

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-21

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION	)	
ASSOCIATION,	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
SALEM-KEIZER SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

Margaret Olney, Bennett Hartman LLP, Portland, Oregon, represented Complainant.

Paul Dakapolos, Garrett Hemann Robertson P.C., Salem, Oregon, represented Respondent.

On May 12, 2022, Administrative Law Judge Jennifer Kaufman issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(e).
2. The District shall restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating its part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.
3. The District shall make all affected bargaining unit employees whole by paying them the portion of their salaries that they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.

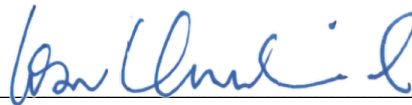
4. The District shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.

5. The District shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: June 8, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-21

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION	)	
ASSOCIATION,	)	
	)	
Complainant,	)	RECOMMENDED RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND PROPOSED ORDER
SALEM-KEIZER SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

---

A hearing was held before Administrative Law Judge (ALJ) Jennifer Kaufman on October 19, 20, and 21, 2021. The record closed on January 11, 2022, following receipt of the parties' post-hearing briefs.

Margaret Olney, Bennett Hartman, Portland, Oregon, represented Complainant.

Paul Dakapolos, Garrett Hemann Robertson P.C., Salem, Oregon, represented Respondent.

---

On February 19, 2021, Salem Keizer Education Association (the Association) filed an unfair labor practice complaint against Salem-Keizer School District (the District) alleging that the District had violated ORS 243.672(1)(e) by unilaterally changing its past practice of calculating full-time equivalency (FTE) for its educators and by failing to provide the Association with relevant requested information in a timely manner. On September 27, 2021, the District filed a timely answer.

The issues are: (1) Did the District refuse to bargain collectively in good faith with the Association, in violation of ORS 243.672(1)(e), by unilaterally changing its past practice of calculating full-time equivalency for its educators, and/or by failing to timely provide the Association with relevant requested information related to the District's FTE calculations; and (2) if so, whether the District must post a notice of any violations found, and distribute the notice

electronically.<sup>1</sup> As set forth below, we conclude that the District violated ORS 243.672(1)(e) as alleged in the complaint. We also conclude that an electronic notice posting is warranted.

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

#### The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13).
2. The District is a public employer within the meaning of ORS 243.650(20).
3. The District operates a public school system in Salem and Keizer, Oregon. The District employs about 7,000 staff members, including approximately 2,500 licensed professionals. John Beight is the District's Executive Director of Human Resources. Brett Cheever is the Director of Staffing, and Gweneth Bruey-Finck is the Director of Secondary Curriculum and Instruction. Peggy Stock is the Director of Labor Relations.
4. The Association exclusively represents a bargaining unit of the District's licensed professionals including teachers, counselors, nurses, school psychologists, physical and occupational therapists, audiologists, speech language pathologists, and social workers. Eric Schutz, a UniServ Consultant for the Oregon Education Association, has been the Association's staff representative for approximately 10 years. Tyler Scialo-Lakeberg has been the Association's president since July 2021. Before July 2021, Scialo-Lakeberg was the Association's vice-president and Mindy Merritt was the Association's president.

#### Secondary Teacher Scheduling and FTE Designation

5. Class schedules or "bell schedules" at the District's secondary level<sup>2</sup> vary over time and may vary from one location to another. Full-time secondary teachers are scheduled to teach six or seven periods per day, or they may be scheduled to teach under block schedules known as "A" days and "B" days (A/B schedules). Full-time teachers are also scheduled for daily preparation periods, which provide educators with teacher-directed time for planning, grading, and providing

---

<sup>1</sup>The Association withdrew its complaint allegation that the District unilaterally departed from an agreement it had reached with the Association regarding working conditions for certain specialists. The withdrawal was made pursuant to an agreement between the parties that if the Association prevailed in this proceeding, then the District would extend the remedy to affected specialists.

<sup>2</sup>The Association's allegations involve FTE calculations for teachers at the secondary level only. The facts recited herein are applicable to middle and high school teachers and are not necessarily applicable to the District's operations at the elementary level, where it is uncommon for teachers to work part-time schedules.

feedback to students. Full-time teachers are given at least one preparation period per day. Part-time teachers are given preparation time in proportion to their FTE.

6. The District's teachers, who are exempt employees under the Fair Labor Standards Act, perform work-related tasks as needed outside of their scheduled workdays. Full-time teachers routinely work more than 40 hours per week. For example, high school teacher Vicki Mashos regularly completed planning and grading work on evenings and weekends when she worked a full-time schedule. Mashos currently works a .84 FTE schedule and although she is usually present at her work site for eight hours a day, Mashos chooses not to work a full-time schedule because it would require significantly more than eight hours of work per day to complete the planning, grading, differentiation, and student contact time required of a full-time teaching assignment. Similarly, Curriculum Director Bruey-Finck, who started her career with the District as a teacher, stated that she was "never a teacher that contained [her] work within the contract day." (Test. Bruey-Finck.) As middle school teacher Zachary Coonen explained, the work associated with teaching a class is "much more than the 53 minutes of the day. It's the extra 20 percent grading, differentiation, phone calls, relationship building, names to learn." (Test. Coonen.)

7. Mashos has taught at the District for 24 years under various class schedules. Mashos started her teaching career under a six-period schedule, followed by a modified four-by-four schedule,<sup>3</sup> a rotating A/B schedule, a seven-period schedule, and then another A/B schedule. During the COVID-19 pandemic Mashos taught under the District's "comprehensive distance learning" (CDL) schedule. Mashos currently teaches under a rolling A/B schedule. In 2005, Mashos moved from a full-time teaching position to a .67 FTE position. At that time, Mashos worked under an A/B schedule and taught two periods per day while full-time teachers taught three periods per day. When Mashos worked as a .67 FTE under a seven-period schedule, she taught four periods per day. In 2019, Mashos moved to a .84 FTE position, teaching five classes while full-time teachers taught six classes. Mashos's understanding is that FTE for part-time teachers has always been based on the number of periods taught in proportion to that of a full-time teacher.<sup>4</sup> When Mashos was working a part-time schedule, she generally took a lunch break with her colleagues if it fell within her time at the school. When she did so, Mashos was never told that she had to remain in the building for an additional 30 minutes to make up that time.

8. The District's staffing team, which is a part of the District's Human Resources (HR) Department, is responsible for the budgeting and allocation of FTE resources to schools throughout the District. The staffing team is managed by Staffing Director Cheever. Cheever has worked in the HR Department since 2009 and has been in his current position since 2016. Cheever is regarded as the District's expert regarding FTE calculations.

---

<sup>3</sup>Under the modified four-by-four schedule, students took four classes per day, four days per week, and full-time teachers taught three classes, or periods, per day.

<sup>4</sup>Mashos's testimony that the District has historically calculated FTE based on the number of periods taught in proportion to a full-time teaching load was corroborated by the testimony of Representative Schutz, who taught at the District at the secondary level for 8 years, and President Scialo-Lakeberg, who has taught at the District at the secondary level for over 20 years.

