EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-015-18

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1159,	)	
Complainant,	)	
v.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
CITY OF LAKE OSWEGO,	)	
Respondent.	)	

Jason Weyand and Haley Rosenthal, Attorneys, Tedesco Law Group, Portland, Oregon, represented Complainant.

Kathy Peck, Attorney, Peck, Rubanoff & Hatfield, PC, Lake Oswego, Oregon, represented Respondent.

On June 11, 2018, International Association of Fire Fighters, Local 1159 (Association) filed a complaint alleging that the City of Lake Oswego (City) violated ORS 243.672(1)(e) and (f). Specifically, the Association alleged that the City submitted a Last Best Offer (LBO) that did not meet the requirements of ORS 243.746(3), in violation of ORS 243.672(1)(e) and (f). The Association also alleged that the City engaged in the following actions in violation of ORS 243.672(1)(e): (1) the City amended its LBO after it was submitted; (2) the City submitted an unlawful LBO to interest arbitration; (3) the City failed to reveal its bargaining position; (4) the City engaged in bad-faith bargaining through the totality of its conduct; and (5) the City unilaterally implemented changes on sick leave calculations during the hiatus period. In addition to specific remedies for the violations, the Association sought a civil penalty and notice posting.

The Association asked that the complaint be expedited under OAR 115-035-0060, and submitted an affidavit in support of the request, as required by that rule. On June 18, the Association moved to amend its complaint and submitted the proposed amended complaint along with the motion. The City did not object to the motion or the filing of the amended complaint. The City also agreed to expedite the complaint.

The Board exercised its discretion to expedite the complaint. The Board also granted the motion to file the amended complaint.

The City filed a timely answer, which asserted the following affirmative defenses: business necessity and statute of limitations.[1] The City's answer also asserted a "counterclaim" that the Association violated ORS 243.672(2)(b) by including a prohibited subject of bargaining in its LBO. The City also requested a civil penalty based on the counterclaim, asserting that the Association's conduct was "egregious."

Pursuant to the terms of a prehearing order, the parties submitted prehearing briefs on July 6, 2018. On that date, the parties also provided the Board with 10 enumerated stipulated facts and a joint statement of issues, which was slightly modified at hearing. On July 13, 2018, this Board conducted a hearing. At the end of the hearing, both parties provided the Board with closing oral arguments.

The issues, as agreed to by the parties regarding the Association's complaint, are:

1. Whether the City violated ORS 243.672(1)(f) and (1)(e) by submitting an LBO that did not meet the requirements of ORS 243.746(3).

2. Whether the City violated ORS 243.672(1)(e) by amending its LBO after submission.

3. Whether the City violated ORS 243.672(1)(e) by submitting an unlawful LBO to arbitration.

4. Whether the City violated ORS 243.672(1)(e) by failing to honestly and fully disclose its position in bargaining.

5. Whether the City's conduct, viewed in light of the totality of the circumstances, violated ORS 243.672(1)(e).

6. Whether the City violated ORS 243.672(1)(e) by unilaterally—and secretly—implementing a change in working conditions before the conclusion of successor negotiations.

7. If the City violated ORS 243.672(1)(e) and (1)(f) as described above, what is the appropriate remedy?

8. Is the Association entitled to a civil penalty?

[1]The City's answer included an additional affirmative defense ("specifically relevant authorization to make the change"), which was withdrawn at hearing.

The issues, as agreed to by the parties regarding the City's answer and counterclaim, are:

1. Whether any or all of the claims alleged by the Association are barred by the City's affirmative defenses?

2. Whether the Association violated ORS 243.672(2)(b) by including a prohibited subject in the LBO submitted to the arbitrator?

3. If the Association violated ORS 243.672(2)(b), what is the appropriate remedy?

4. Is the City entitled to a civil penalty?

For the reasons set forth below, we conclude that the City violated ORS 243.672(1)(e) by failing to adequately bargain the impact on employment relations of the City's decision to change its method of calculating unused sick leave in response to Employer Announcement 88, as described below. We dismiss the remaining claims and the City's counterclaims.

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13) and is the exclusive representative of a bargaining unit of the following City employees: all full-time employees in the classifications of Firefighter, Fire Driver-Engineer, Fire Lieutenant, Deputy Fire Marshal, and EMS Coordinator, but excluding all seasonal, casual and irregular part-time, volunteer intern, supervisory, or confidential employees and workers of the City.

