballots were collected by the representative in a single envelope and turned over to the Association president. The high school voting was postponed because questions arose at the meeting which the representative could not answer. After answers were provided, the vote took place in late March.

Once all ballots were received, they were counted by the Association president, then recounted by staff at the OEA office in Medford. There were 282 eligible voters; 247 cast ballots. The result of the election was 242 votes in favor of the affiliation and 5 votes against. The building-by-building results were provided as an appendix to the petition.

On May 14, the elections coordinator served the petition by certified mail on Respondent. On May 19, Respondent certified that it posted "Notices Unit Amendment Requested." Respondent filed no objections to this petition.

We conclude that the affiliation vote was conducted in compliance with at least minimum due process requirements and that a majority of votes cast by bargaining unit members favored affiliation with SOBC.

Based on the foregoing, this Board issues the following Order:

ORDER

Three Rivers/Josephine County School District's recognition of the Three Rivers Education Association is amended to reflect affiliation with the Southern Oregon Bargaining Council/OEA/NEA.

DATED this 14th day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-39-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES, Complainant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) B. Carlton Grew on March 3, 2004, following a hearing on November 24, 2003, in Salem, Oregon. The hearing closed with the submission of post-hearing briefs on January 9, 2004.

Daryl S. Garrettson, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 638 E. 5th Street, McMinnville, Oregon 97128, represented Complainant.

Linda J. Kessel, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

The Association of Oregon Corrections Employees (Association) filed this complaint on July 16, 2003, alleging that the State of Oregon, Department of Corrections, (State or DOC) had violated ORS 243.672(1)(e) by failing to produce information to the Association after its request. On October 28, 2003, the State timely filed its answer, in which it admitted and denied certain allegations and raised affirmative defenses. A hearing was held on November 24, 2003, at which the parties presented testimony and other evidence.

The issues are whether the State refused to provide information to the Association, in violation of ORS 243.672(1)(e), regarding (a) the Koval grievance; (b) the ISDS coordinator position; and (c) a study involving correctional specialists' four-ten work shifts.

We conclude that the State violated ORS 243.672(1)(e) by failing to respond in a reasonable time to the Association's requests for information about the Koval grievance and about the study involving correctional specialists' four-ten work shifts, and by failing to reveal that it had withheld documents responsive to the Association's requests for information regarding the ISDS coordinator position. We conclude, however, that the State did not violate its duty to provide information under ORS 243.672(1)(e) as to the documents it unsuccessfully attempted to deliver regarding the ISDS coordinator position.

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of employees employed by the State, a public employer.

KOVAL POSITION CLASSIFICATION.

2. On November 21, 2002, Unoda Moyo, a State human resources consultant, performed a desk audit of a heating, ventilating, air conditioning, and refrigeration (HVAC) technician position held by Nick Koval at the Oregon State Penitentiary ("OSP"). Moyo concluded that some of Koval's duties were outside his classification. On December 6, 2002, the Association filed a grievance alleging that Koval was entitled to receive work out-of-class pay.[1]

3. On January 15, 2003, after reviewing the grievance, Acting Superintendent Brian Belleque[2] agreed to pay Koval five percent out-of-class pay retroactively to October 1, 2002, and continuing "until final approval/decision is made related to your position's proper classification, or until such time when these duties are no longer assigned to you."

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[1]On November 17, 2003, the Association won the grievance; the arbitrator awarded Koval five percent out-of-class pay.

[2]Belleque became the permanent OSP superintendent effective June 1, 2003.

4. On January 30, 2003, Moyo e-mailed Koval, Belleque, DOC Trades Maintenance Supervisor Steve Mitchell, and Association Executive Vice President of Correction Specialists Steve Jorgenson. Moyo informed them that he had erred in his assessment of Koval's position. He wrote that the parties needed to meet to discuss the issue.

5. On February 5, at 8:18 a.m., Jorgenson e-mailed Belleque to ask about the DOC's plans regarding Koval's wages. Jorgenson sent copies of the e-mail to Association President Gary Harkins and Association Vice President of Correction Specialists at OSP Martin Bowser, as well as to DOC's Mitchell and Moyo. Belleque responded the same day, stating that his discussions with Mitchell and Moyo indicated that Koval would receive five percent work out-of-class pay "as long as he is assigned duties outside his classification."

6. Moyo also responded to Jorgenson's e-mail on the same day, at 1:35 p.m. Moyo stated, in part, "[t]hat is what I remember also. What we are doing now is looking for is [*sic*] a mechanism to pay him. We are not rescinding on [*sic*] the agreement we had."

7. On February 5, at 11:31 a.m., Koval e-mailed Moyo to request "all documentation that supports your out of class memo, dated 01/30/03." Koval sent copies of the e-mail to Belleque and Association officers Harkins and Jorgenson. Moyo responded, via e-mail, at 2:04 p.m. the same day:

> "Attached is a copy of the compensation plans for different bargaining units for the Refrigeration Mechanic classification. * * * So when we sent the agreement to Records they tried to enter that in the system and the system said NO, and they verbally informed me that it could not be done that way. *I have no other documentation I can share with you.* Like I said in the other e-mail message *we are still honoring the agreement and you will be paid*." (Emphasis added.)

Moyo sent a copy of his response to Belleque, Harkins, and Jorgenson.

8. On February 20, the parties met to discuss the Koval issue. Belleque summarized the information provided at the meeting in a February 24 letter to Koval and the Association. The letter identified some job classifications comparable to Koval's position and concluded that those classifications were paid at, or below, the same salary Koval was receiving. The letter stated, in part:

> "* * * Therefore, there is no need for the employer to request a change in classification of the HVAC technician position, there

> is no justification for additional compensation when you are assigned duties that fall within the class specifications for refrigeration mechanic, and there is no reason to remove those job duties from you."

Belleque's letter also stated that Koval's additional five percent salary payment would end on February 28, 2003, since Belleque had made his final decision regarding the proper classification of Koval's position. This was the first notice to the Association that the State would not continue to pay Koval the additional five percent in salary.

9. On March 3, the Association, through its attorney Daryl Garrettson, filed a demand to bargain regarding the assignment of duties to Koval which were outside of his job classification and job description.

10. On March 20, Belleque wrote Garrettson to state that the State had classified Koval's position properly, and that he was forwarding the demand to bargain to the State Department of Administrative Services (DAS).

11. On March 28, Garrettson wrote Belleque to ask whether Belleque or DAS would be responding to the demand to bargain.

12. On April 4, Jorgenson wrote Belleque to request "all documentation and or information that was used in your response letter to * * * Garrettson dated March 20, 2003," and "all documentation and or information used in the decision to disregard the first written agreement."

13. On April 4, Belleque responded to Garrettson's March 28 letter by stating that Garrettson should deal directly with DAS.

14. On April 10, Belleque wrote Jorgenson, stating:

> "This is in response to your request for information regarding Nick Koval and a letter sent to Mr. Daryl Garrettson dated March 20, 2003. As indicated in a letter to Mr. Garrettson dated April 4, 2003, this issue has been raised as a demand to bargain and, as such, all requests for information will need to be sent to Jan Weeks at Labor Relations."

15. On April 10, 2003, Jorgenson filed a demand to bargain with Jan Weeks regarding the assignment of additional work duties to Koval.

16. On April 17, Jorgenson wrote Weeks at DAS to request "all documentation and or information used in not following the written agreement for Mr. Koval working out of class duties."

17. In late April, Moyo attempted to set a meeting on the Koval issue. On April 25, Jorgenson responded by e-mail, with copies to Wells, Weeks, Harkins, and Koval:

> "Mr. Moyo, there was a meeting on this issue and we talked about having another meeting. This is in the third step a DEMAND TO BARGAIN We will not set down with all these managers about this issue. * * * Until I get the information I have requested on this issue I would coceder [*sic*] this a unfair labor practice and you can conceder [*sic*] this your notice. This is fare [*sic*] from the spirit of the agreement ! I am in no way going to let this one drag on."

18. Weeks responded the same day, stating that the purpose of the meeting was to review the parties' different understandings of the substance of Koval's work, and that Garrettson was going to send Weeks a copy of an Employment Relations Board case regarding the State's obligation to bargain.

19. On May 28, Garrettson wrote Weeks. Garrettson referred to Jorgenson's April 17 request for the following:

> "* * * [A]ny and all documentation and/or information utilized or relied upon by the Department in repudiating or refusing to implement the grievance settlement signed by Brian Belleque on January 15, 2003. This request is for that information considered and relied upon by the Department in repudiating the above referenced settlement."

20. Garrettson also stated that the Association had made numerous requests for this information and threatened to file an unfair labor practice action if the documents were not forthcoming.

21. Association and State representatives discussed the Koval issue several times during labor-management meetings in the spring of 2003. At one such meeting, Association representative Jorgenson asked Belleque, Moyo, and Weeks for the classifications the State had reviewed in reaching its conclusion that Koval was not entitled to any additional wages. Moyo told Jorgenson that the information he sought was in the DAS classification document, which was on the internet.

22. On June 16, 2003, Moyo met with Association representatives about the Koval matter. Attorney Garrettson told Moyo that the Association wanted "whatever it was you looked at in changing your mind." Moyo stated that he would provide the Association with additional information. Moyo believed that the Association representatives did not understand what he was telling them about positions comparable to Koval's. Moyo decided to create a chart to aid their understanding.

23. On July 16, the Association filed this unfair labor practice complaint.

24. On August 6, Moyo presented the chart to the Association.[3]

25. Moyo and Association representatives met on August 11. The Association representatives told Moyo that they did not believe the information he had supplied complied with their requests, because it was information that the Association already had. Moyo responded, "[t]hat's all I've got in my file."[4]

26. The State had asked the Association to put its information requests in writing, so that it could be clear what the requests were. According to Belleque, the State's responses to those requests should also be in writing. Belleque understood that the written requests from the Association sought a formal response.

27. During the spring of 2003, the State was handling several Association document requests on a variety of subjects.

ISDS COORDINATOR POSITION

28. On May 20, 2003, Jorgenson sent a written request to DOC Security Manager Tom Wright for information related to the assignment of Kyle Page to an institution staff development coordinator (ISDS coordinator)[5] position. Jorgenson had seen the State's file on the issue, which was approximately two inches thick, but not the

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[3]Moyo's delay was apparently due to inadvertence or the press of other work; the evidence does not indicate Moyo acted in bad faith.

[4]Moyo did not recall whether he had previously told Association representatives that he had given them everything. Weeks believes that Moyo had made statements to that effect before the August meeting, but did not identify when those statements were made. We conclude that, aside from Moyo's February 5, 2003 e-mail *prior* to Belleque's decision, the State never informed the Association in writing that it had provided all the material responsive to the Association's requests. We conclude that State representatives did not clearly state that they had provided all the information they had until Moyo's remarks on August 11, 2003.

[5]The acronym does not match the testimony regarding the name of the position.

individual documents. Wright responded[6] through a reusable interoffice mail envelope ("thousand-miler") to the OSP interoffice mailroom. Jorgenson never received the letter.

29. On June 12, 2003, Jorgenson sent a second request to Wright, attaching a copy of his May 20 request. Jorgenson stated, "[y]ou still have not given me the information I have requested." Wright realized that Jorgenson had not received the information. On June 13, Wright sent the information again, after reprinting his original letter with the new date. He sent the information through the U.S. mail addressed to the Association's office address, as well as in another "thousand-miler" through the interoffice mail. He addressed copies of the letter to Belleque, Moyo, "Harkins/Bowser," and Garrettson. Belleque received a copy; Jorgenson, Bowser, and Harkins did not.

30. In July, after learning of this unfair labor practice complaint, Wright approached Jorgenson and explained that he had sent the material. Jorgenson replied, "it's in ULP. It's too late now." Later, the State supplied Jorgenson with a copy of Wright's June 13 letter and two additional pages. When Jorgenson told Wright that the information provided did not comply with the request, Wright told him that he had supplied what he believed Jorgenson was asking for.

FOUR-TEN SHIFT STUDY

31. From April 2 to September 3, 2001, the State conducted a pilot program regarding work schedules of four ten-hour days per week (a four-ten shift). The program resulted in a file containing 43 pages of documents.

32. On June 6, 2001, Association Vice President Jorgenson asked for the State's file on the four-ten pilot program. On June 11, the State asked that the Association pay a $9 copying fee for the file. The Association never paid the fee, and the parties disagree about whether the file was provided.[7]

33. On March 18, 2002, Mitchell issued a two-page memo summarizing the State's experience with the four-ten pilot program.

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[6]Wright's response was limited to a cover letter and two additional documents. Wright did not object to the request for information as seeking confidential documents or as otherwise objectionable and did not disclose in his letter to Jorgenson that he had withheld any documents.

[7]The State was inconsistent in demanding payment for information requests, and the Association was inconsistent in responding to those demands. Jorgenson and Mitchell disagree about whether Jorgenson received the report and supporting documentation. We need not resolve this dispute.

34. On April 11, 2002, Association Vice President Jorgenson asked for a copy of the State's pilot program file.

35. On August 26, 2002, Bowser received, and signed for, a copy of Mitchell's March 18 memo.[8]

36. On August 26 and 27, Bowser and the DOC's Stan Czserniak exchanged e-mails about the four-ten pilot program and the March 18 memo.

37. On March 19, 2003, Acting Superintendent Belleque issued a memo denying physical plant worker John Melnick's request to work a four-ten shift. The memo referred to the 2001 study on four-ten shifts. Belleque stated that the study demonstrated that four-ten shifts did not allow "the most effective interface of the physical plant with the overall operations of the institution."

38. On April 2, 2003, Association Vice President Bowser wrote to request "the back up documentation" for the State's conclusion, stated in Belleque's March 19 memo, that the pilot program had failed to meet the needs of the institution. The request sought information including the State's Measure 17 compliance records; work orders received and completed; and complaints from staff about work not being done for the previous two years, the year of the pilot study and the following year.

39. On April 8, 2003, Belleque replied to Bowser. Belleque repeated the list of items Bowser sought. Belleque stated that he understood that the four-ten shift issue had been raised in bargaining, and, therefore, Bowser's request was being referred to Jan Weeks at DAS for a response.

40. On April 17, Bowser wrote Weeks to renew his request for information, enclosing a copy of Belleque's April 8 response.

41. On June 4, 2003, Bowser sent another memo to Weeks. Bowser stated that he had made a request in April for "a copy of an evaluation made after the pilot four ten-hour day program in 2001." Bowser wrote that he had not received a response from Weeks, and requested a response by June 14.

42. At a labor-management meeting on June 16, Garrettson made a verbal request for the four-ten shift study file. Weeks told Garrettson that she would comply with the request. As of the date of hearing, the Association had received only Mitchell's March

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[8]Bowser and Mitchell disagree about whether Bowser also received the supporting documentation for the report. We need not resolve this dispute.

18, 2002, two-page summary report. The State had not provided the Association with the remaining 43 pages of documentation.

CONCLUSIONS OF LAW

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

2. The State violated ORS 243.672(1)(e) in its responses to the requests for information regarding the Koval grievance, ISDS coordinator position, and four-ten shift study.

STANDARDS FOR DECISION

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to "[r]efuse to bargain collectively in good faith with the exclusive representative." As part of their statutory duty to bargain in good faith, employers and labor organizations have a duty under the Public Employee Collective Bargaining Act (PECBA) 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, *Olney Education Association v. Olney School District 11,* 16 PECBR 415, 417-418 (1996), *aff'd* 145 Or App 578, 931 P2d 804 (1997), or if "the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal." *Washington County School District No. 48 v. Beaverton Education Association,* Case No. C-169-79, 5 PECBR 4398, 4405 (1981). This Board considers four factors in reviewing an alleged refusal to provide information:

> "* * * (1) [T]he 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. * * *" *Olney School District,* citing *OSEA v. Colton School District,* Case No. C-124-81, 6 PECBR 5027 (1982).

The Association has the burden of establishing that the State refused to provide information in a timely fashion. OAR 115-035-042(6); *Ralphs v. OPEU and Oregon Executive Department,* Case Nos. UP-68/69-91, 15 PECBR 115, 116-117 (1994). The length of time a party may take to respond to an information request depends on the totality of the circumstances. *Colton School District,* 6 PECBR at 5031. A determination as to whether a party responded within a reasonable time depends on such matters as "the accessibility of the data, clerical time necessary to produce the information, the workload priorities of the responding party, and the amount of data requested." *Id.* at 5032. Further, "the

reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether" where the parties' history includes a pattern of numerous requests or apparent "fish-and-grieve" expeditions. *Id.* at 5032.

In each of these disputes, the State does not contest the Association's right to the requested information. Instead, the State argues that it complied with its statutory duties.

KOVAL POSITION CLASSIFICATION

The State argues that Moyo's February 5, 2003, 2:04 p.m. e-mail advised the Association that the State had no additional documents to provide. It also argues that Association representatives were repeatedly told that the State had no further information to provide. It asserts that Moyo's offer to provide more information was an offer to actually create a document, something which the State had no duty to do.

Moyo's February 5 e-mail to Koval stated that he had "no other documentation I can share with you." It is undisputed that Moyo and the State changed their position on Koval's salary *after* that e-mail. The State's position changed from "still honoring the agreement" and "looking for * * * a mechanism to pay [Koval]" to claiming that Koval had no duties which justified higher wages. The Association was entitled to determine the basis for the State's change in position, as well as the earlier information that led Moyo to call the January 30 meeting. Moyo's e-mail did not inform the Association that no other documentation existed that was responsive to the Association's request.

The parties disagree about the nature of oral representations made at meetings between Association and State representatives. However, it is undisputed that the Association made several formal, written requests for the information and received no written response stating the State's position on producing the documents. It is also undisputed that, on June 16, 2003, Moyo offered to provide additional information to the Association. Both Moyo and the Association representatives understood that Moyo intended to provide that information soon after the meeting. Confusion about the nature of the information Moyo intended to provide could have been clarified by a confirming letter from either party. It is apparent, however, that the Association representatives were not aware that Moyo planned to provide them with information that they already had, albeit in a slightly different form.

It remained the State's obligation to provide a definitive response to the Association's request. The State failed to provide that definitive response until Moyo stated "[t]hat's all I've got in my file" on August 11, 2003. That statement was made nearly a month after this unfair labor practice complaint (ULP) was filed, and after repeated written

and oral requests from the Association. The State argues that this delay does not matter, because the Association had received the appropriate documents long before. We disagree. 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. *See Oregon School Employees Association v. Salem-Keizer School District 24J,* Case No. UP-50-86, 10 PECBR 252 (1987); and *Colton School District,* 6 PECBR at 5033.

We conclude that the State failed to respond in a reasonable time to the Association's request for information about the State's changed view of Koval's job, and that this failure violated its ORS 243.672(1)(e) duty to provide information. We shall order the State to cease and desist from failing to respond in a reasonable time to such information requests from the Association.

ISDS COORDINATOR POSITION

The Association argues that it requested information that the State never provided until after this ULP was filed, and that Wright withheld some information as confidential without informing the Association that he was doing so. The State argues that Wright placed nonconfidential information in the mail to the Association twice, and that the State is not responsible for the failure of delivery. The evidence in the record suggests that the information was sent, but was never received by the Association. From the Association's perspective, two written requests were simply ignored; from the State's perspective, it had responded once, learned that the response had never been delivered, responded again, and received no information from the Association that the documents had not been received.

The State was required to make a reasonable, good faith effort to deliver the documents. From the information available to it, it appeared that the first effort failed completely, while the second succeeded in reaching at least one DOC official, Belleque, although not the Association. The Association followed up with a question after it failed to receive the documents the first time, but made no additional attempts to follow-up with Wright after that. The State did not follow up to see if the documents were, in fact, delivered. However, the State used an additional, and presumably more reliable, means to send them the second time—regular mail.

We conclude that, under these circumstances, the Association has failed to prove that the State violated its ORS 243.672(1)(e) duty to provide information, as to the documents it attempted to deliver. *See Salem-Keizer School District 24J,* 10 PECBR at 264, n 13. However, Wright did not provide the Association with documents he concluded were confidential and made no attempt to notify the Association that he had withheld

documents that fell within the scope of the Association's request for information. *See* Finding of Fact 28. Through these actions, the State violated subsection (1)(e). *See AOCE v. Oregon Department of Corrections,* Case No. UP-7-98, 18 PECBR 64, 74 (1999) (party refusing to supply information on confidentiality grounds has a duty to seek an accommodation). We shall order the State to cease and desist from failing to reveal that it has withheld documents responsive to Association requests for information.

FOUR-TEN SHIFT PILOT PROGRAM STUDY

The State argues that the materials sought by the Association, 45 pages regarding the four-ten shift study, were provided to the Association several times prior to the requests at issue here. The Association argues that the State never provided it with the entire file, and that even if the Association had received the file, and later lost it, the State still had an obligation to respond.

It is undisputed that the State failed to respond to the Association's multiple 2003 requests for the four-ten shift study documents.[9] Even if the State had provided the documents in the past, it still had an obligation to respond to the current request. Multiple, lengthy requests for the same documents could well be unreasonable, and justify a refusal to provide additional copies. However, there is no showing of any such burden in this case. *See Salem-Keizer School District,* 10 PECBR at 262-263, and *Colton School District,* 6 PECBR at 5032.

We conclude that the State failed to respond in a reasonable time to the Association's request for information about the four-ten shift study, and that this failure violated its ORS 243.672(1)(e) duty to provide information. We shall order the State to cease and desist from failing to respond in a reasonable time to such requests from the Association.

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[9]The State argues that the Association modified its request each time it was repeated. However, Garrettson's request clearly seeks all relevant documents. In any event, there was no evidence that the State contacted the Association to resolve any ambiguity in the requests or that any such ambiguity or changes had anything to do with its failure to respond.

ORDER

1. The State will cease and desist from refusing to respond to Association requests to produce information within a reasonable time after the request is made.

2. The State will cease and desist from failing to reveal that it has withheld documents responsive to Association requests for information.

DATED this 16th day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-6-04

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. STATE OF OREGON, JUDICIAL DEPARTMENT, Respondent.	DISMISSAL ORDER

Elizabeth Baker, Attorney at Law, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant.

Linda J. Kessel, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On February 24, 2004,[1] Service Employees International Union Local 503, OPEU (SEIU) filed this unfair labor practice complaint alleging that the State of Oregon, Judicial Department, (State or OJD) violated ORS 243.672(1)(a) by denying Judy Kahler the right to a union representative during an investigative meeting.

On March 10, the State filed a motion to dismiss on two separate grounds. It argued (1) that SEIU has no standing to file this complaint, and (2) that unrepresented

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[1]All dates are 2004 unless otherwise stated.

employees have no right to representation during an investigatory meeting. On March 31, SEIU responded to the State's motion to dismiss. On April 2, the State replied to SEIU's response.

We conclude that SEIU is not an injured party under ORS 243.672(3). Accordingly, we will dismiss the complaint.

BACKGROUND

For purposes of deciding whether to dismiss a complaint without hearing, we assume that the facts alleged in the complaint are true. *Schroeder v. State of Oregon, Department of Corrections, and AOCE*, Case Nos. UP-49/50-98, 17 PECBR 907 (1999). According to the complaint, SEIU was, at all material times, conducting a campaign to organize the employees of OJD for the purpose of collective bargaining. Judy Kahler was employed by OJD in Josephine County and was one of the employees SEIU sought to represent.

In November 2003, Kahler attended a union organizing meeting. While at the meeting, Kahler discussed her concerns over some possible discipline she might receive.[2] Some of the other employees discussed Kahler's situation and decided they "would act as though they already had a union" and would support Kahler in protecting her rights. One of the employees volunteered to go with Kahler to any meeting which Kahler believed might lead to discipline.

On or about January 12, Kahler's supervisor informed her that she and the trial court administrator wanted to meet with Kahler later that day. Kahler asked if the meeting could lead to disciplinary action. Her supervisor did not answer. Kahler told her supervisor that if the meeting could lead to discipline, she wanted a coworker to attend the meeting with her. The supervisor told Kahler that OJD personnel rules did not provide for representation at meetings, and that Kahler would not be permitted to bring anyone with her.

Kahler attended the meeting alone. The next day, Kahler was placed on administrative leave pending termination proceedings. Kahler was subsequently discharged from her employment.

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[2]There is no allegation that Kahler's potential discipline was related to the organizing campaign.

SEIU's complaint seeks to extend the rule of *NLRB v. Weingarten, Inc.*, 420 US 251 (1975) to a nonunion workplace.[3] It asserts that the State violated this rule, as extended to nonunion employees, in its dealings with Kahler.

The State seeks to dismiss the complaint on two separate grounds. First, it argues that SEIU is not an "injured party" under the statute and thus lacks standing to assert the claim. Second, it argues that the Public Employee Collective Bargaining Act (PECBA) does not extend *Weingarten* rights to unrepresented employees and asks us to dismiss the complaint for failure to state a claim.

DISCUSSION

Under the PECBA, only an *injured party* may file an unfair labor practice complaint. ORS 243.672(3) and OAR 115-35-000(1). "*[A]nyone* who has been injured by an unfair labor practice" may file a complaint. *Ahern v. Oregon Public Employees Union,* 329 Or 428, 434, 988 P2d 364 (1999) (emphasis in original). The crucial question is whether the complaining party alleges that it suffered a substantial injury because respondent committed an unfair labor practice. *Jefferson County v. Oregon Public Employees Union,* 174 Or App 12, 21, 23 P3d 401 (2001). SEIU has made no such allegation here.

The complaint alleges that the State denied Judy Kahler the right to representation at a meeting she believed could have resulted in discipline. If an injury occurred, Kahler would be the one who suffered it. Kahler, however, is not named as a complainant, and thus does not assert rights on her own behalf.

SEIU is the only named complainant. To maintain this complaint, it must establish either that it is entitled to assert rights on behalf of Kahler, or else that it suffered an injury to its own interests as a result of the State's actions. The complaint fails to establish either possibility.

Turning to the first possibility, we recognize that in some circumstances, a labor organization can assert the rights of an employee. No such circumstance exists here. SEIU was not Kahler's exclusive bargaining representative, and there is no allegation that Kahler's potential discipline was in retaliation for her organizing activities on behalf of SEIU or that it in any other way arose out of the organizing campaign. SEIU alleges only

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[3]The Supreme Court in *Weingarten* held that employees in a unionized workplace are entitled to request union representation at an employer's investigatory interview that the employee reasonably believes could result in discipline. This Board followed *Weingarten* in *AFSCME, Local 328 v. OHSU,* Case No. UP-119-87, 10 PECBR 922, 926-929 (1988). We have not decided whether the PECBA extends *Weingarten* rights to nonunion employees.

that the employees decided to "act as though they already had a union." This is not enough. Such pretending cannot replace Board certification or an employer's voluntary recognition. In these circumstances, SEIU lacked standing to assert rights on behalf of Kahler.

The remaining possibility is that SEIU has asserted an injury to its own rights. The complaint contains no such allegation. SEIU brought this case under ORS 243.672(1)(a). Subsection (1)(a) is the vehicle for asserting an injury to the rights of *employees*. The rights of *labor organizations,* such as SEIU, are protected by ORS 243.672(1)(b). SEIU has not alleged a violation of subsection (1)(b) or otherwise identified an injury it suffered. SEIU has failed to establish that it is an injured party under ORS 243.672(3).