9. In 2017, the District's HR Department created matrices reflecting FTE, preparation time, and minutes on duty for part-time employees at the middle and high school levels. The middle school matrix, based on a seven-period day of 49 minutes per period, is as follows:

Periods Taught for a Less than full time teacher	Full-Time Equivalency	Minutes Preparation Time	Hours: Minutes on Duty Excluding Lunch
5 (30 min lunch)	.84 (.84167)	41	6:14 (404 MIN TOTAL W/lunch)
4 (30 min lunch)	.69 (.691667)	33	5.02 (332 MIN TOTAL w/lunch)
3 (no lunch)	.47 (.46875)	25	3:45 (225 MIN TOTAL)
2 (no lunch)	.27 (.272917)	0	2:11 (131 MIN TOTAL)
I (no lunch)	.13 (.13125)	0	1.03 (63 MIN TOTAL)

(Exhs. C-54 at 1, R-3 at 1.) The high school matrix, based on an eight-period day of 49 minutes per period, is as follows:

Periods Taught for a Less than full time teacher	Full-Time Equivalency	Minutes Preparation Time	Hours: Minutes on Duty Excluding Lunch
5 (30 min lunch)	.84 (.84167)	41	6:14 (404 MIN TOTAL w/lunch)
4 (30 min lunch)	.69 (.691667)	33	5.02 (332 MIN TOTAL w/lunch)
3 (no lunch)	.47 (.46875)	25	3:45 (225 MIN TOTAL)
2 (no lunch)	.27 (.272917)	0	2:11 (131 MIN TOTAL)
I (no lunch)	.13 (.13125)	0	1.03 (63 MIN TOTAL)

(Exhs. C-54 at 2, R-3 at 2.)<sup>5</sup>

10. In January 2020, the District's Human Resources department created a document titled "High School / Middle School FTE Matrix." That document includes the following matrix:

High School FTE Matrix• —8 periods

Periods Taught	FTE	Prep Min.
6	1.00	90
5	0.83	75
4	0.67	60
3	0.50	45
2	0.34	31
1	0.17	15

Prep Buyout — High School

Additional Periods	Additional FTE
1	.17
2	.34

Middle School FTE Matrix 6 periods

Periods Taught	FTE	Prep Min
5	1.00	57
4	0.80	46
3	0.60	34
2	0.40	23
1	0.20	11

Prep Buyout — Middle School

Additional Periods	Additional FTE
1	.20
2	.40

(Exhs. C-3, R-3 at 3.)<sup>6</sup>

---

<sup>5</sup>Staffing Director Cheever did not provide specific testimony regarding the use or distribution of the 2017 FTE matrices.

<sup>6</sup>Staffing Director Cheever acknowledged that the 2020 matrix was followed during the 2019-2020 school year, but he also testified that the FTE matrices were insufficient to provide staffing guidance because they did not include all components of a teacher's scheduled workday. The record does not establish to whom the 2017 and 2020 FTE matrices were distributed, but the Association first saw them shortly before the hearing in this matter.

11. To meet student and District needs, secondary teachers frequently “sell” their preparation periods. This may be done on an ad hoc basis, such as when a teacher substitutes for an absent colleague and executes a pre-planned lesson.<sup>7</sup> Teachers may also sell their preparation period to teach an additional class for a semester or a year, in which case the teacher is responsible for all duties associated with the teaching of that class including planning, student and family contact, and grading. Teachers who sell their preparation periods to teach an additional class are not allotted additional minutes of preparation time to account for the additional planning and other responsibilities that flow from adding an extra class to their workloads.

12. Middle school teacher Archie Linn sold his preparation period for several years to fill the role of “data specialist.” Linn was compensated an additional .17 FTE for selling his preparation period. The additional .17 FTE that Linn was compensated for the preparation period he sold is consistent with the ratio of one period in a full-time teaching load of six periods per day.

13. Middle school teacher Doug Livermore regularly sold his preparation periods since at least 2011. Linn was compensated an additional .17 FTE for each preparation period that he sold, or .34 FTE for selling both of his preparation periods.<sup>8</sup> The additional .17 FTE that Livermore was compensated for each preparation period he sold is consistent with the ratio of one period in a full-time teaching load of six periods per day.

14. Association President Scialo-Lakeberg, who has been teaching for the District since 1999, sold her preparation period to teach a culinary arts class. At the time, Scialo-Lakeberg was teaching a four-by-four schedule with 84-minute periods. The District compensated Scialo-Lakeberg an additional .33 FTE for the buyout of her preparation period, which is consistent with the ratio of one period in a full-time teaching load of three periods.<sup>9</sup>

#### The COVID-19 Pandemic and the Transition to Comprehensive Distance Learning (CDL)

15. In March 2020, due to the emergence of the COVID-19 pandemic and the spread of cases throughout the state of Oregon, Governor Kate Brown issued an order closing all public schools. In the wake of the initial school closures the District adopted a CDL model that allowed students to receive instruction remotely for the remainder of the school year.

16. In summer 2020, District leaders began preparing for the possibility of ongoing CDL and the need for a comprehensive CDL model for the 2020-21 school year. In early June 2020, a work group was formed with Curriculum Director Bruey-Finck and other District leaders,

---

<sup>7</sup>There is no dispute that when a teacher sells a preparation period to substitute for another teacher on an ad hoc basis, which does not include the assumption of responsibilities beyond instructional time, the teacher is compensated based on a calculation of a per diem rate of pay.

<sup>8</sup>Certain positions, including data specialist positions, are provided more than one preparation period per day.

<sup>9</sup>Staffing Director Cheever testified that compensation for preparation period buyouts is based on the number of minutes in the preparation period. As discussed below, we do not credit that testimony.



and five or six Association members. The group discussed general ideas and concerns about the possibility of ongoing of CDL. At that time, it was unclear to the District and the Association alike what the format for the 2020-21 school year would be.

17. In late June 2020, the District received guidance from the State about requirements for continuing CDL in the fall. In early July 2020, the District made the decision to move to a four-by-four schedule. On July 14, 2020, Curriculum Director Bruey-Finck sent an email to High School Education Director Larry Ramirez and Middle School Education Director Matt Biondi stating:

“I spoke with [Staffing Director Cheever] today, and he is putting together guidance for schools on how to split FTE given the new bell schedules (.17 FTE for one period at HS, for example). He wanted this to come out in an official way, not just through the rumor mill (understandable!). I gave him the 85-90 min range per period for HS and apx 70 min range for MS.

“Larry, he confirmed that I can share with CAPs tomorrow that, on the 4x4:

- One period is .17 FTE
- A .83 employee would teach 2 periods, have 1 period of Prep, and 1 period of Release
- A .5 employee would teach 1 period, have 1 period of Prep, and 2 periods of Release
- He and I agreed we should avoid .67 if at all possible because it means someone would teach more sections one Quarter than another Quarter, which could get messy with payroll if anything changed in the assignment down the road.”

(Exhs. C-4, R-5 at 1.)

18. On August 3, 2020, Staffing Director Cheever sent an email to Education Directors Biondi and Ramirez stating, “Attached is an Excel workbook which takes the middle and high school schedules as I understand them and converts them to common, full-week FTE examples for part-time staff.” (Exhs. C-6 at 1, R-6 at 1.) That same day, Cheever shared the Excel spreadsheets, which he titled “Common FTE Scenarios,” with HR Executive Director Beight and Labor Relations Director Stock.

