BEFORE THE EMPLOYMENT RELATIONS BOARD
OF THE
STATE OF OREGON

UNITED FOOD AND, COMMERCIAL WORKERS, LOCAL 555,

Petitioner.

**BRIEF OF AMICI CURIAE THE UNIVERSITY OF OREGON, SOUTHERN OREGON UNIVERSITY, AND EASTERN OREGON UNIVERSITY**

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## TABLE OF CONTENTS

**Page**






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## I. INTEREST OF THE AMICI

Amici curiae the University of Oregon, Eastern Oregon University, and Southern Oregon University ("the Universities") are public universities of higher education in the State of Oregon. ORS 352.002. They have no direct monetary interest in the outcome of this case and submit this amicus brief in response to the invitation of the Employment Relations Board issued June 9, 2022

The Universities respectfully request that their concerns and interests be considered by ERB as they relate to their collective bargaining negotiations with classified employees' union, Service Employees International Union, Local 503 ("SEIU"), because the outcome of this case has great significance to those negotiations. Those negotiations involve the Universities jointly bargaining with SEIU (along with other state public universities not party to this brief), which developed out and continued from system-wide bargaining when all the Universities were part of the former Oregon University System. These negotiations require the converging of parties, both administration and labor from around the state[1], which during the pandemic was undertaken through a hybrid of in-person and "virtual" meetings.

[1] The Universities have classified employees represented by SEIU in multiple locations. For example, Oregon Institute of Technology operates at its main campus in Klamath Falls, a metropolitan Portland campus in Wilsonville, and has programs in Salem and Seattle. *See* https://www.oit.edu/about/locations. While the University of Oregon's main campus in Eugene, it operates the Oregon Institute for Marine Biology in Charleston, at the White Stag building in downtown Portland and is developing the Balmer Institute for Children's Behavioral Health in North Portland at the former Concordia University site. Eastern Oregon operates centers in 11 different cities off its main campus in LaGrande. *See* https://www.eou.edu/regional-outreach-innovation/eou-centers/. And, Southern Oregon University, located in Ashland, has a Medford campus. *See* https://catalog.sou.edu/content.php?catoid=14&navoid=1690.



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## II. QUESTIONS PRESENTED & SUMMARY ANSWER

1. Can a party insist, over the other party's objection, that some of its bargaining committee members will participate in bargaining sessions virtually or via telephonic means if the other party requests that bargaining should occur only via face-to-face, in-person meetings?

Answer: The answer to this question is yes that a party can take the position that some of its bargaining team members be permitted to attend a bargaining session virtually; that is, bargaining may be a hybrid of in-person and virtual attendance when necessary to enable bargaining to continue when bargaining team members cannot attend in-person (*e.g.* mandatory quarantines due to illness, blizzards, forest fires, travel restrictions). A parties' sole obligation is to propose a reasonable time to meet for negotiations (and that includes hybrid when necessary or in-person) as ERB decided in *AFSCME v. Yamhill County Housing Authority*, UP-120-89, 12 PECBR 372 (1990). The experiences throughout the pandemic have established that the utilization of hybrid settings to replace in-person meetings is sufficiently feasible to justify hybrid settings in lieu of delaying bargaining.

2. Can an employer insist, over the union's objection, that bargaining unit employees, who are not part of either party's chosen bargaining team, must be allowed to attend negotiation sessions as observers?

Answer: The default is closed sessions limited to bargaining teams unless the parties agree to the scope, role, and invitation of observers based on: (1) the rationale and policy considerations cited in ERB's determination barring audio recordings in *Washington County Disp. Ass'n. v. Washington County*, UP-015/025-13, 26 PECBR 35 (2014), and (2) private sector



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precedents from the National Labor Relations Board (NLRB) that have rejected the invitation of observers over the objection of the other party.

## III. ANALYSIS

### A. A PARTY'S PROPOSAL FOR HYBRID MEETINGS SHOULD BE CONSIDERED VALID AND REASONABLE UNDER ORS 243.650(4) IF THE ALTERNATIVE IS DELAYING BARGAINING

The first question should be controlled by the definition of collective bargaining in ORS 243.650(4), which provides:

> "Collective bargaining" means the performance of the mutual obligation of a public employer and the representative of its employees *to meet at reasonable times* and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations. (Italics added).

