EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-18

(UNFAIR LABOR PRACTICE)

PENDLETON FIREFIGHTERS UNION, IAFF LOCAL 2296, Complainant, v. CITY OF PENDLETON, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 18, 2019, this Board heard oral argument on Complainant's objections and Respondent's cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe after a hearing on October 25 and 26, 2018, in Pendleton, Oregon. The record closed on December 17, 2018, upon receipt of the parties' post-hearing briefs.

Jason M. Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant.

Benjamin P. O'Glasser and C. Akin Blitz, Attorneys at Law, Bullard Law, Portland, Oregon, represented the Respondent.

On May 31, 2018, Complainant Pendleton Firefighters Union, IAFF Local 2296 (Union) filed an unfair labor practice complaint against Respondent City of Pendleton (City). The complaint alleges that the City violated ORS 243.672(1)(h) by refusing to sign a bargained-for memorandum of understanding (MOU).

We conclude that the City violated ORS 243.672(1)(h) when it refused to reduce an agreement reached on February 23, 2018, to writing and refused to sign any document recording the terms agreed to at that meeting. We also deny the Union's request for a civil penalty.

RULINGS[1]

1. The Union objected that the ALJ did not grant its request for an adverse inference and other evidentiary restrictions on the City. As background, on October 16, 2018, the ALJ held a prehearing conference with the parties at their request to discuss their multiple prehearing disputes and the City's request for a protective order. After the conference, the ALJ sent written guidance to the parties in an email dated October 16, 2018. In that email, the ALJ informed the parties that they could request clarification of his direction as described in the email, and noted that "either side can supplement its initial arguments in response to this email." The ALJ ruled that the City should respond to the Union's request that it identify the paragraphs of the disputed MOU to which it did not agree. The ALJ also ruled that the City should give the Union the home address of Mike Ciraulo, a former City employee who served as Fire Chief during the events in dispute, and clearly identify whether the City's attorney was representing Ciraulo. The ALJ also wrote that he was not opposed to the City's request for a protective order for Ciraulo's personnel records, but he encouraged the parties to agree on the terms of an agreement without the ALJ's involvement.

Following the conference, the parties agreed on a protective order. The Union ultimately located Ciraulo's home address on its own, before the protective order was signed, and the parties made arrangements for Ciraulo to testify by telephone. After the protective order was signed, the City disclosed the requested Ciraulo personnel records. Those personnel records referenced several additional documents that the Union contended were responsive to other information requests and relevant to the Union's claims, and the Union questioned why the City had not yet produced them. After the Union pointed out those omissions, the City produced the remaining documents, but in some cases, only two days before the October 25 hearing (the parties had executed the protective order only shortly before the hearing). Additionally, the parties disagreed about whether the City had complied with all of the ALJ's October 16 rulings. On October 18, 2018, while these disputes were ongoing (before the City produced all of the documents and information at issue), the Union sought an adverse inference against the City that Ciraulo's testimony and the information not produced by the City would prove paragraphs 4, and 11 to 15 of the complaint. The Union also requested that the ALJ strike the portions of the City's answer related to those paragraphs of the complaint and preclude the City from offering any evidence on those subjects. The ALJ did not rule on that request before the hearing.

In its post-hearing brief, the Union renewed its request for an adverse inference and evidentiary restrictions, contending that the City failed to comply fully with the ALJ's October 16 rulings. In addition, the Union alleged that the City improperly delayed producing the documents that were referenced in Ciraulo's personnel records. Those documents included an email chain (ultimately admitted as Exhibit C-9) in which Ciraulo wrote that he and Assistant Fire Chief Shawn Penninger had "verbally agreed" at the February 23 meeting "on how to move forward with [Union officers] to work on an MOU." The Union argued that the City should have produced the document earlier because it was responsive to its information requests, not subject to the protective order, and supportive of the Union's claim. The City argued that it complied with all of the ALJ's rulings

[1]Both parties objected that the recommended order did not summarize all of the significant evidentiary and procedural rulings, and we address those objections with these rulings.

and produced documents as soon as the protective order was presented by the Union; that the delayed disclosure of the documents referenced in Ciraulo's personnel records was inadvertent; and that it could not identify which paragraphs in the MOU it disputed because it disputed that the parties had reached any enforceable agreement at all.

The City's belated production of the document that became Exhibit C-9 is concerning, as is the timing of the City's disclosure of Ciraulo's home address. The Union asserts that the timing of the disclosures affected its hearing preparation. We agree with the Union that the City could (and should) have provided the disputed information earlier. However, the City's witnesses testified regarding their reasonable efforts to respond to the Union's information requests, and the Union does not contend that the record proves the City acted in bad faith. Further, Ciraulo testified and the Union had a full and fair opportunity to question him, and the documents that the Union sought were produced by the City, offered by the Union at hearing, and admitted. Accordingly, we conclude that the City's prehearing conduct did not materially prejudice the Union's ability to present its case, and that it was within the ALJ's discretion to determine that the evidentiary restrictions requested by the Union were not warranted or necessary under the circumstances.

2. The City objected to the ALJ's rulings denying the City's requests for documents and testimony revealing the substance of communications among Union officers about the dispute in this case. Specifically, before hearing, the City sought documents and correspondence "sent or received by Daryl Sams, Mark Cave, Jared Uselman, or any other Union member who will testify at hearing" about "the substance of the agreement that allegedly was reached at the [February 23] meeting." On October 16, 2018, the ALJ ruled that the Union had not waived the privilege protecting internal union communications, but that if the Union offered such communications into evidence, the City would be permitted to question witnesses about that information, even if it were otherwise privileged. At hearing, the Union did not offer the Union's internal communications into evidence. The City nonetheless sought to question union witnesses, including Sams, about the content of internal Union communications regarding the MOU drafting. The Union objected to those questions, asserting the internal union communication privilege, and the ALJ sustained the Union's objections.

The ALJ's ruling on October 16, 2018, was correct, as were the ALJ's rulings at hearing. The City argues that the Union waived the confidentiality attached to internal union communications merely by filing a complaint alleging a violation of ORS 243.672(1)(h). The City does not offer any authority for this novel proposition, and we decline to hold that the Union's mere filing of a complaint waived the confidentiality attached to the Union officers' internal communications about the disputed MOU.