19. Staffing Director Cheever’s FTE scenarios for high school teachers were as follows. Tuesday through Friday, full-time employees would teach three 85-minute periods per day with an 85-minute preparation period and 110 minutes of “other”<sup>10</sup> time; .53 FTE employees would teach two 85-minute periods per day with a 44-minute preparation period and 40 minutes

---

<sup>10</sup>“Other” time was designed to approximate the time between classes, known as “passing time,” that teachers experienced during traditional in-person instruction when they would still have some responsibility for supervising students. The District’s 2019-20 bell schedules reflect that time between middle and high school classes was generally five to seven minutes. *See* Exh. R-4. “Other” time under CDL also included District-directed time for advisory and “family connections,” otherwise known as office hours.

of other time; and .27 FTE employees would teach one 85-minute period per day with a 25-minute preparation period and 20 minutes of other time. On Mondays, when no classes were taught, full-time employees would be given 365 minutes of other time and an 85-minute preparation period, .53 FTE employees would be given 210 minutes of other time and a 44-minute preparation period, and .27 FTE employees would be given 105 minutes of other time and a 25-minute preparation period. Full-time employees were given a 30-minute paid lunch period each day; part-time employees were not given a paid lunch period.

20. Staffing Director Cheever's FTE scenarios for middle school teachers were as follows. Tuesday through Friday, full-time employees would teach four 67-minute periods per day with a 67-minute preparation period and 115 minutes of other time; .63 FTE employees would teach three 67-minute periods per day with a 42-minute preparation period and 60 minutes of other time; .42 FTE employees would teach two 67-minute periods per day with a 28-minute preparation period and 40 minutes of other time; and .21 FTE employees would teach one 67-minute period per day with a 14-minute preparation period and 20 minutes of other time. On Mondays, when no classes were taught, full-time employees would be given 383 minutes of other time and a 60-minute preparation period, .63 FTE employees would be given 261 minutes of other time and a 42-minute preparation period, .42 FTE employees would be given 174 minutes of other time and a 28-minute preparation period, and .21 FTE employees would be given 87 minutes of other time and a 14-minute preparation period. Full-time employees were given a 30-minute paid lunch period each day; part-time employees were not given a paid lunch period.

21. On August 4, 2020, Director Cheever emailed the FTE scenario spreadsheets to District administrators at the middle and high school levels. The spreadsheets were not shared with the Association.

22. In late August 2020, the District published its CDL bell schedules. The bell schedules reflected students' daily schedules but did not reflect scheduled workdays for teachers. In September 2020, the District shared a PowerPoint presentation about the fall CDL schedules. That presentation was also geared toward parents and did not reflect teachers' entire workdays on the schedule.

23. The CDL schedules were a significant departure from a traditional teaching schedule. There were no classes scheduled on Mondays, which were dedicated to preparation, meetings, and training. On Tuesdays through Fridays there were fewer class periods scheduled per day, but the length of the periods was increased. Middle and high school teachers alike experienced a decrease in overall instructional time and an increase in overall preparation time and "other" time under the CDL schedules.

24. Notwithstanding the overall decrease in instructional time and the overall increase in preparation time and other time that teachers were scheduled for during CDL, teachers experienced an increase in workload.<sup>11</sup> Teachers had to learn how to engage students virtually, a

---

<sup>11</sup>The workload impact was greater on part-time teachers, who did not receive as much preparation time and other time per class taught as full-time teachers. For example, a full-time high school teacher taught 12 periods weekly and was scheduled for 425 minutes of preparation time and 805 minutes of other

time-consuming task that they had not previously undertaken. The transition to CDL required teachers to learn the use of new technology, such as teleconferencing applications and various interactive learning management platforms. The process of formatting and uploading lessons for students was laborious and time consuming, as was the process of reviewing and grading online assignments. Teachers also spent a significant amount of time engaging in outreach to students who were not regularly attending remote classes.

25. With the implementation of the fall 2020 CDL schedules some secondary school administrators struggled with the District's FTE calculations. For example, on August 6, 2020, Education Director Biondi emailed Director Cheever with a question about FTE for one period of instruction in a five-period day. Biondi stated, "For a 6 period it was .2, 7 period it is a .17, I am assuming for a 5 period day it is a .25. On the spreadsheet you sent out with all of the staffing scenarios it was a .21." (Exhs. C-9 at 2, R-10 at 2.) Cheever responded, in part,

"Your original thought of .25 would work if we used the total # of periods taught by a full-time teacher a representative of the entire work day; but given that there are chunks of time in the day that don't fall into the period structure, it is not an exact match. Monday is also problematic using that answer, as was the decision to award 20min of 'other' time per period taught (rather than award a percentage of the full 'other' time based upon the number of periods taught compared to the number of periods taught by a full-time teacher). These both step away from looking at the day as a uniform percentage of a whole.

"Instead, we're currently looking at FTE from a minutes worked perspective (which is, in the strictest sense, what FTE was originally designed to measure . . . we've just gotten away from that a little bit in education)."

(Exhs. C-9 at 1-2, R-10 at 1.) Cheever went on to state, "The outcome is that part-time staff cost slightly LESS in FTE than a strict reading of total periods vs. periods taught." Cheever further stated, "said another way – by strictly paying for the time worked, you are able to purchase more periods of instruction...allowing the same amount of total FTE to purchase more staff." (Exhs. C-9 at 2, R-10 at 2).

26. With the implementation of the fall 2020 CDL schedules some secondary teachers had concerns about the District's FTE calculations. High school teacher Marty Wilkins worked as a .5 FTE mathematics teacher with the District for eight years. Before CDL, Wilkins taught under an A/B schedule, sharing a full-time position with another .5 FTE teacher. Wilkins taught three classes on "B" days, with one preparation period, while his teaching partner taught three classes on "A" days, with one preparation period. Under the fall 2020 CDL schedule, Wilkins was assigned to teach two classes per instructional day and was designated a .53 FTE. Together, Wilkins and his teaching partner taught four classes per day for a total of 1.06 FTE, while 1.0 FTE teachers taught three classes per day. Wilkins was troubled that he had two-thirds of the students, two-thirds of the preparation and grading, and two-thirds of the family contacts as a full-time

---

time per week. A .53 FTE high school teacher taught eight periods weekly and was scheduled for 220 minutes of preparation time and 370 minutes of other time per week.

teacher but he was getting paid approximately half as much. Furthermore, Wilkins found that preparing for CDL classes took significantly more time than preparing for in-person classes. Wilkins was unable to finish his class preparation during the time that he was scheduled to work, and completed most of his preparation during the evenings or on weekends.

27. On September 8, 2020, program associate Andie Andeen sent an email to Staffing Director Cheever about a teacher who believed that his .63 FTE assignment was incorrect. Andeen stated, “[H]e feels that since his Leslie colleagues teach 4 classes for 1.0 he should receive .75 for 3 classes.” (Exhs. C-14 at 1, R-17 at 1.) The next day, Staffing Director Cheever responded to Andeen stating, in part, “FTE...looks a little different this year. In prior years, our bell schedules essentially ran the length of the work day and almost all of that time was blocked into periods, which allowed us to use the number of periods taught as a kind of shorthand for the number of minutes worked. This year’s hybrid schedule looks pretty different, so we’ve found it helpful to look back at total minutes worked (in some instances).” (Exhs. C-14 at 1, R-17 at 1.)

28. On September 14, 2020, middle school teacher Carolee Zavala emailed Assistant Principal Adam Matot stating that she seemed to be overscheduled for her .84 FTE position. Principal Suzanne Leonard responded to Zavala and stated that her schedule equated to .84 FTE. On September 15, 2020, Zavala responded to Principal Leonard stating, in pertinent part:

“Last year I was scheduled for 6/7 periods a day or 30 out of 35 possible classes taught in a week, including my prep (85% of possible time). Though I am still .84 FTE this year I am scheduled 22 out of 24 possible class periods in a week (92% of the possible advisory/teaching/prep time). I just found out yesterday afternoon that I also have advisory. That’s a lot of teaching time. Could you explain the process you used to determine how this works out to be .84%?”