SEIU relies on three cases to support its contention that it has standing to assert Kahler's rights. The cited cases do not further SEIU's arguments. To the contrary, they demonstrate that SEIU has failed to assert the type of circumstances necessary to establish its standing as an injured party.

In *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64 (1995), the union had filed a petition to clarify a group of employees into an existing bargaining unit. It subsequently filed an unfair labor practice complaint which alleged that one of the employees it sought to add to the unit suffered unlawful employer threats, interrogation, and discipline in retaliation for his efforts to join the bargaining unit. We concluded that the union had standing to pursue the unfair labor practice complaint because the alleged misconduct arose in direct response to the employee's protected activity in working with the union. In contrast, the complaint here does not allege Kahler suffered retaliation because she requested a coworker to accompany her to the meeting; neither does it allege that the meeting or her subsequent termination had any connection to the union or the organizing campaign. These factual differences distinguish *Polk County.*

SEIU also cites *Bates v. Portland Federation of Teachers and Classified Employees*, Case No. UP-6-87, 11 PECBR 563 (1989). The labor organization there was not the exclusive representative, but was party to a representation petition. We held that it had standing to assert its own interests as a representation petitioner. In contrast, as discussed above, SEIU does not assert a violation of its own interests. It appears solely to assert the rights of Kahler. For this reason, *Bates* is not controlling.

SEIU further relies on *Oregon State Employes Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980). The union there alleged that after it filed a representation petition, the employer engaged in acts of anti-union discrimination that involved the petition. We concluded that the union was injured by the

act and was therefore a proper complainant. Here, SEIU does not assert that the alleged employer misconduct involved its representation petition or that there was an injury to its own interests. *Coos Bay-North Bend Water Board* does not apply here.

In summary, Kahler does not appear as a complainant to assert her own rights; SEIU cannot assert rights on behalf of Kahler because it is not her exclusive representative and the alleged misconduct did not arise from or otherwise have a connection to SEIU's organizing campaign; and SEIU has not properly asserted a substantial injury to its own interests as a result of the State's refusal to permit Kahler to have a representative at the meeting. We conclude that the complaint must be dismissed because SEIU is not an injured party as required by ORS 243.672(3).[4]

ORDER

The complaint is dismissed.

DATED this 17th day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

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[4]Because of our disposition of the case, we need not address the State's separate basis for urging dismissal, namely that unrepresented employees do not have Weingarten rights under the PECBA. We note that the application of Weingarten to unrepresented employees in the private sector continues to be the subject of debate before the National Labor Relations Board (NLRB). The NLRB recently held, in *IBM Corp.*, 341 NLRB No. 148 (June 9, 2004), that unrepresented employees do not have the right to have a coworker present during investigatory interviews. This decision overruled *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enf'd. in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-64-01

(UNIT CLARIFICATION)

PORTLAND POLICE ASSOCIATION, Complainant, v. CITY OF PORTLAND, Respondent.	)	FINDINGS AND ORDER ON RESPONDENT'S PETITION FOR REPRESENTATION COSTS

This Board issued an Order on May 20, 2003. Respondent filed a petition for representation costs on June 10, 2003, and Complainant filed objections to the petition on June 27, 2003. Complainant appealed the Order to the Court of Appeals on July 18, 2003, but later moved to withdraw the appeal on grounds that the matter had been settled. The Court of Appeals dismissed the appeal on June 16, 2004. Pursuant to Board Rule 115-35-055, this Board makes the following findings:

1. Respondent is the prevailing party.

2. Respondent's cost petition and Complainant's objections were both timely.

3. Respondent requests representation costs of $3,500, the maximum allowed under Board rules in most circumstances. The request is based on 97.17 hours of legal services valued at $97.49 an hour. Respondent asserts that it incurred legal costs of $9,524.77 in defending against the complaint.

4. The case required two days of hearing, post-hearing briefs, and oral argument before this Board. The hourly rate is well below the average. The number of hours is reasonable for a two-day hearing.

5. Complainant charged that Respondent violated ORS 243.672(1)(e) by agreeing to a "parity" clause with another of the labor organizations representing Respondent's employees. The issue presented by the complaint had not previously been squarely addressed by this Board. It is our practice not to award substantial representation costs in cases presenting issues of first impression.

Having considered the appropriate charges for services rendered, our awards in similar cases, and the purposes and policies of the Public Employee Collective Bargaining Act, this Board awards Respondent representation costs of $1,900.

ORDER

Complainant shall remit $1,900 to Respondent within 30 days of the date of this Order.

DATED this 22nd day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-41-03

(PETITION FOR REPRESENTATION)

OREGON AFSCME, COUNCIL 75, Petitioner, v. CITY OF CORVALLIS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) B. Carlton Grew on May 6, 2004, after the case was submitted on stipulated facts on February 19, 2004. The record closed on upon filing of the parties' post-hearing briefs on March 5, 2004.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Petitioner.

David E. Coulombe, Attorney at Law, Fewel & Brewer, 456 S.W. Monroe Avenue, #101, Corvallis, Oregon 97333-4710, represented Respondent.

On October 14, 2003, Oregon AFSCME, Council 75 (AFSCME or Union) filed a petition seeking to represent a bargaining unit of 11 seasonal parks and recreation workers employed by the City of Corvallis (City). The petition was supported by a timely and adequate showing of interest. The City timely objected to the petition on the grounds that (1) a separate unit for seasonal parks and recreation workers is not appropriate, and (2) the petition should be dismissed because of the statutory contract and election bars. In its brief, the City also argues that the petition is not justiciable

because all employees covered by the petition were laid off for the winter after the Union's showing of interest was filed.

The issues are :

(1) Is the petition justiciable?

(2) Is the proposed bargaining unit of all seasonal Parks and Recreation Department employees of the City who work at least 1,040 hours but less than 2,080 hours on a year-to-year basis, an appropriate unit?

We conclude that the petition is justiciable and that the proposed bargaining unit is appropriate. Accordingly, we will order that an election be held.

RULINGS

The rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT[1]

1. AFSCME is a labor organization and the exclusive representative of an existing bargaining unit of employees employed by the City, a public employer.

2. The Union and the City are parties to a collective bargaining agreement effective August 27, 2002 through June 30, 2005. Bargaining sessions for this contract took place from January 11 through August 27, 2002.

3. The City's seasonal Parks and Recreation Department employees who work at least 1,040 hours per year, but less than 2,080 hours per year, and no more than eight months each year (seasonal parks workers or subject employees), are currently unrepresented public employees.

4. Article I, Section 1.1, of the parties' 2002-2005 collective bargaining agreement expressly recognizes AFSCME as the sole and exclusive bargaining agent for employees scheduled to work at least 1,040 hours per year, with specific exceptions, to exclude seasonal Parks and Recreation Department employees working no more than

[1]These findings of fact are based on the parties' February 18, 2004 joint stipulation of facts.

eight months. Employees working less than 1,040 hours per year are considered temporary or casual and are not represented.

5. All current AFSCME-represented positions are specified on the City's AFSCME classification schedule. The employees in these positions work a variety of workweek schedules, both in terms of number of hours (20 to 40 hours per week) and in terms of shift times.

6. The petitioned-for employees are classified as Seasonal Parks Maintenance Workers (II, III, and IV). The positions are not part of the City's AFSCME unit classification schedule.

7. Seasonal parks workers are hired for positions each March and seasonal appointments end on or before October 31 of each year. Seasonal parks workers are told that if they leave the City in good standing at the end of the season, while they are not guaranteed reemployment the following season, they are afforded a preference in the hiring process. If a seasonal parks worker agrees to continue with the City for the next season, the City contacts him or her prior to the start of the next season. These employees are not required to complete a new application or to re-interview. In the 2003 season, 8 of the 11 subject employees had previously performed work for the City. The City's other casual or temporary employees do not have similar annual vacancies.

8. Regular parks employees, other than the parks maintenance supervisor, are classified as parks operation specialists and park maintenance technicians.

9. Regular parks employees are responsible for the care and maintenance of over 1,600 acres of City-owned property as well as riverfront recreation areas and sports fields. They are responsible for maintenance of all trees, shrubs, and lawns, as well as improved landscape areas in the urban area of the City. Regular parks employees train and give day-to-day direction to seasonal parks workers. Regular parks employees are expected to perform a wider range of duties than seasonal parks workers, as well as some significantly higher technical functions. Regular parks employees are involved in preparing and monitoring the budget, supervising volunteers and special projects, acting as lead workers for seasonal parks workers, and routinely responding to public requests.

10. Seasonal parks workers mow lawns and fields, maintain structures and trails, clean bathrooms, and maintain downtown improved landscape areas. Seasonal parks workers are not interchangeable with regular parks employees, and do not temporarily fill the positions of regular parks employees. Seasonal parks workers are

responsible for essential parks functions, but perform more of the routine and day-to-day maintenance work. The character of the work for regular parks employees is generally of a more technical and complex level. The two groups of employees have differences in required qualifications and certifications. They are all an integral part of the City's parks operations.

11. Seasonal parks workers and regular parks employees work in the same locations, throughout the City's parks, trails, and open space network.

12. Both seasonal parks workers and regular parks employees are supervised by Parks Maintenance Supervisor Joe Whinnery.

13. Both seasonal and regular parks employees generally work the same basic schedule (eight hours per day, five days a week) during the season. One of the eight regular parks employees works weekends when volunteers are working. Four of the 12 seasonal parks workers were assigned a weekend day as part of their regular workweek. By comparison, few casual or temporary employees generally work 40 hours per week.

14. Seasonal positions and regular represented positions are funded and budgeted differently. Seasonal and casual employees are hourly workers; no specific number of positions or wage level is budgeted, just a total wage dollar amount. Moving dollars from regular wages to seasonal wages or vice versa is an administrative act that can be authorized by the department director. Moving seasonal wage dollars to contract services would require the approval of the City manager. Seasonal parks workers do not receive regular cost-of-living or specific scheduled increases, although there are five wage steps in each wage range, and the schedule is reviewed by the City annually for appropriate changes, including a review for minimum wage and living wage compliance. Additionally, the City's practice has been that seasonal parks workers who are rehired in the subsequent season are placed at a higher step of their job class or into a higher seasonal job class. Only once in recent years did this not occur. Similar annual vacancies and routine rehiring do not occur for casual and temporary employees, so there is little history on whether those employees would generally receive the same increase in wage rate upon rehire. Step increases are given periodically for casual and temporary employees, but not on a regular schedule.

15. The City maintains a separate wage rate schedule for its seasonal and casual workers entitled "Seasonal and Casual Rate Schedule."

16. Regular parks employees are assigned a job group on one of two AFSCME salary schedules. Regular employees represented by AFSCME change from a non-PERS salary schedule to the PERS salary schedule (which is six percent higher) when they become members of PERS. Casual and seasonal employees do not have separate non-PERS and PERS schedules and their wages do not automatically change based on PERS membership.

17. The City does not automatically promote seasonal parks workers to regular parks employee positions when openings occur. Both seasonal and regular parks employees must follow the regular hiring process, including application and interview, for a regular parks position. The City is required to offer regular represented employees an interview if they meet minimum qualifications for the position, and they are allowed to interview on paid time. No such provisions exist for seasonal employees. Of the three regular parks employees hired in 2003, two had been prior City employees; of the three regular parks employees hired in 2001, all had been prior City employees; and of the two regular parks employees hired in 1999, one was a prior casual or seasonal employee. The remaining two regular parks employees had not been prior City employees and were hired in 1976 and 1994 respectively. Because regular parks positions require related experience, seasonal parks workers generally understand that their seasonal employment provides such experience and would assist them in gaining regular employment, should an opening arise. Opportunities to gain this experience elsewhere are becoming more limited.

18. Former seasonal parks workers are rehired in subsequent years at higher steps on the classification wage range, and typically progress from seasonal parks worker II to worker III or even worker IV levels with even higher hourly wage rates. No other City temporary or casual employees are given this preference in the hiring process, or have regularly scheduled pay adjustments or promotions. While some casual employees in other City employment do become regular employees, it does not occur regularly.

19. Regular employees receive the following benefits: medical and dental insurance, PERS retirement (when eligible under PERS rules), paid holidays, paid vacation, paid sick leave, life insurance, disability insurance, employee assistance program, access to a section 125 flexible benefit plan, deferred compensation, unemployment insurance, workers compensation insurance, eligibility for in-house only recruitments, and training opportunities. Regular employees represented by AFSCME receive differing levels of accrual benefits based on their hours of work and in the case of vacation time, their years of service. For example, a half-time employee would receive half the accrual of a full-time member. They receive differing levels of health benefits

based upon their full-time equivalent (FTE). Part-time employees with 0.5 to 0.75 FTE receive City-paid benefits for single coverage; part-time employees with 0.75 FTE or more receive City-paid benefits for up to two-party coverage; and full-time employees receive City-paid benefits for up to full-family coverage or the dollar threshold established in the contract.

20. Seasonal employees receive the following benefits: PERS retirement (when eligible under PERS rules), unemployment and workers compensation insurance, eligibility for in-house only recruitments, and training opportunities. Casual employees receive the same benefits based on their eligibility.

21. Language excluding seasonal employees from the AFSCME unit first appeared in the 1980 contract's recognition clause. The specific language excluding seasonal Parks and Recreation Department employees working no more than eight months per year appeared in the parties' collective bargaining agreement for the first time in 1993.

22. In 2000, AFSCME purportedly collected showing-of-interest cards for the subject employees. AFSCME Staff Representative Lou Sinniger requested that the City voluntarily recognize the subject employees as part of the existing bargaining unit. The City declined.

23. In 2002, during the negotiations for a successor agreement, AFSCME did not present any proposals to modify the recognition clause to add the subject employees to the existing bargaining unit.

24. On October 6, 2003, Sinniger presented the City council with a request that the City voluntarily recognize the subject employees as part of the existing bargaining unit. Sinniger stated that if the City refused, he intended to file a petition with the Employment Relations Board seeking an election to form a new unit. AFSCME's October 6 and October 19, 2003 letters to the City council, together with attached letters from the subject employees, asked the City to voluntarily agree to add the subject employees to the existing bargaining unit as the preferred manner in which to gain representation for the subject employees. The City declined to do so.

25. On October 14, 2003, AFSCME filed a petition for representation on behalf of all seasonal City Parks and Recreation Department employees who work at least 1,040 but less than 2,080 hours a year on a year-to-year basis. The City sent a letter containing the names and addresses of the then-current employees meeting the

description of the proposed bargaining unit. This consisted of eleven employees. None of these employees were employed by the City as of February 18, 2004.

26. On November 4, 2003, the City filed objections to the petition.

CONCLUSIONS OF LAW

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

2. The petition is justiciable.

3. An appropriate bargaining unit is:

> All seasonal Parks and Recreation Department employees of the City who work at least 1,040 hours but less 2,080 hours on a year-to-year basis.

The City offers three objections to the petition and proposed unit. First, the City contends that the petition is not justiciable because the employees in the proposed unit were laid off at the end of the season, after the Union filed the showing of interest. Second, the City argues that the petition should be dismissed because it is subject to both election and contract bars. Third, the City contends that the subject employees do not share a sufficiently distinct community of interest to warrant the creation of a separate bargaining unit. We consider each objection in turn.

JUSTICIABILITY

AFSCME filed this petition on October 14, 2003. The City argues that the petition is not justiciable because none of the subject employees were employed by the City as of March 5, 2004, the date its post-hearing brief was filed. This argument lacks merit.

The City's seasonal parks workers are hired each March and are laid off on or before October 31 each year. Seasonal parks workers who leave the City in good standing at the end of the season are given a preference in the hiring process. Seasonal parks workers seeking reemployment are called in advance of starting the next season. They are not required to complete a new application or to re-interview, and are paid at a higher level. For the 2003 season, 8 of the 11 subject employees had worked for the City prior to the 2003 season.

The City relies on *Utsey v. Coos County,* 176 Or App 524 at 549-550, 32 P3d 933 (2001) *rev allowed* 334 Or 75, 45 P3d 449 (2002), *rev dismissed* 335 Or 217, 65 P3d 1108, 1109 (2003). In *Utsey*, an intervenor organization, the League of Women Voters, sought to appeal a decision of the Land Use Board of Appeals (LUBA) granting a permit for use of farmland as an off road vehicle area and for a motocross race track. The League never asserted any interest of its own in the decision. The Court of Appeals held that the League suffered "no practical effect" from LUBA's decision, and therefore its appeal of that decision did not present a justiciable controversy.

The Oregon Supreme Court has said that:

> "* * * Under Oregon law, a justiciable controversy exists when 'the interests of the parties to the action are adverse' and 'the court's decision in the matter will have some practical effect on the rights of the parties to the controversy.' *Brumnett v. PSRB,* 315 Or 402, 405-06, 848 P2d 1194 (1993). 'Cases that are otherwise justiciable, but in which a court's decision no longer will have a practical effect on or concerning the rights of the parties,' are moot. *Id.* at 406." *Barcik v. Kubiaczyk,* 321 Or 174, 182, 895 P2d 765 (1995).

Oregon courts have applied a similar analysis in a case arising under the Public Employee Collective Bargaining Act (PECBA). In *Eugene Education Association v. Eugene School District,* 91 Or App 78, 754 P2d 580, *vacated as moot* 306 Or 659, 761 P2d 524 (1988), the Court of Appeals had upheld this Board's bargaining order regarding disputed contract language, reasoning that even though the parties had negotiated an agreement without the disputed language, the bargaining order would apply to future union proposals which included that language. The Oregon Supreme Court, without providing its reasoning, vacated the Court of Appeals' decision and remanded the case with instructions to dismiss it as moot. Shortly thereafter, the Court of Appeals was confronted with a similar issue. The Court of Appeals interpreted the Supreme Court's action as follows:

> "* * * It seems clear from the Supreme Court's action [in *Eugene*] that an ERB case is moot, despite a continuing dispute between a union and an employer over the meaning or legality of a contractual provision or proposal, if there are no longer any specific rights of specific parties at issue. * * *"

Portland Association of Teachers v. Portland School District, 94 Or App 215, 218, 764 P2d 965 (1988).

Accordingly, the Court of Appeals dismissed a petition for judicial review as moot where this Board had ordered the parties to arbitrate a grievance and the grievance had been settled.

This Board confronted the issue of justiciability in *Jefferson County v. Oregon Public Employees Union*, Case No. UP-18-99, 18 PECBR 388 (1999), *reversed and remanded* 174 Or App 12, 23 P3d 401 (2001), *Order on Remand,* 20 PECBR 217 (2003). That case concerned an alleged violation of ORS 243.672(2)(g) based on the union's picketing of a county commissioner's private businesses. This Board originally disposed of the case on standing grounds but the Court of Appeals reversed. When this Board addressed the case on remand, the union no longer represented any employees of the county. Accordingly, this Board held that the issue was moot and dismissed the complaint because there were no longer specific rights of specific parties at issue; there was no reasonable potential that the dispute between these parties would be repeated in the future; and there was no relief which this Board could provide even if it found that OPEU had violated the statute.

Similarly, in *State of Oregon, Department of Administrative Services v. OPEU,* Case No. UP-78-95, 17 PECBR 399 (1997), the employer filed an unfair labor practice complaint alleging that the union had inappropriately pursued a permissive subject of bargaining to interest arbitration. Shortly after the interest arbitrator selected the employer's last best offer, the union lost its status as exclusive representative in a representation election. This Board dismissed the employer's complaint as moot, reasoning that "[s]ince [the union] no longer represents the employees, there is no reasonable expectation that this dispute between these specific parties will be repeated in the future." 17 PECBR at 402.

In this case, however, the Union has filed a petition, with a timely and adequate showing of interest, to represent seasonal parks workers who are generally employed from March through October. There is no evidence that the City's long-standing practice of employing seasonal parks workers has ended, or that the City has altered its practice of generally reemploying seasonal parks workers from the previous season. The City retains salary schedules and other policies governing that seasonal employment. We conclude that, although no seasonal parks workers were employed as of the date of the post-hearing brief, the City's seasonal-worker program and job classifications continue. The positions covered by the petition continue to exist, and, on this record, continue to be filled from March until no later than October 31 each year.

Therefore, specific rights of specific parties are at issue, and there is a reasonable expectation that this dispute between these specific parties will continue. The action is justiciable.[2]

CONTRACT AND ELECTION BARS

The City next argues that a representation election for this unit is barred by ORS 243.692(1), which provides:

> "* * * (1) No election shall be conducted under ORS 243.682(3) in any appropriate bargaining unit within which during the preceding 12-month period an election was held, nor during the term of any lawful collective bargaining agreement between a public employer and an employee representative. However, a contract with a term of more than three years shall be a bar for only the first three years of its term."

That statutory section does not apply to this case. No election was held in the proposed unit, and no collective bargaining agreement exists between the City and a representative of the proposed unit or any of its members. The fact that the City and Union have discussed inclusion of the subject employees in another unit of employees represented by the Union does not trigger the election or contract bars as to this proposed unit.

APPROPRIATE BARGAINING UNIT

ORS 243.682(1) provides that this Board shall:

> "Upon application of a public employer, public employee or a labor organization, designate the appropriate bargaining unit, and in making its determination shall consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the

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[2]The City also argues that the showing of interest is insufficient because, subsequent to its filing, the employees in the proposed unit were laid off. OAR 115-25-000(1)(a) and 115-25-010(1)(h) provide that a petition accompanied by a showing of interest initiates the process of potential certification of a bargaining unit. The Union has satisfied the rules governing the filing of the petition. Our rules do not require that a properly filed showing of interest be revised every time a personnel change occurs in a proposed unit.

> history of collective bargaining, and the desires of the employees. The board may determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate."

"Community of interest" includes such factors as similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision. OAR 115-25-050(2). An appropriate bargaining unit may consist of all of the employer's employees, "or any department, division, section or area, or any part or combination thereof." OAR 115-25-050(1).

The City concedes that the employees in the proposed unit share a sufficient community of interest among themselves to constitute an appropriate unit. Relying on *AFSCME Council 75 v. City of Salem,* Case No. UC-55-91, 13 PECBR 433 (1992), the City first argues that the employees in the proposed unit share a significant community of interest with the existing AFSCME unit, and *more appropriately* belong there.[3] Although that may be the case, in a petition for representation of an unrepresented proposed unit, our responsibility is to determine whether the proposed unit is *an* appropriate unit, "even though some other unit might also be appropriate." ORS 243.682(1).

The City next argues that the employees in the proposed unit do not share a community of interest sufficiently *distinct* from the existing AFSCME unit to warrant creation of a separate bargaining unit. In *Laborers' International Union of North America, Local 320, v. City of Keizer,* Case No. RC-37-99, 18 PECBR 476 (2000), this Board noted:

> "This Board has concluded that a proposed bargaining unit had a 'clearly distinct' community of interest, or that a 'compelling circumstance' required designation of a separate

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[3]The seasonal parks workers share some characteristics with regular parks employees. They share similar work, although at a different skill level. There may be movement of seasonal parks workers to regular parks positions (of the eight regular parks employees hired in 1999, 2001 and 2003, six were previously City employees; the stipulation does not indicate whether their prior employment was in the Parks and Recreation Department.) The seasonal parks workers share common supervision with regular parks employees. There are, however, important differences, such as the skill level of their work, the fact that seasonal parks workers do not temporarily fill in for regular parks employees, the seasonal or non-seasonal nature of their work, the wage and benefits structure, and a 24-year history of separation for collective bargaining purposes.

> unit, in only a few general employment categories. We have designated separate, specialized (other than wall-to-wall) bargaining units for employees who are prohibited by ORS 243.736 from striking, employees such as teachers with special certifications, professional employees, craft employees, production and maintenance employees (where the public employer is a utility that sells its commodities to the public), and for employees who: (a) desire separate representation, (b) have unique working conditions, and (c) have a history of labor relations different from other employees of the employer." 18 PECBR at 481 (footnotes omitted, emphasis omitted).

We turn to the factors set out in ORS 243.682(1) and OAR 115-25-050(2).

Community of interest: Unlike other City employees, the seasonal parks workers do not have a classification description. They do not temporarily replace regular parks employees. The qualifications for hire of a seasonal parks worker are lower than those required for a regular parks employee. Seasonal parks workers are not promoted to regular parks positions, and do not receive any preference in applying for those positions. Regular employees must be offered an interview on paid time. Although the City employs other seasonal workers, those seasonal workers do not work with the parks workers.

The seasonal parks workers work with regular parks employees in the same locations and during the same shift. They share the same line of authority and supervision. They perform work which is similar to that of regular parks employees, although regular parks employees perform tasks which require greater skill, experience, or responsibility.

Although there is no actual hiring preference, seasonal parks workers understand their experience in those positions provides experience that will assist them in gaining regular Parks and Recreation Department positions. There are many other job categories identified in the City-AFSCME, 2002-2005 collective bargaining agreement, none of which appear to have duties similar to those performed by the seasonal parks workers.

Wages, hours, and working conditions: Seasonal parks workers are paid on a different pay scale from regular parks employees. The City's other seasonal workers do not have a multilevel pay scale like the seasonal parks workers. While seasonal

workers can qualify for PERS, the employee portion of those payments is deducted from their wages. In contrast, the wages of regular employees are increased once they qualify for PERS so that their take-home pay is not reduced. Regular City workers receive medical and dental insurance, paid holidays, sick leave, life and disability insurance, a deferred compensation plan, and related benefits, while seasonal parks workers do not.

History of collective bargaining: The seasonal parks workers have been excluded from the existing AFSCME unit since 1980. In 2000, AFSCME collected showing of interest cards and attempted to have the seasonal parks workers included in the AFSCME unit through bargaining with the City. The City did not agree, and AFSCME did not raise the issue in later bargaining during 2001 and 2002. In October 2003, AFSCME again asked the City to add the seasonal parks workers to the AFSCME unit. As part of that effort, AFSCME presented the City with letters from seasonal parks workers asking to be made part of the existing unit. The City declined AFSCME's request.[4] The record does not contain a list of other City bargaining units, but it appears from the unit description that the AFSCME unit includes virtually all eligible City employees, except sworn police officers, firefighters, and seasonal parks workers.

The desires of the employees: The evidence in the record suggests that the seasonal parks workers have recently expressed both a desire to join the existing AFSCME unit and a desire to create their own unit. We conclude that the employees' desires are in favor of representation in general.

DISCUSSION

In *City of Keizer,* 18 PECBR at 476, this Board certified a small bargaining unit of a separate department of city utility workers after finding that the job duties, skills, and desires of the petitioned-for employees differed from those of other employees. In *Laborers' International Union of North America, Local #483 v. City of Portland,* Case No. RC-30-00, 19 PECBR 384 (2001), this Board certified a bargaining unit consisting of a portion of an employer's seasonal employees, based on similar findings.