In *Yamhill County Housing Authority*, ERB interpreted this provision to ascertain parties' obligations to make themselves available for bargaining. ERB addressed the employer's offer to meet for bargaining starting at 4:30 pm, when the agency's office closed to the public. The workday for staff ended at 5:00 p.m. 12 PECBR at 374. ERB ruled that the employer's sole obligation was to offer reasonable times to meet, such that effective bargaining was not interfered with:

> Based on private sector precedent, bargaining experience under the PECBA, and the wording of ORS 243.650(4), we hold that an employer violates ORS 243.672(1)(e)--concerning the times for bargaining sessions--only if it insists on meeting at a time that is not reasonable under the circumstances of a case, and that a proposed time is unreasonable only if meeting at that time would restrict the union's choice of negotiators or would otherwise tend to interfere with the bargaining process. 12 PECBR at 381-82.



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ERB held that the agency's proposed time was not "unreasonable under the circumstances of the case. The time itself is not, on its face, unreasonable--as would be, for example, 2 a.m." *Id.* at 382. Further, ERB ruled, "There is no evidence that meeting at 4:30 p.m. would restrict AFSCME's selection of bargaining team members" or "would tend to interfere with effective bargaining." *Id.*

ERB also distinguished those cases where the parties squabbled over bargaining times in ground rules negotiations and conditioned bargaining on agreeing to certain bargaining times in ground rules agreement. *Id.* at 382 n. 11. So long as the parties are not insisting on codifying bargaining arrangements in ground rules, the parties need only meet the statutory obligations of bargaining as provided in the definition provided in ORS 243.650(4).

This then raises the question of what constitutes "to meet" and whether hybrid bargaining can and should be considered a meeting under ORS 243.650(4). The experience over the last 2 ½ years of the parties demonstrate that hybrid bargaining satisfies the obligation to meet if the alternative is not to meet at all. For example:

- Public employers (including the Universities) and their unions moved to virtual bargaining immediately at the start of the shutdown in March 2020 and have continued to bargain virtually since then.
- ERB has convened mediation sessions virtually throughout the pandemic.
- ERB has convened contested case hearings and oral argument through virtual platforms.
- The Governor's Executive Order 20-16 expressly permitted and directed public bodies to meet virtually and that order has since been encoded into statutory law. *See* 2021 HB 2560; 2021 Or. Laws ch. 228, amending ORS 192.670.



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Since the pandemic, there have been only two interest arbitration hearings held and awards issued.[2] And since the pandemic shutdown, there has been only one public sector strike (at Oregon Tech) that these amici are aware of.[3] This demonstrates hybrid meetings can be successful, and that it is better than the alternative delaying bargaining.

The option for hybrid meeting, moreover, needs to be considered under the realities of bargaining for units such as the Universities with multiple locations spread throughout Oregon, as described in the introduction. The Universities bargain jointly with SEIU. And even when bargaining independently, all but one of the universities have more than one location where represented faculty or staff work and who may participate as bargaining team members. The expediency of allowing some members to attend bargaining virtually allows broader participation while minimizing release and travel time and disruptions to work. And this becomes more important when considering the financial obligations imposed upon public employers under ORS 243.798(1)(d) to provide for "reasonable time . . . during the public employee's regularly scheduled work hours without loss of compensation" to "[a]ct as a representative of the exclusive representative for employees within the bargaining unit for purposes of collective bargaining . . . ." Such paid time for bargaining can become exorbitant if travel time from remote locations must be covered when there is no practicable way to travel in an efficient manner, like when there are road closures due to natural disasters (*e.g.* landslides, blizzards, forest fires, floods, etc.) or distances make travel impracticable. And even if travel

[2] One award was issued May 6, 2020, but the hearing was held before the shutdown.

[3] *See* Cornell University, Institute of Labor & Industrial Relations, *Strike Tracker* https://striketracker.ilr.cornell.edu/



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time is not covered, there may be substantial time if travel is involved that must be backfilled by a substitute or replacement worker.