Moreover, the Union did not selectively rely on union witnesses' testimony regarding internal union communications, and then seek to prevent the City from cross examining witnesses about those same communications. Consequently, the ALJ's ruling that the Union did not waive the confidentiality of the Union officers' statements was correct. *See, e.g.*, *Baltus et al. v. Multnomah School District 1J and Portland Association of Teachers*, Case Nos. UP-51/52-94 at

19, 15 PECBR 764, 782 (1994) (with respect to the disputed contract and settlement negotiations, the complainants "are clearly entitled to inquire about the exchange of positions and reasons given therefor, as expressed by the parties to each other" during the negotiations, but "generally are not entitled to inquire about 'in-house' conversations such as bargaining caucuses and other like activities which, by their nature, are carried on with an expectation of confidentiality"); *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08 at 4 n 3, 23 PECBR 583, 586 n 3 (2010) (concluding that the employer could not compel a union official to testify about statements made by employees at a union meeting held to discuss ratification of a collective bargaining agreement, and observing that the Board has authority to "impose confidentiality rules in proceedings before this Board when, as here, doing so would further the purposes and policies of the [Public Employee Collective Bargaining Act (PECBA)]").

3. The City objected that the ALJ sustained the Union's objections to the City's questions at hearing that, if answered, would have revealed the substance of communications between the Union and its attorney. The City does not contend that the communications were not covered by the attorney-client privilege. Rather, relying on *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F3d 1322, 1326 (9th Cir 1995), the City argues that the Union waived the attorney-client privilege with respect to the drafting of the MOU by asserting a violation of ORS 243.672(1)(h). The Union disputes that it waived the privilege.

The ALJ correctly sustained the Union's objections. A party may implicitly waive the attorney-client privilege where (1) the party asserts the privilege as a result of some affirmative act, such as filing suit, (2) through this affirmative act, the asserting party puts the privileged information at issue, and (3) allowing the privilege would deny the opposing party access to information vital to its defense. *Home Indem. Co*., 43 F3d at 1326; *see also Adidas Am., Inc. v. TRB Acquisitions LLC*, 2018 U.S. Dist. LEXIS 172601 (D Or Oct. 5, 2018). The party seeking the disclosure meets this third factor when the lack of disclosure would be "manifestly unjust" and would result in significant prejudice to the party seeking disclosure. *Home Indem. Co*., 43 F3d at 1326.

The City cites no PECBA case in support of its argument that merely filing an unfair labor practice complaint alleging a violation of ORS 243.672(1)(h) automatically places attorney-client communications at issue. The City argues, however, that "[t]he critical issue in this case" is whether the MOU that the Union presented to the City accurately reflected the agreements allegedly reached. Because the Union's attorney was involved in the preparation of that MOU, the City contends, the Union put its attorney's advice directly in controversy. *See Gomez v. Vernon*, 255 F3d 1118, 1132 (9th Cir 2001), *cert den*, 534 US 1066 (2001) (the "privilege may be waived by the client either implicitly, by placing privileged matters in controversy, or explicitly, by turning over privileged documents"). We disagree with the City's characterization of the issue in controversy in this case. In fact, the critical issue is whether the City objectively communicated its assent to the terms discussed at the February 23 meeting between the Union and Ciraulo and Assistant Fire Chief Penninger. Therefore, whether (as the City appears to believe) the Union's

counsel may have suggested that the Union include terms in the MOU that the parties did not discuss is not at issue in this case.[2]

Moreover, even assuming that the Union's communications with its counsel were at issue, the ALJ nonetheless properly sustained the Union's objections. The third element of the test relied on by the City is absent here. Lack of disclosure was not manifestly unjust and did not result in significant prejudice to the City. Whether the Union's counsel may have advised adding paragraphs five and six to the MOU, which could be construed as an intent on the Union's part to continue bargaining, as the City appears to contend, is not material to this Board's analysis of the Union's claim. As described below, our conclusion turns on whether the City objectively manifested assent to the terms discussed with the Union at the February 23 meeting. The Union's communications with its counsel are irrelevant to that determination.

4. The City also objected that the ALJ erred by not drawing an adverse inference against the Union as a result of the Union asserting the attorney-client privilege. The City argued that *Hood River County*, UP-09-08 at 8, 23 PECBR at 590, permitted the ALJ to draw such an inference. The document at issue in that case, however, was directly relevant to a material factual dispute, and it did not involve attorney-client communications. Specifically, the Union's witnesses testified regarding what they stated during the bargaining unit's ratification meeting, but the Union declined to offer at hearing the minutes from that meeting, asserting that the individual bargaining unit members' statements were protected by the union communications privilege. The Board concluded that an adverse inference was proper, because the union could have "redact[ed] the minutes to avoid exposing the identity or statements of individual bargaining unit members who engaged in protected activity at the meeting," thereby preserving the privilege, and produced the non-privileged portions of the minutes relevant to the union witnesses' testimony. *Hood River County*, UP-09-08 at 8, 23 PECBR at 590. Here, the disputed communications involved attorney-client communications, and the Union did not rely on its attorney's communications to attempt to prove its claim. Thus, the City's reliance on *Hood River County* is misplaced.

Further, there are no other factors that would justify an adverse inference. The Union asserted the attorney-client privilege in good faith; it did not willfully suppress evidence without offering explanation. *See, e.g.*, *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Hermiston*, Case No. UP-57-01 at 4, 19 PECBR 860, 863 (2002) (respondent failed to respond to subpoena *duces tecum*, did not move to quash, and provided no excuse for not complying with the subpoena, justifying the statutory presumption in ORS 40.135 that evidence "willfully suppressed would be adverse to the party suppressing it"); *see also* ORS 40.290(1) ("No inference may be drawn from a claim of privilege."). The ALJ acted within his discretion in declining to draw an adverse inference.

5. All other rulings made by the ALJ were reviewed and are correct.

[2]The City argues that the Union used the attorney-client privilege as both a sword and a shield. We disagree. The Union did not, for example, rely on the advice of its counsel to establish a necessary element of its ORS 243.672(1)(h) claim.

FINDINGS OF FACT

The Parties and Background

1. The City is a public employer within the meaning of ORS 243.650(20). The City has a fire department, which operates with a chain of command that includes, in descending order, Fire Chief (as the Department Head), Assistant Chief, Captain, Lieutenant, and Firefighter.

2. Mike Ciraulo served as Fire Chief from October 2015 until early April 2018.[3] Shawn Penninger was the Assistant Chief.

3. The Fire Chief reports to the City Manager and, at least in this case, to the City's Public Safety Director. The Public Safety Director oversees the fire department as well as the City's police department, and reports directly to the City Manager, who reports to the City Council. The City Manager is Robb Corbett. The Public Safety Director is Stuart Roberts, who is also the City's Police Chief. The City's Human Resources Manager is Andrea Denton.

4. The Union is a labor organization within the meaning of ORS 243.650(13). It is the exclusive representative of all 21 full-time employees in the fire department's Captain, Lieutenant, and Firefighter classifications. The Union's current President is Lieutenant Daryl Sams, who, by the time of the hearing, had held that position for around two years. Jared Uselman, a Firefighter, is the Union's Shop Steward. Lieutenant Mark Cave is the Union's Secretary-Treasurer.