In *Oregon School Employees Association v. South Coast ESD, Region #7,* Case No. RC-10-00, 19 PECBR 58 (2001), OSEA sought to represent a proposed unit of

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[4]The City suggests that the history of bargaining should lead us to deny a separate unit because AFSCME failed to make a proposal to represent these employees during bargaining for the 2002-2005 collective bargaining agreement. Our focus here, however, is on the appropriateness of the proposed unit, not whether the Union sought to bargain with the employer over the issue.

part-time instructional assistants. This Board noted that the employees in the proposed unit shared a community of interest with the existing unit employees, in part because they worked in the same schools, often in the same classrooms, under the same job descriptions using the same knowledge and skills. This Board also concluded that the petition proposed an appropriate unit, in part because the part-time employees had the same job descriptions, skills, (lack of) benefits, and supervision. They also had no history of being represented, and had expressed, by signing authorization cards, a desire to be represented in a separate bargaining unit. 19 PECBR at 63-65.

OSEA had sought to represent the subject employees for over two years. It first sought to include them in the existing unit. While the parties were in the process of negotiating a collective bargaining agreement, and after they had reached tentative agreement on the recognition clause, the association filed a unit clarification petition seeking to add the part-time employees to the existing unit. OSEA withdrew the petition after failing to submit the required showing of interest. Later, OSEA filed a representation petition for a wall-to-wall unit, which was dismissed by this Board after concluding that a question of representation did not exist. 19 PECBR at 65. This Board concluded that there were compelling circumstances that supported designation of the petitioned-for unit:

> "What this history means is that OSEA, although willing, is unable to include the part-time employees in its existing bargaining unit. The result is that this residual group of employees is being denied the statutory right to choose an exclusive representative for 'the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.' ORS 243.662.
>
> "Approval of this unit will not unduly fragment ESD's workforce. It is already fragmented. The full-time classified employees are represented; the part-time classified employees are unrepresented. If these employees choose OSEA as their exclusive representative, ESD will have to bargain with one additional bargaining unit. While a wall-to-wall unit combining the part-time employees with the existing unit might be more appropriate, we need not withhold approval of a proposed unit merely because it is not the most appropriate.

> "Where, as here, the statutory directives for determining appropriate bargaining units dictate one result—approval of the unit—but conflict with Board-created policy preferences (for large units and against fragmentation), adherence to the statute is the better course of action. In other circumstances, where our preferences work to further the policies of the PECBA, such preferences will still be applied. Each unit determination case is governed by its own peculiar facts. Here, the procedural history of this matter, coupled with our conclusion that the proposed unit is appropriate under the requirements of ORS 243.682(1), leads us to approve the unit and order an election." 19 PECBR at 65 (footnote omitted, emphasis omitted).

In *City of Portland, supra*, this Board concluded that employees in a proposed unit of seasonal maintenance workers, including parks workers, had a sufficiently distinct community of interest to warrant the creation of a separate bargaining unit. This Board stated:

> "Although this Board in the past typically has declined to include seasonal and casual employees in a bargaining unit of regular employees, it has allowed separate units of employees with a limited employment relationship with a public employer. *AFSCME Council 75 v. Multnomah County Juvenile Justice Division*, Case Nos. RC-36/UC-47-92, 14 PECBR 202 (1992), and *Beaverton Education Association v. Beaverton School District 48J*, Case No. RC-72-93, 15 PECBR 210 (1994)." 19 PECBR at 390.

In *Multnomah County Juvenile Justice Division, supra*, we designated a bargaining unit of on-call juvenile group workers. In *Beaverton School District 48J, supra*, we designated a bargaining unit of substitute teachers. In *ILWU v. Port of Portland,* Case Nos. RC-3/5-95, 16 PECBR 205, 211-16 (1995), *aff'd* 142 Or App 592, 921 P2d 429 (1996), this Board declined to create separate bargaining units for ten port terminal supervisors and six port terminal berth agents, when the same union already represented a unit of three berth agents who shared a community of interest with the supervisors and berth agents.

We conclude that City seasonal parks workers are sufficiently distinct from other City workers and that it is appropriate to allow them to organize separately.[5]

The subject employees have signed cards demonstrating that they desire separate representation. They have unique working conditions. They are employees with a different level of attachment to their employment than regular City employees. Their work differs from both other City seasonal workers and regular Parks and Recreation Department employees. These employees also have a 24-year history of separation from the other Parks and Recreation Department employees and the existing AFSCME unit, and thus have a history of labor relations different from other City employees.

Were we to dismiss this petition, it would effectively prevent these public employees from exercising their statutory right to seek representation. Based on the appropriate unit factors, we designate a bargaining unit of City seasonal parks workers and order an election.

ORDER

1. An appropriate bargaining unit is all seasonal Parks and Recreation Department employees of the City of Corvallis, who work at least 1,040 hours but less 2,080 hours on a year-to-year basis.

2. The elections coordinator shall conduct a secret mail ballot election in the above bargaining unit for eligible employees to express their desires for or against collective bargaining representation. Eligible voters are those employees of the City employed in the bargaining unit on the date of this Order and who are still employed at the time of the close of the election. The choices on the ballot shall be Oregon AFSCME, Council 75 and No Representation.

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[5]We observe that this will create a small unit which has certain community of interest factors similar to the larger AFSCME unit. During the discussions leading to this petition, AFSCME asked the City to voluntarily recognize the seasonal parks workers as part of the larger unit. The City here suggests this is where they belong. While this separate unit is appropriate under the law, the parties may both benefit, in the event the employees vote for representation, by a voluntary amendment to the larger unit's recognition clause. This would avoid undue fragmentation and the time required to bargain a new agreement, and would provide the employees the bargaining benefits of being members of the larger established unit.

3. The City shall provide this Board and AFSCME with an alphabetical listing of names, home addresses, and classification titles of all eligible employees within 10 days of the date of this Order. The City shall provide a set of mailing labels, with the addresses of eligible voters in alphabetical order to the elections coordinator within 20 days of the date of this Order.

DATED this 30 day of June 2004.

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-23/25-03

(UNFAIR LABOR PRACTICE)

PORTLAND SCHOOL DISTRICT NO. 1, Complainant, v. PORTLAND ASSOCIATION OF TEACHERS, Respondent, Case No. UP-23-03;	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
PORTLAND ASSOCIATION OF TEACHERS, Complainant, v. PORTLAND SCHOOL DISTRICT NO. 1, Respondent, Case No. UP-25-03.	

The Board[1] heard oral argument on April 1, 2003, on Respondent Portland School Distric No. 1's objections[2] to a recommended decision issued by Administrative Law Judge (ALJ) Vickie Cowan on January 16, 2004, following a hearing on September 16 and 17, 2003, in Portland, Oregon. The record closed on October 23, 2003, upon receipt of the parties' post-hearing briefs.

Lester V. Smith, Jr., Attorney at Law (Barbara A. Bloom, Attorney at Law, on brief), Bullard, Smith, Jernstedt and Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented the Portland School District No. 1 (District) before this Board; Nancy J. Hungerford, Attorney at Law, The Hungerford Law Firm, 615 High Street, Oregon City, Oregon 97045, represented the District before the ALJ.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented the Portland Association of Teachers (PAT).

On May 21, 2003, the District filed an unfair labor practice complaint (UP-23-03), alleging that PAT violated ORS 243.672(2)(e) by refusing to sign the contract proffered by the District. On May 27, 2003, PAT filed an unfair labor practice complaint (UP-25-03), alleging that the District violated ORS 243.672(1)(g) and (1)(h) by refusing to sign an agreement which accurately reflected the agreement between the parties and by violating an agreement reached in collective bargaining. On June 5, 2003, PAT filed an amended complaint and requested expedited consideration of both cases. This Board denied expedited consideration and assigned the cases to the ALJ for hearing. The ALJ consolidated the cases for hearing.

The issues presented are:

1. Did PAT refuse to sign the contract agreed to by the parties, in violation of ORS 243.672(2)(e)?

2. Did the District refuse to accurately reduce to writing and sign the agreement reached by the parties, in violation of ORS 243.672(1)(h)?

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[1]Chair Gamson recused himself from this case.

[2]The Association moved to strike certain of the District's objections. The District opposed that motion. While this Board did not strike the objections, we limited oral argument and our consideration to matters specifically raised in the objections and filed in accordance with Board Rules.

3. Did the District refuse to honor Section 3 of the February 25, 2003 tentative agreement, in violation of ORS 243.672(1)(g)?

4. Is a civil penalty warranted?

Both parties concur that they reached an agreement as a result of bargaining. The dispute is whether, as part of that agreement, the parties agreed to revive Appendix J to the prior collective bargaining agreement. Appendix J provided for the placement of entry-level teachers at higher levels on the salary schedule in 1998-2002. The ALJ concluded that the parties did not mutually agree to revive Appendix J during bargaining and found the District had violated ORS 243.672 (1)(g) and (1)(h). For reasons discussed below, we agree with the ALJ that the District violated ORS 243.672 (1)(g) and (1)(h). However, we conclude a civil penalty is not warranted.

We will dismiss the District's UP-23-03 complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. PAT, a labor organization, is affiliated with the Oregon Education Association (OEA) and is the exclusive representative of a bargaining unit of licensed teaching personnel employed by the District, a public employer.

2. PAT and the District were parties to a collective bargaining agreement effective July 1, 1998, through June 30, 2002.

3. The 1998-2002 agreement provided for a 14-step salary schedule. The schedule is indexed, so that increasing the base step results in an increase in each cell of the salary schedule.

4. During bargaining for the 1998-2002 bargaining agreement, the District proposed that it be allowed to increase entry-level teacher salaries by placing them at step 2 and 3 of the salary schedule. This would allow the District to pay new teachers a higher salary without increasing the salaries of more senior teachers. PAT ultimately agreed to the placement language, with a sunset provision that the accelerated salary schedule placement of new teachers would not continue beyond the 2002 school year unless mutually agreed to by the parties. This agreement became Appendix J in the 1998-2002 collective bargaining agreement.

5. Appendix J provided:

"For the 1999-2000 school year the District may place first year teachers or other first year unit members at Step 2 of the salary schedule.

"For the 2000-2001 and 2001-2002 school years the District may place first year teachers or other first year unit members at Step 3 of the salary schedule.

"Such placement will not continue beyond 2001-2002 unless mutually agreed upon by the Association and the District."

6. Shortly before the expiration of the 1998-2002 contract, District Human Resource (HR) Director Steve Goldschmidt asked OEA representative Nancy Arlington if PAT would mutually agree to extend the dates of Appendix J into the status quo period.[3] Arlington told Goldschmidt that PAT would not agree and suggested they discuss the competitiveness of teacher salaries in the upcoming contract negotiations. Goldschmidt asserted that the District could continue to hire beginning teachers at step 3 under the theory that the practice was part of the status quo. Arlington was adamant that placement of beginning teachers was not part of the Public Employee Collective Bargaining Act (PECBA) status quo.

7. The District apparently agreed with Arlington because it hired beginning teachers for the 2002-2003 school year consistent with the 14-step salary schedule. Teachers with no prior experience were placed at step 1 of the salary schedule, and teachers with one year of prior experience were placed at step 2 of the salary schedule. Application of Appendix J did not continue.[4]

8. PAT and the District began successor contract negotiations for the 2003 contract on or about May 23, 2002. Bruce Zagar served as chief spokesperson for the District. Arlington was chief spokesperson for PAT.

9. The District faced a significant funding crisis. Without financial help, the District would have to cut 24 days from the school year, leaving the District with the shortest school year in the nation.

10. During bargaining, PAT proposed to retain the 14-step salary schedule with no accelerated salary placement for beginning teachers. PAT wanted to increase

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[3]ORS 243.712(2)(d) defines the status quo period as: "* * * After a collective bargaining agreement has expired, and prior to agreement on a successor contract, the status quo with respect to employment relations shall be preserved until completion of impasse procedures * * *."

[4]This finding comes from the parties' partial fact stipulation.

salaries at *all* steps. Arlington told the District that PAT would not agree to placement of beginning teachers at higher steps.

11. The District proposed a 12-step salary schedule, eliminating the existing prior bottom two salary steps and the salary schedule index. Because this change made Appendix J unnecessary, the District proposed that Appendix J be eliminated from the contract.

12. The parties remained steadfast in their positions throughout bargaining. PAT's final offer retained the existing prior salary language, including the indexed 14-step salary schedule. PAT also proposed that teachers would work nine days without pay and accept a salary freeze in the first year. The District proposed a 12-step salary schedule with no index, eliminating Appendix J, shortening the school year,[5] capping insurance premiums, and changing transfer language.

13. During the cooling-off period, the parties prepared for a possible strike. PAT scheduled a strike vote for 6:00 p.m. on February 25, 2003. The community became concerned and began putting pressure on the parties to save the school year.[6]

14. In mid-February, Arlington and PAT President Ann Nice met with Portland City (City) Commissioners Erik Sten and Randy Leonard. Arlington proposed that the teachers agree to work 10 days without pay if the City would contribute money to fund the 14 remaining days of the school year—approximately 15 million dollars. Leonard liked the approach and agreed to act as an intermediary.

15. On February 20, 2003, PAT representatives Arlington, Steve Palumbo, and Nice met with Interim School Superintendent Jim Scherzinger and made the same proposal to the District: teachers would work 10 days without pay and the City would make up the difference for the remaining 14 days, if the District agreed to maintain the existing salary schedule with a wage freeze for 2001-2003, and incremental salary increases in July and January of the 2003-2004 school year. Scherzinger indicated that the District would consider the proposal and respond to PAT by February 22, 2003.[7]

16. Commissioner Leonard began drafting a settlement proposal to be presented to PAT and the District. His first draft provided that the salary schedule for 2001-2002 remain the same. When he presented this proposal to Arlington, she suggested

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[5]The District's initial proposal was to eliminate nine days from the school year. As the funding crisis continued, that figure grew to 24 days.

[6]At this same time, the Doonesbury comic strip featured the Portland school situation.

[7]Scherzinger did not testify at the hearing.

that the language be changed to "current" salary schedule instead. Arlington made this change to clarify that the tentative agreement would not include any accelerated placement of entry-level teachers. Leonard changed the language to reflect PAT's concern.

17. When the District did not respond to PAT's offer on February 22, PAT held a press conference outlining its proposal to save the school year, with the help of the City and Multnomah County (County).

18. On Monday, February 24, School Board Chair Karla Wenzel and Scherzinger were at City hall for a meeting. Mayor Vera Katz approached them and offered to assist in the negotiations and to personally mediate the dispute. Wenzel and Scherzinger agreed and invited Katz to the school board meeting that night.[8]

19. On the afternoon of February 24, Katz called PAT representatives to City hall to brief City and County officials. Katz asked Arlington why PAT would not agree to pay beginning teachers above the first step of the salary schedule. Arlington explained that the parties needed to address the whole salary schedule. Arlington further explained that teacher salaries had eroded to the point that Portland teachers received some of the lowest wages in the region.

20. On the evening of February 24, Katz, Multnomah County Chair Diane Linn, Multnomah County Chief Operating Officer John Ball, and some of their staff met with the school board, District staff members Scherzinger, Goldschmidt, HR Attorney Maureen Sloane, and others. They discussed the District's interest in the insurance cap and the transfer language. They did not discuss salary placement of beginning teachers. Ball explained that the District's proposal was overly ambitious because it sought substantial concessions from the teachers without providing anything favorable in return. The District then put together a new offer. The District assumed Ball would verbally relay the new offer to PAT. Ball contacted PAT after the executive session, but did not convey the District's new offer. Because the parties were no closer to a resolution, Katz directed the District and PAT to come to City hall the next day for further discussions.

21. On the morning of February 25, 2003, District school board members, along with Scherzinger, Sloane, Goldschmidt, and other District staff members, assembled in a room at City hall. Zagar was not present. PAT representatives Arlington, Palumbo, and Nice were assembled in a separate room at City hall. City and County representatives, including Katz, Linn, and Ball were also present. Ball served as principal facilitator. City and County representatives met separately with the parties. At no time during the day did PAT and the District meet with one another. During his meetings with the District, Ball

[8]Wenzel did not participate in the bargaining process prior to the tentative agreement negotiations.

informed the District that PAT would not agree to the higher salary placement of entry-level teachers.

22. Because there was a lot of media attention, Katz cautioned both sides against making any disclosures to the press prior to settlement. During the day, while awaiting some interaction by City and County representatives, District staff used a laptop computer to write down the terms of the verbal proposal given to Ball the previous evening. During the afternoon of February 25, 2003, the District e-mailed this new proposal directly to teachers at their school computers. The proposal provided for the current salary schedule with no increase for the first year. For the second year, the District proposed a 12-step salary schedule, which effectively placed newly-hired teachers at the old step 3; a .5 percent salary increase; an increase in the cap on insurance contributions; and changes to the transfer language. The District also held a press conference to convey the District's new offer.

23. Mayor Katz became irate over the District's actions. She and Ball were worried that the District's actions would undermine any progress or cause PAT to walk out of the talks. To avoid a breakdown in the process, Katz informed the District that its e-mailed proposal was not on the table. Ball also informed the District that, absent a broader agreement on compensation, the salary placement of entry-level teachers would not be resolved. Instead, that issue would be part of the charge of a committee that would look at the key issues of health care cost containment and the competitive implications of the salary schedule.

24. In the afternoon, Commissioner Leonard again became involved in the negotiations and began trying to narrow the issues. The mayor and the County chair told the District that if they did not reach agreement with PAT, local government would not contribute the $15 million needed to save the school year.

25. The parties ultimately signed a tentative agreement, which provided:

> "Proposed elements for a Tentative Agreement between the Portland Association of Teachers and the Portland Public Schools for a two-year collective bargaining agreement effective July 1, 2002 through June 30, 2004.
>
> "1. Current Salary Schedule (2001-02)
>
> "a. 0% increase 7-1-2002 through 6-30-2003
>
> "b. ½% increase 7-1-2003 through 12-31-2003
>
> "c. ½% increase 1-1-2004 through 6-30-2004
>
> "d. The PAT agrees to work 10 days of the 2002-03 school year without compensation

"2. Creation of 6 person advisory committee comprised of; 2 members appointed by the Portland Association of Teachers; 2 members appointed by the Portland Public Schools District; 1 member appointed by the Portland City Council; 1 member appointed by the Multnomah County Board of Commissioners.

"The advisory committee shall be charged with making findings and recommendations for the **creation of a balanced and competitive compensation package that reduces cost of benefits and increases teacher salaries.** The report is due by 10/31/2003 and will include:

"Health Care Design and cost control features for Health Care Plans provided for the Portland Association of Teachers by PPS. The goal of the health plan program redesign will be to maintain the cost of benefits at the current contribution level.

"a) The initial step of this process is for the Trust to seek competitive bids for the current benefit package.

"b) Salary and benefit cost analysis that compares PAT with the other Metro 13 school districts.

"c) Agreements reached by PAT and the District in this process shall supersede the collective bargaining terms.

"3. With the exception of items 1 and 2 of this proposed Tentative Agreement, and the previous tentative agreements (Articles 7 and 8), all other language in the agreement shall remain the same as the agreement effective July 1, 1998, unless specifically modified by an agreement from the Contract Administration Committee. If a party wishes to discuss Article 10, the City and County will agree to facilitate such discussions. Such discussions shall commence no later than 30 days from the date of the ratification by the parties to the contract." (Emphasis in original.)

26. Wenzel and Sloane, who were involved in the tentative agreement negotiations, understood that the tentative agreement meant the District would continue to operate in the same way it had operated during 2001-2002, except that teachers would work 10 days without pay and would participate in an advisory committee to review insurance and total compensation.[9]

27. PAT prepared an analysis of the tentative agreement and presented it to the membership for ratification. This document provided that Appendix J retain the existing language of the 1998-2002 contract. The language in that Appendix indicated that it expired on June 30, 2002. The Appendix could not be revived in the tentative agreement without mutual agreement. There was no mutual agreement to revive it.

28. PAT representative Palumbo prepared and distributed a 14-step salary schedule for 2003-2004, showing entry-level teacher salaries beginning at step 1. On the reverse side, Palumbo provided a chart with which teachers could compute their own pay reduction as a result of the 10-day salary reduction. The calculation is based upon new teachers starting at step 1, not step 3. The teachers ratified the tentative agreement on February 27, 2003.

29. After February 25, 2003, Sloane and Goldschmidt asked Zagar to convert the parties' tentative agreement into contract language. Since Zagar was not present for the tentative agreement negotiation session, Zagar relied upon the express wording of the tentative agreement document.

30. In his first draft, Zagar decided to follow the tentative agreement literally. With the exception of some uncontested date changes, he did not update dates or salary amounts. He made no change to the language of Article J. On or about March 6, 2003, Zagar sent a hard copy of this draft to Arlington.

31. On March 14 and 18, 2003, Arlington submitted to Zagar drafts of the bargaining agreement. She modified numerous portions of the agreement by updating dates in some of the appendices; deleting provisions referring to dates or events now past; and advancing the rates paid for extra duty, mentoring, home instruction, evening high school, substituting, summer school, and a variety of other compensation items. Arlington made no changes to Appendix J, but did update Appendix E.

32. Appendix E from the 1998-2002 agreement pertains to the mentor teacher program and provides, in relevant part:

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[9]Wenzel mistakenly believed that the District was still paying new teachers at step 3.

"H. A mentor teacher shall receive extended responsibility pay of Eight Hundred and Thirty-Four Dollars ($834) for the 1998-1999 school year. This amount will be increased by the base salary increases in the 1999-2000, 2000-2001 and 2001-2002 school years.

"I. The District may expand or discontinue the Mentor Teacher Program at its discretion.

"J. This Memorandum of Understanding shall become part of the Agreement and shall remain in effect through June 30, 2002."

33. Arlington's modifications to Appendix E were limited to updating the dollar figure in Paragraph H to $880.47; updating the school year references in Paragraph H to 2002-2003 and 2003-2004; and updating the "sunset" date in Paragraph J to June 30, 2004. The dollar figure in Paragraph H was calculated from the base salary for the 2002-2003 school year–i.e., the base salary at the end of the 1998-2002 contract, an amount that was unchanged during the first year of the contract term under the tentative agreement.

34. In mid-March, but prior to March 19, 2003, Arlington and other PAT representatives met with Scherzinger to discuss how the 10 days of lost pay would be spread over the teachers' remaining paychecks for the 2002-2003 school year. There was no discussion about placement of beginning teachers on the salary scale.

35. On or about March 19, 2003, Zagar and Arlington met to discuss the drafts of the 2002-2004 bargaining agreement. Arlington explained it was PAT's position that the tentative agreement provided that the parties would maintain conditions as they existed at the expiration of the 1998-2002 bargaining agreement.

36. On March 21, 2003, Arlington faxed a scattergram to District Financial Officer Heidi Franklin setting out how the 10-day pay reductions would affect each teacher on the salary schedule. The scattergram was based on new teachers being placed at step 1 of the salary schedule.

37. On March 21, 2003, Superintendent Scherzinger and PAT President Nice issued a joint memorandum to PAT members explaining how the 10-day reduction would be implemented. This document contained no mention of increasing the pay of entry-level teachers who were hired at, and were currently being paid at, steps 1 and 2. It thanked teachers for "taking a 5.263% pay reduction for the 2002-2003 school year."

38. On March 31, 2003, Zagar sent Arlington the final draft of the 2002-2004 bargaining agreement. In his letter accompanying that draft, Zagar stated that he agreed with PAT's approach and made the changes suggested by Arlington, except that Zagar changed the language of Appendix J (re-lettered Appendix H). Zagar's letter provided, in pertinent part:

> "* * * Your explanation was that no matter how it was specifically worded in the tentative agreement, the Association was not intending to go back to the language as it existed at the beginning of the 1998-2002 agreement but back to the conditions of the contract as they existed in June of 2002 when the contract was ending. That is what you mean by 'current language'; the current language and the current conditions as the previous contract was ending.
>
> "After considering your interpretation and understanding of the tentative agreement, I agree that your approach to drafting the tentative agreement is more logical than returning all the way back to the language as it existed on July 1, 1998. I understand that the Association would probably not have been intending to return to various employment conditions that had been incrementally increased over the life of the 1998-2002 contract.
>
> "As a result, I have revised the District's draft of the tentative agreement and I have enclosed it with this letter. I believe there were some inconsistencies in your draft in terms of the return to 'current language' as it existed at the termination of the previous contract. * * *
>
> "* * * * *
>
> "I have amended Appendix J regarding the entry-level hiring so as to refer to the conditions that were in existence as the predecessor contract was ending. The 'current language' would have referred to the contractual conditions that existed prior to termination of the predecessor contract since there would not have been any 'current language' after termination of that contract."

39. Zagar's revision to Appendix J (now Appendix H) read as follows:

> "The District may place first year teachers or other first year unit members at Step 3 of the salary schedule.

"Such placement will not continue beyond 2002-2004 unless mutually agreed upon by the Association and the District."

40. In his testimony, Zagar explained his thought process leading to this revision, as follows:

"Well, updating it. If we're going back to the current language as it existed at the termination of the '98/2002 contract, then what was the condition of employment. The status quo, then, was step 3 hiring, and that that step 3 hiring authority would terminate with the end of that, then existing, contract. Would now . . updated, would terminate with the new two-year agreement in . . on June 30, 2004."

41. On or about April 16, 2003, the District ratified and signed Zagar's final draft. Subsequently, Zagar forwarded the bargaining agreement to PAT for signature. In his cover letter, Zagar wrote:

"As I indicated to you in our previous discussions, the District believes that, in order to be consistent with the tentative agreement's return to current language, the provisions of former Appendix J (Appendix H after relettering) similarly needs to be updated. The 'current language,' or condition of employment, that existed before the end of the predecessor contract was that the District had step 3 hiring authority. Just as with the other appendices, that condition needs to be updated, based upon the tentative agreement reached on February 25, 2003. That tentative agreement supersedes many previously held positions of both parties. Newly lettered Appendix H has been updated accordingly."

42. By letter dated April 25, 2003, Zagar requested that PAT sign and return the District's version of the bargaining agreement.

43. By letter dated May 7, 2003, PAT responded, through its attorney, that it was prepared to sign the bargaining agreement, with the exception of the revised Appendix J (now Appendix H). PAT asserted that the District's version of Appendix J did not reflect the agreement of the parties. PAT demanded that the District include the language of Appendix J as it appeared in the 1998-2002 bargaining agreement.

44. Neither party was willing to sign the version advanced by the other. As a result, on May 21, 2003, the District filed this unfair labor practice against PAT alleging

a violation of ORS 243.672(2)(e). PAT responded by filing an unfair labor practice against the District alleging violations of ORS 243.672(1)(g) and (h).

45. On May 30, 2003, the District changed the salary of entry-level teachers hired at steps 1 and 2 to step 3. It made the change retroactive to the beginning of the 2002-2003 school year. This move increased the salary for 111 teachers (out of a unit of 3,356) by nearly 7 percent. The District moved those same teachers to step 4 on the salary schedule for the 2003-2004 school year. Entry-level teachers hired at the beginning of 2003-2004, who had zero or one year of previous teaching experience, were hired at step 3 of the salary schedule.[10]

CONCLUSIONS OF LAW

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

2. PAT did not violate ORS 243.672(2)(e) when it refused to sign the contract presented by the District. We dismiss this complaint.

3. The District violated ORS 243.672(1)(h) when it refused to reduce to writing the agreement reached by the parties.

4. The District violated a written agreement between the parties, in violation of ORS 243.672(1)(g).

(1)(h) and (2)(e) Claims

ORS 243.672(1)(h) and (2)(e) make it an unfair labor practice for a party to refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign such contract. This Board applies an objective standard when deciding 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 School Dist. v. Redmond Education Assn.*, 4 PECBR 2086 (1978), *aff'd* 42 Or App 523, 600 P2d 943, *rev den* 288 Or 173 (1979).