The definition of ORS 243.650(4) was adopted from similar provision in section 8(d) of the National Labor Relations Act (NLRA), which states that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (Italics added.) A closer look at the NLRB authority than was provided in the petition, moreover, does not undercut the Universities' position that a party can act reasonably by offering a hybrid meeting format, at least in some circumstances. Some of the cases the petition cites are simply not weighing a virtual or hybrid offer to meet versus a face-to-face. Indeed, in *Aaron Newman et al. d/b/a Colony Furniture Company*, 144 NLRB 1582, 1589 (1963) (Petition, at 10), the decision turned on the need to meet with the owner of the business face-to-face, rather than his son who lacked decision-making authority. In *Success Village Apartments*, 347 NLRB 1065, 1068 (2006) (Petition, at 10), the alternative to face-to-face meetings was to sit in private rooms with a mediator shuttling between teams, which did not satisfy the party's obligation to meet. In *Alle Arecibo Corp.*, 264 NLRB 1267 (1982), the alternative to in-person bargaining was bargaining over the telephone and by mail.

In *United Restoration, d/b/a United Air Comfort*, Case No. 36-CA-9318, 2003 NLRB GCM LEXIS 103, *1 (Oct. 30, 2003), in an advice memorandum nearly 20 years old, the General Counsel advised the Region that teleconferencing did not satisfy the meeting requirement notwithstanding its use in other contexts by the employer. That ruling, however,



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does not take into account the advances in virtual meetings and related technologies, including live document sharing, electronic file sharing of proposals and drafts through sharefile, dropbox or the like, real time access to and transfer of records among and between bargaining teams, individual access and close-ups on personal laptops, and the ready availability of breakout rooms for caucuses or sidebar meetings. Nor does that ruling account for the commonplace use and experience of virtual platforms for at-the-table bargaining, mediation, hearings, and oral arguments that have proven adequate over the last 2 ½ years.

The one case cited arising during the pandemic is an Administrative Law Judge (ALJ) ruling pending before the NLRB that actually supports the Universities' position that a party can act reasonably offering to meet in-person or in a hybrid arrangement. *See Hood River Distillers, Inc.*, 2021 NLRB LEXIS 501, *117, 2021 WL 5885711 (December 10, 2021) (Petition, at 11). There, at the very start of the shutdown the union offered to meet in-person, rejecting the employers' offer of a virtual meeting. The ALJ ruled that the union's failure to agree to meet virtually was not unreasonable at the time. The parties may differ on the meeting format yet both be acting reasonably with the format proposed.

As a practical matter, such differences occurred routinely in the past over proposed meeting times, dates and locations and, during the pandemic, disputes over format have been added. Yet, the parties routinely work out the differences. As did the parties in this case as discussed in the Petition, Statement of Relevant Facts 15-16 (Petition, at 6-7).

The Petition, at 10, also cites to *Rogue River Ed. Ass'n. v. Rogue River Sch. Dist.*, UP-62-09, 23 PECBR 878, 880 (2010) (order on recons.), as stating the proposition that alternative bargaining methods other than in-person meetings is permitted only if the parties



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mutually agree. While the concurring opinion is cited and might be read as supportive of such a concept, the Board majority makes it clear that the employer passed a formal proposal through email and ruled "that the good faith bargaining obligation may also be satisfied by e-mail communications." *Id.* at 880 n. 3. The majority does not require a prior agreement to use email to communicate bargaining positions or proposals.[4]

### B. A PARTY MAY NOT UNILATERALLY INVITE OBSERVERS TO BARGAINING SESSIONS

Addressing the second question, the subject of who may be invited to attend bargaining sessions, other than the bargaining teams, is a permissive subject of bargaining based on ERB's decision in *Washington County Disp. Ass'n.*, 26 PECBR at 42-46. There, ERB adopted private sector precedent under the NLRB that use of court reporting or recording devices is a permissive subject of bargaining and a party could not insist on recording a session over the objection of the other party. *Id.* at 42, 45. The rationale of that case apply equally here to the question of who, outside of the bargaining teams, may be invited to attend bargaining sessions.