5. The City and the Union are parties to a number of collective bargaining agreements. The current agreement (CBA) is in effect from July 1, 2017 through June 30, 2020.

6. The job description for the Fire Chief provides that the Fire Chief "[w]orks with the labor organization to address workplace issues and resolve grievances." The job description does not, however, expressly authorize the fire chief to act as a labor negotiator or to bind the City to any contracts.

7. The job description for the Assistant Chief provides that the Assistant Chief "meets with staff to identify and resolve problems." Assistant Chief Penninger has collaborated with the Union to resolve a number of issues that did not involve a demand to bargain, including topics such as staffing, recall, overtime, wildland deployment, and Lexipol policies. Lexipol is a policy management database that helps employers draft policies that incorporate existing local, state, and federal laws.

8. The City Manager is the administrative head of city government and holds the authority to negotiate the City's labor contracts. For all collective bargaining agreements and for some MOUs, when the City reaches an agreement with the Union, the City Manager recommends that agreement to the City Council. If the City Council approves the agreement, the City Manager

[3]Chief Ciraulo resigned effective June 30, 2018, but he served as Fire Chief only through early April 2018. Paul Berardi is the current Fire Chief.

can sign it and bind the City.[4] When City Manager Corbett is involved in a negotiation, he may rely on the subject matter expertise of a particular department head (*e.g.*, Police Chief or Fire Chief). The City Manager also sometimes delegates authority to subordinate managers. There is no formal delegation process or particular document used to formalize delegated authority. When the City Manager delegates authority, it is generally limited to a specific subject. The City does not notify the Union when the City Manager delegates his authority.

Prior Negotiations

9. City Manager Corbett signed MOUs on behalf of the City on April 25, 2012; April 17, 2014; July 21, 2014; December 10, 2014; July 29, 2015; October 8, 2015; and June 6, 2016. In all of those MOUs, the Union's President signed on behalf of the Union.

10. On January 29, 2015, then-Fire Chief Jason Walker and then-Union President Conrad Wyss signed an MOU to resolve a grievance that the Union had filed over a promotion.

11. In March 2015, Public Safety Director Roberts and Wyss signed an MOU involving employees returning to work for light duty. According to the MOU, this followed a February 10, 2015, meeting. In this instance, Roberts signed on a line that identified him as "Chief." Roberts did not explain to the Union in advance that the City Manager had authorized him to sign this MOU.

12. In late 2017, Sams proposed moving employees from a 24 hours on/48 hours off work schedule to a 48 hours on/96 hours off work schedule. The Union and the City met to discuss the matter on more than one occasion. Eventually, the two sides orally agreed to the proposed change. Ciraulo, Penninger, and Denton were present and represented the City during these meetings. Subsequently, with the assistance of legal counsel, the Union drafted an MOU and gave it to the City. Ciraulo then recommended to City Manager Corbett that the City agree to the MOU's terms. In response, Corbett gave Ciraulo the authority to sign on his behalf. The City did not tell the Union about the exchange between Corbett and Ciraulo, or that Ciraulo needed Corbett's approval to sign the MOU. On January 8, 2018, Ciraulo and Sams signed the MOU.

13. By the beginning of 2018, Roberts had developed serious concerns that Ciraulo did not adequately involve other city managers in his handling of the City's labor-management relationship with the Union, including with respect to the negotiation and execution of MOUs. On January 8, 2018, Roberts notified Ciraulo that he was investigating Ciraulo's handling of labor relations, including the 48/96 schedule change. Roberts gave Ciraulo the following directive in a written memorandum: "I will be briefed on all emerging and/or contemporary personnel matters before policy/collective bargaining interpretation(s)/conversation(s) involving Local representatives occur, administrative investigations are initiated, and/or discipline is imposed. The exception will be emergent administrative leave decisions dictated by policy and supervisory discretion." The Union was not informed that Roberts had given this direction to Ciraulo.

[4]For example, on January 30, 2017, City Manager Corbett signed a ground rules agreement for the successor negotiations that identifies Corbett as spokesperson for the City. During those successor negotiations, all contract changes were approved by Corbett or the City's lawyer. Corbett also signed the final agreement.

14. On January 23, 2018, the Union hand delivered to Ciraulo and Penninger a written demand to bargain in response to the City's "desire to start a health and wellness program," frequently referred to as "NFPA 1582." The Union did not address or provide a copy of the demand to bargain to Denton, Corbett, or any other City representatives, and the City did not ask the Union to do so. On February 9, 2018, Sams and Uselman (representing the Union) met with Ciraulo, Penninger, and Denton to discuss the topic. During the meeting, no one from the City told the Union that any of the City representatives present could not bargain or that any agreement would have to be ratified by the City Manager. Ultimately, the City decided not to implement this particular program because of cost. On February 15, 2018, Penninger sent Sams a related letter that stated the hope that, if the City chose to proceed, the parties would later discuss the impacts of that decision before implementation.

The Latest Demand to Bargain

15. On February 15, 2018, Penninger sent an email to fire department staff with the subject, "OSHA Required Questionnaire." The email directed employees to complete and submit an attached medical questionnaire, which was substantively identical to the model respiratory protection questionnaire published by the U.S. Department of Labor Occupational Safety and Health Administration. This questionnaire helps determine whether each employee could safely wear a respirator—effectively a job requirement for fire fighters. Later that day, Sams replied to Penninger, stating that they needed to "discuss this" and asking to "sit down and talk" about the matter the following week. Sams did not include Denton or Corbett in this email.

16. At 6:50 a.m. on February 16, 2018, Penninger responded to Sam's email from the day before, writing only, "Sure thing." Later, at 8:03 a.m., Penninger sent Sams a second email that included a link to the United States Department of Labor Occupational Safety and Health Administration model questionnaire. In this second email, Penninger also asserted that the questionnaire is a "mandatory item per OSHA." At 8:26 a.m., Penninger sent Sams a third email that included a link to an OSHA respiratory protection "Fact Sheet."

17. On February 21, 2018, Sams spoke with Penninger about the questionnaire, and Penninger requested that Sams put any demands in writing. At 10:34 p.m. that same day, Sams emailed Ciraulo and Penninger a written demand to bargain. The demand referred to the City's apparent wish to "start" a respiratory protection program, and demanded to bargain "both the decision and the impacts of the decision on mandatory subjects of bargaining." The demand also stated, "Please contact me at your earliest opportunity so that we may set some dates for our formal discussion." Sams sent the demand to Ciraulo and Penninger, not Corbett or Denton, because that is how he had proceeded in the past, and no one from the City had asked him to do otherwise.