In this case, the parties agree they reached a final and binding agreement in the tentative agreement; they also agree on what the terms of that agreement were, other than the disputed Appendix J. The remaining task, therefore, is to determine whether either party's version of that Appendix expresses the parties' agreement on that point.

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[10]Arlington asked the District to defer payment until the unfair labor practice complaints were resolved. The District refused.

In construing the language of an agreement, this Board uses the same approach and rules of construction as Oregon courts. *OSEA v. Rainier School District No. 13*, 311 Or 188, 194, 808 P2d 83 (1991); *Marion County Law Enforcement Association v. Marion County*, 130 Or App 569, 575, 883 P2d 222 (1994). The predominant consideration in contract construction is the parties' intent. *Miller v. Miller*, 276 Or 639, 647, 555 P2d 1246 (1976). In determining the parties' intent, the objective manifestations of intent control, rather than the parties' "subjective intentions or unspoken understandings and assumptions." *Stedman v. Eugene School District 4J*, Case No. UP-9-91, 13 PECBR 211, 216 (1991), citing *City of Portland v. DCTU*, Case Nos. UP-58/76-87, 10 PECBR 109, 118 (1987).

Our inquiry into the parties' tentative agreement involves a three-stage analysis. We first examine the text of the language in the context of the agreement as a whole. If the provision is clear, no further analysis is necessary. If it is ambiguous, we examine "extrinsic evidence of the parties' intent." If the meaning of the text remains unclear after that examination, we use "appropriate maxims of contract construction." *IAM Woodworker Lodge W-261 v. Roseburg Urban Sanitary Authority*, Case No. UP-75-97, 17 PECBR 757, 763 (1998), citing *Yogman v. Parrott*, 325 Or 358, 361-364, 937 P2d 1019 (1997).

The District argued before this Board that the tentative agreement clearly revived Appendix J in the manner reflected in the District's second draft of the agreement. Before the ALJ, the District argued that the drafter of its version of the final agreement, Zagar, who was not part of the tentative agreement negotiations, was "puzzled by the language of the tentative agreement," and therefore followed its literal language by not updating any of the dates or compensation amounts from the 1998-2002 contract other than those that had been specifically agreed upon. The District's original draft did not include any changes in Appendix J. Only after accepting Arlington's explanation of the intent of the tentative agreement did Zagar revise Appendix J.

The tentative agreement itself does not address the subject of accelerated salary placement of entry-level teachers–nor, for that matter, does it address most of the economic terms. Instead, it commits "creation of a balanced and competitive compensation package that reduces cost of benefits and increases teacher salaries" to the purview of the advisory committee set up in item 2. With the exception of increases in the salary schedule for the second year of the contract provided in item 1, and the matters on which the parties had previously reached tentative agreements, the tentative agreement left the remainder of the language unchanged from the 1998-2002 contract "unless specifically modified by an agreement from the Contract Administration Committee."

It is undisputed that there was no prior tentative agreement regarding Appendix J, nor did the contract administration committee agree to modify it. Unfortunately, the fate of Appendix J rested with the proviso in the tentative agreement

that "all other language in the agreement shall remain the same as the agreement effective July 1, 1998." While this cryptic language is not a model of clarity when viewed in isolation, its meaning becomes evident in the context of the status quo from the prior bargaining agreement, at the time it was drafted.

As both parties ultimately recognized in preparing their respective versions of the 2002-2004 agreement for signature, in context, this language was not intended to be applied literally. For example, the 1998-2002 bargaining agreement contained specific salary schedules for the first two years and a formula based on the consumer price index for calculating salaries for the remaining two years. It is self-evident that the salary increases in item 1 of the tentative agreement are increases from the status quo, not from the 1998 salaries. Updating the salary schedules accordingly does not modify language, but merely conforms the updated document to the intent of the tentative agreement. The District argues that its revisions to Appendix J were the same sort of "housekeeping" detail. In support of this argument, it points to the other changes made by Arlington, particularly to Appendix E–the mentor teacher program. We find this argument without merit.

Appendix J in the 1998-2002 agreement included three basic elements:

1. In 1999-2000, i.e., the *second* year of the agreement, the District could start beginning teachers at step 2 of the salary schedule.

2. In 2000-2001 and 2001-2002, i.e., the *third and fourth* years of the agreement, the District could start beginning teachers at step 3 of the salary schedule.

3. The placement of beginning teachers would "not continue beyond 2001-2002 *unless mutually agreed upon by the Association and the District.*" (Emphasis added.)

The first two elements of Appendix J resembled some other articles of the 1998-2002 bargaining agreement, including the salary schedules and Appendix E, in that they tied specific provisions to particular school years. The third element was somewhat similar to the "sunset" clause in Appendix E insofar as it set an ending date for that provision which coincided with the end of the 1998-2002 bargaining agreement. However, Appendix J's "sunset" clause did not merely set an ending date for placement of beginning teachers; it specifically required that such placement would not continue "unless mutually agreed upon" by the parties. It is this further proviso that sets Appendix J apart from other contract language tied to school years that had already passed.

Although the parties never discussed the meaning of section 3 of the tentative agreement, both parties understood the agreement to be, except for those specifically enumerated items, that the parties would continue to operate in the same manner as they were currently operating. In other words, the status quo would remain in effect. That understanding was consistent with the language of the tentative agreement. There was no

evidence that Appendix J was part of the status quo. To the contrary, the District's righ to accelerate the placement of beginning teachers had expired some eight months previous. PAT had explicitly refused to extend Appendix J at the time of its expiration, and the District had hired beginning teachers at step 1 for the 2002-2003 school year. The status quo therefore was that beginning teachers were hired at step 1.

The District presented no evidence that the mentor teacher program, as described in the 2002-2004 agreement (Appendix E), was not part of the status quo. To the contrary, Arlington's unrebutted testimony was that both parties intended to continue the mentor teacher program. As further support that this was in fact the parties' intent, the District ratified and signed a contract which contained an updated version of Appendix E.[11]

Finally, even assuming *arguendo* that the tentative agreement revived Appendix J in some form, the District's revision actually went beyond merely updating that provision. The District omitted the entire first paragraph of Appendix J and instead started with a modified version of the second paragraph. This was more than a mere "housekeeping" detail. If the first paragraph of Appendix J survived in updated form, then for the first year of the new bargaining agreement, the District had no authorization to hire or pay beginning teachers at step 2 or 3; for the second year, it had authorization only to hire and pay them at step 2, not at step 3. We find nothing in the record establishing that the parties ever agreed that the District could start beginning teachers at step 3 during the 2002-200 bargaining agreement.

Another aspect of the parties' agreement argues strongly against such an interpretation. The parties had agreed to a major pay reduction for the remainder of the school year and only nominal raises for the second year of the new bargaining agreement. They had diverted the larger issue of compensation structure, along with health insurance cost containment, for study by a newly-established committee. It would be illogical to limit the available recommendations from that committee by providing a major salary increase in the interim for one part of the bargaining unit. Thus, neither the language nor the logic of the tentative agreement support the District's attempted revision of Appendix J.

In summary, the District did not establish, by a preponderance of the evidence, that Appendix J was revived as a result of the parties' collective bargaining. The District has violated ORS 243.672(1)(h) by refusing to sign the agreement which pays teachers on a 14-step salary schedule, and which does not revive Appendix J.

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[11]Section J of Appendix E provides that the agreement shall remain in effect through June 30, 2002. There is no specific requirement that mutual agreement is required to continue th terms of Appendix E. We also note that the District has the right to discontinue the mentor teacher program at its discretion.

The District did not correctly draft or apply the tentative agreement language regarding Appendix J: therefore, its ORS 243.672(2)(e) complaint will be dismissed.

(1)(G) CLAIM

Appendix J was the contractual authorization for accelerating the salary placement of entry-level teachers during the predecessor contract; this authorization, by its terms, expired at the end of that contract "unless mutually agreed upon" by the parties to continue it. As discussed in detail above, the tentative agreement did not continue the terms of Appendix J. The District nonetheless changed the salary of entry-level teachers to step 3 retroactively to the start of the 2002-2003 school year; moved those teachers to step 4 for the 2003-2004 school year; and hired entry-level teachers at step 3 for the 2003-2004 school year.

ORS 243.672(1)(g) provides that it is an unfair labor practice for an employer to violate the provisions of any written contract with respect to employment relations. Both parties agree that the tentative agreement constituted a binding contract. That contract did not give the District the right to accelerate the placement of entry-level teachers. The District therefore violated the contract by unilaterally and retroactively paying beginning teachers salaries higher than those agreed to by the parties, in violation of ORS 243.672(1)(g).

CIVIL PENALTY

This Board has the discretion under OAR 115-35-075(1)(a) to award a civil penalty to a party in redress of an unfair labor practice. In order to do so, we must find that the District has either repetitively engaged in unlawful conduct or that the District's actions were egregious. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684 (2002). We have defined egregious to mean "conspicuously bad" and/or "flagrant." *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986). We find that the District's actions in this case do not meet that criteria.

The written terms of the parties' tentative agreement had to be discussed and clarified after that agreement was reached.[12] Zagar prepared the initial draft for the District but was not part of the final negotiation session. When he sent the District's initial draft of the contract to PAT, he relied on the express wording of the tentative agreement.

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[12]We also note that Arlington had some direct input into drafting the terms of the tentative agreement through her discussions with Commissioner Leonard. Normally, the terms of ambiguous language are construed against the drafting party. While we do not take that step here, Arlington's involvement in the drafting is one of the elements in our decision to deny a civil penalty.

Consequently, the dollar amounts and dates remained the same as those effective on July 1, 1998, and he made no change to Appendix J.

Arlington, who had been part of the final negotiations responded to the District's draft with a draft of the new agreement with many modifications that updated dates; deleted language regarding events that were past; and increased pay rates for extra duty, mentoring, home instruction, evening high school, substituting, summer school, and other compensation areas. Her draft left Appendix J as it was in the July 1, 1998 agreement but updated Appendix E. Arlington also updated compensation increases in the new agreement to comport with the status quo at the end of the 1998-2002 contract.

Because the District's and Pat's drafts differed, Arlington and Zagar met. Arlington explained that PAT believed the tentative agreement was to maintain conditions as they existed at the expiration instead of the beginning of the 1998-2002 agreement. Within days of the meeting, Zagar sent a letter to Arlington agreeing with PAT's interpretation and noted that he understood that this interpretation meant Appendix J would also continue in effect with the dates modified to extend to 2004.

On this incorrect understanding regarding Appendix J, the District then ratified the agreement as proposed by Arlington and re-drafted by Zagar with all the dates and salaries updated to the end of the 1998 agreement instead of the beginning, as stated in the tentative agreement. Zagar requested that PAT sign the agreement and return it to the District. PAT responded that it would sign the agreement absent the District's proposed updating of Appendix J, which had become Appendix H in the new agreement.

We do not underestimate the impact of the District's conduct on PAT's interests. The District passed up several opportunities to alert PAT to its belief that the tentative agreement gave it the right to hire new teachers at higher salary levels while the parties were still conforming the contract language to the terms of the tentative agreement. Implementation of a pay increase for new teachers, more than a month after the teachers ratified the tentative agreement based on PAT's description of the unit-wide concession on salaries, undermined PAT's credibility with the teachers it represented. But for the unique City-generated mediation that brought these parties to this agreement, we might well have considered the District's conduct an egregious disregard for the collective bargaining agreement and the PECBA. However, given the post-tentative agreement discussions that became necessary to modify and clarify the specific language of the tentative agreement, the District's actions regarding Appendix J do not constitute egregious conduct. A civil penalty is not warranted.

ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(h) by refusing to reduce to writing and sign the contract reached through collective bargaining effective July 1, 2002.

2. The District shall cease and desist from violating ORS 243.672(1)(g) and immediately pay all teachers in conformance with the 14-step salary schedule with no accelerated salary schedule placement for beginning teachers.

3. The District shall recoup all funds wrongfully paid to beginning teachers. The District and PAT will mutually agree to a schedule to accomplish this task.

4. The District shall sign the attached Notice to Employees and shall post a copy of it for a period of 30 days in a prominent place in each District building.

5. The request for a civil penalty is denied.

6. UP-23-03 is dismissed.

DATED this 12th day of July 2004.

*

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (ERB) in Case No. UP-25-03, Portland Association of Teachers v. Portland School District No. 1, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Portland Association of Teachers filed an unfair labor practice complaint against the District, alleging that the District violated ORS 243.672(1)(g) and (h) by violating the parties' contract and refusing to accurately reduce to writing and sign a collective bargaining agreement reached by the parties.

ORS 243.672(1)(g) provides, in pertinent part, that it is an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations." ORS 243.672 (1)(h) provides that it is an unfair labor practice for a public employer to "[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign such contract."

ERB, after a hearing on the complaint, concluded that the District violated the parties' settlement agreement by refusing to sign the agreement reached by the parties. As a consequence, the District unlawfully paid entry-level teachers retroactively above the appropriate salary step and refused to incorporate the June 30, 2002 expiration of the placement of entry-level teachers (Appendix J) into the parties' agreement. ERB ordered the District to (1) cease and desist from its unlawful conduct; (2) recoup all funds wrongfully paid to beginning teachers; and (3) post this notice.

The District will comply with the Order of the ERB.

PORTLAND SCHOOL DISTRICT NO. 1

Dated:_____, 2004

By: _____
Employer Representative

_____
Title

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted in each employer facility in which bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807, ext. "248."

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-2-04

(DECLARATORY RULING)

IN THE MATTER OF THE JOINT PETITION FOR DECLARATORY RULING FILED BY MEDFORD SCHOOL DISTRICT 549C AND OREGON SCHOOL EMPLOYEES ASSOCIATION CHAPTER 15	)	DECLARATORY RULING

The Board held oral argument on June 23, 2004, in Salem, Oregon.

David W. Turner, Staff Counsel, Oregon School Boards Association, 1201 Court Street N.E., P.O. Box 1068, Salem, Oregon 97308, represented the District.

Michael J. Tedesco, Attorney at Law, 15050 S.W. 150th Court, Beaverton, Oregon 97007, represented the Association.

Petitioners Medford School District 549C (District) and Oregon School Employees Association Chapter 15 (Association) jointly filed this request for a declaratory ruling on April 26, 2004. The petition seeks a ruling on whether the salary and fringe benefits reopener provision of the collective bargaining agreement is governed by the 90-day provisions of ORS 243.698 or the 150-day provisions of ORS 243.712. We conclude that, in the circumstances presented, the parties' bargaining is governed by the 150-day provisions of ORS 243.712.

STATEMENT OF FACTS BEING ADJUDICATED

1. The District is a public employer. The Association is the exclusive representative of a group of classified employees employed by the District.

2. The District and Association are parties to a collective bargaining agreement (Agreement) effective July 1, 1999, through June 30, 2006.[1]

3. The parties have agreed to reopen salary and fringe benefit portions of the Agreement pursuant to Article I, Section 1.2.

4. Article I, Section 1.2, of the Agreement reads, as follows:

"1.2 CONTRACT DURATION AND REOPENING OF NEGOTIATIONS

"This contract shall be effective July 1, 1999 and shall remain in full force and effect to and including June 30, 2004. This contract may be extended by mutual agreement of both parties at any time prior to June 30, 2004. The term of the contract shall be extended for two years. The agreement will now expire on June 30, 2006.

"Upon expiration of this contract and until a new contract is negotiated, the salaries and fringe benefits identified in this Agreement or its supplements shall not be reduced.

"If, as a result of bargaining described in the paragraph above, salary or benefits are reduced, the District agrees to reopen for negotiations those items that had been reduced if it receives significantly more revenue than anticipated.

"In the event of a budget deficit from the prior year, legislative action or initiative affecting any portion of this agreement, the salary and related economic items

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[1]The petition states that the Agreement was effective July 1, 1999, through June 30, 2004, and a document was attached bearing those dates. The parties acknowledge that the Agreement has been extended and will now expire on June 30, 2006. The revised Agreement, which was attached to the District's brief in support of oral argument, contains changes in the pertinent contract language. At oral argument, the parties stipulated on the record that the current language, rather than the language of the 1999-2004 Agreement, is pertinent here.

agreed to herein shall not be reduced without negotiations between the Association and the District. A budget deficit shall be defined as the inability of the District to finance staffing and programs through the general fund operating budget at the previous year's level. The District or Association shall give notice of its need to renegotiate the contract during the term of the contract."

STATUTES BEING APPLIED TO THE FACTS

ORS 243.712, which sets out the process applicable to most collective bargaining, was amended in 1995. It establishes a 150-day period for bargaining "the terms of an agreement." It sets the time frames within which parties may declare impasse, submit final offers, and (in the case of strike-permitted units) impose a final offer or engage in a strike. ORS 243.698, which establishes an expedited 90-day bargaining period for certain negotiations, provides, in relevant part:

"(1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.

"(2) The employer shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain.

"(3) Within 14 calendar days after the employer's notification of anticipated changes specified in subsection (2) of this section is sent, the exclusive representative may file a demand to bargain. If a demand to bargain is not filed within 14 days of the notice, the exclusive representative waives its right to bargain over the change or the impact of the change identified in the notice.

"(4) The expedited bargaining process shall cease 90 calendar days after the written notice described in subsection (2) of this section is sent, and the employer may implement the proposed changes without further obligations to bargain. * * *."

No analogous provision existed before the 1995 enactment of ORS 243.698.

QUESTIONS PRESENTED BY THE JOINT PETITIONERS

1. When there is a salary and fringe benefit contract reopener, and the reopener language is silent as to bargaining timelines, is the reopener bargaining governed by ORS 243.698 or ORS 243.712?

2. Does it make a difference if successor contract negotiations have commenced as defined in *Cascade Bargaining Council v. Jefferson County School District*, Case No. UP-12-00, 19 PECBR 12 (2001)?

ANSWER REQUESTED BY THE DISTRICT

ORS 243.698 applies. This statute was enacted in 1995 for this very purpose.

ANSWER REQUESTED BY THE ASSOCIATION

ORS 243.712 applies when contract language is silent. If the parties intended the expedited process of ORS 243.698 to apply, they would have bargained language with that specification.

CONCLUSIONS AND REASONING

Prior to 1995, one process applied in all circumstances in which the parties had an obligation to bargain. The 1995 statutory amendments established two separate bargaining processes. The first, ORS 243.698, is an expedited process that applies to certain negotiations during the term of an agreement. The second, ORS 243.712, applies to all other bargaining. The issue presented here is which process governs these parties' reopener negotiations.

This Board implemented the 1995 amendments by adopting administrative rules. OAR 115-40-000. The pertinent provisions of those rules state, as follows:

"**Mediation**

"**115-40-000** (1) Negotiations concerning a new or reopened collective bargaining agreement.

"* * * * *

"(b) The 150-calendar-day period of negotiations begins:

"(A) When an exclusive representative is recognized or certified; or,

"(B) Where the parties are negotiating over the terms of a successor agreement or pursuant to a contractual reopener provision, when the parties meet for the first bargaining session and each party has received the other party's initial proposal.

"* * * * *

"(2) Mid-contract negotiations.

"(a) At any time during a 90-day period of expedited negotiations concerning a proposed change in employment relations not covered by a collective bargaining agreement or concerning the renegotiation of contract terms pursuant to ORS 243.702, the parties may jointly request mediation. * * *

"(b) Mediation of a labor dispute subject to expedited negotiations shall not continue past the 90-day period. The 90-day period of expedited negotiations begins:

"(A) When the employer notifies the exclusive representative in writing of anticipated changes that impose a duty to bargain; or

"(B) When a party requests in writing renegotiation of contract terms pursuant to ORS 243.702."

The plain language of OAR 115-40-000 answers the questions presented here. The 150-day bargaining period applies when parties are "negotiating over the terms of a successor agreement *or pursuant to a contractual reopener provision* * * * ." OAR 115-40-000(1)(b)(B) (emphasis added). By contrast, the 90-day bargaining period applies when the parties are negotiating "concerning a proposed change in employment relations *not covered by a collective bargaining agreement*," or the parties are renegotiating an invalid contractual provision pursuant to ORS 243.702. OAR 115-40-000(2)(a) (emphasis added). Article I, Section 1.2, is a "contractual reopener provision" on salary and benefits, subjects that *are* "covered by" the Agreement. Bargaining pursuant to that reopener provision is therefore governed by ORS 243.712 and is subject to the 150-day

bargaining period and subsequent dispute resolution processes in that statutory provision.

The District nonetheless urges us to either (1) declare OAR 115-40-000 invalid to the extent it applies ORS 243.712 to reopeners, or (2) limit the rule to scheduled reopeners rather than optional or conditional reopeners such as the one here. We decline both invitations. Beginning with the District's second argument, we find no statutory or practical support for the narrow and tortured definition of reopener the District suggests. The rule applies to all reopeners, including the one at issue here.

Regarding the District's first argument, we conclude the rule is valid. The language of this rule is grounded in both the statutory language and the context in which that language was enacted–*i.e.*, a substantial body of case law that determines when an employer is "obligated to bargain over employment relations during the term of a collective bargaining agreement."

Mid-contract negotiations are not new to the Public Employee Collective Bargaining Act (PECBA). In 1996, law professor Henry H. Drummonds aptly summarized this Board's case law on mid-contract bargaining obligations as they existed prior to the 1995 statutory amendments:

> "* * * Mid-contract bargaining obligations can arise under the PECBA in several situations: for example, when some term of a contract cannot be performed or is declared invalid; or when the contract remains silent on a 'condition of employment' and the employer proposes or makes a unilateral change in working conditions." LERC Monograph, Issue No. 14, *After SB 750: Implications of the 1995 Reform of Oregon's Public Employee Collective Bargaining Act*, University of Oregon, 47-48 (1996) (footnotes omitted).

In a footnote at the end of the paragraph quoted above, Professor Drummonds discussed the situation addressed by ORS 243.698, in which the contract is silent on the condition of employment:

> "Mid-contract disputes in this latter situation arise most often when an employer attempts to make a 'unilateral change' in a 'condition of employment' on some subject not covered by the collective bargaining agreement, and the union has not waived its right to bargain by contract or

> inaction. AFSCME, Local 2752 v. Wasco County, 4 PECBR 2397, 2400 (1979), *aff'd* 46 Or. App. 859, 613 P.2d 1067 (1980); Eugene Educ. Ass'n. v. Eugene Sch. Dist., 2 PECBR 1101 (1977). The 'unilateral change' law under the PECBA generally follows private-sector NLRB precedents. *See, e.g.,* NLRB v. Katz, 369 U.S. 736 (1962); May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945). *See generally*, Nancy J. Hungerford & Henry H. Drummonds, *The Continuing Duty to Bargain*, 2 LERC MONOGRAPH SER. 1 (1983) (updated 1986 by Paul B. Gamson)." *Id.* at fn. 192.

ORS 243.698 did not change the standards for determining when an employer is "obligated to bargain"; it merely provided an expedited vehicle for completing mid-term negotiations when that obligation exists. *Benton County Deputy Sheriff's Association v. Benton County Sheriff's Department*, Case No. UP-36-02, 20 PECBR 551, 561 (2004). Our administrative rules are consistent with the purpose and intent of the statutory provisions resulting from the 1995 amendments.[2]

This Board's case law leads to the same answers to the questions posed. We have previously discussed at length the history, purpose, and impact of the 1995 amendments. *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699 (1996), involved a proposal to subcontract transportation services, which was proffered within a month after the parties began negotiations for a successor collective bargaining agreement. There, the question was which bargaining process applied. We described the "special circumstances" in which ORS 243.698 applies. The bargaining must be:

> "* * * (1) during the term of a contract; (2) when the employer notifies the union of 'anticipated changes'; (3) giving rise to an obligation to bargain – *i.e.*, changes concerning a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement." *Id.* at 703 (footnotes omitted).

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[2]Courts will uphold an agency's construction and interpretation of its own rules if the interpretation is plausible and not inconsistent with the rule, the context of the rule, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994); *Stroeder v. OMAP*, 178 Or App 374, 380, 37 P3d 1012 (2001).

We explained that the expedited bargaining process in ORS 243.698 "does not by its terms supersede the regular bargaining process unless the special circumstances giving rise to its application are in place." *Id.* at 705.

The questions posed here fit easily within our statutory analysis in *Sandy Union High*. Expedited bargaining under ORS 243.698 is an exception to the regular bargaining process, and is limited to the situation the legislature sought to address–*i.e.*, where the employer wishes to make a mid-term change in a condition of employment that is not already covered by the existing contract. A reopener is not such a situation. The subjects of negotiation–here, salary and fringe benefits–are covered by the existing contract. The parties are negotiating over possible changes on those subjects.[3] For this reason, the 150-day process of ORS 243.712 applies to negotiations pursuant to a reopener provision in a collective bargaining agreement.

The second question posed by the petition is whether our answer would be different if the parties had already commenced successor bargaining when the time arose to bargain the reopener issues. This question would be significant only if we concluded that reopener bargaining in general is governed by the expedited process. The question apparently arises from our holding in *Sandy Union High* that the expedited process does not apply once successor bargaining has commenced. Here, however, that question does not arise because we conclude the reopener bargaining is governed by the 150-day process in ORS 243.712. That process would still apply if the parties had begun successor contract negotiations at the time of the reopener.[4]

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[3]The duty to bargain over salary and fringe benefits under this reopener results from an agreement by the parties to bargain over subjects that are ***already covered by the contract***. Further, ***either party*** may notify the other of "its need to renegotiate the contract during the term of the agreement." This contractual provision does not fit within the scheme of ORS 243.698, which obligates only ***the employer*** to notify the union in writing when ***the employer*** is "obligated to bargain" over "anticipated changes" in employment relations while the contract is in effect.

[4]We decline to join our concurring colleague in extending the expedited process of ORS 243.698 to changes proposed during bargaining for a successor contract. In *Sandy Union High*, we considered, and unanimously rejected, the same argument. We noted the potential to undermine the bargaining process if an employer could isolate one issue for expedited treatment while simultaneously bargaining for a successor contract. 16 PECBR at 705. That potential has not diminished in the intervening years. Our analysis of the text and context of ORS 243.698 has similarly retained its vitality. That statutory provision is a limited one, intended to apply to a specific situation, *i.e.*, "where the employer's duty to bargain *only arises* because of its desire to make a mid-term change." 16 PECBR at 705 (emphasis in original). When successor bargaining

(continued...)

RULINGS

1. In response to the first question, we rule that bargaining under a reopener clause is governed by ORS 243.712.

2. In response to the second question, we rule that the answer to the first question does not change depending on whether successor contract negotiations have begun at the time of the reopener.

DATED this 14th day of July 2004.

Paul B. Gamson, Chair

* Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas Concurring:

I concur with this Order but write separately to discuss when expedited bargaining under ORS 243.698 applies.

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[4](...continued)
has already begun, the employer's duty to bargain does not "only arise" because of its proposed mid-term change. It arises instead under ORS 243.672(1)(e) and 243.712-243.756. That duty applies both to subjects addressed in the predecessor contract and to new subjects raised in bargaining. The expedited process of ORS 243.698 does not apply.