2. The City is a public employer within the meaning of ORS 243.650(20).

3. The Association and the City were parties to a collective bargaining agreement that was effective from July 1, 2014 through June 30, 2017 (Contract).

4. Retirement benefits for eligible bargaining unit members are provided through Oregon's Public Employee Retirement System (PERS). Under PERS, retiree benefits for Tier 1 and Tier 2 members may be increased by PERS based on a portion of employees' accumulated unused sick leave at the time of retirement. The City and the Association agreed—through Article 15.9 of the Contract—that, "as provided by ORS 237.153 and regulations established by the Oregon Public Employee Retirement System, fifty percent (50%) of an employee's accumulated sick leave shall be applied in the form of increased retirement benefits."[2]

5. The amount of "credited" sick leave that may be used by PERS to calculate eligible employees' retirement benefits is capped at eight hours per month of service under ORS 238.350(2)(a).

[2]The parties' Contract did not reflect that the cited chapter (ORS 237.153) had been renumbered to ORS 238.350; both parties' final offers and LBOs updated the citation.

6. For the purpose of calculating the accumulated unused sick leave for Association members who work 24-hour shifts, going back to at least 2003, the City converted the hours of sick leave used by these Association members to the equivalent percentage of a normal eight (8) hour work shift rather than deducting a full 24 hours. For example, if Employee A used 24 hours of sick leave because they were ill and needed to miss one full shift, the City would deduct eight (8) hours of sick leave in the unused sick leave calculation to be reported to PERS. If the employee only needed 12 hours of sick leave, or 50% of their shift, the City would deduct 4 hours for PERS reporting purposes (50% of 8 hours). At retirement, the City calculated the actual number of sick leave hours used divided by 24 and multiplied the amount by eight (8) hours. That amount was then subtracted from the accrual of eight (8) hours of PERS sick leave per month of service and the difference was reported to PERS for the computation of the retirement benefits for Tier 1 and Tier 2 employees. That practice continued until the City made the change in PERS sick leave reporting that is the subject of this proceeding.

7. On February 21, 2017, the parties met and signed ground rules for successor negotiations.

8. On March 13, 2017, Assistant City Manager Megan Phelan sent an email to Dan Carpenter, a shop steward for the Association, which stated in part that the City

> "had a chance to review our process and consult with PERS on sick leave reporting when an IAFF member retires. We're confident that we have been doing it incorrectly. What we currently do is if a shift fire employee takes a shift off (24 hours) as sick leave, * * * we reduce the employee's sick leave balance by 8. Instead, we are required to deduct the full 24 hours. This is despite the fact that when shift personnel accrue 16 hours of sick leave per month, PERS states that the maximum sick leave accrual that can be reported is 8 hour[s] of sick leave per month. * * *
>
> "In light of that information, I wanted to put you on notice that effective April 1, 2017[,] we will begin to subtract actual sick leave used for all active employees. Meaning, if a firefighter takes 24 hours of sick leave, the full 24 hours will be deducted."

9. In that email, Phelan attached a document from PERS titled "Employer Advisory 88, Accumulated Unused Sick Leave" (EA88).

10. On March 15, 2017, Association President Karl Koenig responded that

> "[a]ny change in sick leave accruals or computation at retirement would violate the [Public Employee Collective Bargaining Act (PECBA),] as it is a mandatory subject of bargaining and impacts mandatory subjects of bargaining.
>
> "The current formula as described in your March 13 email is a practice that was bargained in good faith between both parties over 30 years ago.

> "Please consider this our demand to bargain per the PECBA. Until the parties have completed the entire PECBA dispute resolution process, including a possible interest arbitration, the City must maintain the status quo and refrain from implementing the changes. Any change in current practice would be an unlawful unilateral change to mandatory subjects of bargaining and the Local would be forced to seek legal recourse through an unfair labor practice complaint."

11. On March 23, 2017, Phelan responded to Koenig as follows: "I got your message this morning. Sorry for the delay. I'm emailing to confirm I received your response. Have a good rest of your week and we'll see you on the 6th."

12. In successor contract negotiations, the parties negotiated about the issue raised by Phelan's March 13, 2017, email, and Koenig's March 15, 2017, response.