In *Washington County Disp. Ass'n.*, 26 PECBR at 42, ERB found persuasive the reasoning of the NLRB in *Bartlett-Collins Co.*, 237 NLRB 770, 772-73 (1978), *enf'd.*, 639 F2d 652 (10th Cir.), *cert den*., 452 US 961, 101 S.Ct. 3109 (1981). ERB quoted the NLRB as determining that "'a court reporter during negotiations or, in the alternative, the issue of a device to record those negotiations' did not constitute a mandatory subject of bargaining under the NLRA, but rather a permissive subject." 26 PECBR at 42. And ERB noted that "if a party

[4] Likewise, in *ATU v. TriMet*, UP-016-11, at 22-28, 2011 WL 4590222, * 16-19 (2011), ERB concluded that the parties had bargained over issues through emails and sidebars so that when included in a final offer a "new issue" was not asserted for the first time. In so concluding, ERB considered only whether the ground rules required at-the-table bargaining and concluded they did not. Significantly, ERB did not consider whether the parties had specifically agreed that emails and sidebars would constitute bargaining.



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'insist[ed] to impasse' over the other party's objection on using a court reporter or a recording device in bargaining sessions, the insisting party violated the duty to collectively bargain in good faith." *Id.*

In *Washington County Disp. Ass'n*, ERB recognized the NLRB's rationale for concluding that recording bargaining interfered with the bargaining process in the following ways:

> The court further explained that insisting on a verbatim recording of collective bargaining sessions: (1) 'may cause parties to talk for the record rather than to advance toward an agreement'; (2) may formalize the bargaining, 'sapping the spontaneity and flexibility often necessary to successful negotiations'; (3) may begin the bargaining 'on a discordant note'; and (4) 'may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement.' 26 PECBR at 43, quoting *Bartlett-Collins*, 237 NLRB at 172-73.

ERB adopted the precedent of *Bartlett-Collins* and its progeny, noting that its rationale has stood for 35 years and that there has been no disagreement with the holding in either the public or private sector cases. 26 PECBR at 44. The concerns and rationale summarized above about recording of sessions applies with equal force to the presence of unwelcomed observers to bargaining.

And, as noted in the Petition, at 13-14, the NLRB has long-held that insisting on observers to attend bargaining sessions over the objection of the other party is an unfair labor practice. While three of the cases cited involved invitations to bargaining unit members who were not part of the bargaining team, the NLRB also applied this ruling to persons invited from outside the bargaining unit. *See Brooke Glen Behavioral Hosp.*, 365 NLRB No. 19, at 5 (2017) *cited in* Petition, at 14. There, the invited observer was an employee represented by a different bargaining unit. The Board adopted the ALJ's decision including the conclusion that "Extending



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bargaining to such observers—by either side, over the objection of the other—would raise the potential for mischief and serious interference with good-faith bargaining." *Id.*[5]

To avoid mischief and interference in bargaining, the invitation of observers not members of the bargaining team should be limited to situations where there is agreement from the other party.

## IV. CONCLUSION

For the foregoing reasons, the Universities respectfully request that ERB rule (1) on the first issue, that that some of a parties' bargaining committee members will participate in bargaining sessions virtually or via telephonic means if the other party requests that bargaining should occur only via face-to-face, in-person meetings – if face-to-face, in-person meetings are impracticable and the alternative would be to delay bargaining; and (2) on the second issue, that observers may be invited to attend only by mutual agreement of the parties.

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[5] Finally, it should be noted that public meetings law, ORS 192.610 to 192.690, does not apply here. First, the governing board is not engaged in bargaining (and need not be so engaged) nor was it bargaining through an advisory committee. *See TriMet v. ATU*, 362 Or 484, 502-507, 412 P.3d 162 (2018). Second, the public law does not come into play when a public employer hires a private negotiator to represent it in bargaining. *S.W. Ore. Pub. Co. v. S.W. Ore. Comm. Coll.*, 28 Or. App. 383, 559 P.2d 1289, *rev. den*., 279 Or. 1 (1977).



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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Amicus Brief on Behalf of the Universities on:

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