(Exhs. C-16 at 2, R-19 at 2.)

29. On September 16, 2020, Principal Leonard emailed Staffing Director Cheever about Zavala’s inquiry and stated that she wanted to make sure that there had not been an error in scheduling Zavala. Cheever responded that FTE should be based on the total number of minutes that an employee is scheduled to work, and stated, “While it’s not uncommon for folks in education to think of FTE as the number of periods taught and for that to be mostly accurate during a typical year, that idea doesn’t hold up well in a year in which the bell schedule doesn’t apply to each day of the week AND the bell schedule leaves blocks of time outside the teaching day unaccounted for.” (Exhs. C-16 at 1, R-19 at 1.)

30. In late August or early September 2020, part-time secondary teachers began contacting the Association with questions about their FTE calculations. At that time, the Association presumed that the questioned FTE calculations were a result of errors made by the District. The Association raised the issue during a Labor Management Committee meeting in early September 2020, and Labor Relations Director Stock responded that the District would bring Staffing Director Cheever to a meeting to discuss the issue.

31. With the implementation of the fall 2020 CDL schedules, compensation for preparation period buyouts also became an issue. On September 28, 2020, Staffing Analyst Lori

Chamberlin sent an email to middle school administrators stating that there had been a change to FTE calculations for preparation buyouts. Chamberlin stated, “Originally, we were informed they would be .21 FTE but a new calculation has been released by HR.” (Exh. C-19 at 2.) Middle school principal David Wood asked, “Why was there a change from .21? Aren’t we buying their prep time every day (1 of the 5 periods?)” (Exh. C-19-1.) Chamberlin responded that the change had come from HR.

32. In 2018 and 2019, middle school teacher Linn was compensated an additional .17 FTE for selling his preparation periods. During CDL, Linn’s compensation for selling his preparation period was changed to .12 FTE. On October 2, 2020, Linn sent an email to District employee Jody Heit stating, “For last year, I was paid an extra 17% for my prep in which I worked for 47 minutes a day for 5 days, which equals 3.91 hours. In the present model, I work for 1 hour for 4 days, which equals 4 hours per week. So, I am working for more hours and less pay, which I do not understand.” (Exh. C-80 at 3.)

33. On October 5, 2020, HR Staffing Specialist Allison Handley responded to Linn’s inquiry, stating, “In previous years, we calculated FTE by periods, so 1.0 middle school teachers were teaching six periods at .17/each (technically 16.66). For prep buyout, we continued with .17 instead of looking at the specific prep minutes of 48 mins (minimum per CBA). This year, because Monday’s schedule is so incredibly different, our HR directors worked for several weeks along side SKEA to produce a mutually agreed upon schedule and FTE breakdown, which resulted in calculating by minutes instead of periods.” (Exh. C-80 at 2). Linn forwarded Handley’s email to the Association, and Representative Schutz refuted Handley’s statements that the Association had been involved in determining the District’s FTE calculations.

34. High school teacher Livermore was historically compensated an additional .17 FTE for each preparation period that he sold. On January 27, 2021, Livermore exchanged emails with HR Specialist Handley about his compensation for selling his preparation period under CDL, and Handley told Livermore that the District was calculating preparation period buyouts based on the number of minutes worked. Livermore asked if the District was going to continue using that formula, and Handley responded that the District would like to “pay everyone very specifically for work time scheduled.” Livermore in turn responded:

“[F]rom a teacher perspective, I think the formula falls short. As a teacher I am contracted to teach three periods a day, or six classes over two days. When I teach through a prep period I am taking on an additional 17% workload (100% divided by six classes), but currently, I am being compensated for the student contact time only, not the prep time and grading time also associated with each class. \*\*\* In the past I was compensated at about 16% - 17% per class for each of the prep periods I worked. To me this seemed fair because it was based on workload, but when based on minutes I end up being compensated for student contact time at just over half of what I was compensated for in the past. Does this make sense? I understand each Monday this year does give me some prep time back, but I am still working with an additional 34% workload compared to other teachers that have a prep period for each day. Had I known this compensation package was going to change so dramatically, I would not have agreed to work through my prep periods.”

(Exh. C-42 at 3.) Livermore is no longer selling his preparation periods to the District.

#### Association Grievance and Information Request

35. In October 2020, Staffing Director Cheever attended a Labor Management meeting to discuss FTE calculations. Also present at that meeting were HR Executive Director Beight, Labor Relations Director Stock, Association Representative Schutz, Mindy Merritt (at that time, the Association's president), and Scialo-Lakeberg (at that time, the Association's vice president). Cheever explained that from the District's perspective FTE had always been calculated based on the sum of time scheduled to work. Cheever further stated that although staff at the secondary level had developed a habit of using the number of periods taught as a "shorthand" for measuring FTE, that concept was not reflective of the District's actual practice. Schutz disagreed with Cheever's representations and stated that the District appeared to have changed its past practice of calculating FTE for part-time secondary teachers, which was based on the number of periods taught in proportion to a full-time teaching load.

36. On October 14, 2020, Association Representative Schutz sent an email to Labor Relations Director Stock and HR Director Beight stating, "To date, we still have not received from the District an accounting of how FTE is being calculated. Please provide this information to SKEA as quickly as possible." (Exh. C-20 at 1.) Schutz stated that the Association had also learned that the District appeared to have changed the way that sold preparation periods were being compensated. Schutz explained:

"A 1.0 FTE teaches 4 out of 5 periods and thus each period is equal to .25 FTE. From this, SKEA concludes that this member is being shorted compensation equivalent to .13 FTE (.25 -.12). This is a fundamental shift in how the District is compensating employees without providing SKEA notice. \*\*\*If this is how the District plans to move forward with FTE calculations and compensation, then consider this as notice that SKEA is demanding to bargain over this."

(Exh. C-20 at 1-2.)

37. On November 9, 2020, the Association orally initiated a grievance alleging that the District had changed the way it was calculating FTE. That same day, Representative Schutz sent an email to Labor Relations Director Stock requesting documents "to help understand the scope of this grievance." Schutz stated:

"The specific information SKEA is requesting in an electronic sortable document is as follows:

"Employee Name or ID

"FTE amount

"Time worked (schedule including prep time)

"Number of class periods assigned (if applicable)

“In our conversation we also discussed that SKEA submitted a Demand to Bargain over this issue on October 14<sup>th</sup>. My understanding is that both SKEA and the District understand that we are pursuing resolution of this issue through two different means – the grievance process (loss of compensation) and expedited bargaining (FTE calculation definition and impact to compensation) – with the hopes that through one of these two means we will reach a resolution.

“I’m glad that we had this conversation to get on the same page about the level of seriousness that SKEA had been viewing this issue.”

(Exhs. C-21 at 1- 2, R-25 at 2.)

38. On November 17, 2020, Labor Relations Director Stock notified Representative Schutz that the District was working on the information request and planned to provide the information by the end of the day on November 20, 2020.