18. At 5:18 a.m. on Thursday, February 22, 2018, Penninger forwarded the Union's demand to bargain to Denton. At 1:25 p.m. that day, Ciraulo sent Sams an email asking to meet about the demand the next day because Penninger was "leaving for military time" the next Monday, February 26, 2018, and would not return until March 7, 2018. Ciraulo's email did not include any indication that Ciraulo did not have any authority to bargain, or that bargaining would not occur when they met.

19. At 9:00 a.m. on February 23, 2018, Sams, Cave, and Uselman met with Ciraulo and Penninger in Ciraulo's office. During the meeting, the Union shared its concerns with the questionnaire Penninger had emailed to employees. The Union emphasized its concerns about confidentiality and health information privacy. The Union also proposed a range of specific policies.

20. In particular, during the February 23 meeting, the Union explained its concern about the medical provider listed in the questionnaire, KS (a physician assistant), because she is married to a Union member and that was seen as a conflict of interest. The Union also explained its concern about the involvement of Dr. BA, an orthopedist and KS's colleague, because Dr. BA was the "physician advisor" for the fire department who reviews paramedicine calls and does case reviews. Dr. BA is also party to a malpractice lawsuit involving a Union member. The Union proposed that the City use a provider who specializes in the subject matter at issue in the questionnaire (*e.g.*, an occupational health doctor), and that the parties mutually agree on the provider who would be used. During the meeting, both sides agreed that Dr. BA and KS were not the best-suited providers for this program. Both sides also agreed that they would find a provider who would be acceptable to both parties.

21. Also during the same February 23 meeting, the Union proposed that (1) the questionnaires should not have to be turned in to Penninger as the questionnaire directs, and should instead be kept confidential and mailed directly to the provider, who would simply tell the fire department whether each member was deemed qualified; (2) the questionnaires be turned in every three years, not annually; (3) the evaluations be conducted while employees were on regular duty, and not while they were off duty, which would require overtime; and (4) there be an appeal process whereby an employee could get a second or third medical opinion if needed, with the second opinion paid for by the City and, if needed, the third opinion paid for by the employee.

22. At the meeting, Ciraulo expressed agreement with the Union's positions on these issues, and Penninger expressed some support for one proposal regarding how frequently the examinations would be held. At the conclusion of the meeting, Ciraulo tasked the Union's team with drafting a written MOU and then submitting that draft MOU to Penninger for review and subsequent approval. After that, all of the attendees shook hands. At that time, the Union's team believed that the two sides had reached a binding oral agreement on all of the issues that had been discussed. Meanwhile, Ciraulo and Penninger did not believe that this meeting had been a formal bargaining session. At the time of the meeting, none of the participants knew that the City had a chapter (Chapter 14) in its safety manual that set forth a respiratory protection program.

23. During the February 23 meeting, neither Ciraulo nor Penninger indicated that they could not bargain, that they were not bargaining, or that anything that they agreed to was ultimately subject to ratification by the City Manager. No written proposals were ever exchanged, and specific MOU language was never discussed. During the meeting, the parties referred to a contract involving the City of Corvallis as a potentially good model, but an actual copy of that contract was not presented or shared at the time.

24. After the meeting, at 10:06 a.m. on February 23, Penninger sent an email to employees, stating, "Please hold off on the respiratory questionnaire. I need to update the

reviewing medical provider information prior to you filling it out. I apologize for the inconvenience and will send out the updated form in the near future."

25. On February 23, 2018, in response to Penninger's February 22 email forwarding the Union's demand to bargain, Denton replied to Penninger, Ciraulo, and Roberts suggesting that they meet as a management group to discuss the City's position "before we meet with IAFF." On February 23 at 2:22 p.m., Roberts replied to Denton, Ciraulo, and Penninger that he concurred and had questions.

26. On Monday, February 26, 2018, Chief Ciraulo replied to Denton and Roberts (copying Penninger) on the same email chain. Ciraulo wrote, in part:

> "Shawn [Penninger] and I met with the local last week. We verbally agreed on how to move forward with Shawn and Daryl [Sams] to work on an MOU."

27. In response to Ciraulo's February 26 email, neither Roberts nor Denton communicated with the Union in either February or March to tell the Union that the City contended that Ciraulo was not authorized to negotiate with the Union about the respiratory protection questionnaire.

28. On March 27, 2018, the Union met with Ciraulo and Penninger and proposed giving employees premium pay for transporting after-hours transfers to different hospitals. The Union shared this proposal in the form of an MOU. At the outset of this meeting, Ciraulo expressly emphasized that the two sides were not bargaining and that he and Penninger would "not commit to anything." In the end, Ciraulo rejected the Union's proposal. Sams did not attend this meeting.

29. On March 28, 2018, Sams emailed a draft MOU about the respiratory protection questionnaire to Ciraulo and Penninger.

30. In an introductory section labeled "RECITAL," the March 28 draft MOU states:

> "The City wishes to implement a respiratory protection program in accordance with the OSHA requirement to maintain such a program for employees who are exposed or potentially exposed to hazardous gases or vapors, dust, fumes, mists, other airborne particles and agents, or insufficient levels of oxygen."[5]

Below that, the draft MOU provides:

> "1. The City and the Local will mutually select a qualified medical provider, preferably an occupational healthcare provider, to oversee and evaluate the respiratory questionnaire.

[5]The "RECITAL" language was copied from the first paragraph of the OSHA Fact Sheet that Penninger emailed on February 16, 2018.

"2. The respiratory questionnaire will be completed by the employee every three years. To maintain employee confidentiality, City representatives will not review the completed respiratory questionnaire for any employees. After an employee completes the respiratory questionnaire, it will be sent by mail to the healthcare provider for review and the City will only get back the one page of the form attached to this MOU indicating whether the employee does or does not need a physical examination.[6]

"3. If the healthcare provider decides that a physical examination is necessary, all expenses associated with performing the physical examination, including coverage for the employee or overtime compensation if the employee is required to attend the examination outside of their regularly scheduled shift, will be paid for by the City. In the event that the healthcare provider does not certify that the employee is fit to continue working after the physical examination, the employee has the option to seek another physical examination from the healthcare provider of his/her choice at the City's expense. If the employee's healthcare provider certifies that the employee is fit to continue working, the City may choose to accept that certification. If the City does not accept that finding, a third healthcare provider (acceptable to both the City and the employee) will be consulted to resolve the dispute.

"4. If the medical condition is deemed permanent and the employee cannot be rehabilitated to return to suppression duties, then the City (in coordination with other pertinent agencies) will determine the next step, including but not limited to, reassignment of the employee to suitable work, making reasonable accommodations, retirement, or termination. If the employee is deemed not medically certified to perform duties but the healthcare provider determines that rehabilitation is possible, the City will assist the employee in his/her rehabilitation efforts by allowing the use of sick/vacation leave and may allow options such as modified duty or reassignment, leave without pay, and shift trades (this does not represent an exclusive list of options). Any actions taken by the City will be consistent with any obligations it may have under the collective bargaining agreement, state and federal disability and leave laws, and workers' compensation laws.