13. Under the parties' ground rules, the 150-day period under PECBA began running April 6, 2017.

14. In successor bargaining, the parties met on numerous occassions and discussed EA88 during the course of bargaining. The parties also exchanged proposals on sick leave and vacation that were intended to address the impact of changed sick leave calculations for PERS reporting purposes.

15. On May 3, 2017, the Association offered a sick leave proposal that specified the "effective date" on which the City could change how it calculated used sick leave in response to EA88. The Association included an EA88 "effective date" in each of its subsequent proposals on this issue. The City did not, at any point, refuse to bargain over the EA88 effective date or assert that the Association's proposals on that issue were permissive or prohibited for bargaining.

16. On July 12, 2017, City Human Resources Analyst Patrick Foiles emailed City Payroll Administrator Lucas Pakes requesting that Pakes calculate what Association Member Ron Baker's "PERS sick leave number would be if reported [that day]." Baker was copied on the email.

17. On July 17, 2017, Pakes replied to Baker stating: "At this time we are not able to provide your PERS Sick leave balance. With contract negotiations open and the pending determination on the PERS Sick leave calculations we want to avoid creating any confusion as well as providing you with an invalid PERS Sick leave amount."

18. On November 1, 2017, Phelan sent an email to Carpenter responding to a question from Carpenter about what the City would do if a bargaining unit member retired before negotiations were settled:

> "This email is in response to your question to me last month about what the City would do if we have an IAFF member retire prior to negotiations being settle[d]. As I mentioned when you posed the question, that is a tough question that would need some consideration. I appreciate your patience.

> "The City has determined that if an IAFF employee were to retire prior to any tentative agreement with IAFF on the matter that we will use April 1, 2017[,] as the date. This is consistent with my notice to the union on March 13, 2017, that effective April 1, 2017[,] we will begin to subtract actual sick leave used for all active employees. A copy of that email is below for your reference.
>
> "As stated before, the City remains willing to bargain of the effects of the change needed to comply with these legal obligations regarding the reporting of sick leave to PERS."

19. On November 10, Koenig sent an email to Phelan, responding to her November 1, 2017, email. In a letter attached to that email, Koenig asserted, in part, that the Association had responded to Phelan's March 13, 2017, email with "a demand to bargain the impact." Koenig also wrote, in relevant part, "That letter remains our position regarding our rights to bargain the impact of any changes to mandatory subjects of bargaining proposed by employer for any reason. * * * Any unilateral change as proposed in your email violates the PECBA and our rights to bargain the impact prior to any change."

20. On November 20, 2017, Phelan and Koenig talked by telephone. Koenig reiterated the Association's position that the parties must conclude their bargaining before the City changed its method of calculating unused sick leave for PERS reporting. Phelan told Koenig that the City would wait until November 30, 2017, the date of the parties' first scheduled mediation session. Phelan further stated that, given that employee Baker was retiring effective November 30, 2017, if the parties did not reach agreement on November 30, the City would change its calculation method effective April 1, 2017, for that retiree.

21. The parties bargained for over 150 days and commenced mediation under ORS 243.712 on November 30, 2017.

22. In the afternoon of November 30, 2017, the City presented a "what-if" package to the Association. In that mediation package, the City's proposal on Article 15, the sick leave article, included: "Will implement EA88 12/1/17." In mediation discussions, the City also indicated that the implementation of EA88 could be pushed down the road to December or January.

23. The parties did not reach agreement on the successor contract during the November 30 session.

24. In December 2017, the Association's Koenig and the City's chief negotiator, Jim Mooney, continued collective bargaining negotiations to try to reach an agreement. Those negotiations included some movements from the City on the effective date of an EA88 implementation. At no point did Mooney refuse to bargain effective dates or assert that the Association's proposals on that issue were permissive or prohibited for bargaining.

25. On January 5, 2018, the City declared impasse.

26. On January 11 and 12, 2018, respectively, the City and Association submitted their final offers and cost summaries. An interest arbitration hearing was scheduled to be heard by an

arbitrator on June 19-20, 2018. That hearing has been postponed to August 13-14, 2018, pending the outcome of this case.