Our decision in *Sandy Union High* was driven by the balance struck by the legislature when it drafted ORS 243.698. The partial retrenchment from that balance urged by our colleague would exceed the limited scope of ORS 243.698.

In *Sandy Union High*, we concluded that once bargaining has begun for a successor agreement, mid-contract bargaining should be subsumed into the 150-day successor bargaining process. I disagree.

ORS 243.698 provides that matters subject to mid-contract negotiations, which are subjects not already covered by the agreement, and which arise "during the term of the agreement," shall be bargained under the 90-day process. This language is clear and unambiguous. There is no statutory language under ORS 243.712 that modifies the rights and obligations provided under ORS 243.698.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-02

HILLSBORO EDUCATION ASSOCIATION, Complainant, v. HILLSBORO SCHOOL DISTRICT, Respondent.	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR ATTORNEY FEES ON APPEAL

This Board issued an Order on December 19, 2002. 20 PECBR 124 (2002). Respondent filed a petition for judicial review. The Court of Appeals affirmed the Order without opinion on March 31, 2004. An appellate judgment was issued on June 2, 2004. Complainant filed a petition for attorney fees on appeal on June 23, 2004. Pursuant to OAR 115-35-057, we make the following findings:

1. The appellate judgment names Complainant as the prevailing party.

2. The petition was timely. Respondent filed no objections.

3. Complainant requests a fee award of $3,500, the maximum allowed under our rules in most cases. The request is based on 33.6 hours of legal services valued at $130 per hour, 10.4 hours of service valued at $135 per hour, plus two hours of travel time valued at $65 per hour, for a total of $5,902 billed on appeal.

4. This case involved a motion to stay this Board's Order. The number of hours claimed exceeds the average in similar cases, a factor we consider in making cost awards. The hourly rates are reasonable.

5. The issue in this case was whether Respondent violated ORS 243.672(1)(e) by deciding to change the number of classes assigned to teachers and

teaching load premium pay for the 2002-2003 school year, and by taking significant steps toward implementing those decisions. This Board unanimously found a violation. The Court of Appeals affirmed the Order without opinion.

In ruling on the petition for representation costs in this case, we noted that we typically make an average award in unilateral change cases. We also found that this case did not involve matters of first impression, and that no other factors argued strongly for either an enhanced or reduced award. We find nothing in either our Order or the decision of the court that supports either a greater or lesser than average award.

Having considered the policies and purposes of the Public Employee Collective Bargaining Act, the appropriate charges for the services rendered, and our awards in similar cases, this Board awards Complainant attorney fees in the amount of $1,800.

ORDER

Respondent is ordered to remit $1,800 to Complainant within 30 days of the date of this Order.

DATED this 15th day of July 2004.

*

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson has recused himself from this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-18-03

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 3742,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
UMATILLA COUNTY,	)	
Respondent.	)	

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) William Greer on December 19, 2003, following a hearing on August 12, 2003, in Pendleton, Oregon. The hearing closed on September 12, 2003, upon receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Douglas R. Olsen, Umatilla County Counsel, 216 S.E. Fourth Street, Pendleton, Oregon 97801, represented Respondent.

Oregon AFSCME Council 75, Local 3742 (AFSCME) filed this complaint on April 21, 2003, alleging that Umatilla County (County) did not promote AFSCME bargaining unit member Patricia Perry into a management position because of Perry's protected activity on behalf of AFSCME, in violation of ORS 243.672(1)(a) and (c). The ALJ investigated and scheduled the complaint for hearing. On June 2, the County filed an answer in which it denied the complaint's allegations.

The issue is whether the County refused to promote Patricia Perry into a management position because of her exercise of protected rights on behalf of AFSCME, in violation of ORS 243.672(1)(a) and (c).

We conclude that the County based its decision on legitimate, nondiscriminatory reasons. We will therefore dismiss the complaint.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. AFSCME is the exclusive representative of a bargaining unit of personnel employed by the County. The County is a public employer.

2. The County's Resources Services and Development Department (Department) is responsible for several functions, including land use planning, emergency management, the County fair, watermaster, and extension service. As of the hearing date, the Department consisted of a planning director, a senior planner, two planners, a zoning aide, a cartographer, and an administrative aide.

The Department is also the County's representative to the Chemical Stockpile Emergency Preparedness Program (CSEPP), an intergovernmental agency. CSEPP monitors the incineration of chemicals at the Umatilla Army Depot, a chemical storage facility that includes land in both Umatilla County and Morrow County.

3. Doug Olson became the County's planning director in 1978. He was also the Department director from the Department's inception in 1995 until his retirement on May 1, 2003. Olson was involved in both land use planning and CSEPP activities. County Commissioner Dennis Doherty was also closely involved in CSEPP. Bob Perry served as the County's assistant planning director from the late 1980s until his retirement in November 2002.

4. Patricia Perry[1] began her employment with the County in its Mental Health Department as an office assistant 1 (1991-1993) and office assistant 2 (1993-1994). She later transferred to a zoning aide position in the Department

[1]Bob Perry and Patricia Perry are not related. We will refer to Bob as "Bob Perry" and to Patricia as "Perry."

(1994-1997). She was promoted to senior planner in 1997. Perry has bachelor's and master's degrees in forestry, with a specialty in park planning.

5. Perry was the AFSCME local's president from 1994 to 2001, and, as of the hearing date, was its vice-president. Simultaneously, she has been the local's chief steward. In that role, she processed AFSCME grievances against the County. Perry was on the local's bargaining team for the two most recent collective bargaining agreements. Her various positions with AFSCME brought her into contact with the County commissioners.

6. In the first half of 2002, due to changes in Perry's duties, the County amended her classification description to senior planner/transportation planner and increased her pay by two ranges. The County commissioners approved the change. In that position, Perry acts as liaison to various intergovernmental programs and is involved in grant writing and project management. The County's classification description states that a senior planner provides "direction and guidance" to other Department employees on particular work "when necessary."

7. In the summer of 2002, Olson told the County commissioners that both he and Bob Perry were likely to retire within the next year. Olson suggested that the commissioners review the Department's function and plan for any reorganization that they considered appropriate. At that time, the Department had increasing responsibilities for the CSEPP.

8. Also in the summer of 2002, Perry asked Olson whether the County might fill Bob Perry's assistant planning director position through an internal recruitment.[2] Olson told her that he wanted to fill the position in that manner. When Olson asked County Human Resources Department Director Jim Barrow about that possibility, however, Barrow replied that the County commissioners generally preferred hiring through an open recruitment. Later, the commissioners told Olson that they would not consider a direct appointment for the vacancy. They stated that they wanted to see who might apply and that they welcomed Perry's application.

9. In August 2002, Olson recommended that the County commissioners consider reorganizing the Department. One specific recommendation was to change the name of the "assistant planner" position to "planning manager," increase the supervisory responsibility of the position, and increase the pay by two ranges.

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[2]The County had promoted Bob Perry from senior planner to assistant planning director through an internal, noncompetitive process.

Because Bob Perry, the incumbent assistant planning director, would retire on November 29, 2002, Olson further recommended filling the planning manager position by November 15 to allow for some overlap between the incumbent and the new planning manager. In September, the County adopted Olson's recommendations.

10. On October 9, 2002, the County initiated the planning manager recruitment by posting an announcement which stated that the recruitment would close on October 23. One job requirement stated in the announcement was "exceptional ability to: plan, organize, manage, and review work of subordinate employees * * *." Also on October 9, Olson sent a copy of the announcement by e-mail to all Oregon planning directors.

11. Perry decided to apply for the planning manager position. Both Olson and Bob Perry encouraged her to apply.

12. On October 9, after receiving Olson's e-mail, Morrow County Planning Director Tamra Mabbott called Olson to discuss the planning manager recruitment.

Before Mabbott became Planning Director in Morrow County, she worked for Umatilla County from 1991 to 1995 as a senior planner . She had formal education (including a master's degree in urban planning from UCLA) and experience as a planner and was widely respected as the Morrow County Planning Director. Mabbott had supervisory, managerial, and planning director experience, and she was Morrow County's representative to the CSEPP. From her prior employment with Umatilla County, Mabbott was familiar with County personnel and planning issues.

Mabbott expressed interest in the Umatilla County position, but told Olson that she had applied for a position with Walla Walla, Washington. She interviewed for that position on October 9, the same day she received Olson's e-mail.

13. At hearing, Perry acknowledged that Mabbott is qualified for the planning manager position.

14. Upon learning of Mabbott's interest in the planning manager position, the County commissioners considered how to approach the situation. Commissioner Doherty, who had worked with Mabbott on CSEPP issues, knew that she had management experience as the Umatilla County planning director, had planning experience beyond the minimum qualifications specified in the recruitment announcement, and could move easily into the County planning director position soon

to be vacated by Olson. The commissioners decided simultaneously to offer Mabbott the assistant planning director position (soon to be vacated by Bob Perry) and to cancel the planning manager recruitment. Mabbott tentatively accepted the offer.

15. During the process of negotiating an employment contract with Mabbott, Olson directed Administrative Assistant Valerie Thorne to type a draft and admonished her not to discuss the project with anyone. When Thorne told Olson that Perry was interested in the position, Olson responded that the commissioners wanted to hire Mabbott, who was known and qualified, and did not want to hire Perry because of her union activities.[3]

16. Around October 14, 2002, Olson told Perry that the County had hired Mabbott to the assistant planning director position, with the intention of moving Mabbott into the planning manager position, and that the County had canceled the planning manager recruitment.[4] As of that date, Perry had not completed her application for the planning manager vacancy.

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[3] Thorne testified that Olson used words to the effect of "the commissioners do not want to hire Perry because of her union involvement and their dealings with her." Olson testified that he used words to the effect of "we'll see; the board of commissioners wants to hire Mabbott." Olson testified that he did *not recall* making the statement described by Thorne in her testimony.

A witness who *does not recall* making a particular statement has not *denied* making the statement. Such a witness simply does not recall one way or the other whether the statement was made. Given Olson's failure to deny the statement, our finding that he later made a similar statement (see footnote 5), and the fact that Thorne had no direct stake in the outcome of this case, we credit Thorne's testimony.

[4]At hearing, Perry testified that Thorne told her about an October 2002 conversation between Thorne and Olson. Perry testified that Thorne said: the County planning commission held a meeting on October 24; before the meeting began, while Perry was out of the room, Thorne overheard Olson tell commission members that the County had hired Mabbott; Thorne said to Olson words to the effect of "you better tell them the shady reason for what happened"; and Olson responded with words to the effect of "it wouldn't matter anyway—Perry wouldn't have gotten the job because of her union involvement."

AFSCME did not carry its burden of proving Olson made this statement to Thorne. First, although Thorne was called to testify to other similar conversations with Olson, she did not refer to that conversation in her testimony. Second, Perry's testimony amounts to double hearsay. It concerns a statement Thorne allegedly made to Perry (first level of hearsay) about a statement Thorne allegedly heard Olson make (second level of hearsay). That is not as reliable as the direct testimony from Thorne that AFSCME could have offered.

17. Around October 15, 2002, Olson told Perry that he was sorry the recruitment and hiring sequence happened as it did. He told her that the director of the County Human Resources Department had approved the process.

18. Perry believes that she has the qualifications required for the assistant planning director position. The record reflects that Perry has experience as a planner but no formal education in that field; she has minimal experience as a supervisor or manager; and she has had little involvement with CSEPP.

19. Mabbott started work on November 15, 2002. Over the next several months, Mabbott took over some of Perry's work.

20. In March 2003, Mabbott disagreed with a statement Perry made in an intergovernmental meeting. Mabbott asked Olson to facilitate a meeting between her and Perry. After discussing the particular issue, Perry expressed her frustration that the County selected Mabbott for the management position vacancy. Olson responded by saying that Mabbott was highly qualified for the position and that Perry had been involved in some union activities.[5]

21. In the summer of 2003, the County promoted Mabbott to planning director and changed the vacant assistant planner position into a planner position.

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[5] We have three versions of the conversation. Perry testified that Olson said words to the effect of "you are very well qualified but the reason you did not get the position was because of your union activities." In his testimony, Olson denied saying that Perry was not hired because of her union activities. Mabbott, who was also present for the conversation, testified that Olson said to Perry words to the effect of "Mabbott has management experience and you don't" and "you do have your union involvement."

We credit Mabbott's testimony. Both Olson and Perry were under significant stress during the meeting. After Mabbott expressed interest in the position that Perry sought, Olson essentially withdrew his previously enthusiastic support of Perry, a long-time fellow employee. In contrast, as of that meeting date, the County had already hired Mabbott, and she did not have the stress of dealing with a fracture in a long-term professional relationship. Under the circumstances, Mabbott was in a better position to note and accurately recollect the conversation.

Further, when Mabbott testified that Olson had referred to Perry's union activity, she provided evidence that was adverse to her employer's interest. In that context, Mabbott's testimony has an additional ring of truth. We find that Olson said in this meeting that one consideration in the hiring process was Perry's union involvement.

22. Thorne, in her March 2003 annual evaluation conference with Olson, said words to the effect of "you realize it was Perry's union involvement and adversarial role that prevented her from being hired." Olson replied with words to the effect of "[r]emember, what we did was perfectly legal."

23. Olson never heard the commissioners state that they decided not to hire Perry because of her union activities. Olson, Barrow, and County Commissioners Hansell, Doherty, and Holeman all deny that Perry's union activities were a factor in the County's decision to hire Mabbott as planning manager.

CONCLUSIONS OF LAW

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

2. The County's refusal to promote Perry into a management position did not violate ORS 243.672(1)(a) or (c).

ORS 243.672(1)(A) CLAIM

ORS 243.672(1)(a) states two separate violations. First, it prohibits an employer from taking certain actions "because of" an employee's exercise of protected rights. Second, it prevents employer actions that have a natural and probable tendency to chill an employee "in the exercise" of protected rights. *See, generally, Lane County Public Works Association, Local 626 v. Lane County,* Case No. UP-15-03, 20 PECBR 596 (2004); and *Portland Association of Teachers and Bailey v. Multnomah County School District #1,* Case No. C-68-84, 9 PECBR 8635 (1986).

AFSCME alleges that the County refused to promote Perry "because of" her union activities. In *Teamsters Local 670 v. City of Vale,* Case No. UP-14-02, 20 PECBR 337 (2003), this Board discussed its method of analyzing complaints under the "because of" branch of ORS 243.672(1)(a):

> "ORS 243.672(1)(a) prohibits public employers from interfering with, restraining, or coercing employees in or because of the exercise of their ORS 243.662 rights '* * * to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.'

"To state a claim, a complainant must plead protected employee activity, employer action toward the employee, and a connection between the two that suggests a causal relationship. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *reconsid* 17 PECBR 549 (1998), *rev'd and remanded* 171 Or App 616, 16 P3d 1189 (2000), *order on remand* 19 PECBR 284, 295 (2001). The employer has the opportunity to offer a legitimate, nondiscriminatory reason for its action. If it does, then a question of law or fact exists which requires a hearing. *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 786-787 (1998).

"In analyzing a subsection (1)(a) 'because of' claim, we focus on the reason for the employer's conduct. If the employer acted to interfere with, restrain, or coerce employees because of the employees' exercise of protected rights, the action is unlawful. *Tri-County Metropolitan Transit District,* 17 PECBR at 786.

"* * * * *

"Subsection (1)(a) complaints typically fall into one of two categories, pretext cases and mixed-motive cases. In a pretext case, a complainant must prove that the employer's asserted legitimate reason for its action is not the actual reason. Said differently, we must be persuaded that the employer's stated reason is a sham, and that the employer actually acted for another—and unlawful—reason. In a mixed-motive case where the evidence establishes that the employer had both lawful and unlawful motives for its action, complainant must prove that the employer would not have taken the disputed action but for the employer's unlawful motive. In other words, we must determine whether, absent complainant's protected activity, the employer would have treated the complainant the same way. *STEA v. Willamette Education Service District*, Case No UP-14-99, 19 PECBR 228 (2001) [AWOP 188 Or App 112,

70 P3d 903 (2003)]." 20 PECBR at 348-349 (emphasis added).

AFSCME asserts that the County considered a mixture of lawful factors (qualifications) and unlawful ones (protected union activities) in deciding whether to promote Perry. It asks us to apply a mixed-motive analysis. This request is analytically premature. We apply a mixed-motive analysis only after we have (1) made the factual determination that the employer acted for multiple reasons, and (2) made the legal determination that some of those reasons are lawful and some are not. We must first make these determinations before we can then proceed to a mixed-motive analysis and ask whether the unlawful reason "was a sufficient factor to attribute the decision to it." *Portland Association of Teachers v. Multnomah School District No. 1,* 171 Or App 616, 639, 16 P3d 1189 (2000).

At the outset of a case, we cannot tell whether to use a pretext analysis or a mixed-motive analysis. We make that determination later in the analytical process. Instead, once the complainant has properly pled a prima facie case, we begin the analysis in *all* cases under the "because of" branch of (1)(a)–that is, both mixed-motive and pretext cases–by examining the reasons for the employer's actions. This is a factual inquiry. Typically, the employer asserts it acted for legitimate, nondiscriminatory reasons; the union asserts the employer acted in response to protected union activity.

Once we have determined the reason or reasons for the employer's actions, we must then decide if those reasons are lawful. If all of the reasons are lawful, we will dismiss the complaint. If all of the reasons are unlawful, or if the employer's purportedly lawful reasons are merely a pretext for its unlawful conduct, then complainant will prevail. If we conclude that the employer acted for a combination of lawful and unlawful reasons, then we apply a mixed-motive analysis.

Applying this analysis, we begin by examining the reason the County offers to explain its actions. The County—not unreasonably—considered Mabbott to be an experienced, well-qualified, and known applicant. In addition, the County knew it had to act promptly because Mabbott was applying for another position and might not be available when the scheduled recruitment ended. The County's decision to hire Mabbott for these reasons is legitimate and nondiscriminatory.

AFSCME asserts that the reason offered by the County is a pretext to hide its unlawful reasons. AFSCME relies primarily on Olson's statements. We found that Olson twice stated that the commissioners refused to promote Perry because of her

union activities.[6] We are troubled by those statements.[7] Nevertheless, finding that Olson made the statements is not the same as finding the statements are true. That is, just because Olson said the commissioners considered Perry's protected activities does not conclusively establish that they did. The record as a whole convinces us that the commissioners did not consider Perry's protected union activities.[8] Significantly, we found that Olson never heard the commissioners say they refused to promote Perry because of her union activities, and each witness who was present at the deliberations and decision denied that Perry's union activities were a factor.[9]

We also find it significant that the record lacks any indication that Perry, in her role as an AFSCME activist for almost a decade, had a highly adversarial or bitter relationship with County managers and elected officials. To the contrary, the County promoted Perry into progressively more responsible positions during the time that she was the AFSCME local's president and negotiator. The County most recently promoted Perry in the first half of 2002 when the commissioners approved a change in her classification and increased her pay by two ranges. This occurred only months before the decision to hire Mabbott instead of Perry. There is no evidence of any acrimony arising from Perry's union activity that might have caused the commissioners to change their attitude towards Perry in the short time between Perry's most recent promotion and the decision to hire Mabbott.

Further, the record contains no evidence of any prior County discrimination against Perry, or any other employee, based on protected activities.

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[6]*See* Findings of Fact 15 and 20.

[7]The pleadings allege that the County violated only the "because of" branch of (1)(a). We confine our analysis to that issue. We do not decide whether Olson's statements by themselves violate the "in the exercise" branch of (1)(a).

[8]In some circumstances, even if the final decision-maker is not unlawfully motivated, we will nevertheless find a (1)(a) violation if a lower-level supervisor with an unlawful motivation plays a significant role in the decision. *Days Creek Association of Classified Employees v. Days Creek School District 15,* Case No. UP-93-94, 16 PECBR 187, 201 (1995); *OSEA v. Medford School District,* Case No. UP-60-86, 10 PECBR 402, 428, *AWOP* 94 Or App 781, 767 P2d 934 (1989). Here, however, there is no evidence that Olson had any role or influence in the process that led to the decision, or in the decision itself, to hire Mabbott rather than promote Perry.

[9]*See* Finding of Fact 23.

Under the circumstances, we conclude that Perry's union activities were not a factor in the County's hiring decision. We find no combination of lawful and unlawful reasons for the County's decision, so we need not consider a mixed-motive analysis. The County based its decision entirely on legitimate, nondiscriminatory reasons. AFSCME did not prove that the County refused to hire Perry because of her union activity, in violation of the "because of" branch of ORS 243.672(1)(a).

We will dismiss this element of the complaint.

ORS 243.672(1)(C) CLAIM

AFSCME also alleges that the County's actions violate ORS 243.672(1)(c) which makes it an unfair labor practice for a public employer or its designated representative to:

> "Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. * * *"

In *AFSCME Council 75, and Haphey and Bondietti v. Linn County*, Case No. UP-115-87, 11 PECBR 631, 650-651 (1989), we described the analysis under (1)(c):

> "Like most (1)(a) interference complaints, subsection (1)(c) discrimination charges turn on a question of causation. In a typical case, an employer violates (1)(c), as well as (1)(a), when it treats an employe disparately <u>because of</u> the employe's union activity. In such cases, a (1)(c) violation is established by the same but for causation analysis employed under (1)(a). However, the exercise of protected rights is not a necessary element of a (1)(c) case; neither is a showing of actual encouragement or discouragement with regard to the exercise of such rights. It is sufficient that Complainant prove discrimination which is intended to affect the exercise of protected rights, and which does so or would have the natural or probable affect [*sic*] of doing so. The element of unlawful purpose (sometimes referred to loosely as intent, motive or animus) may be established by an actual showing of employer animus or may be inferred from the circumstances surrounding the discriminatory conduct. The latter usually follows from a finding that the employer conduct was

'inherently destructive' of protected rights." (Footnotes omitted; emphasis in original.)

AFSCME established that Perry engaged in protected activities. It alleges that the County would have promoted her had she not engaged in those activities. As we discussed in our analysis of the (1)(a) claim, Perry's union activities were not a factor in the County's decision. Perry was not denied the promotion because of her union activities. AFSCME failed to prove the causation element necessary to establish a (1)(c) violation.

Further, AFSCME has not proven that the County had an unlawful purpose, another critical component of a subsection (1)(c) complaint. The County closed the recruitment and hired Mabbott without receiving an application from Perry. The County, not unreasonably, considered Mabbott to be well qualified for the new position in the newly-reorganized Department. This is a lawful purpose.

Under the circumstances, AFSCME did not prove that the County had a discriminatory reason for hiring Mabbott instead of promoting Perry. We will dismiss this element of the complaint.

ORDER

The complaint is dismissed.

DATED this 16th day of July 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-30-03

(REPRESENTATION PETITION)

OREGON AFSCME COUNCIL 75, Petitioner, v. WASHINGTON COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Board heard oral argument on February 26, 2004, on Complainant's objections to a recommended decision issued by Administrative Law Judge (ALJ) William Greer on December 31, 2003, following a hearing on October 31, 2003, in Hillsboro, Oregon. The hearing closed on December 5, 2003, upon receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Petitioner.

Kenneth E. Bemis, Attorney at Law, Bullard, Smith, Jernstedt & Wilson, 1000 S.W. Broadway, Suite 1900, Portland, Oregon 97205, represented Respondent.

On June 5, 2003, Oregon AFSCME Council 75 (AFSCME) filed this petition to represent a proposed bargaining unit of "all regular employees working for Washington County's Community Corrections Residential Services excluding confidential, supervisory and managerial employees." On June 25, Washington County (County) filed objections to the petition.

The issue is: Does the petition propose an appropriate bargaining unit? Th ALJ concluded that the petition does not propose an appropriate bargaining unit. We agree the unit sought is not appropriate. However, we conclude that an appropriate unit is "All residential counselors and residential services monitors employed in the Washington County's Community Corrections Center Division of the Community Corrections Department; excluding clerical, confidential, supervisory and managerial employees."

RULINGS

The ALJ made no rulings.

FINDINGS OF FACT[1]

1. AFSCME is a labor organization. The County is a public employer.

2. **Organization** of County. The Community Corrections Center Division (Division) of the County's Community Corrections Department (Department) provides counseling and residential services to adult offenders who are transitioning from the County's Correction Center back into the community. The Department presently employs approximately 85 employees, including approximately 34 employees in th Division. The remainder of the Department's employees include approximately 35 parole and probation officers, 5 supervisory and administrative staff in the Probation and Parole Division, and approximately 11 supervisory and administrative staff in the Program Services Division.

The Division is responsible for operating the Community Corrections Center (CCC), a minimum security residential facility for sentenced offenders. As of the hearing date, the CCC had a capacity of 191 residents, housed in dormitories used only for adults. The Department's other two divisions are in a different building one block away. CCC personnel have occasional contact with parole and probation officers.

3. **Personnel included in proposed bargaining unit.** On the date of the hearing, the proposed bargaining unit of employees included approximately 27 employees in the following classifications: senior administrative specialist—1; administrative specialist II—2; residential counselor—6; residential services monitor I—0; and residential services monitor II—18.

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[1]The Findings of Fact are adapted, in part, from the parties' fact stipulation.

Administrative specialists. The administrative specialist II classification description states that such employees "perform a variety of administrative support duties of moderate complexity requiring knowledge of the work unit, its procedures and operating details * * *."

Throughout all its departments, the County employs approximately 55 employees in the classification of senior administrative specialist and approximately 228 in the classification of administrative specialist II. None of the employees in those classifications are represented by a labor organization.

Residential counselors and similar classification. The County employs six residential counselors (RC) in the Division. The classification description states that the "definition" of an RC is: "To provide lifeskills counseling and program supervision to adult offenders in a residential correctional program; to screen offenders for admission to the program and orient newly admitted residents; to conduct needs assessments and develop case plans; to maintain caseload records of residents and monitor their probation compliance while in the program."

The County employs approximately 40 juvenile counselors in the juvenile shelter, a residential facility operated by a division of the County Juvenile Department. The classification description states that the definition of a juvenile counselor I is: "To provide case management, counseling, and supervision to juvenile offenders in Shelter Care, home detention, community service, and admissions; to conduct needs assessments; to interview and make referrals to community resources; monitor clients' activities, progress and caseload records; and to accompany juveniles to court."

The RC and juvenile counselor I classifications require similar knowledge, skills, and abilities. Those two classifications are on the same salary range in the County pay plan.

Residential services monitors and similar classification. The County employs 18 residential services monitor II (RSM-2) employees in the Division.[2] The classification description states that the definition of an RSM-2 is: "To monitor the daily activities of residents and act as lead worker for the Residential Services Monitors in the [CCC]; to maintain security and oversee the operations of a residential correctional facility; to interact with residents providing information and assistance; and to provide security checks of facilities and residents."

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[2]The residential services monitors are strike-permitted employees. *Washington County Police Officers Association v. Washington County*, Case No. UC-36-00, 19 PECBR 641 (2002).

As of the hearing date, the County did not employ any personnel in the residential services monitor I (RSM-1) classification. The classification description states that the definition of an RSM-1 is: "To monitor the daily activities of residents, maintain security and oversee the operations of a residential correctional facility; to interact with residents providing information and assistance; and to provide security checks of facilities and residents."