"5. The terms and content of this MOU are enforceable through the grievance process article 20 of the union contract.

"6. This MOU will be rolled over into an article and added to the contract during the next negotiations."

31. The Union based the draft MOU in part on the contemporaneous notes that Cave, the Union Secretary-Treasurer, had taken at the February 23 meeting. However, the parties had

[6]Although this language refers to an attached form, the Union did not attach a form to the MOU. The Union understood that the form would be the one that Penninger sent to employees on February 15, 2018, modified to state the mutually agreed medical provider's name.

not discussed paragraph 5 (making the MOU subject to the CBA's grievance procedure) and paragraph 6 (providing that the MOU would be rolled over into the next CBA) during the February 23 meeting. The Union included those paragraphs because of what it viewed as prior procedural problems with the City. The Union based Paragraph 4 on the City of Corvallis contract. The draft MOU also included a signature line for Ciraulo, although the parties had not discussed who would sign the MOU on behalf of the City. In paragraph 3, the Union unintentionally left out who would pay for a third medical examination.

32. Around the time that Sams emailed the draft MOU, Sams also handed Penninger a hard copy of it. After briefly reviewing the document, Penninger and Sams discussed it during a short conversation in a hallway. Penninger pointed out to Sams that parts of the draft MOU, referring to Paragraphs 5 and 6, had not been discussed during the prior meeting. He also explained to Sams that the City Manager, not Ciraulo, would have to sign an MOU.

33. On April 3, 2018, Penninger emailed Ciraulo, "Daryl [Sams] approached me today and asked about the MOU. I directed him that it's your call but, it has contractual implications that can only be approved by the [City Manager]. He will most likely be reaching out to you."

34. On April 5, 2018, Ciraulo forwarded the Union's draft MOU to Roberts, asking him for direction about how to proceed.

35. On April 6, 2018, Roberts notified Ciraulo in writing that Roberts and Corbett had concluded that Ciraulo had repeatedly met with Union officials to discuss mandatory subjects of bargaining without first consulting with Roberts, as Roberts had required in his January 8, 2018, memorandum. Roberts's April 6 memorandum informed Ciraulo that the City was willing to discuss alternatives to termination of employment. Ciraulo ultimately resigned his employment effective June 2018. The City did not inform the Union of the reasons that Roberts and Corbett lost confidence in Ciraulo or the reasons for Ciraulo's departure.

36. On April 9, 2018, Denton emailed Sams to request a meeting during the following week to discuss the Union's draft MOU. On April 10, 2018, Sams responded that the morning of April 17, 2018 would work for him. The same day, Roberts told Sams that "any personnel matters" would now have to go to either Roberts or Penninger, not Ciraulo. This was the first time that Roberts directly communicated his concerns to the Union about Ciraulo meeting with the Union. At the time, Ciraulo was no longer functioning as Fire Chief. Penninger became Interim Fire Chief, a position he held until Chief Berardi took over on October 15, 2018.

37. On April 16, 2018, Penninger emailed Sams, Cave, and Uselman a draft policy, generated via Lexipol, regarding a respiratory protection program, and a copy of Chapter 14 of the City's Safety Manual. Until this email, the Union was unaware of Chapter 14's existence. Among other things, Chapter 14 provides that the employer has the exclusive authority to decide which medical professional should be used.

38. On April 17, 2018, Sams, Uselman, Roberts, Penninger, and Denton met. During this meeting, the City representatives stated that the City already had a respiratory protection program, documented in Chapter 14 of the City's Safety Manual. The City also asserted that City

employees from other departments followed that program. In response, Sams stated that the Union had reached a verbal agreement with Ciraulo during the February 23 meeting. Sams then asked the City to sign the Union's draft MOU. The City refused. Sams argued that the City was obligated to sign the MOU, citing ORS 243.672(1)(h). During the meeting, the City did not assert that no agreement was reached at the February 23 meeting. Instead, the City explained that Ciraulo and Penninger did not have the authority to bargain with the Union or bind the City to an MOU. Additionally, Penninger again noted that they had not actually spoken about the content of Paragraphs 5 and 6 of the MOU during the February 23 meeting, and Sams conceded that was true. Roberts also stated that he would never sign an MOU that was written the way that this MOU was, but he nevertheless assured the Union that Dr. BA would not be used for this program. Responding to Paragraph 4 of the draft MOU, Denton explained that the City was already required to comply with the Americans with Disabilities Act.

39. On April 25, 2018, Sams sent Corbett, Denton, Roberts, and Penninger an email that included as an attachment an updated version of the draft MOU. Sams wrote that the Union had signed this updated MOU, and he asked the City to sign it. With respect to the changes from the first draft MOU, the Union wrote,

> "We wanted to confirm that, in the first draft we provided, the Union had suggested adding two terms specifying how disputes about the MOU would be resolved and clarifying what would happen to the MOU at the end of the current CBA. Those two terms were not discussed at the February 23, 2018 bargaining meeting, but the Union thought adding those terms would provide clarity for the parties. But we understand that the City did not agree, and so we have agreed to remove those terms to include only the terms specifically agreed to in our bargaining session. We also changed the individual signing from Fire Chief Mike Ciraulo to City Manager Robb Corbett after Shawn Penninger expressed concern to myself and Jared Uselman about who should be signing for the City prior to our meeting 04/17/18."

40. On May 3, 2018, Penninger sent Sams a responsive email attaching a letter dated May 2, 2018. In the letter, Penninger asserted the City's position that there had been no change in the City's policies or procedures that created a duty to bargain, and reiterated the City's position that Ciraulo had no authority to negotiate with the Union at the February 23 meeting. Penninger also wrote:

> "We acknowledge, and are sorry for, the misunderstanding on this subject that resulted from the meeting and conversation between IAFF representatives and the Chiefs at the meeting on February 23, 2018. We believe the confusion from the outcome could have been avoided if the conversation had been properly directed to our current policy and procedure in Chapter 14. However, mishandling of that conversation does not obligate the City to sign an MOU that it does not agree to.
>
> "Finally, we want to shift our attention to what seems to us to be the primary focus of IAFF; the two issues raised as 'impacts' to the members: 1) the selection of the doctor; and 2) the 'what if' that could happen if an employee failed to meet the medical qualifications under the respiratory program.

"1. As we discussed at our meeting, while the City policy in Chapter 14 is clear that the selection of the doctor is up to the City, we acknowledge your concerns about using Dr. [BA] as a provider for this service, and committed not to use him for the Respiratory Program. The City currently uses Dr. Fulper, who is known to have expertise in this area, but could move to another provider, such as Dr. Fisher, who we were told recently became certified.