27. In its January 11, 2018, final offer, the City did not provide a particular proposal or effective date regarding changes in response to EA88. The City's final offer retained the current contract language in Article 15.9, titled "Sick Leave and PERS," with the exception that the City corrected the statutory cite in the article. Thus, the City's final offer on Article 15.9 read: "Upon retirement of an employee, and as provided by ORS 238.350 and regulations established by the Oregon Public Employee Retirement System, fifty percent (50%) of an employee's accumulated sick leave shall be applied in the form of increased retirement benefits."

28. In Articles 13.1 and 15.1, the City's final offer reduced the employees' sick leave accrual by four hours per month, increased the employees' vacation accrual by four hours per month, and removed the cap on sick leave accrual for Tier 1 and Tier 2 employees. The City's final offer maintained a cap of 2,920 accrued sick leave hours for OPSRP employees (who are ineligible to have their unused sick leave used by PERS in the calculation of their retirement benefits). The City's final offer provided a July 1, 2017, effective date for these provisions.

29. In its January 12, 2018, final offer, the Association included proposals for Articles 15.12 and 15.13. Proposed Article 15.12 stated: "Effective July 1, 2018, the City may subtract twenty-four (24) hours of PERS sick leave credit for every twenty-four (24) hours of sick leave taken. Section 15.1 reduces the sick leave accrual hours from 16 to 10, as a result of the City's decision to implement [EA] 88."

30. Proposed Article 15.13 stated:

> "To make bargaining unit members whole for the change described in 15.12, effective July 1, 2018, Tier 1, Tier 2, and OPSRP employees shall have an EA88 conversion allowance of 72 hours of sick leave to 72 hours of vacation leave annually. This 72 hours of leave will not be subject to the current Telestaff vacation code restrictions. On June 30, 2019, and on June 30th of every year thereafter, the remaining balance of the 72 hours of [conversion] allowance will be paid out at straight time into the employee's Post Employment Health Plan ('PEHP') account." (Emphasis omitted.)

The Association also added this language to Article 13.1, with an effective date of July 1, 2018.

31. In its January 12, 2018, final offer, the Associaton also proposed to eliminate the sick leave cap of 2,920 hours for all employees.

32. Other than correcting a statutory cite, the Association's January 12, 2018, final offer proposed no changes to Article 15.9, titled "Sick Leave and PERS."

33. On June 5, 2018, the Association and City each submitted an LBO.

34. The text of each party's LBO, with respect to the issues pertinent to this matter, remained the same as their final offers.

35. On June 5, 2018, Kathy Peck, Attorney for the City, sent an email to Koenig. The email to Koenig forwarded the correspondence between Phelan and Koenig from November 2017 regarding EA88.

36. On June 6, 2018, Haley Rosenthal, Attorney for the Association, emailed Peck regarding the email to Koenig and asked whether Peck intended to argue at the interest arbitration for retroactive application of the change in calculating unused sick leave for purposes of reporting to PERS, pursuant to EA88.

37. On June 6, 2018, Peck responded to Rosenthal that the City "put the Union on notice that it would begin deducting actual sick leave usage, i.e. 24 hours for every 24-hour shift, rather than 8 hours, starting on April 1, 2017." Peck further stated in the email to Rosenthal:

> "However, if what you are suggesting is that the City proposed that it would not follow PERS regulations and deduct actual sick leave actually used from PERS reports on employees who retired after April 1, 2017, that is incorrect. That position is contrary to the notice provided to [Koenig] in the attached emails."

38. On June 13, 2018, the Association filed the complaint in this matter. The Association amended the complaint on June 18, 2018, and the City filed its answer and counterclaim on that same date. In the counterclaim, the City raised for the first time its position that the Association's LBO contained a prohibited subject of bargaining—specifically, the Association's proposed Article 15.12.

39. On June 18, 2018, Phelan emailed Koenig and asked him whether the Association would be willing to remove proposed Article 15.12 of the LBO. That was the first time that the City requested that the Association remove that proposal.

40. When Association-represented employee Baker retired on November 30, 2017, the City deducted actual sick leave used by employee Baker between April 1, 2017 and November 30, 2017, for purposes of reporting that information to PERS. The Association did not ask the City about which calculation method it used, and the City did not inform the Association or Baker of that action until June 13, 2018, when the City sent Baker (at his request) a copy of his PERS sick leave balance.