39. On November 24, 2020, Representative Schutz emailed Labor Relations Director Stock stating that the Association had not received the requested information. Stock responded on November 25, 2020, stating:

“I am attaching documents containing most of the information you have requested. The District does not have a system for tracking the number of teaching periods for each educator that is 100% accurate (It does not track the number of bought prep periods) so we are asking for confirmation from all our secondary administrators. We are awaiting confirmation for the blanks in the “#\_Periods\_Taught\_Week” column. We hope to have this to you by next Wednesday. We will send you updates as we receive them beginning next Monday.”

(Exhs. C-22 at 1, R-26 at 3.)

40. On December 1, 2020, Representative Schutz emailed Labor Relations Director Stock stating that he had numerous questions about the information provided on November 25, 2020. Schutz also commented that the information furnished by the District contained FTE calculations that were inconsistent with the District’s long-standing practice of calculating FTE, and stated, “While SKEA still maintains that the correct solution is to undo this unilateral change in FTE calculation, having the actual schedules for these educators (with regard to what periods they are teaching and when) would greatly increase our ability to accurately discuss this matter and its impacts.” (Exhs. C-23 at 2, R-26 at 2.)

41. On December 3, 2020, Labor Relations Director Stock sent the Association an updated spreadsheet including FTE information for EDGE<sup>12</sup> employees. Later that day, Stock emailed Representative Schutz stating:

---

<sup>12</sup>The EDGE program provides online instruction for those families who wish to engage solely in distance learning and do not want their students to return to in-person education.

“At this time the District does not maintain a centralized collection of employee schedules and we anticipate it would be very time consuming for the District to collect all of the schedules being requested. If SKEA would still like us to fulfill this request, we would have to evaluate the amount of time the work would take to complete the request and provide a cost estimate for SKEA to consider . \*\*\* please let us know and we will provide you with the estimate for service.”<sup>13</sup>

(Exh. C-25 at 1.)

42. On December 3, 2020, the District denied the Association’s grievance. The District maintained that it had not modified its FTE calculation or its practices for preparation period buyouts, which had always been based on time worked.

43. On December 18, 2020, the Association’s attorney, Margaret Olney, sent a letter to the District’s attorney, Paul Dakopolos, stating that the Association did not believe it had been given complete and accurate information. The Association also requested the following documents:

“1. Copies of all emails, directives, training materials or other guidance from the central office to building administrators on how to determine and/or allocate and employee’s FTE status for the 2018-2019 and 2019-2021 school years.

“2. Beginning in March 2020, copies of all emails, directives, training materials or other guidance from the central office to building administrators about how to schedule employees based on FTE status, if and when the District began offering distance learning.

“3. Copies of all emails, directives, training materials or other guidance from the central office to building administrators on how to determine and/or allocate and employee’s FTE status for the 2020-2021 school year.

“4. Copies of any emails to or from building administrators asking for direction or clarification for any individual teacher for the 2020-2021 school year.

“5. Copies of building level “master schedules” for 2018-2019, 2019-2020 and 2021-2022 school years.

“6. The name, FTE and schedule for all AVID Coordinators, Activity Directors, IB Coordinators, Data Specialists, and Link Advisors. Note that the parties had discussed adjustments relating to these employees’ schedules during labor management (particularly around buying out preparation time), but it is not clear from the District’s data that it is doing what it promised.

“7. The name, FTE and schedule for all elementary specialists.”

---

<sup>13</sup>Article I.D.6 of the CBA entitles the District to seek reimbursement for costs incurred in responding to information requests submitted by the Association.



(Exh. C-29 at 4-5.) Olney followed up regarding the status of the information request on January 12, 2021.

44. On January 22, 2021, Olney emailed Dakopolos stating that she had received some information from Dakopolos, that the Association had seen most of the information before, and that it did not clear up the Association's questions. Olney also stated that she would be filing an unfair labor practice complaint, and that the Association continued to request a complete response to its December 18, 2020, information request.<sup>14</sup>

45. On February 4, 2021, Olney emailed Dakopolos stating that the Association had still not received additional information from the District. Olney reiterated that the Association would be pursuing an unfair labor practice complaint.

46. On February 5, 2021, Dakopolos responded to Olney stating, in part, "The District's position is that it has not changed the status quo. The payroll department has consistently paid based upon an FTE calculation by minutes, not classes." (Exh. R-31 at 2.) Dakopolos further stated,

"I think what I sent you satisfies your requests 1-4. When we talked on the phone about this some time ago, I mentioned that some of the information would take time to retrieve and that we would need to know if SKEA wants to pay for the time it will take to retrieve this information. Requests 5-7 fall in that category. The parties CBA recognizes that the [A]ssociation will pay for information that is not easily obtainable. Would you like me to get an estimate of the cost of compiling the documents for Requests 5-7?"

(Exh. R-31 at 2.) That same day, Olney responded that she would like the District to provide an estimate. Olney also stated that the information provided contained inaccuracies and inconsistencies, and she asked the District to provide any evidence it had that the District has historically calculated FTE for part-time educators and those who sell their preparation time based on a calculation of minutes.

47. On February 19, 2021, Olney notified Dakopolos that the Association had filed an unfair labor practice complaint.<sup>15</sup> Olney advised that the Association's request for information continued, and she reiterated her request for an estimate of the charge to produce the outstanding documents.

48. On March 1, 2021, Olney sent an email to Dakopolos requesting a status update on the information request. On March 3, 2021, Dakopolos responded that he expected to have an

---

<sup>14</sup>In January 2021, the parties bargained, and reached agreement on, a memorandum of understanding regarding certain aspects of CDL. The question of how to calculate FTE was not a part of that bargaining.

<sup>15</sup>After the Association filed the complaint in this matter it chose to withdraw its grievance over FTE calculations. The record does not establish the date on which the Association withdrew the grievance.

answer that week, and that the District's HR staff had been busy working with the Association to resume in-person instruction.

49. On March 18, 2021, Olney responded that she was following up again on the information request, and stated, "We are sympathetic that these are crazy times, but the Association has been asking for much of this information for five months." (Exh. C-32 at 1.)

50. On April 15, 2021, Dakopolos emailed Olney additional documents that had been furnished to him by the District. Dakopolos stated that he expected to receive an estimate of the time it would take to provide the other requested information within the next several days. Between April 30 and May 5, 2021, Olney and Dakopolos corresponded about technical issues that prevented Olney from retrieving the documents that Dakopolos had furnished on April 15, 2021.

51. On May 25, 2021, Olney emailed Dakopolos stating that while the Association appreciated receiving email correspondence related to the FTE issue, the District still had not provided the bulk of the information requested. Olney stated that the information provided was inadequate because it "does not actually identify the schedule or hours worked by these employees (either part-time or those who had their 'prep time' bought out) and also appears to include inaccurate and/or inconsistently defined information. [Schutz] identified these issues last October and has yet to receive any substantive response. After I became involved, you indicated that there may be a cost and I asked for an estimate. That still has not been provided." (Exh. R-40 at 1.) Olney went on to identify the items that had not been provided, as follows:

"In excel format, the following information:

- Employee name and ID
- Time worked (i.e., actual schedules, including preparation time and Monday Assigned Time)
- Number of class periods assigned (if applicable).

"Copies of building level 'master schedules' for high schools or middle schools for SY 2018-2019 2019-2020 and 2021-2022.

"The name, FTE and schedule for all AVID Coordinators, Activity Directors, IB Coordinators, Data Specialists, and Link Advisors."

(Exh. R-40 at 2.) On May 27, 2021, Dakopolos responded that he had conveyed the urgency of Olney's request to the District.