"2. We believe it would be a rare situation for an employee to be medically disqualified under the Respiratory Program, and it is difficult to plan for hypothetical situations which would each represent a unique set of circumstances. However, as we stated in our meeting, in this situation the City would follow the requirements of the ADAAA. Meaning, we would engage in an interactive process with the affected employee to explore what kinds of accommodations would enable them to be able to perform the essential functions of their job. This could involve any number of things, including temporary modified duty, a leave of absence, 2nd medical opinions, etc. We do not need to capture this in an MOU; it is a requirement under federal law."

41. On May 4, 2018, Sams sent an email to Penninger responding to Penninger's May 3, 2018, email. Sams disagreed with the City's contentions, and again asked the City to "keep to the agreement made by the Chiefs during negotiations. Please let us know shortly whether the City will sign the MOU, or whether we will be forced to resort to filing an unfair labor practice."[7]

42. On May 7, 2018, Penninger replied to Sams's May 4, 2018 email stating the City did not intend to sign the MOU based on the information contained in the City's May 2 letter.

43. On May 15, 2018, Penninger emailed Roberts and Denton and wrote, in part:

"I did speak with Daryl [Sams] today and they are in the process of filing a ULP for the respirator questionnaire MOU. While he wouldn't tell me exactly what it is over, my guess is that it's over the fact that 'we' wouldn't put in writing what was verbally committed to by Ciraulo."

44. On May 31, 2018, the Union filed this unfair labor practice complaint with the Board.

45. Between April 2018 and October 2018, no firefighter failed a respiratory medical exam, and no bargaining unit member was examined by anyone in KS's office.

[7]The phrase "the Chiefs" was used by the parties to refer to the Fire Chief and the Assistant Chief collectively.

CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(h) when it refused to reduce the agreement reached during a February 23, 2018, meeting to writing or sign a contract stating the agreed terms.

The Union alleges that the City violated ORS 243.672(1)(h) when it refused to sign a document memorializing an agreement reached at a meeting on February 23, 2018. The City asserts that the parties did not reach an agreement at that meeting and, further, that Chief Ciraulo did not have sufficient authority to bind the City in any event.

Under ORS 243.672(1)(h), it is an unfair labor practice for a public employer to "[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract." In a case alleging a violation of subsection (1)(h), this Board has described the analysis as follows:

> "'The question of whether the parties have actually reached an agreement which must be embodied in a signed contract must be determined on the facts of each case. If the Complainant is able to show by a preponderance of the evidence that Respondent's conduct was such as to objectively indicate that the parties had reached agreement, which Respondent had refused to sign, then a violation of ORS 243.672(1)(h) is established notwithstanding the contention that Respondent subjectively had not agreed to the matters in dispute.'"

AFSCME Council 75 and Worthington v. City of Sweet Home, Case No. UP-107-89 at 8, 12 PECBR 224, 231 (1990) (quoting *Redmond Education Association v. Redmond School District*, Case No. C-5-78 at 6, 4 PECBR 2086, 2091 (1978), *aff'd*, 42 Or App 523, 600 P2d 943, *rev den*, 288 Or 173 (1979)). *See also Klamath County Education Association v. Klamath County School District*, Case No. UP-53-85 at 14, 9 PECBR 8671, 8684 (1986) (the "objective manifestations of the parties, not their subjective impressions," control). Because PECBA requires good faith collective bargaining, but does not require a "party to agree to particular terms," subsection (1)(h) does not "require a party to sign a contract to which it did not agree. There must be a 'meeting of the minds' on a collective bargaining agreement before a party can be compelled to sign it." *Id*.

We conclude that the record in this case establishes that the City's representatives objectively indicated to the Union that the parties reached an agreement on February 23, 2018. The events leading up to the meeting, the discussions at the meeting itself, and the conduct of City representatives after the meeting all support a conclusion that the City objectively communicated to the Union that the City's representatives were bargaining for and ultimately assented to an agreement on February 23.

To begin, the City's communications leading up to the meeting objectively communicated to the Union that the purpose of the meeting was to engage in bargaining. Specifically, in response to Penninger distributing to bargaining unit members a respiratory questionnaire with a request that employees complete and return the form, the Union told Penninger that it wanted to discuss

the matter. Penninger asked the Union to put its demands in writing. The Union then emailed Ciraulo and Penninger a formal demand to bargain about the decision to start an "OSHA Respiratory Protection Program" and its impacts. The next day, Ciraulo offered to meet with Union representatives, and informed them that the meeting would either need to be the following day or would have to wait until after March 7, because Penninger would be unavailable in the meantime. The parties then met on February 23, before Penninger's planned absence. There were no preliminary discussions in which either Ciraulo or Penninger informed the Union that they understood the February 23 meeting to be merely preliminary or a prelude to later, formal bargaining. Although the meeting was informal, it occurred in direct response to, and shortly after, the Union's demand to bargain.

Further, at the meeting itself, Ciraulo and Penninger objectively communicated agreement to specific terms discussed by the parties. For example, the parties discussed the Union's identified concerns with the respiratory questionnaire—most significantly its concern that the City intended to use the medical provider listed on Penninger's form (KS, a local physician assistant). The Union also explained its concern about the City potentially using the physician under whose medical license the bargaining unit members practice paramedicine. The participants at the meeting discussed specific methods to address those concerns, reaching a shared understanding that there would be a mutually acceptable medical provider. The record also indicates that the parties discussed other essential terms regarding how the questionnaires and medical examinations would be completed and agreed to them. At the conclusion of the meeting, Ciraulo directed Sams to work with Penninger to develop a memorandum of understanding, *i.e.*, to put their oral agreement in writing. The parties did not set another meeting to talk further, and neither Ciraulo nor Penninger made any statements objectively indicating that the agreements were preliminary, conditional, or subject to review or ratification by others, or that the City intended the negotiations to continue.

Finally, Penninger's conduct after the February 23 meeting also objectively communicated to the Union that the City had agreed to the terms discussed at the meeting. In particular, on February 23 shortly after the meeting, Penninger sent an email to the bargaining unit members informing them that they should not complete the respiratory questionnaire because Penninger would be making changes to the questionnaire to update the reviewing medical provider information. Penninger's statement in the email was consistent with the parties' agreement. Later, on March 28, 2018, after Sams emailed a draft MOU to Ciraulo and Penninger, Sams gave Penninger a paper copy of the MOU. Sams and Penninger then discussed the draft briefly in passing. During that brief conversation, Penninger pointed out that paragraphs 5 and 6 covered topics that the parties had not discussed (making violations subject to the grievance process, and providing that the MOU would be incorporated into the collective bargaining agreement during successor negotiations). Penninger also asked Sams to change the signature line, from Ciraulo to Corbett. Penninger did not assert that no agreement had been reached on February 23. Penninger also did not communicate that the City needed time to consider the language, formulate its own counterproposal, or discuss the terms with other city managers. Penninger's conduct, objectively taken, communicated to the Union that the parties had reached a meeting of the minds on February 23, and their only remaining task was the preparation of a document to memorialize the agreement reached.