41. Subsequently, Association-represented employee Brian Hicks retired, and the City deducted actual sick leave that he used between April 1, 2017 and his retirement date for purposes of reporting that information to PERS. The record does not establish that the City informed the Association or Hicks of that action.[3]

42. The parties did not bargain about the impact on mandatory subjects of bargaining of a change in the City's method of calculating unused sick leave to report to PERS with respect to the two bargaining unit employees who retired after April 1, 2017 (Baker and Hicks).

[3]The City did provide testimony at hearing that it had deducted actual sick leave that Hicks used between April 1, 2017 and his retirement date for purposes of reporting that information to PERS.

43. From July 2017 through at least June 2018, Baker and several other Association-represented employees asked the City to provide their respective PERS sick leave balances. The City declined to provide those employees with that information, stating that the City could not calculate their PERS sick leave balances because those calculations depended on a matter that was being discussed in successor bargaining.

CONCLUSIONS OF LAW

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

2. The City's LBO sufficiently complied with ORS 243.746(3); therefore, the City did not violate ORS 243.672(1)(f) and (1)(e) by submitting it.

We first address the Association's claim under ORS 243.672(1)(f), which makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." Here, the Association asserts that the City's LBO failed to comply with the provisions of ORS 243.746(3), which states in relevant part that:

> "Not less than 14 calendar days prior to the date of the [interest arbitration] hearing, each party shall submit to the other party a written last best offer package on all unresolved mandatory subjects, and neither party may change the last best offer package unless pursuant to stipulation of the parties or as otherwise provided in this subsection."

According to the Association, the City violated ORS 243.746(3) because its LBO did not include a proposal that gave "an effective date for sick leave calculations at retirement." We disagree that ORS 243.746(3) imposes such a requirement on the City. Here, as detailed in our findings of fact, the City opted in its LBO to retain current contract language regarding sick leave and PERS. The City further opted to increase the vacation hour accrual rate, decrease the sick leave accrual rate, and eliminate the sick leave accrual cap for Tier 1 and Tier 2 employees (the employees who are eligible to have a portion of their unused sick leave used in PERS's calculation of their retirement benefits). Nothing in PECBA required the City to include in its LBO, which addressed numerous other unresolved matters, a particular proposal and effective date regarding EA88. Rather, it was lawful for the City to adhere to its position to retain current contract language.

In arguing for a different result, the Association relies on *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640 (2013), where the Board found that the employer committed a *per se* violation of ORS 243.672(1)(e) when it substantively changed its LBO at an interest arbitration hearing. That case is inapt. First, no interest arbitration has occurred in this case. Second, this record does not establish (as discussed below) that the City has changed its LBO to date. Any claim that the City will be changing the terms of its LBO at the scheduled interest arbitration hearing is premature. Therefore, we dismiss the Association's claim under ORS 243.672(1)(f).

We likewise dismiss the Association's claim under ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with

the exclusive representative" of its employees. The Association asserts that it is a *per se* violation of ORS 243.672(1)(e) for a public employer to submit an LBO that does not comply with ORS 243.746(3). We have already concluded, however, that the City's LBO did not violate ORS 243.746(3). Therefore, we dismiss this claim.

3. The City did not amend its LBO after submitting it to the arbitrator and did not, therefore, violate ORS 243.672(1)(e).

The Association next asserts that the City violated ORS 243.672(1)(e) "by amending its LBO after submission through the assertion that it was proposing a retroactive effective date for the sick leave calculation changes." According to the Association, this amendment "added a new substantive provision to the LBO that was not included in the City's Final Offer or earlier proposals." The difficulty with the the Association's argument is that the record does not establish that the City amended its LBO after submission; to the contrary, the City's LBO remains unchanged.

The Association argues that the City effectively amended its proposal by clarifying that it contains an EA88 effective date of April 1, 2017. We do not agree that the City, by using that date in the reports for Baker and Hicks, modified its bargaining proposal. The City's proposal has been, throughout bargaining, not to specify an EA88 implementation date in the CBA. Although the City has been willing to bargain over the Association's proposals that specify EA88 implementation dates, and even offered alternative dates, the City did not amend its LBO after submission, as alleged by the Association.