52. On June 3, 2021, Dakopolos emailed Olney stating that he would be furnishing master schedules the next day. Dakopolos further stated that the remaining items were kept at the school level, and he provided estimated costs for compiling that information. Dakopolos closed the email by stating, "Let me know if SKEA will pay the costs outlined above and we will proceed." (Exhs. C-33 at 1, R-41 at 1.)

53. On September 28, 2021, Dakopolos emailed Olney stating that he had not received an answer whether the Association wanted to pay for the information request at the rates he had sent to her on June 3, 2021. Olney responded that the Association would pay for the information.

54. On September 30, 2021, the Association narrowed its information request. The District furnished additional responsive documents before the hearing in this matter.

#### Relevant Contractual Provisions

55. The Association and the District were parties to a collective-bargaining agreement (CBA) effective from July 1, 2017, through June 30, 2021.

56. Article IX, Section A.1 of the CBA states: “The normal workweek (**Monday through Friday**) of employees shall be forty (40) hours **a week**, including a 30-minute duty-free lunch period each day. Employees starting and release times may vary, depending on building and program hours. Full-time employees shall be on duty and available on the school site or site otherwise designated by their principal or immediate supervisor for such above period of time on days employees are to report to work.” (Exhs. C-1 at 26, R-1 at 26, emphasis in original.)

57. Article IX, Section B.3 of the CBA states: “Full-time middle school and high school employees shall be allowed one instructional period free of other duties or responsibilities for utilization as preparation time each workday. Middle school preparation time shall be 45 minutes or one full period, whichever is greater. High school preparation time shall be 48 minutes or one full period, whichever is greater.” (Exhs. C-1 at 26, R-1 at 26.)

58. Article IX, Section B.5 of the CBA states: “The District shall provide a portion of preparation time to an employee who is contracted as .5 FTE or more per week but less than full time. The portion shall be prorated based on the ratio of the employee’s scheduled workweek to the normal full-time workweek.” (Exhs. C-1 at 26, R-1 at 26.)

59. Article VII, Section A.3 of the CBA states, “The District shall contribute a portion of the insurance premium for employees who are scheduled to work less than-full-time. The District’s contribution shall be prorated based on the ratio of the employee’s scheduled workweek to the normal full-time workweek.” (Exhs. C-1 at 20, R-1 at 20.)

60. Article VIII, Section A.1.a.(1) of the CBA, covering paid sick leave, states: “An employee who serves for a fraction of the school year or school day shall receive benefits on a pro[r]rata basis.” (Exhs. C-1 at 21, R-1 at 21.)

61. Article VIII, Section A.4.b of the CBA, covering paid family illness leave, states: “An employee who serves for a fraction of the school year or school day shall receive benefits on a pro[r]rata basis.” (Exhs. C-1 at 23, R-1 at 23.)

#### CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it unilaterally changed its practice of calculating FTE for the purposes of compensating part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.

3. The District violated ORS 243.672(1)(e) by failing to timely provide the Association with requested information that was relevant to a dispute over FTE calculations.

#### The Alleged Unilateral Change to FTE Calculations

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” A public employer violates its duty to bargain in good faith under ORS 243.672(1)(e) if it does not complete its bargaining obligation before making a change in the status quo concerning a mandatory subject of bargaining. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE II*) (absent “a sufficient affirmative defense, a union has a statutory right to insist that an employer bargain over mandatory subjects before making changes to the status quo”). When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the status quo, (2) whether the change concerned a mandatory subject of bargaining, and (3) whether the employer exhausted its duty to bargain. *Id.* at 177 (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 8, 20 PECBR 890, 897 (2005), *rev'd on other grounds*, 209 Or App 761, 149 P3d 319 (2006) (*AOCE I*)).

We begin by determining whether there was a unilateral change to the status quo. The Association contends that the District unilaterally changed the way it calculated FTE for part-time secondary teachers and for compensating teachers for preparation period buyouts, from one based on the number of periods taught to one based on time scheduled to work.<sup>16</sup> The District maintains that there was no change because it has always calculated FTE based on time scheduled to work.

We determine the status quo by reference to a CBA, work rule, policy, or past practice. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00 at 9-10, 19 PECBR 656, 664-65 (2002); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007). Here, the Association contends that the status quo is determined by the District’s past practice, and the District contends that the status quo is established by the parties’ CBA, which the District contends is consistent with its past practice.

We first address the District’s contention that the parties’ CBA establishes the status quo for calculating FTE for part-time teachers. When we interpret contracts, our goal is to discern the parties’ intent. To do so, we apply the three-part analysis described in *Lincoln County Education*

---

<sup>16</sup>The Association does not allege that the District’s changes to class schedules under CDL, in and of themselves, triggered a bargaining obligation. As the Association states, “this case is not about a failure to bargain the CDL schedule or the workload caused by the CDL schedule. The dispute is about a unilateral decision made in HR to no longer set FTE based on proportional workload – *i.e.*, periods taught – which has resulted in part-time teachers being paid less than full-time employees for the same work.” (Association’s brief at 19.)

*Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. If the provision is ambiguous, we examine extrinsic evidence of the parties' intent, to the extent it is available. If the provision remains ambiguous after considering the extrinsic evidence, we apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

The District relies on Article IX.A.1, which states: “The normal workweek (Monday through Friday) of employees shall be forty (40) hours a week, including a 30-minute duty-free lunch period each day. . . . Full-time employees shall be on duty and available on the school site or site otherwise designated by their principal or immediate supervisor for such above period of time on days employees are to report to work.” (Exhs. C-1 at 26, R-1 at 26, emphasis omitted.) According to the District, the quoted provision establishes that full-time employees work 40 hours per week, and that FTE is therefore a calculation of time relative to that 40-hour week.

We disagree. The plain language of Article IX.A.1 does not state anything about the calculation of FTE. At most, Article IX.A.1 sets the expectation that full-time employees be “on duty and available on the school site” for 40 hours per week during a normal work week. The District also points to other language in the CBA to establish that the CBA’s contractual provisions generally operate based on a principle of time scheduled to work. Specifically, the District relies on a provision in Article VII stating that the District’s portion of insurance premiums for part-time employees shall be based on “the ratio of the employee’s scheduled workweek to the normal full-time workweek,” and on provisions in Article VIII stating that an “employee who serves for a fraction of the school year or school day shall receive benefits on a pro[ ]rata basis” for sick leave and family illness leave. (Exhs. C-1 at 20-21, 23; R-1 at 20-21, 23.) The District contends that this language shows that the CBA provisions are based upon calculations of time, not calculations of the number of periods taught. At most, the quoted provisions establish that the parties agreed to calculate certain employment benefits based on a calculation of time scheduled to work. They do not establish that the parties also agreed to set salary for part-time teachers based on a calculation of time scheduled to work in proportion to a 40-hour work week, or that the parties agreed to set compensation for the selling of preparation periods based on the number of minutes in the preparation period.

Even if we thought there was ambiguity about whether the quoted language established a methodology for calculating FTE, the record establishes, and the District does not dispute, that teachers are professional, exempt employees who routinely work beyond their scheduled hours to complete their work duties. Consequently, the language cited by the District does not control the number of hours that full-time teachers work per week. In practice, the language relied on by the District operates as a minimum expectation for the number of hours worked by a full-time teacher; it does not define or encompass their entire work schedules. Given that Article IX.A.1 does not control, or reflect, the number of hours that teachers actually work per week, we decline to find that Article IX.A.1 must mean, by extension, that FTE for part-time teachers is based on the percentage of time they are scheduled to work in proportion to a 40-hour work week. For these reasons, we are not persuaded by the District’s argument that the CBA establishes the status quo for the District’s FTE calculations. *See Eugene Police Employees' Association v. City of Eugene*,

Case Nos. UP-38/41-08 at 25-26, 23 PECBR 972, 996-97 (2010) (no status quo established by agreements that did not specifically prohibit or address complained-of action).