The City contends that the Union did not meet its burden to prove by a preponderance of the evidence that the parties reached an agreement on February 23. The City argues that the February 23 meeting lacks various common hallmarks of formal collective bargaining. For example, it points out that that the parties did not exchange written proposals and the City did not have a note taker present. Collective bargaining, however, may be informal. *See*, *e.g.*, ORS 243.650(4) (defining "collective bargaining" as "meet[ing] and confer[ring] in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining"); *Portland Fire Fighters' Association, IAFF Local 43 v. City of Portland*, Case No. UP-059-13 at 14, 26 PECBR 548, 561 (2015) (appeal pending); *Oregon School Employees Association v. Eagle Point School District 9 of Jackson County*, Case No. C-123-80 at 5 n 4, 5 PECBR 4054, 4058 n 4 (1980) ("PECBA does not require formal structured negotiations in order to meet the definition of 'collective bargaining' contained in ORS 243.650(4)."). Here, considering all of the facts, we find sufficient evidence that the parties were bargaining when Ciraulo and Penninger objectively indicated assent to the terms discussed, notwithstanding the informality of the meeting. For example, Ciraulo's initial email, in which he agreed to meet, did not communicate that the meeting would merely be a preliminary discussion. In addition, although the February 23 meeting was informal, these parties had a history of informal midterm bargaining that culminated in MOUs (including one signed by Ciraulo). Further, at the conclusion of the meeting, the parties did not schedule another time to meet and confer, as one would expect if the discussions were merely preliminary; instead, they moved directly to Sams working with Penninger to draft an MOU.

In the City's view, the fact that the two MOU drafts contain various details that the parties did not discuss during the February 23 meeting shows that the parties did not actually reach an agreement. However, "a meeting of the parties' minds on the essential terms of an oral agreement, rather than all terms, is all that is required" for contract formation. *Pacificorp v. Lakeview Power Co.*, 131 Or App 301, 307, 884 P2d 897, 901 (1994). *See also Hughes v. Misar*, 189 Or App 258, 266, 76 P3d 111, 115 (2003), *rev den*, 336 Or 615, 90 P3d 626 (2004) ("[P]arties who agree on the essential terms of a contract may intend those terms to be binding and, at the same time, implicitly agree to bargain in good faith on the remaining terms. That fact does not prevent a court from enforcing the parties' agreement."). Here, all of the evidence regarding the parties' February 23 meeting consistently shows that the parties orally agreed on the essential terms, and that other details that the Union filled out when reducing that agreement to writing were not material. For example, witnesses for both parties testified that, at the February 23 meeting, they agreed that bargaining unit employees would send completed questionnaires directly to the provider (instead of a fire department supervisor), but they did not discuss the particular delivery method for the questionnaires. When drafting the MOU, the Union specified that the completed questionnaires would be sent "by mail" to the provider. That added detail does not establish, as the City contends, that no agreement was reached on February 23. The parties expressly agreed to the *essential* term—that the bargaining unit employees would send the questionnaires directly to the health care provider—and the delivery method for completed questionnaires is the type of administrative detail we would ordinarily expect the parties to finalize as they memorialize an oral agreement reached by the negotiators.

As further evidence that the parties did not reach an agreement, the City relies on the fact that the Union prepared two MOU drafts that did not accurately reflect the February 23 discussion. The City correctly notes that the first draft of the MOU included two terms (in paragraphs 5 and 6) that the parties did not discuss, and that both drafts omitted a term that the parties did discuss (that employees would pay the cost of third medical opinions). In light of all the other evidence in the record, however, these discrepancies do not indicate that the parties failed to reach an agreement on essential terms on February 23. Specifically, after Penninger informed Sams that paragraphs 5 and 6 went beyond the parties' discussions, the Union omitted those terms without debate, an indication that, in this particular case, the terms in paragraphs 5 and 6 were not essential to these parties' February 23 agreement. Notably, Penninger simply pointed out the terms that were not discussed. He did not propose alternative or new terms—another objective indication to the Union that the purpose of the MOU preparation was simply to record what had been discussed and agreed to on February 23. Turning to the Union's omission of language about payment responsibility for third medical opinions, the record establishes that the omission was an inadvertent drafting error that the Union also would have corrected if the City had pointed it out.[8] The process of reducing an oral agreement to writing commonly involves the resolution of such wording issues. Under these circumstances, the omission is not strong evidence that the parties did not reach agreement on essential terms in the first instance.

On this record, taking into account all these facts, we conclude that the City and the Union reached an agreement on February 23 with respect to the content and handling of a respiratory protection questionnaire. The preponderance of all the evidence demonstrates that the City's

[8]We are persuaded that this discrepancy was merely an inadvertent omission of a detail for several reasons. The Union's draft MOU specified that the City would pay for a second medical examination, but was simply silent regarding who would pay for a third medical examination; *i.e.*, although the Union failed to specify that the employee would pay, the Union did not expressly specify that the City would pay instead. Thus, the Union's draft did not expressly conflict with the essential terms of the agreement. Further, no one from the City pointed out the omission until the hearing in this matter; when that occurred, the Union's witnesses readily acknowledged the error and credibly testified that if the City had pointed out the error when given the draft MOU, the Union would have agreed to correct the wording to reflect the oral agreement.

"conduct was such as to objectively indicate that the parties had reached agreement."[9] *See City of Sweet Home*, UP-107-89 at 8, 12 PECBR at 231.[10]

The City nonetheless argues that it did not violate ORS 243.672(1)(h) because Ciraulo did not have sufficient authority to bind the City to any agreements reached on February 23.[11] Relying on the City Charter and the job descriptions of the City Manager, the Fire Chief, and the Assistant Chief, the City asserts that Ciraulo had insufficient authority to bind the City to an agreement with the Union about a respiratory protection questionnaire and program. This argument, however, is not supported by the record. The job description for the Fire Chief expressly lists working "with the labor organization to address workplace issues and resolve grievances" as an essential function of the job. Although Roberts had reprimanded Ciraulo on January 8, 2018, for his handling of meetings with the Union, Roberts directed only that Ciraulo

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[9]We also note that internal management communications after the February 23 meeting support our conclusion that Ciraulo objectively conveyed to the Union representatives at that meeting that the City was agreeing to terms that would be documented in an MOU. Specifically, on February 26, Ciraulo emailed Roberts and Denton and reported that he had "verbally agreed on how to move forward with Shawn and Daryl to work on an MOU." Later, on May 15, after Ciraulo's departure from the City, Penninger emailed Roberts and Denton, and stated that he thought the Union's unfair labor practice complaint would allege that the City would not "put in writing what was verbally committed to by Ciraulo." These communications corroborate Ciraulo's testimony at hearing that Ciraulo believed that the parties had reached a general agreement on February 23.