The County employs shelter aides at the juvenile shelter. The classification description states that the definition of a shelter aide is: "To oversee routine activities of shelter residents and monitor their safety; and maintain security in a juvenile shelter."

The RSM-1 and shelter aide classifications are at the same salary range in the County pay plan.

The above-described personnel in the juvenile shelter do not interact on the job with the CCC personnel who are the subject of this petition. The juvenile shelter is in a different building from the adult residential facilities operated by the Division.

4. **Labor organization representation of County personnel.** Approximately 475 County employees are represented by labor organizations in four separate bargaining units:

(a) Washington County Police Officers' Association represents approximately 290 employees in the Department of Public Safety;

(b) Teamsters Local 223 represents approximately 123 maintenance and technical employees in the Department of Land Use and Transportation and the Department of Support Services;

(c) Federation of Oregon Parole and Probation Officers represents approximately 35 parole and probation officers employed in the Department; and

(d) Oregon Nurses Association represents approximately 27 nurses employed in the Department of Health and Human Resources and the Department of Public Safety.

5. **Unrepresented County employees.** Approximately 1,119 County employees (including the 27 subject to this petition) are unrepresented. The County also employs approximately 206 temporary employees, who are unrepresented.

Unrepresented employees' terms and conditions of employment are established by the County pay plan and personnel rules and regulations. Unrepresented employees all receive the same benefits.

6. History. Neither AFSCME nor any other labor organization has ever petitioned for a residual wall-to-wall bargaining unit at the County. As discussed in our Conclusions of Law, labor organizations, including AFSCME, have filed representation and unit clarification petitions to represent particular groups of County employees.

7. Desires of the employees. The petition was supported by an adequate showing of interest. AFSCME Executive Director Ken Allen testified at hearing that his organization has been unsuccessful in attempting to organize unrepresented County employees in a residual wall-to-wall bargaining unit, despite several attempts.

8. Transfer of employees. From 1981 (when the County began to provide a community corrections program) until the hearing date, 27 employees have voluntarily transferred into or out of proposed bargaining unit positions. Most such transfers have been between CCC and positions in police, corrections, or parole or probation; two were RSMs who resigned and were rehired in the juvenile facility in mid-2001; and two administrative specialists transferred in or out of other departments.

CONCLUSIONS OF LAW

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

2. The petition does not propose an appropriate bargaining unit.

3. The appropriate unit is:

> All residential counselors and residential services monitors employed in the Washington County's Community Corrections Center Division of the Community Corrections Department, excluding clerical, confidential, supervisory and managerial employees.

AFSCME proposes a bargaining unit of "all regular employees working for Washington County's Community Corrections Residential Services excluding confidential, supervisory and managerial employees."

The County objects to the petition, arguing primarily that the classifications in the proposed bargaining unit do not have a community of interest that is clearly distinct from the interests of the County's many other unrepresented personnel.

Statute and evolution of precedents. The legislature enacted the Public Employee Collective Bargaining Act (PECBA) in 1973. ORS 243.682(1) provides that this Board shall:

> "(1) Upon application of a public employer, public employee or a labor organization, designate the appropriate bargaining unit, and in making its determination shall consider such factors as [1] community of interest, [2] wages, hours and [3] other working conditions of the employees involved, [4] the history of collective bargaining, and [5] the desires of the employees. The board may determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate."

This Board's designation of bargaining units has evolved over the thirty years in which it has decided representation petitions. *See, generally*, K. Bemis and M. Smith, "Appropriate Bargaining Unit: Scope and Composition," *Labor and Employment Law: Public Sector* (Oregon State Bar CLE 2002), at 3-4 to 3-9.

Bargaining unit designation considerations. In the early years of public employee bargaining in Oregon, this Board focused on employees' desires to organize, and thus approved relatively small units while reserving the option of evaluating any future petitions to minimize bargaining unit fragmentation. *Communication Workers of America v. Lincoln County Assessors Department*, Case No. C-224, 1 PECBR 75 (1974). In 1980, this Board explicitly abandoned that policy and announced a strong preference for wall-to-wall units except where there was either a clearly distinct community of interest in the smaller unit or the presence of other compelling reasons to approve a smaller unit. *Teamsters Local Union 670 v. Linn County Parks & Recreation Department*, Case No. C-40-80, 5 PECBR 3081 (1980). The policy considerations we have articulated in favor of larger units in subsequent years include stable labor relations; promoting greater equality in bargaining power; "undue hardship" on employers through fragmentation of the workforce by magnifying the time and resources expended in bargaining with multiple and units; and avoiding the possibility of "whipsawing" an employer as numerous bargaining units compete for better settlements.

This Board's most recent comprehensive examination of bargaining unit designation issues occurred in *Laborers' International Union of North America, Local 320 v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476 (2000). In that decision, we stated:

> "In addition to the * * * statutory factors, this Board has adopted and applied other factors in determining appropriate bargaining units. The most prominent of those factors is our preference, in most situations, for establishing the largest possible appropriate unit. In *University of Oregon Chapter, AFT v. University of Oregon*, 10 PECBR 265 (1987), *affirmed* 92 Or App 614, 759 P2d 1112 (1988), we stated:
>
> > "'The large unit policy is designed to serve two basic purposes of the PECBA: the promotion of stability in labor relations and the establishment of greater equality of bargaining power between employers and employees. In *Teamsters Local 670 v. Linn County*, Case No. C-40-80, 5 PECBR 3081 (1980), this Board stated that generally it would not approve fragmentary units unless a group of employees had a *clearly distinct community of interest* or there existed other *compelling reasons* to do so.' 10 PECBR at 275 (Emphasis added; Footnotes omitted)." 18 PECBR at 480-481.

In *Keizer*, we stated that this Board "has concluded that a proposed bargaining unit had a 'clearly distinct' community of interest, or that a 'compelling circumstance' required designation of a separate unit, in only a few general employment categories." 18 PECBR at 481.

Of the categories of personnel discussed in *Keizer*, only one is relevant to the unit sought in this petition: "employees who: (a) desire separate representation, (b) have unique working conditions, *and* (c) have a history of labor relations different from other employees of the employer." 18 PECBR at 481 (emphasis in original). In support of that statement, this Board cited *Division of State Lands Employes Association v. Division of State Lands and OPEU*, Case No. C-72-83, 7 PECBR 6118 (1983), and several other decisions.

We also acknowledged in *Keizer* that "our preference for wall-to-wall bargaining units may conflict with the statutory bargaining unit determination factors, especially the 'desires of the employees' * * *." 18 PECBR at 482, quoting *Division of State Lands*, 7 PECBR at 6128.

In *Keizer*, citing two decisions,[3] we stated that the wall-to-wall bargaining unit designation preference is not unlimited. We summarized that those two Board decisions included statements that "were intended as a gentle reminder that our preference for large units is an administratively-created factor. While it is derived from the [PECBA] policies, the preference itself is not statutory. To function properly, the preference must be applied in a way that supports, rather than supplants, the statutory unit determination factors." 18 PECBR at 483.

Departmental bargaining units. In addition to discussing our preference for wall-to-wall bargaining units, in *Keizer*, we noted that this Board "has designated separate departmental units based in large part upon the desires of the employees, when evidence about that criterion is coupled with other factors." 18 PECBR at 483.[4] Based upon principles discussed in two precedents,[5] this Board summarized that it may designate a separate departmental bargaining unit where:

> "* * * (1) employees in the proposed bargaining unit have *working conditions that are significantly different* from those of other personnel employed by the employer; (2) the department in which the employees work is self-contained and clearly separate from other employer operations; (3) the

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[3] *Association of Oregon Correction Employees v. Department of Corrections and AFSCME*, 17 PECBR 730 (1998), *AWOP* 161 Or App 667, 984 P2d 959 (1999); and *AFSCME, Council 75 v. Department of Corrections and AOCE*, 17 PECBR 767 (1998).

[4] Subject to the factors specified in ORS 243.682(1) and the additional factors traditionally considered by this Board in designating appropriate bargaining units, this Board may designate a bargaining unit consisting of "all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board." OAR 115-25-050(1). The important factor is not the organizational label of the group of employees but rather the community of interest that they share, when compared to the interests of other employees.

[5] *International Union of Operating Engineers, Local 701 v. Deschutes County Public Works*, Case No. RC-4-88, 10 PECBR 906 (1988); and *International Union of Operating Engineers, Local 701 v. Grant County Road Department*, Case No. C-254-83, 8 PECBR 6735 (1984).

employees desire a separate bargaining unit; *and* (4) designation of the unit would not lead to *undue fragmentation*." 18 PECBR at 484 (emphasis added).

History of Board Decisions Involving This County. AFSCME and other unions have sought a variety of bargaining units consisting of portions of the County's unrepresented workforce. The employees sought in several of those petitions included some of those in the unit proposed here.

(a) In 1986, this Board certified AFSCME as the representative of a unit in the Department consisting primarily of clerical employees, pursuant to a consent election agreement in Case No. RC-66-86. A decertification petition for that unit was filed as Case No. DC-4-89 in 1989, and AFSCME disclaimed further interest in representing that unit. We revoked the certification on March 27, 1989.

(b) In 1987, AFSCME filed a petition to represent clerical employees in the Department of Public Safety. *Oregon AFSCME Council 75 v. Washington County Department of Public Safety (Sheriff's Office)*, Case No. RC-27-87, 10 PECBR 172 (1987). This Board's decision in that case noted evidence that employees in the unit sought had been unable to secure a showing of interest in a County-wide clerical unit. 10 PECBR at 175. We dismissed the petition based on a finding that the clericals in question did not have a community of interest "clearly distinct" from that of other County clerical employees, and that the bargaining unit sought would "further fragment the already fragmented bargaining situation" in the County. We found that neither the petitioning employees' employment with the Sheriff's Department nor the fact that they had been "twice rebuffed by the bargaining unit representing Deputy Sheriffs" constituted a compelling reason to establish further fragmentation. 10 PECBR at 177. We also noted there was no evidence regarding the possibility of adding the employees in question to the existing Department clerical unit.

(c) Later in 1987, AFSCME filed a unit clarification petition seeking to add the 36 clerical employees in the Department of Public Safety to the existing 15-employee Department clerical unit.[6] *Oregon AFSCME Council 75 v. Washington County Department of Public Safety (Sheriff's Office) and Washington County*, Case No. UC-127-87, 11 PECBR 230 (1989). This Board dismissed the petition, noting the existing unit, the group of employees sought to be added to that unit, and the combination of the two

[6]AFSCME had sought this clarification earlier in 1987, in Case No. UC-107-87, but withdrew that petition upon being informed that the petition appeared to be barred by the certification in Case No. RC-66-86.

groups would all be inappropriate units. Thus, while we noted the County could have recognized such a unit voluntarily, we concluded we could not clarify the unit in the manner sought. We further concluded that, even if we had the statutory authority to clarify the unit in that manner, we would not do so in that case. We concluded all the County's clerical employees were "essentially interchangeable." 11 PECBR at 239.

(d) In 1990, the Washington County Police Officers Association sought to clarify its existing unit of 180 strike-prohibited employees by adding 40 unrepresented clerical employees of the Department of Public Safety and transferring three jail nurses from an existing unit of 20 nurses represented by the Oregon Nurses Association. *Washington County Police Officers Association v. Washington County and Oregon Nurses Association*, Case No. UC-27-90, 13 PECBR 1 (1991). We dismissed both elements of the petition after analyzing a number of factors. Those factors relevant to the clerical employees which we concluded argued against the requested clarification were (1) the indirect relationship of the employees' duties to the law enforcement mission was not as significant or crucial as the direct assistance provided by personnel such as dispatchers; (2) the clericals were "essentially interchangeable" with other County clericals and did not constitute a "logically defined" group or class of employees; (3) placement of 40 out of 192 unrepresented clerical employees would fragment the potential residual bargaining unit, thereby reducing its bargaining power; (4) the County's workforce was organized horizontally (i.e., along the lines of the employees' craft, special function, or type of employment) rather than vertically (i.e., by department); and (5) the bargaining relationship within the existing Washington County Police Officers' Association unit had been stable and placing clericals in the unit could disrupt the current balance.

(e) In 1992, AFSCME filed a petition for a department-wide unit in the County Department of Housing Services. ***Oregon AFSCME Council 75 v. Washington County***, Case No. RC-57-92, 14 PECBR 271 (1993). In that case, the department was newly-created as a result of an intergovernmental agreement whereby the County assumed support services responsibility for a previously autonomous Washington County Housing Authority (Authority), and the Authority transferred its employees to the County. This Board found these employees were a fragment of 670 unrepresented County employees, noting that 14 of the employees in the proposed unit held job titles that existed in other unrepresented portions of the workforce, and shared wages, hours, and working conditions. We concluded those factors outweighed the considerations raised by AFSCME (e.g., the contract between the County and Authority, the possibility that employees would be transferred back to the Authority if that contract ended, the significant control over operations by the Authority, the impact of federal funding

conditions and limitations, and the lack of contact or interchange with other County employees).

(f) In *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Union No. 290 v. Washington County*, Case No. RC-20-93, 14 PECBR 679 (1993), this Board considered a petition for all employees in the County's Land Development Services Division, Building Services Section. This Board noted that 33 of the 36 employees in the proposed unit held job titles that also existed elsewhere in the County. We concluded that designating the proposed department-wide unit would fragment at least the administrative specialist workforce. Alternatively, the union sought a "craft" unit consisting of only the construction inspection and plan review personnel. We noted that, unlike the private sector, there was no tradition in the Oregon public sector of organizing on a craft basis; instead, craft employees had been included in wall-to-wall units. We concluded the employees at issue would not meet the private sector definition of a "craft" and did not constitute an appropriate separate unit.

(g) In *Washington County Police Officers Association v. Washington County*, Case No. UC-36-00, 19 PECBR 641 (2002), the association sought to clarify its existing strike-prohibited unit by adding 16 strike-permitted RSMs. This Board noted our historical preference for separate bargaining units for strike-permitted and strike-prohibited employees. We further noted the many differences between the employees sought to be added and the existing unit, including such things as the primary purpose of the facilities where they work; their location; their skills and daily duties; their supervision; and the lack of significant interaction or interchange. We concluded the community of interest factors did not outweigh the loss of the right to strike and our "disfavor of adding strike-permitted employees to a unit prohibited from striking."

Analysis. Based upon the principles and analysis stated in *Keizer*, and in our prior decisions involving this County, the proposed bargaining unit is not appropriate.

All of the County's unrepresented employees, including those sought here, work under the same personnel rules and policies, and the same compensation and benefit structure. An additional significant factor in this particular case is the history in this County of organizing horizontally by function, rather than vertically along departmental lines. The fact that the employees sought in this petition all work in the same building or division does not, by itself, demonstrate a distinct community of interest sufficient to override that organizing history. While these employees unquestionably share a community of interest to varying degrees, more significant community of interest factors point to the conclusion we draw below.

The proposed bargaining unit includes three employees in the administrative specialist classifications. In its other operations, the County employs approximately 55 employees in the classification of senior administrative specialist and approximately 228 employees in the classification of administrative specialist II. Their working conditions are essentially identical, aside from the specific clerical tasks that they perform in the various County departments. None of the employees in the administrative specialist classifications is represented by a labor organization. The personnel in those classifications share a community of interest. In considering prior petitions in this County, this Board has repeatedly held that placing some of these clerical employees in bargaining units organized along departmental lines would inappropriately fragment a County-wide group of "essentially interchangeable" clerical employees. Like the prior petitions involving County employees disapproved by this Board, this petition abandons the County's horizontal organizing structure and includes a fragment of the clericals who share a significant community of interest with one another. We therefore conclude that the petition seeks an inappropriate unit.

Our conclusion regarding the appropriateness of the unit sought does not end our inquiry. If we conclude that a proposed unit is not appropriate, this Board has the authority to determine whether another unit contained within the petition would be appropriate. *IBEW v. Eugene Water and Electric Board*, Case No. RC-36-93, 14 PECBR 808, 817 (1993). *See* ORS 243.682(1) (Board shall designate the appropriate bargaining unit).

If we eliminate the three clericals, the remainder of the proposed unit consists of six RCs and 18 RSM-2s, all of whom work with adult offenders in a residential setting at the CCC. The County asserts that both of these classifications are similar to classifications in the juvenile shelter. The RC classification (employees who work in the CCC) and juvenile counselor I classification (employees who work in a different County operation) require similar knowledge, skills, and abilities, and they are on the same salary range in the County pay plan. In a like vein, employees in the RSM-1 classification at the CCC (a vacant classification as of the date of hearing) and juvenile shelter aides would be expected to perform similar duties at the same salary range in the County pay plan. These similarities indicate somewhat of a shared community of interests between the CCC and juvenile staff.

However, significant factors also indicate a distinct, separate community of interest within the nonclerical positions at CCC. There are currently no RSM-1s; all of the existing RSMs perform duties and receive compensation at the higher RSM-2 level. RCs and RSMs work exclusively with adjudicated adult offenders, while the juvenile positions work exclusively with juveniles; CCC is housed in a different building

from the juvenile facility; and the adult and juvenile classifications do not interact on the job. These two functions are administratively divided under separate departments. Although two employees hired into juvenile positions after resigning from CCC, there has been no direct interchange between these two employee groups.[7]

Given these significant differences, we would conclude that a distinctive community of interest exists in a CCC unit that excludes clerical employees. Such a unit is also consistent with the County's history of functional organizing, since it includes all the strike-permitted personnel working with adult offenders, but excludes the Department's clerical, administrative, supervisory, and parole and probation personnel (the latter of whom are separately represented).

Accordingly, we designate the appropriate unit to be:

> All residential counselors and residential services monitors employed in the Washington County's Community Corrections Center Division of the Community Corrections Department, excluding clerical, confidential, supervisory and managerial employees.

In order to determine whether AFSCME has submitted a sufficient showing of interest in the appropriate unit, we will order the County to produce a list of employees in the unit designated as appropriate. We will then check the showing of interest against the new list to determine the adequacy of the showing. If the showing of interest is sufficient in that unit, we will conduct an election in that unit. If the showing of interest is insufficient, the petition will be dismissed.

ORDER

1. The County shall submit to this Board a list of employees included in the appropriate bargaining unit within 10 days of the date of this Order.

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[7]Indeed, the bulk of job-related contacts and interchange between these CCC personnel and other County positions are with police and corrections—i.e., employees who are already separately represented. This Board previously determined that RSMs do not share a sufficient community of interest to be included in the strike-prohibited Department of Public Safety unit. 19 PECBR 641.

2. If the showing of interest submitted by AFSCME is adequate for the bargaining unit designated, the Elections Coordinator shall conduct a secret mail ballot election for employees in the following bargaining unit:

> All residential counselors and residential services monitors employed in the Washington County's Community Corrections Center Division of the Community Corrections Department, excluding clerical, confidential, supervisory and managerial employees.

The ballot shall provide a choice between the Oregon AFSCME Council 75 and no representation.

3. Eligible voters shall be those persons employed by the County on the date of this Order and still employed at the time of the closing of the election and who are included in the description of the bargaining unit.

4. No later than 10 days from the date on which AFSCME's showing of interest is deemed adequate, the County shall provide this Board and AFSCME with alphabetized lists of the names, home addresses, and position titles of eligible voters. The County shall also provide to this Board at that time an alphabetized list of mailing labels addressed to eligible voters.

DATED this 16th day of July 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-54-03

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES ASSOCIATION AND KRISTY ENGELBRECHT,	)	
Complainants,	)	DISMISSAL ORDER
v.	)	
CLACKAMAS COUNTY,	)	
Respondent.	)	

Kevin Keaney, Attorney at Law, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Complainants.

David W. Anderson, Assistant County Counsel, 906 Main Street, Oregon City, Oregon 97045, represented Respondent.

The Clackamas County Employees Association and Kristy Engelbrecht filed this complaint on October 13, 2003. Complainants requested that processing of the case be deferred pending resolution of a grievance. On March 10, 2004, counsel for Complainants advised the Administrative Law Judge (ALJ) by telephone that this matter had been resolved, and that Complainants would withdraw their complaint. The ALJ received no written withdrawal or other communication. On June 30, 2004, the ALJ sent counsel for Complainants a letter notifying him that he would dismiss the case for lack of prosecution on July 14, 2004, unless either party objected prior to that time. No objection was received.

ORDER

The complaint is dismissed.

DATED this 8th day of September 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-9-04

(UNIT CLARIFICATION)

TEAMSTERS LOCAL UNION #223, Petitioner, v. LAKE COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Upon no objections to a proposed order issued by Administrative Law Judge (ALJ) Vickie Cowan on August 10, 2004, following a hearing on June 3, 2004, in Bend, Oregon. The hearing closed on June 3, 2004, at the conclusion of the parties' closing arguments.

Michael J. Tedesco, Attorney at Law, 15050 S.W. 150th Court, Beaverton, Oregon 97007, represented Petitioner.

James E. Bailey III, Attorney at Law, C. E. Wright Building, 388 S.W. Bluff Drive, Bend, Oregon 97702, represented Respondent.

On February 27, 2004, Teamsters Local Union #223 (Union) filed an OAR 115-25-005(2) unit clarification petition, seeking a determination of the public employee status of Lake County's (County) newly created associate finance director position. On March 8, 2004, the County filed timely objections alleging that the position was confidential and thus excluded from the bargaining unit.

The issue presented for hearing is: Is the associate finance director a confidential employee?

The ALJ proposed that the associate finance director is not a confidential employee and clarified the position into the bargaining unit. We affirm.

RULINGS

1. On May 28, 2004, ALJ Cowan conducted a prehearing telephone conference with the parties. The Union moved to include certain historical evidence of prior finance office positions. The County objected based on relevance. The ALJ sustained the County's objections, but allowed the Union to make an offer of proof at hearing.[1]

This is a newly-created position and is significantly different from prior finance department positions. Therefore, the history of previous positions is not relevant to the dispute before us. The evidence is not received.

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of employees employed by the County, a public employer.

2. The County and the Union are parties to a collective bargaining agreement effective July 1, 2003, to June 30, 2004.

3. The County has a population of approximately 7,500 people with 1,800 of them living in the town of Lakeview. The County is governed by an elected, three-member board of commissioners.

4. In January 2004, the parties began negotiations for a successor agreement. As of the date of hearing, the parties had met three times; twice before March 22, 2004, and once after March 22. Commissioner J. R. Stewart and County Attorney James Bailey III serve as the County's negotiating team.

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[1]The Union's offer of proof consists of Union Exhibits U-2 through U-4, U-7 through U-9, and U-12 through U-22.

5. For several years prior to August 2003, one person, the finance director, was in charge of the County's finance department. The County had difficulty getting accurate information from the finance director, and there was no one qualified to back her up. When the finance director quit, the County had to use the treasurer and a road department employee to process the payroll and perform accounts payable and receivable functions.

6. In August 2003, the County hired Robin Drinkwater as its finance director. Drinkwater has worked as an accountant for a CPA firm and as a payroll manager. She has 15 years of financial experience in both the public and private sectors. As finance director, Drinkwater is a full-time salaried employee and is paid $1,100 bi-monthly. Drinkwater is responsible for all financial accounting tasks relating to the budget, accounts payable, and payroll for all County departments. She also maintains the data processing system. She works under the general direction of the County commissioners.

7. In early November 2003, the County posted a job announcement for an accounting specialist to assist the finance director.

8. After interviewing the applicants, Drinkwater recommended that the board hire one of the applicants. During the interim, the County commissioners reconsidered their needs and decided to create a new associate finance director position. There had been serious problems when the former finance director quit, and the commissioners wanted to have someone who could step in and take over in the event the finance director either left or was unavailable.

9. On February 9, 2004, the commissioners met and discussed restructuring of the finance department. Drinkwater provided the commissioners with a draft job description of the new associate finance director position, as well as her ideas on how the restructuring should work.

10. On February 20, 2004, in a special session, the commissioners approved the associate finance director position description and authorized Drinkwater to begin the recruitment process.

11. The job description provides that the associate finance director's general duties consist of performing varied and complex accounting and finance functions, including development and analysis of labor proposals. The associate director is required to act in the absence of the finance director and to perform all functions of the finance director.

12. On or about March 22, 2004, the County hired Nicky Alves as the associate finance director. Alves has approximately five years of private sector financial experience. Alves is paid on an hourly basis and works approximately 37½ hours per week. She is paid approximately $700 every two weeks. This amount varies, however, based upon the actual hours Alves works.

13. Alves is still in training to provide full backup to Drinkwater. Currently, Alves is responsible for accounts payable, preparing quarterly tax reports, payroll, and other duties as assigned.

14. While Drinkwater was on vacation, and at the board's request, Alves obtained comparable pay rate information from other counties. A list of counties was identified by Union representative Wayne Botta. Alves checked budget size and fund balances of all the counties and determined those which she felt most closely compared to the County. She prepared a recommendation which consisted of a review and summarization of the data from other counties and Lake County and gave her opinion on how certain percentage changes would affect the general fund. She gave this information to John Bailey, the County's attorney and chief spokesperson. The board also received a copy of her analysis.[2] At the board's request, Alves also reviewed the County's health and welfare plans. Historically, this type of information was provided by the finance director.

15. Alves and Drinkwater have not participated in the negotiation sessions. However, Drinkwater has been called in to answer questions on occasion.

CONCLUSIONS OF LAW

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

2. The associate finance director is not a confidential employee.

ORS 243.650(6) defines a confidential employee as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Confidential employees are

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[2]There was no evidence presented indicating whether Alves' information was accurate or whether the board considered her recommendation.

not public employees under the terms of the Public Employee Collective Bargaining Act (PECBA) and are excluded from collective bargaining units. ORS 243.650(19).

This Board applies a three-part test to determine whether an employee is confidential under the PECBA. *OSEA v. Phoenix-Talent School District*, Case No. UC-10-93, 14 PECBR 776, 781 (1993). A position may be determined confidential if it meets all three criteria. First, we look at the person or persons being assisted: does that person(s) actually formulate, determine, and effectuate management collective bargaining policies? If so, does the assistance being rendered involve collective bargaining matters? If it does, is this assistance necessary, thus requiring that the position be excluded from the bargaining unit in order to protect the employer from disclosure of its strategies? *Laborers' International Union of North America, Local No. 121 v. Crook County Park and Recreation Department*, Case No. RC-3-98, 17 PECBR 929 (1999).

Alves currently provides assistance to the board of commissioners, who formulate, determine, and effectuate management policies in the area of collective bargaining. In Drinkwater's absence, and at the board's request, Alves compiled data and gave her opinion on how certain changes would affect the County's budget. We do not know what Alves recommended, nor do we know whether the board even considered, much less adopted, her recommendation. Alves meets the first two criteria. The final question is whether it is necessary that Alves provide this assistance.

We have previously determined that an employee who occasionally compiles collective bargaining data was not a confidential employee, especially when there is another confidential employee who can perform that same work. *OPEU v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25 (1987). We have also decided that being a backup to a confidential employee is not a basis for exclusion from the bargaining unit. *OSEA v. Clatsop Education Service District*, Case No. UC-93-85, 9 PECBR 8742 (1986). Nor will we deem as confidential an employee who assists in costing bargaining proposals when the work could be performed by a confidential employee. *AFSCME, Council 75 v. Gilliam County*, Case No. UC-39-86, 9 PECBR 8971 (1986).