Having determined that the CBA does not determine the status quo for how the District has conducted its FTE calculations, we turn to the parties' past practice. A past practice in labor relations is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005). Acceptability means that both parties know about the conduct and consider it the acceptable method of dealing with a particular situation. Mutuality means that the practice arose from a joint undertaking by the labor organization and the employer. *Id.* Here, the Association contends that the District had a past practice of calculating FTE based on the number of classes, or periods, taught in proportion to a full-time teacher. The District contends that it has always calculated FTE based on the sum of the amount of time that a teacher is scheduled to work. For the reasons discussed below, we conclude that the evidence supports the Association's contention.

We first address the FTE matrices introduced into evidence by the parties. The District argues that the 2017 matrices support its position that FTE is based on the number of minutes a teacher is scheduled to work, while the Association contends that the 2020 matrix supports its position that FTE correlates with the number of periods a part-time teacher is assigned in proportion to a full-time teacher. We conclude that the FTE matrices are of limited value in establishing the District's historic practice because the record does not contain detailed evidence about their usage. Although the record establishes that the 2017 and 2020 FTE matrices were created and maintained by the District's HR Department, there was no specific testimony establishing to whom the matrices were distributed, to what extent they were used, or for how long. Because the use of the District's FTE matrices is not adequately explained in the record, the documents, standing alone, are of little value. We note, however, that the credible record testimony regarding the District's practice for calculating FTE, discussed below, is consistent with the 2020 matrix.

We turn now to the record testimony regarding the District's past practice of calculating FTE. The credible testimony of high school teacher Mashos, who worked for the District for 24 years under various bell schedules, and who worked under a part-time schedule as early as 2005, establishes that FTE has historically corresponded to the number of periods taught relative to a full-time teaching load, not to the number of minutes a teacher was scheduled to work. Mashos's testimony was corroborated by Representative Schutz and President Scialo-Lakeberg. Furthermore, Middle School Education Director Biondi's August 6, 2020, email exchange with Staffing Director Cheever reveals that Biondi also equated FTE with the number of periods taught in proportion to a full-time teacher.

The District dismisses this evidence on the basis that teachers and administrators at the "building level" had a habit of equating FTE with number of classes taught as a "shorthand" for estimating FTE. The District reasons that while this shorthand was a roughly accurate method for determining FTE when the bell schedule encompassed the entire length of each workday, the method falls apart under the CDL model. The District's argument is belied by several pieces of record evidence. First, Middle School Education Director Biondi is a District-level manager, not

a building-level manager. Furthermore, Cheever himself stated in an email to a staff member that “FTE...looks a little different this year.” (Exhs. C-14 at 1, R-17 at 1.) Moreover, several statements in Cheever’s email correspondence are inconsistent with the District’s claim that it has always paid its teachers based on the number of minutes they were scheduled to work. In his August 6, 2020, email exchange with Biondi, Cheever addressed Biondi’s understanding about how FTE was calculated by stating, “Instead, we’re *currently* looking at FTE from a minutes worked perspective” and that “we’ve just gotten away from that a little bit in education.” (Exhs. C-9 at 1-2, R-10 at 1, emphasis added.) Cheever’s comments plainly reflect that the District’s “current” practice was a departure from the way it handled FTE in the past. Moreover, Cheever stated that part-time staff “cost slightly LESS in FTE than a strict reading of total periods vs. periods taught” and that “by strictly paying for the time worked, you are able to purchase more periods of instruction...allowing the same amount of total FTE to purchase more staff.”<sup>17</sup> (Exhs. C-9 at 2, R-10 at 2, emphasis in original). It is unclear how the District would be able to “purchase more staff” for the same amount of FTE if it did not change the way it was calculating FTE.

The District’s position that its FTE calculations have been exclusively based on time scheduled to work is further undermined by evidence regarding the District’s past practice for compensating teachers for preparation period buyouts, which contradicts the District’s claims. In the two years before CDL, the District compensated middle school teacher Linn an additional .17 FTE for the buyout of his preparation period. If Linn had been compensated based on the number of minutes in his preparation period, .17 of a 480-minute day is 81.6 minutes. As Linn stated in his October 2, 2020, email to the District, however, the length of his sold preparation period was 47 minutes.<sup>18</sup> Similarly, high school teacher Livermore, who has sold his preparation periods to the District since 2011, was compensated .17 FTE for each preparation period that he sold. The .17 figure could not have equated to the number of minutes in Livermore’s preparation period unless his preparation period was 81.6 minutes long. In a seven-period day, however, periods are between 40 and 50 minutes long.<sup>19</sup>

For the reasons stated above, we conclude that the record evidence persuasively establishes that the District’s past practice has been to calculate FTE for part-time teachers and for preparation period buyouts based on the number of periods taught in proportion to a full-time teaching load. We further conclude that the practice has been longstanding and consistent among the District’s teachers at the secondary level. Mashos has been with the District for 24 years and has worked under numerous bell schedules, and Linn has been selling his preparation periods since at least 2011. The evidence also establishes that the practice was acceptable to both parties, that is, that

---

<sup>17</sup>Staffing Director Cheever’s plan to purchase more staff for less money is illustrated by the experiences of high school teacher Wilkins and his teaching partner, who together taught four classes per day for a total of 1.06 FTE, while a full-time teacher taught three classes per day.

<sup>18</sup>Even assuming the District included five minutes of “passing time” (time between classes) on each end of the preparation period into its calculation of the number of minutes it was “buying” from Linn, it would not equate to 81.6 minutes.

<sup>19</sup>In the bell schedule under which Livermore taught, full-time teachers taught six classes and received one preparation period, for a total of seven periods per day.

both parties knew about the practice. Although the District contends that the practice of equating FTE with number of classes taught was not “known or acquiesced to” by the District,<sup>20</sup> as discussed above, not only were District administrators familiar with the practice, but Staffing Director Cheever acknowledged the previous practice in his email communications with District staff. Finally, we conclude that the practice was mutual. There is no evidence that there have been any previous disputes between the Association and the District regarding FTE calculations. In sum, we conclude that the practice of calculating the FTE based on the number of periods taught meets the criteria for a past practice. We further conclude that the District’s actions were inconsistent with the status quo when it began calculating FTE for part-time teachers and preparation period buyouts based on the number of minutes scheduled to work.

Next, we turn to the questions of whether the subject of the change at issue concerns a mandatory subject of bargaining and if so, whether the District met its bargaining obligation. The method the District uses to calculate FTE for part-time teachers and for preparation period buyouts is tied to a monetary benefit – salaries – and is a mandatory subject for negotiations. *See* ORS 243.650(7)(a). *See also Oregon Tech American Association of University Professors v. Oregon Institute of Technologies*, Case No. UP-023-20, 35, \_\_ PECBR at \_\_ (2020) (compensation is a mandatory subject). The District does not contend otherwise. Furthermore, the District’s change to calculating FTE by minutes scheduled to work also impacted workload, a mandatory subject of bargaining. *See Id.* at 27. Finally, the District does not dispute that it did not provide notice to the Association about the change because, from the District’s perspective, there was no change. The District did not share its FTE scenarios with the Association before implementing its fall 2020 CDL schedules, and the Association only learned of the change to the status quo regarding FTE calculations when its members began to report problems with their pay calculations.<sup>21</sup> An employer must bargain about its decision to change a mandatory subject for bargaining before deciding to make the change. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08 at 5, 25 PECBR 712, 716 (2013). Accordingly, the District did not meet its obligation to provide the Association with notice and an opportunity to bargain over the change.