As with the (1)(f) claim, if the City takes actions at the pending arbitration hearing that amount to adding a new substantive provision to the LBO, the Association can bring that action to the arbitrator's attention as incompatible with PECBA, as well as file an unfair labor practice complaint with this Board. At this point, however, we are not persuaded that the City has amended its LBO. Therefore, we dismiss this claim.[4]

4. The City's bargaining conduct in successor negotiations did not violate ORS 243.672(1)(e).

The Association next claims that the City violated ORS 243.672(1)(e) "by failing to honestly and fully disclose its position in bargaining" and through the totality of its conduct during successor bargaining. As set forth above, ORS 243.672(1)(e) prohibits a public employer from refusing to bargain collectively in good faith with the exclusive representative. In *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 95-96, 21 PECBR 673, 767-68 (2007), the Board observed that "[t]he duty to bargain in good faith requires a party to honestly and candidly explain its bargaining position and proposals." The Board further stated that "a party violates ORS 243.672(1)(e) if it deliberately misrepresents its bargaining position and its intentions on an issue under negotiations." *Id.*

[4]We also dismiss the Association's (1)(e) claim that the City submitted an unlawful LBO to arbitration, which is premised on the same arguments as this unlawful amendment claim.

Here, the Association argues that that the City deliberately misrepresented its position on the effective date of the change on PERS sick leave calculations. According to the Association, the City "hid" its position on that issue until two weeks before the interest arbitration. We disagree. The record establishes that the City informed the Association in March 2017 that it intended to conform its PERS reporting to EA88, effective April 1, 2017. Although the parties also agreed to bargain that issue as part of successor bargaining, and the City was open to considering other dates as the effective date of its reporting change, the record does not establish that the City "deliberately misrepresented its bargaining position and its intentions" on that issue. *Id.* Rather, the record establishes that the City preferred an April 1, 2017, implementation date regarding EA88 reporting, but also that the City was open to negotiating that date as part of an overall package compromise. We do not find such actions to be indicative of collectively bargaining in bad faith.

Moreover, as set forth above, the City's final offer and LBO did not add an "effective date" for implementing EA88 or add a different or new contract term regarding that issue. Rather, the City's final offer and LBO were consistent in that regard and not misrepresentative of the City's bargaining position. Therefore, we dismiss this claim.

We likewise conclude that the Association has not established that the totality of the City's bargaining conduct during successor negotiations amounted to bad-faith bargaining. In these claims, we examine the totality of the bargaining conduct to determine whether the employer demonstrated a willingness to reach an agreement that is the result of good-faith negotiations. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 12, 25 PECBR 506, 517 (2013). In applying the totality-of-conduct standard to allegations of surface bargaining, we examine multiple factors, including: (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party's negotiator; (4) the nature and number of concessions made; (5) a failure to explain a bargaining position; and (6) the course of negotiations. *Id.* We also consider other factors that might be relevant in any given case. *Id.* Here, the record does not establish that the City used dilatory tactics or failed to explain its bargaining position. Moreover, the record shows that the parties reached agreement on almost all articles and engaged in fairly commonplace back-and-forth negotiations in an earnest attempt to reach an overall package agreement. Additionally, as set forth above, the record establishes that the City was willing to make concessions regarding the date that it would change its method of calculating unused sick leave for purposes of its reporting to PERS. Although the parties were unable to ultimately achieve consensus, the record does not establish that the City was unwilling to reach an agreement that was the result of good-faith negotiations. Consequently, we dismiss this claim.

5. The City violated ORS 243.672(1)(e) by not completing its bargaining obligations regarding the impact on Association-represented employees Baker and Hicks, once those employees announced their retirements, of the City's change in its method of calculating unused sick leave for PERS reporting.

A public employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under PECBA. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (upholding the Board's authority to adopt the *per se* analysis in unilateral change cases and citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)). Even if the changed employment matter does not concern a mandatory bargaining subject

of bargaining, the employer is still required to bargain with the exclusive representative concerning the impacts of the change, so long as the impact on any mandatory subject is more than *de minimis*.[5] *Portland Fire Fighters' Assoc., Local 43 v. City of Portland*, 245 Or App 255, 264-65, 263 P3d 1040 (2011). An employer, therefore, violates ORS 243.672(1)(e) if it unilaterally implements a decision that changes or derivatively impacts a mandatory subject of bargaining before completing its bargaining obligation. *Id.* at 255.