Historically, the finance director has provided financial assistance to the County commissioners and bargaining team. Because of problems experienced with the previous finance director, the commissioners wanted an additional person as backup to the finance director. Although we understand the County's reason for wanting two financial specialists, either of whom can perform all of the required financial duties,

we do not find it necessary that Alves provide this assistance. Nor is it necessary to exclude *both* employees as confidential. Therefore, we conclude, that the associate finance director is not a confidential position and is not excluded from the bargaining unit.

ORDER

The bargaining unit is clarified to include the position of associate finance director.

DATED this 10th day of September 2004.

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-66-03

(UNFAIR LABOR PRACTICE)

TEAMSTERS LOCAL 206, Complainant, v. CITY OF COQUILLE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Upon no objections to a proposed order issued by Administrative Law Judge (ALJ) B. Carlton Grew on August 6, 2004, following a hearing on March 19, 2003, in Coquille, Oregon. The hearing closed on April 6, 2004, upon receipt of the parties' post-hearing briefs.

Stefan Alan Ostrach, Union Representative, Teamsters Union Local No. 206, 711 Shelley Street, Springfield, Oregon 97477, represented Complainant.

Karen O'Kasey, Attorney at Law, Hoffman, Hart & Wagner, Twentieth Floor, 1000 S.W. Broadway, Portland, Oregon 97205, represented Respondent.

Teamsters Local 206 (Union) filed this complaint on November 25, 2003, alleging that the City of Coquille (City) violated ORS 243.672(1)(a), (c), and (d) by reducing an employee's pay and hours[1] after she supported the Union's efforts to include her position in the bargaining unit and testified in favor of the Union's position in a

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[1]The Union withdrew its claim regarding the reduction of hours at the start of the hearing, based on an arbitrator's ruling in favor of the City on that issue.

grievance arbitration hearing. On December 31, 2003, the City timely filed its answer, in which it admitted and denied certain allegations, and raised affirmative defenses.

The issue is:

Did the City demote and reduce the pay of Modena Thomas, in violation of ORS 243.672(1)(a), (c), and (d)?

We conclude that the City violated ORS 243.672(1)(a) because the natural and probable effect of the City's demotion of Thomas would tend to interfere with, restrain, and coerce employees in the exercise of their Public Employee Collective Bargaining Act (PECBA) rights. We conclude that the City did not violate ORS 243.672(1)(c) and (d).

RULINGS

1. At the opening of the hearing, the Union moved for summary judgment, based on the City's admission in its answer that "[Thomas's] salary was reduced due to the Administrative Law Judge's decision [in UC-32-02] issued on April 18, 2003 and affirmed by the Employment Relations Board on May 22, 2003." The ALJ properly exercised his discretion in taking the matter under advisement. The Board needed a more complete factual record than the one available at the opening of the hearing to determine whether the City's actions violated ORS 243.672.

2. The ALJ's remaining rulings have been reviewed and are correct.

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a unit of employees employed by the City, a public employer.

2. In 2000, Modena Thomas was hired as a full-time records clerk for the City police department. Thomas had previously been employed by the City as a part-time parking patrol officer and dispatcher. Barbara Thurman was the office manager.

3. During 2002, the City decided to eliminate Thomas's records clerk position effective July 2002. Thurman retired in June of that year, and on July 1, 2002, Thomas began work as the office manager. Because the records clerk position had been eliminated, Thomas did not supervise any employees.

4. The City treated the office manager position as a management position, and the parties had excluded it from the bargaining unit for as long as they could recall. On October 7, 2002, the Union filed a unit clarification petition seeking to have the office manager position clarified into the bargaining unit. The City objected to the petition.

5. The City and Union were parties to a 2000-2003 collective bargaining agreement which was scheduled to expire on June 30, 2003. The recognition clause of the agreement states that the bargaining unit includes certain City police department employees "who are employed in classifications listed in Appendix A, except those employees that are supervisory or confidential and properly excluded by ruling of The Employment Relations Board of the State of Oregon." Appendix A is the salary schedule for the classifications of police officer and records clerk.

6. Thomas wished the office manager position to be included in the bargaining unit. She signed a showing of interest form, and openly supported the petition. As office manager, Thomas's salary was $2,276 per month. However, she did not receive a $260 per month payment for medical insurance coverage for her family that the City provided to similarly situated employees who were in the bargaining unit.

7. ALJ Grew held a hearing on the unit clarification petition on January 21, 2003, at which Thomas testified. ALJ Greer issued a recommended order on April 18, 2003. In his recommended order, ALJ Greer stated as follows:

> "* * * Thomas accepted [the office manager position], thereby voluntarily agreeing to leave the bargaining unit and receive the pay and other employment terms offered by the City. If the 'office manager' is in fact a 'records clerk,' the City arguably could reduce her pay to that specified in the contract for the records clerk classification. That result likely was not intended by the Union."

ALJ Greer concluded that Thomas's office manager position was not supervisory or confidential, but was also not properly included in the bargaining unit.

8. This Board issued its decision on May 22, 2003.[2] This Board affirmed ALJ Greer's recommended order, holding that Thomas's office manager position was not supervisory or confidential, nor properly included in the bargaining unit.

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[2]Paragraph 8 is not a finding of fact; we include it here to aid the reader.

However, it did not repeat ALJ Greer's point in Finding of Fact 7, noted above. Instead, this Board stated as follows:

> "The Union argues that because the office manager performs the duties of the records clerk classification, the 'office manager' is really a 'records clerk' and, therefore, is included in the bargaining unit. We reject that argument.
>
> "The change in duties and responsibilities for the office manager following the budgetary elimination of the records clerk position did not transform the office manager into a records clerk. The office manager historically performed some records clerk duties. In addition, the office manager does not perform *only* records clerk duties. The position is also responsible for '* * * a variety of higher level of clerical duties' including arguably supervisory and confidential duties not currently being performed.
>
> "The office manager position is a nonsupervisory, nonconfidential, unrepresented position. The Union could petition to add the [position] to its existing bargaining unit under OAR 115-25-005(4). Such a petition must be filed during an appropriate open period and accompanied by a showing of interest. Alternatively, of course, the Union and the City could agree to include the office manager in the bargaining unit.
>
> "Under the circumstances, we conclude that the office manager position is neither a supervisory nor a confidential position, and the classification is not included in the bargaining unit." *Teamsters Local Union #206 v. City of Coquille*, Case No. UC-32-02, 20 PECBR 326, 332-333 (2003) (emphasis in original; underlining added).

9. Early in 2003, the City terminated a police officer, Daniel Brenden. The Union grieved the termination, and an arbitration hearing was held on May 16, 2003.

10. Thomas testified at the hearing by telephone. As both office manager and records clerk, Thomas had worked with Brenden and his supervisors, including Chief

of Police Michael W. Reaves. Thomas's testimony was damaging to the City's case, and included testimony about statements made by Reaves.

11. Witnesses were sequestered at the hearing. Chief Reaves testified without being specifically informed that Thomas had testified. City Manager Terence O'Connor was present throughout the hearing as the employer representative. O'Connor did not tell Reaves that Thomas had testified.

12. Less than a week after the hearing, Reaves became aware that Thomas had testified as a witness called by the Union, and that her testimony was adverse to the City's position.[3]

13. On May 29, 2003, Reaves sent a memo to Thomas stating that, effective July 1, 2003, her position was being reclassified as a records clerk, with a salary of $2,170 per month, based on the records clerk salary schedule, and with her hours reduced from 40 to 30 hours per week. Reaves had recommended, and O'Connor had selected, the salary step for Thomas, which was the step she would have reached if she had never left the records clerk position.

14. On July 3, the Union filed a grievance over the City's reduction of Thomas's hours of work.

15. Although Thomas was once again in a records clerk position, she retained her previous office manager duties and was given the additional responsibilities of evidence custodian and parking enforcement clerk.

16. On July 29, an arbitrator issued a decision in favor of Brenden.

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[3]Reaves had reason to believe that Thomas would testify at the Brenden arbitration hearing even before the hearing took place. The City has a small number of employees who work at City hall, and Thomas, who worked with Brenden and his superiors, was an obvious potential witness. Thomas was scheduled to be out of the State on vacation at the time scheduled for the arbitration hearing, and the parties to the arbitration discussed rescheduling the hearing because a Union witness would be unavailable. Reaves was aware of these facts. After Thomas returned from vacation, less than a week after the Brenden hearing, Thomas mentioned to Reaves that it had been inconvenient for her to testify. (Reaves testified that he did not recall this conversation.) Thomas did not tell Reaves the substance of her testimony. However, given the totality of the circumstances, it is likely that Reaves was aware that Thomas had testified as a witness for the Union in the Brenden arbitration, and that her testimony was adverse to the City.

17. In August 2003, the bargaining unit members voted to add Thomas's position to the bargaining unit. This Board certified the unit on August 26, 2003.[4]

18. On December 3, 2003, Thomas left her position with the City.

19. On January 9, 2004, Arbitrator Ronald Hoh denied the Union's grievance regarding Thomas's reduced hours of work, holding that the reduction was the result of the City's economic situation. Hoh found that the City had experienced "significant budget shortfalls" and had chosen in "what appears to be a rather draconian decision in such a small Department" not to replace two police officers who had left City employment.

CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(a) when it demoted Thomas and reduced her pay. The natural and probable effect of the City's actions would tend to interfere with, restrain, or coerce employees in the exercise of their PECBA rights.

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees *in* or *because of* the exercise of rights guaranteed in ORS 243.662." (Emphasis added.) The statute establishes two separate claims, a "because of" violation and an "in the exercise" violation. *AFSCME Council 75, Local 3742 v. Umatilla County,* Case No. UP-18-03, 20 PECBR 733 (2004). The Union alleges that the City violated both branches of (1)(a).

"BECAUSE OF" CLAIM

In *Teamsters Local 670 v. City of Vale,* Case No. UP-14-02, 20 PECBR 337 (2003), this Board discussed standards for evaluating "because of" claims.

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[4]Neither party submitted this certification as part of its case, but we take administrative notice of the unit certification. The certification states, in part, "Teamsters Local 206 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining: All employees of the City of Coquille Police Department, excluding supervisory and confidential employees as defined in the PECBA." *Teamsters Local 206 v. City of Coquille* (Certification of Representative), Case No. RC-23-03 (August 26, 2003).

> "To state a claim, a complainant must plead protected employee activity, employer action toward the employee, and a connection between the two that suggests a causal relationship. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *reconsid* 17 PECBR 549 (1998), *rev'd and remanded* 171 Or App 616, 16 P3d 1189 (2000), *order on remand* 19 PECBR 284, 295 (2001). The employer has the opportunity to offer a legitimate, nondiscriminatory reason for its action. If it does, then a question of law or fact exists which requires a hearing. *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 786-787 (1998).
>
> "In analyzing a subsection (1)(a) 'because of' claim, we focus on the reason for the employer's conduct. If the employer acted to interfere with, restrain, or coerce employees because of the employees' exercise of protected rights, the action is unlawful. *Tri-County Metropolitan Transit District*, 17 PECBR at 786." 20 PECBR at 348 (emphasis in original).

The Union argues that the City, by reducing Thomas's office manager position to records clerk, based on the ALJ's comments and the ALJ and Board's conclusions regarding her confidential or supervisory status, the City acted "because of" the Union's filing of that petition and Thomas's support of that petition. The Union also argues that the City's decision was in retaliation for Thomas's testimony at the Brenden grievance arbitration and in support of inclusion of her position in the bargaining unit. The City argues that this Board articulated the duties and responsibilities of Thomas's position, and that, having reviewed this Board's decision, the City was entitled to change the compensation for the position based upon this Board's conclusions. The City argues that this was the only reason for its decision.

In its May 22, 2003 decision on the unit clarification petition, this Board[5] concluded that Thomas was not performing confidential or supervisory duties in the office manager position, and that the position could not be excluded from the bargaining unit on that basis. (*Coquille,* 20 PECBR at 332-333.) The City, which based its pay rate

[5]Although the City relied in part on the recommended order of the ALJ, such orders are not precedent and are not final or binding upon the parties.

to Thomas in part upon her predecessors' performance of such duties, chose to treat this Board's conclusions as determinative of her salary and reduced her pay.

In *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District,* Case No. UP-48-97 (*Tri-Met*), 17 PECBR 780 (1998), this Board addressed a situation in which a supervisor who reviewed an employee's suspension grievance determined that the employee should have been terminated instead of suspended, and terminated the employee. This Board stated the following:

> "* * * There is little dispute that the District terminated Rotter because a grievance was filed. Absent the grievance, Earl would have had no occasion to review Rotter's conduct in more detail and would thus have had no opportunity to decide that a five-day suspension was insufficient. In the simplest terms then, it could be said that Rotter was fired *because of* his exercise of the protected activity of filing a grievance. The inquiry, however, is more complex than that.
>
> "The words of (1)(a) indicate intentional action on the part of the employer, action taken with a purpose. The District contends that 'an unlawful motive of retaliation or discrimination is indispensable to a section (1)(a) "because of" violation,' citing *Monroe, Elgin* and *Malheur County*.[6] While we do not endorse the District's particular verbiage, we do agree that there cannot be an *unintentional* 'because of' violation. It is not enough, in other words, that an employer acts simply as a *result* of the exercise of protected activity; it must be *in response to* the protected activity. Rotter's termination resulted from his filing of a grievance, but for what reason did the District fire him? Was the reason the grievance (protected activity), or was the reason Rotter's conduct? Was the District's purpose to interfere with or restrain Rotter in pursuing his grievance, a protected right?[8]

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[6]*Monroe Elementary Education Association v. Monroe School District No. 25J,* Case Nos. UP-49/56-90, 13 PECBR 54, 67 (1991); *Elgin Education Association and Wilson v. Elgin School District, No. 23,* Case No. UP-44-90, 12 PECBR 708 (1991); and *OPEU and Termine v. Malheur County,* Case No. UP-47-87, 10 PECBR 514 (1988).

"* * * * *

> "[8]It is not necessary in a 'because of' claim that the facts establish that the employer acted for reasons of anti-union animus—although that might be the case—but it must be shown that the employer was motivated *by the protected right* to take the disputed action." 17 PECBR at 787-788 and n. 8 (italics in original, underlining added).

City officials were aware, when Thomas was promoted, that the office manager position no longer exercised supervisory authority because the City had eliminated the records clerk position it formerly supervised. Given the small size of the City's workforce, City officials knew, or should have known, the nature of the work Thomas was performing. *See H.E.R.E. Local No. 9 v. R & K Drive Inn, Inc.*, Case No. UP-6-78, 4 PECBR 2562, 2570 n. 4 (1980) (applying "small plant" doctrine). The City did not know how this Board would characterize Thomas's position under the PECBA. Although it is unusual to make an employee's compensation depend upon their PECBA status, it is not unlawful.

Other than the timing of the demotion and reduction in pay, there are no facts suggesting that the City's reason for acting was improper. There are no other "attending circumstances" indicating an unlawful intention to take actions that interfere with or restrain Thomas or other Union members because of their exercise of PECBA rights. City Manager O'Connor and Chief Reaves were aware of Thomas's testimony at the grievance arbitration before making their decision to reduce her position and pay, but the Union did not meet its burden to show that, but for that testimony, Thomas would have been retained as an office manager. Nor did the Union prove that Thomas's reduction in pay was in response to, or retaliation for, the filing of the unit clarification petition in UC-32-02 or Thomas's action in support of that petition. We will dismiss the "because of" element of the complaint.[7]

[7]When an employer violates the "because of" prong of subsection (1)(a), there is usually a derivative violation of the "in" prong. Having determined that the City did not reduce Thomas's position and pay "because of" her or the Union's exercise of protected rights, the Union has not proven a derivative "in" violation in this case.

"IN THE EXERCISE OF" CLAIM

In analyzing an "in" subsection (1)(a) claim, we decide whether the natural and probable effect of the employer's conduct would tend to interfere with, restrain, or coerce employees in the exercise of their PECBA rights. The Union need not prove anti-union motivation, actual interference, restraint, or coercion. *Tri-Met,* 17 PECBR at 789 and n. 10 (citing *Malheur County,* 10 PECBR at 521 and 523, and *OSEA v. The Dalles School District*, Case No. UP-75-87, 11 PECBR 167, 171-172 (1989)). The possible effect of the employer's actions is insufficient to establish a violation. *Tri-Met,* 17 PECBR at 789 and n. 11 (citing *OSEA v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988)). The subjective impressions of employees are not controlling. *Tri-Met,* 17 PECBR at 789 and n. 12 (citing *Spray Education Association v. Spray School District*, Case No. UP-91-87, 11 PECBR 201, 219-220 (1989)).

While it was legitimate for the City to use Thomas's PECBA status as a supervisory or confidential employee to determine her compensation, there is no evidence that the PECBA status salary criteria was put in place before the ALJ and Board's recommended and final orders. Thomas's duties expanded after the demotion.[8] In addition, this Board specifically rejected the contention that Thomas's office manager position had been converted to "records clerk" as it was defined under the 2000-2003 salary schedule. In effect, after the Board's decision, the City created a new position for Thomas, with additional duties, which it also entitled "records clerk." The changes in job classification, reduction of pay, and increased duties were in response to the ALJ and Board decisions.

Under the totality of all of these circumstances, we conclude that the demotion and pay cut is a (1)(a) "in the exercise" violation.[9] The City's reduction of pay for Thomas and increase of duties was taken without any prior, clear City standards that linked compensation to PECBA status. The natural and probable effect of this action would be to interfere with, restrain, or coerce other bargaining unit employees in the exercise of their right to support inclusion of a position in a bargaining unit.

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[8]Thomas had previously worked as the records clerk. When the City demoted her from office manager to records clerk, the City actually just added many of the office manager's duties to her previous records clerk duties and reduced her pay.

[9]This conclusion applies only to the City's actions toward Thomas, whether the records clerk position is in or out of the unit is not at issue here.

The City violated the "in" prohibition of ORS 243.672(1)(a). We will order the City to pay Thomas any difference between what she actually received and her pre-demotion level of compensation, including any salary increases and other monetary benefits she would have received in that position, from July 1, 2003, through the date of her separation from City employment on December 3, 2003. We will also order that the City post a notice.

3. The City did not violate ORS 243.672(1)(c).

ORS 243.672(1)(c) makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." In analyzing a (1)(c) claim, it is "not enough that the employer treated the employee unfairly; the unfair treatment must have been intended to discourage or encourage union membership." *AFSCME Local 2067 and Williams v. City of Salem*, Case No. UP-17-00, 19 PECBR 1, 9 (2001)(citing *Schreiber v. Oregon State Penitentiary,* Case No. UP-124-92, 14 PECBR 313, 320 (1993)).

This Board's analysis of a (1)(c) issue is as follows:

> "'Like most (1)(a) interference complaints, subsection (1)(c) discrimination charges turn on a question of causation. In a typical case, an employer violates (1)(c), as well as (1)(a), when it treats an employe disparately <u>because of</u> the employe's union activity. In such cases, a (1)(c) violation is established by the same but for causation analysis employed under (1)(a). However, the exercise of protected rights is not a necessary element of a (1)(c) case; neither is a showing of actual encouragement or discouragement with regard to the exercise of such rights. It is sufficient that Complainant prove discrimination which is intended to affect the exercise of protected rights, and which does so or would have the natural or probable affect [*sic*] of doing so. The element of unlawful purpose (sometimes referred to loosely as intent, motive or animus) may be established by an actual showing of employer animus or may be inferred from the circumstances surrounding the discriminatory conduct. The latter usually follows from a finding that the employer conduct was 'inherently destructive' of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County,* Case No.

> UP-18-03, 20 PECBR 733, 743-744 (2004) (quoting *AFSCME Council 75 and Haphey and Bondietti v. Linn County,* Case No. UP-115-87, 11 PECBR 631, 650-651 (1989)) (footnotes omitted; emphasis in original).

For the same reasons that we rejected the Union's "because of" claim under ORS 243.672(1)(a), we conclude that the Union has not proven that the City intentionally discriminated in regard to Thomas's position and pay with the intention of encouraging or discouraging membership in the Union. The Union has not proven that the City's actions were inherently destructive of protected rights. The City's conduct did not violate ORS 243.672(1)(c), and we will dismiss this claim.

4. The City did not violate ORS 243.672(1)(d).

Subsection (1)(d) provides that it is an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782." In order to prove a violation of (1)(d), a complainant must show that the employer acted adversely toward an employee because of the employee's role in proceedings before this Board. *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office,* Case No. UP-18-97, 17 PECBR 515, 527 (1998).

The Union first argues that the City retaliated against Thomas for her testimony at the Brenden arbitration hearing. ORS 243.672(1)(d) does not apply to arbitration testimony. Rather, it applies to matters directly under the PECBA.[10] The Union next argues that the City retaliated against Thomas for her testimony in support of the Union's petition in proceedings to clarify her position into the bargaining unit. Thomas's testimony in such a PECBA proceeding is activity that is protected by (1)(d). However, for the same reasons we rejected the (1)(a) "because" claim, we conclude that the Union failed to carry its burden to prove the City acted "because" of Thomas's testimony. We will dismiss this claim.

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[10]Although not protected by (1)(d), participation in a grievance process is protected by (1)(a). *See PAT and Bailey v. Mult. Co. S.D. #1,* Case No. C-68-84, 9 PECBR 8635 (1986).

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(a).

2. The City is directed to pay Thomas, within 10 days of this Order, the difference between what she actually received in wages after her demotion and her pre-demotion wages, including any wage increases and other monetary benefits she would have received, from the effective date of her demotion and reduction in pay (July 1, 2003) through the date of her separation from City employment (December 3, 2003).

This make-whole order requires the City to restore Thomas's status, as nearly as possible, to that which it would have been but for the City's unfair labor practice. The difference in pay shall be computed on the basis of each separate month, or portion of a month, during the period from the date of the violation, July 1, 2003, to December 3, 2003. The resulting sum that is owed shall accrue interest at 9 percent per annum, from the last day of the respective months (or portion of a month) until paid.[11]

As a further remedy, we order the City to post the attached notice in a prominent place for 30 days at all City facilities where members of the bargaining unit represented by the Union work.

3. The Union's claims that the City violated ORS 243.672(1)(c) and (d) are dismissed.

DATED this 15th day of September 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

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[11] *See Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8853 (1986).

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-66-03, Teamsters Local 206 v. City of Coquille, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Teamsters Local 206 (the Union) filed an unfair labor practice complaint against the City of Coquille (City) alleging that the City violated the Public Employee Collective Bargaining Act (PECBA).

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

The Board concluded that the City violated the law by interfering with, restraining, or coercing employees in the exercise of rights under the PECBA by demoting and reducing the pay of Modena Thomas after this Board concluded, in an earlier case brought by the Union with Thomas's support, that Thomas's position was not supervisory or confidential.

In this current case, the Board ordered the City to cease and desist from violating the statute, to reimburse Thomas for the wages and benefits she had lost because of the demotion and reduction in pay, and to post this notice in a prominent place for 30 days at all City facilities where members of the bargaining unit work.

The City will comply with the Employment Relations Board's Order.

City of Coquille

Dated _____, 20___ By _____
Employer Representative

_____
Title

* * * * * * * *

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Bo.. ., 528 Cottage Street N.E., Suite 400, Salem, Oregon 97301-3807, phone (503) 378-3807.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-35-04

(PETITION FOR REPRESENTATION)

MEDFORD PROFESSIONAL EMPLOYEES ASSOCIATION, Petitioner, v. CITY OF MEDFORD, Respondent, and MEDFORD MUNICIPAL EMPLOYEES ASSOCIATION Incumbent.	DISMISSAL ORDER

Stephen M. Terry, Association Planner, Medford Professional Employees Association, 1016 Aspen Street, Medford, Oregon 97501, represents Petitioner.

Patrick J. Mosey, Mosey Consulting, Inc., 3260 Balsam Drive S., Salem, Oregon 97302, represents Respondent.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represents Incumbent.

On May 3, 2004, Medford Professional Employees Association (Petitioner) filed this representation petition seeking to establish a separate bargaining unit of professional city planners employed by the City of Medford (City). These employees have historically been included as part of a larger bargaining unit represented by AFSCME. Both AFSCME and the City timely objected to the petition.

The case was assigned to Administrative Law Judge (ALJ) James W. Kasameyer for processing.

By letter to Petitioner dated July 27, 2004, the ALJ stated that it appeared that the petitioned-for unit was not appropriate under the Public Employees Collective Bargaining Act. The ALJ warned Petitioner that he would recommend this Board dismiss the petition unless Petitioner convinced him to the contrary by August 11, 2004. Petitioner did not respond.

ORDER

The petition is dismissed for want of prosecution. *See Wilson v. Malheur County Employees Association and Malheur County*, Case Nos. UP-74/75-93 (August 1993) (unpublished dismissal order).

DATED this 4th day of October 2004.

Paul B. Gamson, Chair

Rita E. Thomas

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-45-04

(UNIT CLARIFICATION)

OCCUPATIONAL AND PHYSICAL THERAPIST EMPLOYEES OF MULTNOMAH SCHOOL DISTRICT NO. 1, Petitioner, v. PORTLAND ASSOCIATION OF TEACHERS, AND SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, Respondents, and PORTLAND FEDERATION OF TEACHERS AND CLASSIFIED EMPLOYEES, AFT, LOCAL 111, Incumbent.	)	WITHDRAWAL AND RE-ISSUANCE OF DISMISSAL ORDER

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Petitioner.

On November 3, 2004, we issued an Order dismissing this petition. We will withdraw our previous Order and will dismiss the petition for reasons which follow.

On June 10, 2004, approximately 26 occupational and physical therapists employed by Multnomah County School District No. 1 (District) filed this petition for

representation and for unit clarification. Occupational and physical therapists are currently included in a bargaining unit of District employees represented by the American Federation of Teachers. The petition seeks to transfer these employees into the bargaining unit represented by the Portland Association of Teachers (PAT). According to Petitioners' attorney, Kevin Keaney, Petitioners more appropriately belong in the PAT bargaining unit with other licensed professionals. Petitioners initiated these proceedings on their own because PAT does not wish to represent them and has declined to initiate or participate in the petition.

On its face, the petition fails to meet the requirements for either a representation petition or a unit clarification petition. We will therefore dismiss it.

A representation petition "may be filed by any labor organization claiming to represent 30 percent of the public employees in an alleged appropriate bargaining unit." OAR 115-25-000(1)(a). The petition here fails this standard in several respects.

First, Petitioners offer no evidence that they represent anyone, much less 30 percent of the unit. A claim of representation is established by submitting a showing of interest with the representation petition. OAR 115-25-010(1)(h). The showing of interest cards submitted here indicate that the employees wish to be represented not by their own labor organization, but by PAT, an organization that has expressly declined to join in this petition. Based on this showing of interest, our rule allows only PAT to file the petition. Petitioners are not the proper parties to file this petition.