Consequently, for the reasons stated above, we conclude that the District violated ORS 243.672(1)(e) by changing its practice of calculating FTE for part-time secondary teachers and for preparation period buyouts from one based on periods taught in proportion to a full-time teaching load to one based on time scheduled to work.

#### Alleged Failure to Timely Provide Requested Information

It is well-settled that a public employer’s obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes the duty to provide an exclusive representative with requested information that has “some probable or potential relevance to a grievance or other contractual matter.” *Association of Oregon Corrections Employees v. State of Oregon, Department of*

---

<sup>20</sup>Respondent’s post-hearing brief at 30.

<sup>21</sup>Although the parties bargained, and reached agreement on, a memorandum of understanding regarding certain aspects of CDL in January 2021, the question of how to calculate FTE was not a part of that bargaining.



*Corrections*, Case No. UP-7-98 at 7, 18 PECBR 64, 70 (1999). When analyzing (1)(e) claims, we “begin with the premise of full disclosure.” *Id.* It is the requesting party’s burden to establish that the requested information meets the relevance standard. Here, the Association’s requested information meets the relevance standard because it was directly related to a pending grievance over the District’s alleged change to its method for calculating FTE. Furthermore, the District does not dispute the relevance of the requested information.

The Association alleges that the District unreasonably delayed in the handling of its information request. The question of whether an employer has unreasonably delayed in responding to an information request is dependent on the totality of the circumstances. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982). In assessing the totality of circumstances, we are guided by the four factors identified in *Colton*: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties’ labor-management relations. *Id.* at 5031-32.

Here, the Association’s stated reason for the request was in support of a grievance and to investigate member complaints that they were not being paid correctly, a factor which weighs in favor of prompt disclosure. *See Id.* at 5031 (a “request for information relating to a pending grievance ordinarily will require a quicker and more specific response than a request for information that concerns the administration of a collective bargaining agreement generally.”)

Turning to the second factor, the ease or difficulty with which the information could have been produced, the Association alleges that the requested reports would have been easy to produce, while the District alleges that the information initially requested by the Association – data explaining how many minutes each part-time employee in middle or high school was present at their work site – was data that did not exist. The District also asserts that its handling of the information request was reasonable given the extra demands and challenges placed on its staff because of the COVID-19 school closures.

In assessing the reasonableness of the District’s response, we are mindful that the Association’s information request came during a very difficult time for the District, with increased workload on its administrators and support staff because of the challenges of CDL and the uncertain timeline for the reopening of schools. We are also mindful that there was a significant amount of correspondence between the parties regarding the information requests, including modifications by the Association, and that the Association did not immediately respond to the District’s request to let it know whether it wanted a cost estimate for compiling certain categories of requested documents. Nonetheless, the Association affirmatively requested the cost estimate on February 5, 2021, and the District did not provide the estimate until approximately four months later, on June 3, 2021. Furthermore, the master schedules, which were first requested on December 18, 2020, were not furnished until over five months later, on June 4, 2021. In these circumstances, we agree with the Association that the District’s delay was unacceptable. *See Oregon Public Employees Union, SEIU, Local 503, AFL-CIO, CLC v. State of Oregon, Executive Department, Labor Relations Division*, Case No. C-64-84, 8 PECBR 7863, 7871 (1985) (a three-month delay in beginning to compile information requested by a union is unreasonable notwithstanding that the information sought was extensive and involved a large number of the employer’s divisions); *Lebanon Education Association/OEA v Lebanon Community School District*, Case No. UP-4-06,

22 PECBR 323, 369 (2008) (a school district's delay of two months to respond to a union's information request was untimely).

With respect to the third factor, the type of information requested, the District has raised no confidentiality argument or other argument that would preclude the disclosure of the information requested by the Association. And finally, with respect to the fourth factor, the history of the parties' labor-management relations, the evidence does not establish that the Association has engaged in "a pattern of numerous requests or of 'fish-and-grieve' expeditions," such that the time to provide the information may be lengthened or excused. *See Colton*, 6 PECBR at 5032. Accordingly, this factor does not justify delay by the District.

Based on the totality of the circumstances, we find that the District unreasonably delayed in responding to the Association's information request, in violation of ORS 243.672(1)(e).

### Remedy

We turn to the remedy for the District's good faith bargaining violations. Because the District violated ORS 243.672(1)(e), we are required to enter a cease-and-desist order. ORS 243.676(2)(b). We will also "[t]ake such affirmative action \* \* \* as necessary to effectuate the purposes of [PECBA]." ORS 243.676(2)(c). We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. In this case, we order the District to restore the status quo with respect to calculating FTE for its part-time secondary teachers and for its preparation period buyouts. Because the record establishes that, under the status quo, some of the District's teachers would have received a higher salary than what they received after the District began calculating FTE based on time scheduled to work, a make-whole remedy is also necessary. We will, therefore, order the District to make teachers whole for any loss of salary they suffered due to the District's change in calculating FTE, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (citing *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80 at 14, 6 PECBR 4726, 4739 (1981)).

The Association requests that we order physical and electronic notice posting. We generally order notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 8, 26 PECBR 254, 261 (2014). In this case, a notice posting is warranted because the District's conduct affected a significant number of bargaining unit employees. In addition to the traditional physical posting of the notice, we require an employer to electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Id.* at 9, 26 PECBR at 262. Here, the record establishes that email is the common method of communication between the District and the represented

employees. Accordingly, we will order the District to post the notice and distribute it to bargaining unit employees by email.

### PROPOSED ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(e).
2. The District shall restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating its part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.
3. The District shall make all affected bargaining unit employees whole by paying them the portion of their salaries that they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. The District shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.
5. The District shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: May 12, 2022.



---

Jennifer Kaufman  
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at <https://apps.oregon.gov/erb/cms/auth>. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to [ERB.Filings@ERB.Oregon.gov](mailto:ERB.Filings@ERB.Oregon.gov). Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)



**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-006-21, *Salem Keizer Education Association v. Salem-Keizer School District*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Salem-Keizer School District committed unfair labor practices in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees.

The Board concluded that Salem-Keizer School District violated the duty to bargain in good faith when it unilaterally changed its past practice for calculating full-time equivalency (FTE) for the purpose of paying its part-time secondary teachers and for buying out employees' preparation periods. The Board also concluded that Salem-Keizer School District violated the duty to bargain in good faith when it unreasonably delayed in furnishing Salem Keizer Education Association with relevant requested information.

To remedy these violations, the Board orders Salem-Keizer School District to:

1. Cease and desist from violating ORS 243.672(1)(e).
2. Restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.
3. Make all bargaining unit employees whole by paying them any additional salary they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. Post this notice for 30 days in prominent places where Association-represented employees are employed.
5. Distribute this notice by email to all Association-represented employees within 10 days of the date of this order.

EMPLOYER

Dated: \_\_\_\_\_, 2022

By: \_\_\_\_\_

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 in each employer facility in which bargaining unit personnel are likely to see it. This notice 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.*