Our conclusion is also supported by the fact that, when the City and the Union met on April 17, 2018, the City's representatives did not claim that an agreement was not reached on February 23. Instead, they contended that the City was not required to bargain at all, and disputed Ciraulo's authority to do so on the City's behalf. If there was no agreement at all, or the parties had merely agreed to continue negotiating, one would expect the City to have clearly said so to the Union representatives on April 17.

[10]In arguing for a different result, the City cites several prior Board cases. Those cases, however, involve parties exchanging written proposals or drafts of agreements where those exchanges never culminated in a meeting of the minds. Here, in contrast, we conclude that the parties reached an enforceable oral agreement on February 23. *See, e.g.*, *Lane Unified Bargaining v. South Lane Sch. Dist.*, 169 Or App 280, 288, 9 P3d 130, 135 (2000), *rev'd on other grounds*, 334 Or 157, 47 P3d 4 (2002) (the employer did not violate ORS 243.672(1)(h) when it offered to fully settle a grievance subject to the union drafting a "final signed resolution document," and ultimately declined to sign the agreement prepared by the union stating that the pending grievance would be withdrawn "without prejudice"; the union's "purported acceptance of [the employer's] proposal was thus equivocal and did not result in the creation of an enforceable agreement"); *AFSCME Council 75, Local 328 v. Oregon Health Sciences University*, Case No. UP-37-96 at 20, 17 PECBR 343, 362 (1997) (in case involving multiple exchanges of written proposals, the employer did not violate ORS 243.672(1)(h) "because the draft agreement presented by AFSCME included a provision that had never been discussed by the parties and to which OHSU had not objectively agreed"); *see also North Clackamas Education Association v. North Clackamas School District*, Case No. UP-51-04, 21 PECBR 629 (2007).

[11]The recommended order concluded that Ciraulo acted with at least apparent authority to bargain collectively with the Union, and the City did not object to that conclusion. As a result, any objections to that conclusion are unpreserved and waived.

brief him before Ciraulo undertook collective bargaining interpretations or conversations with Union representatives. Roberts did not *revoke* Ciraulo's authority. Moreover, the City knew by February 26 that Ciraulo believed that he had "verbally agreed" with the Union on how to move forward on an MOU, yet the City took no steps to inform the Union that Ciraulo had insufficient authority to do so. The City's silence further undermines its argument. If the City believed that Ciraulo had improperly bound the City to an agreement about the respiration protection questionnaire, it likely would have promptly told the Union. In short, we conclude that Ciraulo had sufficient authority to bargain with the Union representatives on February 23 and to bind the City to an agreement on the terms discussed.

Finally, the City argues that it could not violate ORS 243.672(1)(h) because it had no obligation to sign MOUs that did not accurately reflect the terms discussed at the February 23 meeting—and the MOUs prepared by the Union contained terms different than those discussed at the meeting. The City misapprehends the scope of ORS 243.672(1)(h). Although a party will be required to sign only a contract that contains agreed terms, *see, e.g.*, *AFSCME Council 75, Local 328 v. Oregon Health Sciences University*, Case No. UP-37-96 at 19-20, 17 PECBR 343, 361-62 (1997) (there is no obligation to sign an agreement that includes provisions never discussed by the parties), this case arises from the City's refusal to sign *any* agreement, a position it took because it asserted that it was not bound by Ciraulo's agreement. Once the parties reached an agreement (as we conclude they did, on February 23), the City was required to engage in good faith in the process of reducing that agreement to writing and, ultimately, to sign it. The fact that one party generated two drafts of a written agreement that needed further revision does not obviate the City's legal obligation to sign a written agreement that accurately reflects the agreed-upon terms. *See, e.g.*, *Gresham Tchrs v. Gresham Gr. Sch.*, 52 Or App 881, 892, 630 P2d 1304, 1310 (1981) (holding that, in a case alleging a violation of ORS 243.672(1)(h), this Board "has the authority to order the signing of an agreement, not only in the first instance, but also where an executed written document does not reflect the parties' bargained agreement").[12]

In sum, we conclude that the City violated ORS 243.672(1)(h) when it refused to sign any writing documenting the agreement reached by the parties at the February 23, 2018, meeting.

Having found that the City violated ORS 243.672(1)(h), we turn to the appropriate remedy. Because the City violated ORS 243.672(1)(h), we order the City to cease and desist from the unfair labor practice. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Here, we order the City to sign an agreement that accurately documents the terms agreed to by the parties at the February 23, 2018, meeting. *See,*

[12]The City also argues that even if the parties reached an agreement, there was a mutual mistake of fact permitting the City to rescind the agreement. Mutual mistake may be a basis for rescission of a contract when a party proves by clear and convincing evidence a mutual mistake so fundamental that it frustrates the purpose of the contract. *See, e.g., Lesher v. Strid*, 165 Or App 34, 42, 996 P2d 988, 993 (2000). Here, the City points to the fact that neither party realized that the City already had a respiratory protection program described in its safety manual when the parties met on February 23. Even assuming that mutual mistake could be the basis to rescind an MOU reached as a result of midterm collective bargaining (a proposition the City did not brief), the fact that the City already had a respiratory protection program is not the type of fundamental mistake that frustrates the purpose of the parties' bargain.

e.g., *Gresham Gr. Sch.*, 52 Or App at 892 (this Board has the authority to order the signing of an agreement).

We also decline the Union's request that we impose a civil penalty on the City.[13] We may award a civil penalty when the action constituting an unfair labor practice was egregious or the party committing an unfair labor practice did so knowingly and repetitively. ORS 243.676(4)(a)(A); OAR 115-035-0075. The Union asserts that the City knew that Ciraulo agreed to the essential terms of an agreement at the February 23, 2018, meeting with Union representatives and, consequently, that the City had no good faith factual or legal basis for its defense in this case. We disagree. Although we conclude that the City did not comply with ORS 243.672(1)(h), the City's actions were not egregious, and the City did not commit an unfair labor practice knowingly and repetitively. Under these circumstances, we conclude that a civil penalty is not warranted.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(h).

2. Within 30 days of the date of this order, the City shall sign an agreement documenting the terms agreed to at the February 23, 2018, meeting.

DATED: September 4, 2019.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

[13]By email dated October 21, 2018, the Union moved for leave to amend the complaint to request a civil penalty. The ALJ treated the complaint as amended to include such a request, although the Union did not actually file an amended complaint. The City did not object to the ALJ effectively granting the motion for leave to amend, so any objection is waived.