Second, Petitioners are not a "labor organization" as the term is defined in ORS 243.650(13). That is, they do not purport to be an organization whose purpose is to represent employees in their employment relationship with public employers. Petitioners do not themselves seek to provide representation in bargaining matters; instead, they seek to compel PAT to provide such representation to them. Because Petitioners are not a "labor organization," they are not the proper parties to file this petition.[1]

Third, Petitioners do not claim to represent 30 percent of the employees *in the unit they allege to be appropriate.* Petitioners do not seek to carve themselves out as a separate unit. Instead, they seek to join the existing PAT unit, but do not purport to represent 30 percent of that larger unit, as the rule requires. For all of these reasons, the petition fails as a representation petition.

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[1]The only type of petition concerning representation that an individual or group of individuals can file is a petition for decertification. *See* ORS 243.682(2) and OAR 115-25-000(1). These provisions do not apply here because Petitioners do not seek to decertify their current representative.

The filing also fails as a unit clarification petition. OAR 115-25-005(1) provides generally that unit clarification petitions may be filed only by "the recognized or certified representative or by the public employer * * *." The group of individuals here does not fall into any of these categories. They are therefore not the proper parties to file such a petition.

More specifically, this petition seeks to remove a fragment from one bargaining unit and transfer it into another existing unit. As such, the petition is controlled by OAR 115-25-005(6). Under subsection (6), the petition must assert that the fragment "more appropriately belongs in a unit represented by the *petitioning labor organization*," and it must be supported by a 50 percent showing of interest which states that the affected employees "wish to be represented by the *petitioning labor organization* * * *." The petition fails this test on numerous counts. As discussed earlier, Petitioners are not a "labor organization"; Petitioners do not represent the unit into which the petition seeks to transfer them; and the affected employees do not seek to be represented by their own labor organization.

This petition fails in nearly every respect to comply with the applicable statutes and rules. We will therefore dismiss it.

ORDER

1. The Dismissal Order dated November 3, 2004, is withdrawn.

2. The petition is dismissed.

DATED this 19th day of November 2004.

Paul B. Gamson, Chair

James W. Kasameyer, Board Member

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-16-04

(UNIT CLARIFICATION)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Petitioner, v. OREGON CASCADES WEST COUNCIL OF GOVERNMENTS, Respondent.	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 8, 2004, in Salem, Oregon. The record closed with submission of the parties' post-hearing briefs on July 12, 2004.

Elizabeth Baker, Attorney at Law, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Petitioner.

Chandra R. Hatfield, Attorney at Law, Williams, Zografos & Peck, 334 Third Street, P.O. Box 547, Lake Oswego, Oregon 97034, represented Respondent.

Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) filed this unit clarification petition on March 10,

2004, seeking to include six additional employees in the unit. On March 24, 2004, the Oregon Cascades West Council of Governments (Council) timely filed objections to the petition, contending that the six employees were confidential employees. Prior to hearing, the parties agreed to the status of two employees.[1] A hearing was held on June 8, 2004, at which the parties presented testimony and other evidence regarding the status of the remaining four employees.

The issue is:

Are the positions of personnel executive assistant, senior accountant, accounting specialist, and finance administrative assistant appropriately excluded from the SEIU bargaining unit as confidential employee positions?

We conclude that two positions, the personnel executive assistant and senior accountant, are appropriately excluded from the SEIU bargaining unit as confidential employee positions.

RULINGS

The ALJ correctly admitted, over the Union's objection, evidence of work assigned to the employees in the positions at issue after this petition was filed. Such evidence is relevant, although this Board will view such evidence with caution. *See Polk County Deputy Sheriff's Association v. Polk County Sheriff's Department,* Case No. UC-61-94, 15 PECBR 845, 857 (1995); and *Washington County Professional Fire Fighters, Local 1660 v. Tualatin Valley Fire and Rescue District and City of Beaverton*, Case No. UC-17-94, 15 PECBR 427, 429 (1994).

The ALJ correctly admitted, over SEIU's objection, evidence of the involvement of the employees in the preparation of termination and severance agreements of Council employees. Termination and severance agreements of bargaining unit employees are part of the administration of a collective bargaining agreement (CBA).

The remaining rulings of the ALJ have been reviewed and are correct.

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[1]The parties agreed that a clerical specialist position was confidential, and that an executive assistant position was not confidential.

FINDINGS OF FACT

1. SEIU is a labor organization and the exclusive representative of a bargaining unit of approximately 90 employees employed by the Council, a public employer.

2. The Union and Council were parties to a CBA effective November 13, 2002, through September 30, 2004. The unit description contained in that CBA states:

> "The Employer recognizes the Union as the exclusive bargaining representative for all employees excluding temporary, supervisory, and confidential employees."

3. The Council provides government services to local governments and the public as delegated by its member city and county governments. Those services include senior and disability services, transportation planning, economic and community development, and public works and technology services assistance. The Council is comprised of three major divisions: Senior and Disability Services Division, Community and Economic Development Division, and the Technology Support Division. The Council is governed by a board comprised of officials from its member governments.

4. SEIU and the Council have had a collective bargaining relationship since 1986. In recent negotiations, the parties have used a form of interest-based collective bargaining. SEIU does not arrive at a specific agenda or perform independent research prior to bargaining. The Council arrives at a set of strategic goals prior to bargaining, and caucuses frequently regarding such issues as whether the proposal at hand advances those goals. It performs independent research prior to and during bargaining. The Council does not always share the results of its research, or the particular subjects of its research, with SEIU.

5. The parties spend significant time in collective bargaining. The 2002-2004 agreement required approximately 50 bargaining sessions of four to eight hours each. Including a wage reopener, the parties were engaged in collective bargaining all but six months of the last three years. The parties began negotiations for the successor agreement in May 2004.

6. At the time of hearing, the Council's negotiating team consisted of Executive Director Bill Wagner, Human Resources Director Lydia George, and Finance Director Jeanette Denos, as well as Senior Services Director Scott Bond, Community and Economic Development Director Cynthia Solie, and Technology Services Director Steve Martinenko.

7. The Council's general administrative office performs the human resources and financial services for the Council. The employees in that office include Wagner, George, and Denos. A clerical specialist, Diana Crumpton, provides clerical support to the office, primarily to Wagner. The parties agree that Crumpton's clerical specialist position is confidential.

8. The status of four employees is in dispute. They are: Personnel Executive Assistant Kathleen Shepard; Finance Administrative Assistant Debbie Halvorson; Senior Accountant Sue Forty; and Accounting Specialist Kristy Nofziger.

9. No later than 1998, the Union and the Council agreed that two positions would be designated confidential executive assistants. One position was designated to assist the executive director. The other position was designated to assist the senior services director. In 2001-2002, the Council reorganized. As part of its reorganization, the Council retained the confidential position which assists the executive director, now the clerical specialist position held by Crumpton. The duties of the second confidential position were divided between Personnel Executive Assistant Shepard's position and another clerical specialist supervised by George.

10. In 2000, the Council hired Personnel Executive Assistant Shepard to assist Human Resources Director George. In 2002, the Council brought its financial functions in-house, creating several new positions and hiring Finance Director Denos. Shortly thereafter, Denos hired Senior Accountant Forty, Finance Administrative Assistant Halvorson, and Accounting Specialist Nofziger.

HUMAN RESOURCES DIVISION: PERSONNEL EXECUTIVE ASSISTANT SHEPARD

11. Human Resources Director George sits at the bargaining and litigation tables for the Council in negotiations and adjudications regarding CBAs, grievances, arbitrations, and this unit clarification proceeding; assists managers with discipline of bargaining unit members; and develops and interprets the Council's personnel policies. She is also responsible for the day-to-day administration of the contract on behalf of the Council.

12. Because of bargaining, and other duties, George is generally unavailable for other human resource duties 30 percent of the time. George has delegated some of her duties to Shepard, who also does substantial work for George in George's absence.

13. Shepard has received training in human resources work from a community college class and a two-day workshop. She has also received substantial on-the-job training from George.

14. Shepard maintains job descriptions through conversations with managers; processes employee performance reviews; and handles all Council recruitment for new employees, which is subject to CBA requirements regarding the offers of positions to internal candidates. As part of that recruitment, Shepard discusses the viability of internal candidates with the relevant managers before seeking outside candidates and prepares interview questions for candidates. Shepard devotes approximately one-eighth of her work time to the recruitment and hiring process.

15. Shepard has performed benefits survey research for George for her use in collective bargaining.

16. George has delegated the handling of safety issues to Shepard, who performs ergonomic assessments, acts as Council representative for SAIF claims, sits as a nonrepresented/management member on the employer/SEIU safety committee, and orders relevant equipment. Shepard spends one-fourth of her time on safety issues.

17. Shepard also coordinates training for Council employees.

18. In order to perform her own duties, as well as George's during the time George is unavailable, Shepard has access to all Council personnel records and George's computer files.

FINANCE DIVISION: SENIOR ACCOUNTANT FORTY, FINANCE ADMINISTRATIVE ASSISTANT HALVORSON, AND ACCOUNTING SPECIALIST NOFZIGER

19. The Council, which operates with public funds, is subject to standards and duties imposed by ethical accounting practices and government audits. As part of those obligations, the Council has separated its payroll responsibilities from reconciliation work and accounts payable or receivable tasks.

20. The Finance Division has four employees: Finance Director Denos, Senior Accountant Forty, Finance Administrative Assistant Halvorson, and Accounting Specialist Nofziger.

21. Denos is responsible for all Council financial reports, analysis, budgets, and compliance with legal requirements. Denos' work takes her out of the office 50 to 70 percent of the time.

22. Denos is a member of the Council's negotiating team. She formulates bargaining proposals related to the Council's financial activities and the requirements

of its federal and State funding. Denos assigns each of her staff to perform research for bargaining because she does not have the time, nor computer training, to do it herself.[2]

SENIOR ACCOUNTANT FORTY

23. Senior Accountant Forty has primary responsibility for the Council's payroll, which takes 60 to 70 percent of her time. As part of that function, she is guided by the Council's interpretation of the terms of the CBA. In April 2004, Forty received a request for compassionate leave and direction from the employee's manager to grant the request. Forty concluded that the request was not authorized by the CBA and after discussing the matter with George, denied the leave request.[3]

24. Forty denies sick leave draws to employees in the event the leave fails to conform to the terms of the CBA. Forty also processes all separations from Council employment. Council managers often disclose anticipated employee terminations to Forty to permit her to calculate benefits payable upon the employee's termination. Forty sometimes does this before the employee is aware of their impending termination. Forty also prepares all severance checks pursuant to severance agreements with bargaining and nonbargaining unit employees, which are confidential and not shared with SEIU.

25. Forty has performed research for Denos, George, and Wagner regarding issues in collective bargaining. Her research has included: the represented status of Council employees by department; insurance costs; insurance utilization by Council bargaining unit employees; cost of fringe benefit options; and cost scenario analysis. Denos is not trained to perform this research. Forty spends about 10 percent of her time on bargaining-related research. Forty has met with the management bargaining team to discuss and make suggestions regarding proposals related to her research. Forty has not attended any bargaining sessions.

ACCOUNTING SPECIALIST NOFZIGER

26. Nofziger, the accounting specialist, issues checks, verifies the payroll, and ensures that payroll checks match their recorded amounts. She is also responsible

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[2]Denos believes it would take six to nine months for her to be trained to do this research herself. Some of the research can be performed by outside vendors, at a cost.

[3]Forty believes she did not have the authority to deny this request without consulting with her supervisor because the request came from a manager. Forty is able to apply the terms of the CBA when they are clear. Where the terms of the CBA are unclear, or more than one interpretation is possible, Forty turns to her superiors for assistance.

for accounts payable and receivable, and assists Denos with preparation for the annual audit of the Council. Nofziger also tracks and pays employee travel expenses, which require her to consult the CBA and Denos regarding Council management's interpretation of the CBA. Nofziger also oversees the Council's cafeteria-style health insurance plan and tracks plan usage. She provides information regarding that usage to Denos for use in bargaining. Denos also assigns bargaining research to Nofziger. At the time of hearing, Nofziger was researching trends of expenditures in three areas to aid the bargaining team. Nofziger has not attended any bargaining sessions.

27. Denos assigns some bargaining research to Nofziger because as a result of the separation of financial duties in the department, Forty does not have access to the information while Halvorson does not have the level of knowledge necessary to perform that research.

FINANCE ADMINISTRATIVE ASSISTANT HALVORSON

28. Halvorson, the finance administrative assistant, is the only clerical support for Denos. Halvorson assists Denos in preparing confidential Council budget drafts and final public Council budgets. She has access to all of Denos' files and all employee personnel files. Halvorson spends 10 percent of her time tracking Council staff levels relative to one source of its funding, Medicaid. Because of this work, Halvorson has advance knowledge of which employees might be subject to lay off, although the information at issue is publicly available. Halvorson also collects employee time sheets and acts as a backup to Nofziger in accounts payable/receivable.

29. Denos has assigned bargaining research to Halvorson. That research has consisted of pulling together information from the files she maintains, such as historical information regarding bargaining.

CONCLUSIONS OF LAW

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

2. The personnel executive assistant and senior accountant are appropriately excluded from the SEIU bargaining unit as confidential employee positions. The positions of accounting specialist and finance administrative assistant are not confidential and are included in the bargaining unit.

STANDARDS FOR DECISION

Confidential employees are not "public employees" under the Public Employee Collective Bargaining Act (PECBA), and are, therefore, excluded from bargaining units certified by this Board. ORS 243.650(19). The PECBA defines a confidential employee as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." ORS 243.650(6). This Board applies a three-part test to determine the confidential status of an employee:

> "* * * (1) Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining?
>
> "(2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement?
>
> "(3) Is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies? * * *" *AFSCME, Council 75 v. Illinois Valley Fire District,* Case No. RC-38-97, 17 PECBR 493, 498 (1998) (paragraph breaks added).

See also Oregon AFSCME Council 75, AFL-CIO v. SAIF Corporation, Case No. RC-6-01, 19 PECBR 399 (2001), *citing OSEA v. Phoenix Talent School District*, Case No. UC-10-93, 14 PECBR 776 (1993).

This Board seeks to avoid the proliferation of confidential employees; our touchstone is what is "reasonable under the circumstances." *Oregon Public Employees Union, Local 503 v. City of Beaverton,* Case No. UC-54-86, 10 PECBR 25, 31 (1987). Employee access to confidential or sensitive documents, such as personnel or disciplinary records, does not render the employee confidential for purposes of the PECBA. *SAIF Corporation, supra.* An employee's involvement in costing bargaining proposals or alternative wage schedules, without more, is not sufficient to designate the employee as a confidential employee, even where the research is considered confidential by the employer. *AFSCME Local Union 2746 v. Clatsop County,* Case No. UC-4-93, 14 PECBR 434, 438-439 (1993). Employees designated to back up a confidential employee do not thereby become confidential employees. *Reynolds School Dist. v. OSEA*, Case No. C-197-

79, 6 PECBR 4543, 4552 (1981), *aff'd* 58 Or App 609, 650 P2d 119 (1982). With these standards in mind, we turn to the positions at issue in this case.

Human Resources (Personnel Executive Assistant Shepard): Shepard provides assistance to Human Resources Director George. George actually formulates, determines, and effectuates management policies in the area of collective bargaining. George sits at the bargaining table in an interest-based bargaining process and in arbitrations. She develops collective bargaining proposals and administers the CBA through the grievance process and through day-to-day interpretation of the CBA. Shepard's assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. It is reasonably necessary for Shepard to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies. Shepard is heavily involved in decisions regarding whether the CBA standards for internal or external recruitment are applicable to a job opening and provides assistance in collective bargaining. The duties of her position were originally part of a position designated as confidential by agreement between the parties. Shepard's position is confidential.

Finance Department (Senior Accountant Forty): Forty provides assistance to Finance Director Denos, an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. Forty's assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. Forty spends about 10 percent of her time on bargaining-related research; her research is not confined to cost scenarios; and she has met with the management bargaining team to discuss and make suggestions regarding proposals related to her research. We conclude that it is reasonably necessary for Forty to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

Finance Department (Accounting Specialist Nofziger): Nofziger provides assistance to Denos, an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. Nofziger has provided a limited amount of assistance relating to collective bargaining negotiations and administration of a collective bargaining agreement, primarily by researching expenditure trends and utilization costs. We conclude that it is not reasonably necessary for Nofziger to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

Finance Department (Finance Administrative Assistant Halvorson): Like Forty and Nofziger, Halvorson provides assistance to Denos, an individual who actually formulates, determines, and effectuates management policies in the area of

collective bargaining, and that assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. Halvorson spends 10 percent of her time tracking Council staff levels relative to one source of its funding, Medicaid. Halvorson is also aware of which funds support which staff positions. The Council argues that this information gives Halvorson an early picture of what employees may be subject to layoff. However, this information is public and reflects external pressures on the Council, not the Council's own priorities or bargaining strategies. Halvorson also runs computer programs to determine the cost of various wage and benefit levels, a task which we have previously determined is not determinative of confidential status. *AFSCME Local Union 2746 v. Clatsop County, supra.* We conclude that it is not reasonably necessary for Halvorson to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

The petition is granted as to the accounting specialist and finance administrative assistant. These positions are appropriately included in the SEIU bargaining unit. The personnel executive assistant and senior accountant are appropriately excluded from the SEIU bargaining unit.

ORDER

The accounting specialist and finance administrative assistant positions are not confidential and are included in the bargaining unit. The personnel executive assistant and the senior accountant positions are confidential and are excluded from the bargaining unit.

DATED this 29th day of November 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-52-04

(REVOCATION OF CERTIFICATION)

CORBETT WATER DISTRICT, Petitioner, v. IUOE LOCAL 701, Respondent.	)	ORDER REVOKING CERTIFICATION

On March 30, 2004, in *International Union of Operating Engineers, Local 701 v. Corbett Water District*, Case No. RC-3-04, IUOE Local 701 (Respondent) was certified as exclusive representative of a bargaining unit of employees described as:

> "All hourly employees of Corbett Water District, *excluding* office and clerical employees, guards, and supervisors."

On November 4, 2004, Corbett Water District (Petitioner) filed a revocation petition under OAR 115-25-009 seeking to revoke the certification of Respondent. Attached to the petition was the November 1, 2004 letter of Respondent's general counsel disclaiming interest in representing the bargaining unit. On November 5, the elections coordinator served the petition on Respondent and requested that Petitioner post notices of the petition in the workplace. Petitioner certified that the notices were posted on November 8, 2004.

In her November 5 letter, the elections coordinator explained that this Board would order revocation of certification if (1) no collective bargaining agreement was in effect, and (2) the labor organization disclaimed further interest in representing the bargaining unit. OAR 115-25-009. She further informed Respondent that Petitioner had represented in the petition that no contract was currently in place, had attached Respondent's November 1 letter disclaiming interest in the bargaining unit, and had

requested the revocation of certification. Her letter stated that if Respondent disputed Petitioner's representations, then Respondent was to file objections within 14 days. Respondent did not file any objections.

Based on the foregoing, this Board issues the following order:

ORDER

The certification of IUOE Local 701 as exclusive representative of the above-referenced bargaining unit of employees of Corbett Water District is revoked.

DATED this 6th day of December 2004.

Paul B. Gamson, Chair

Rita E. Thomas, Board Member

James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-44-04

(DECERTIFICATION)

DONITTA K. BOOTH AND EMPLOYEES OF MID-COLUMBIA COUNCIL OF GOVERNMENTS, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Respondent.	)	DISMISSAL ORDER

This matter is before this Board on Respondent's motion to dismiss, following a hearing before Administrative Law Judge (ALJ) B. Carlton Grew on November 23, 2004, in The Dalles, Oregon.

Bruce Bischof, Attorney at Law, 747 S.W. Mill View Way, Bend, Oregon 97702, represented Petitioner.

Joel L. Rosenblit, Attorney at Law, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Respondent.

On May 28, 2004, Petitioner Booth filed a petition to decertify the Service Employees International Union Local 503, Oregon Public Employees Union (SEIU) as the exclusive representative of a bargaining unit of employees of the Mid-Columbia Council of Governments (Council). Pursuant to a consent election agreement signed by

the parties' on June 24, 2004, an election was held on July 22, 2004. Four ballots were challenged by Petitioner, and the Oregon Employment Relations Board (ERB) Elections Coordinator determined that the challenged ballots could determine the outcome of the election. Accordingly, a hearing on the challenges was held on November 23, 2004. After the hearing, but prior to the issuance of the recommended order, the Council and SEIU reached a settlement of their disputes in a related unfair labor practice proceeding, UP-34-04.

As part of the settlement, SEIU and the Council stipulated to the following facts, of which we take notice :

1. On April 28, 2004, the Council and SEIU reached tentative agreement on their first collective bargaining agreement.

2. The tentative agreement did not require that it be otherwise signed or ratified by the parties in order to take effect. Nevertheless, the Council ratified the agreement on April 29, and SEIU ratified the agreement on May 6.

3. The new collective bargaining agreement was effective April 28, 2004.

In addition, we take notice that the records of ERB show that SEIU was certified as the exclusive representative of a bargaining unit of Council employees on May 27, 2003, following an election on May 13, 2003. *Service Employees International Union Local 503, Oregon Public Employees Union v. Mid-Columbia Council of Governments*, Case No. RC-8-03. This petition for decertification was filed on May 28, 2004.

Based upon these facts and applicable ERB precedent, Respondent SEIU moved to dismiss this decertification petition as untimely under this Board's contract bar doctrine. We grant Respondent's motion for reasons set forth below.

DISCUSSION

OAR 115-25-000(1) deals with decertification petitions, and provides, in part:

> "A petition for decertification may be filed by a public employee or group of public employees alleging that 30 percent of the employees in a bargaining unit assert that

the designated exclusive representative is no longer the representative of the majority of the employees in the unit;"

This Board's contract bar doctrine is derived from ORS 243.692, which provides, in part:

> "* * * (1) No election shall be conducted under ORS 243.682(3) in any appropriate bargaining unit * * * during the term of any lawful collective bargaining agreement between a public employer and an employee representative. * * *
>
> "* * * * *
>
> "(3) A petition for an election where a contract exists must be filed not more than 90 calendar days and not less than 60 calendar days before the end of the contract period. * * * "

Under the contract bar doctrine, if a contract between the Council and SEIU was in existence when this decertification petition was filed, the petition is untimely and will be dismissed.

On April 28, 2004, the Council and SEIU reached tentative agreement on their first collective bargaining agreement. The tentative agreement did not require that it be otherwise signed or ratified by the parties in order to take effect. Nevertheless, the Council ratified the agreement on April 29 and SEIU ratified the agreement on May 6, 2004. The new contract was effective on April 28, 2004. This decertification petition was filed on May 28, 2004. The parties had not signed a contract when the petition was filed. The issue is whether the parties' actions were sufficient to constitute a contract prior to May 28.

This Board has previously held that a ratified, but not signed, agreement constitutes a contract sufficient to bar an election. *Douglas County Law Enforcement Association v. Douglas County,* Case No. UC-19-00, 18 PECBR 704 (2000), and cases cited therein.

In this case, employees subject to this decertification petition were covered by a collective bargaining agreement at the time the petition was filed. At the latest, the labor contract became effective on May 6, 2004, when both parties had ratified the agreement. The petition was not filed until May 28, 2004, and hence was untimely

our contract bar rule. Because no objections were raised by any party, and a consent election agreement was signed, an election was held. We grant SEIU's motion to dismiss, because under these circumstances, no election should have been held .

ORDER

The petition is dismissed.

DATED this 20 day of December 2004.

Paul B. Gamson, Chair

James W. Kasameyer, Board Member

*

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas absent on date of signing.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-69-03

(UNFAIR LABOR PRACTICE)

IBEW, LOCAL 48 AND DISTRICT COUNCIL OF TRADE UNIONS, Complainants, v. SCHOOL DISTRICT NO. 1J, MULTNOMAH COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The parties filed no objections to a proposed order issued by Administrative Law Judge (ALJ) Vickie Cowan on November 23, 2004, following a hearing on July 1, 2004, in Portland, Oregon. The hearing closed on August 18, 2004, upon receipt of the parties' post-hearing briefs

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

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

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

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

The issues presented for hearing were:

1. Did the District violate ORS 243.672(1)(f) by failing to give IBEW advance notice of the sale of KBPS, as required by ORS 243.698?

2. Did the District fail to give IBEW notice and provide IBEW with an opportunity to bargain the impacts of the sale, in violation of ORS 243.672(1)(e)?

3. Did the District violate ORS 243.672(1)(e) by misrepresenting the conditions under which KBPS employees would assume employment with the Foundation after the sale?

4. Did the District instruct KBPS employees not to discuss the proposed sale of KBPS prior to the District Board's resolution? If so, did such action by the District violate ORS 243.672(1)(a) and (b)?

5. Did the District's and the Foundation's direct communication with KBPS employees concerning the terms and conditions of employment after the sale violate ORS 243.672(1)(a) and (b)?

6. Did the District violate ORS 243.672(1)(a) and (b) by prohibiting IBEW representation during the November 6, 2003 meetings between KBPS employees and District representatives?

7. Is a civil penalty warranted?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. IBEW, through its affiliation with DCTU, was the exclusive representative of a bargaining unit comprised of all technicians, engineers, and on-air talent at KBPS radio, which was owned by the District, a public employer.

2. The District and DCTU were parties to a collective bargaining agreement (CBA) effective July 1, 1999 through June 30, 2004.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "We were recently informed that talks are underway regarding the potential sale of the KBPS-FM license to the KBPS Foundation. The proposed transaction will be presented to the Board on June 16th for a vote. The sale is contingent upon the Board's approval. The sale will not be final until the FCC approves it and the information we have been given indicates October 2003 as the earliest possibility.
>
> "At this time, we do not have any more specific information regarding the impact on employees. We will, however, ensure that employees and I.B.E.W. Local 48 are given detailed information as it becomes available. We will be scheduling a meeting next week with the KBPS employees to help answer questions. We will let you know when the meeting is scheduled, and you are welcome to attend."

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

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

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

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

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

21. Based upon the Foundation's resolution, the employees canceled the June 13 meeting with the District and met, instead, with Foundation representatives. Several KBPS employees, including Station Manager White[1] and IBEW Representatives Davis and Duncan, met with Foundation representatives Roger Doyle and Carl Widing. The Foundation reassured the employees that they would continue to be employed at their current salaries and that the Foundation was going to form an ad hoc human relations committee to look into benefits to make sure everything remained equal. The parties also discussed the possibility of future IBEW representation.

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

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

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

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

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

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

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

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

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

> "Q The subsequent meeting that was going to be with Carl Widing was to meet with the Foundation and what it would do as the new employer, correct?
>
> "A Yes.
>
> "Q There were no representations intended from the District at that second meeting, correct? This was all what the Foundation was intending to do?
>
> "A Well, Suzanne White was there.
>
> "Q But the meeting was for determining what the Foundation was willing to do?
>
> "A Yes.

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

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

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

CONCLUSIONS OF LAW

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

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

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

DISCUSSION

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

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"Q But not anything else, correct?

"A Yes.

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

"A Yes.

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

"A Yes."

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

(1)(e) and (f) allegations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

The complaint is dismissed.

DATED this 30th day of December 2004.

Paul B. Gamson, Chair

James W. Kasameyer, Board Member

Rita E. Thomas, Board Member

This Order may be appealed pursuant to ORS 183.482.