Here, the Association alleges, and we agree, that the City violated ORS 243.672(1)(e) when it unilaterally changed how it calculated sick leave accrual for PERS purposes regarding two Association-represented employees, without completing impact bargaining with the Association. Specifically, the City acknowledges that it changed the established practice on that subject with respect to those employees. It is also undisputed that the parties were still engaged in successor negotiations at that time, including negotiations on that subject. Moreover, putting aside whether the City was required by EA88 to report sick leave accrual to PERS in a particular manner, the City was nevertheless obligated to engage in and complete impact bargaining with the Association, as the change directly effected employment relations, including retirement benefits and leave benefits. Here, the record establishes that the City did not engage in any impact bargaining over this change, as it did not even provide the Association (or the affected employees) with notice that it had enacted that change with respect to those employees.[6] Consequently, we conclude that the City violated ORS 243.672(1)(e).

In reaching that conclusion, we disagree with the City's assertion that it has established the affirmative defenses of business necessity and statute of limitations. We first address the City's "business necessity" defense.[7] To establish a "business necessity" defense, the City must prove that: (1) a business emergency existed; (2) it bargained in good faith as much as the circumstances allowed before implementing a change in working conditions; and (3) the change was narrowly tailored to address the business necessity. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 16, 19 PECBR 590, 605 (2002) (Interim Order). Here, the City asserts a business necessity that it was legally obligated by EA88 to change its sick leave accrual reporting to PERS when each of the Association-represented employees retired. As set forth above, even assuming that the City had to comply with EA88 with respect to its reports to PERS on the two retired employees, PECBA still requires the City to engage in impact bargaining with the Association. In other words, we conclude that the City did not bargain as much as the circumstances allowed before making its calculations with respect to Baker and Hicks. In fact, no impact bargaining took place in that regard.

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[5]There is no assertion here that the impact is *de minimis* or insubstantial.

[6]The City contends that it notified the Association on November 20, 2017, that it would use the April 1, 2017, implementation date to calculate Baker's unused sick leave for the City's report to PERS. We note, however, as discussed below, that the City's subsequent conduct at and after the mediation resulted in the Association reasonably believing that the implementation date for the City's change in the reporting calculation was still a subject of discussion.

[7]The City did not assert, at the time that it changed its practice with respect to Baker and Hicks, that a business necessity required it to do so without engaging in impact bargaining. Indeed, the City did not notify the Association of that action.

We turn to the City's affirmative defense that the Association's claim is barred by the statute of limitations. Unfair labor practice complaints are subject to a 180-day statute of limitations under ORS 243.672(3), which provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3), however, incorporates a "discovery rule," meaning that "the limitation period begins to run when a public employee, labor organization, or public employer knows or reasonably should know that an unfair labor practice has occurred." *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011). "[T]he determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis." *Id.* at 190.

Here, the complaint was filed on June 11, 2018, meaning that it was untimely if the Association knew or reasonably should have known that the City had refused to engage in impact bargaining with respect to the two Association-represented employees before December 13, 2017 (*i.e.*, by December 12, 2017, or earlier). The record establishes that Baker, who retired on November 30, 2017, was the first Association-represented employee that the Association knew of who had his PERS sick leave accrual calculation changed upon retirement. The record further establishes that the Association did not actually know of the City's action with respect to Baker until June 2018. It necessarily follows that the Association was not aware until that time that the City had not engaged in impact bargaining with regard to that action.

The question remains, however, whether the Association reasonably should have known by December 12, 2017 (181 days before the complaint was filed), that the City had not engaged in impact bargaining with respect to Baker's changed PERS sick leave accrual calculation. The City asserts that the Association reasonably should have known of that action because it had put the Association on notice in March 2017 that it would implement the change effective April 1, 2017. The City further argues that on November 20, 2017, Phelan notifed the Association that if the parties did not reach an agreement on November 30, 2017, then the City would use April 1, 2017, as an effective implementation date regarding EA88. Thus, when the parties did not reach an agreement on November 30, 2017, that date, the City asserts, is the "very latest" that the Association reasonably should have known of the alleged unfair labor practice.

As a factual matter, we disagree that the Association reasonably should have known that the City had not engaged in impact bargaining by November 30, 2017 (as the City asserts), or by December 12, 2017 (as the statute would require for the claim to be untimely). We reach this conclusion for several reasons. First, it is undisputed that the City did not affirmatively tell the Association or the affected employees that it had altered its practice with respect to PERS sick leave accrual until June 2018 when Baker specifically asked for the calculation that the City used. Second, until June 2018, the City continued responding to all other Association-represented employees' requests for their PERS sick leave balances by declining to provide that information. The City explained its denials on the ground that the parties were still negotiating that issue. Third, through early January 2018 (when it declared impasse), the City continued to bargain with the Association about when the City would effectively change its method of calculating unused sick leave to report to PERS.

Under these circumstances, we conclude that it was reasonable for the Association to believe that the City had not changed its method of calculating unused sick leave for PERS

reporting with respect to Baker (or any other employee who had retired during the interim). Moreover, because the City was still engaged in bargaining with the Association about when to implement EA88, it was reasonable for the Association to believe that the City had not yet implemented any change on that issue, and that the City would not implement it until the parties completed impact bargaining. Consequently, we hold that the City has not established its affirmative defense that this claim was untimely filed.

6. The Association did not violate ORS 243.672(2)(b) by including a prohibited subject in the LBO submitted to the arbitrator, over the City's objection, as alleged in the City's counterclaim.

The City's counterclaim asserts that the Association violated ORS 243.672(2)(b) because the Association's LBO included the following provision: "Effective July 1, 2018, the City may subtract twenty-four (24) hours of PERS sick leave credit for every twenty-four (24) hours of sick leave taken. Section 15.1 reduces the sick leave accrual hours from 16 to 10, as a result of the City's decision to implement [EA] 88." According to the City, the proposal constitutes a prohibited subject of bargaining because "it would require the City to delay its compliance with the legally required method for computing and reporting unused sick leave to PERS." By including this proposal in its LBO, the City asserts, the Association violated ORS 243.672(2)(b). For the following reasons, we disagree with the City's assertion.

A subject or proposal that is prohibited by law is considered a prohibited subject of bargaining, if it is "specifically contrary to statute or would require a party to act contrary to statute." *Clackamas County Employees' Association v. Clackamas County and Clackamas County Housing Authority*, Case No. UP-032-15 at 6, 26 PECBR 798, 803 (2016), *aff'd without opinion* 288 Or App 167, 403 P3d 821 (2017), *rev den*, 362 Or 665, 415 P3d 578 (2018); *see also Eugene Police Employee Association v. City of Eugene*, Case No. UP-5-97 at 6, 17 PECBR 299, 304 (1997), *aff'd*, 157 Or App 341, 972 P2d 1191 (1998), *rev den*, 328 Or 418, 987 P2d 511 (1999). A party violates ORS 243.672(1)(e) or (2)(b) if it insists, even short of impasse, on a proposal that is directly contrary to statute, and it does so over the other party's objection. *See Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 22, 25 PECBR at 661; *Eugene Education Association v. Eugene School District*, Case No. UP-32-87 at 27, 32, 9 PECBR 9455, 9481, 9486 (1987). An unfair labor practice concerning the unlawful pursuit of a prohibited subject of bargaining does not ripen until the objecting party gives notice of its objection and refuses to bargain over the offending language, and the proposing party elects not to modify the proposal to satisfy that objection. *Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. UP-024-17 at 6 (Order on Reconsideration); *see also Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96 at 3, 16 PECBR 429, 430-31 (1996) (Order on Reconsideration).[8]

[8]In its prehearing memorandum, the City recognized that pursuing a prohibited subject of bargaining violates PECBA only if done over the other party's objection. At oral argument, the City acknowledged that an objection over a permissive subject of bargaining was a prerequisite to finding an unfair labor practice based on unlawful pursuit, but argued that such a requirement was less clear under the Board's case law with respect to a prohibited subject of bargaining. However, we applied this same standard recently in a prohibited subject dispute. *Multnomah County School District*, UP-024-17 at 6 (Order on Reconsideration). We also have longstanding precedent that this Board does not "treat[] prohibited subjects differently than it treats permissive subjects for purposes of (1)(e) and (2)(b) violations." *Eugene School District*, UP-32-87 at 27, 32, 9 PECBR at 9481, 9486.

Here, the Association asserts, and the evidence establishes, that before the Association filed its June 5, 2018, LBO, the City never identified the Association's proposal as unlawful or otherwise objected to the proposal. The Association further notes, and the evidence establishes, that this same proposal was included in its January 12, 2018, final offer, with no objection from the City. Additionally, the Association has, since May 3, 2017, offered similar proposals (with prospective dates for changing the date that the City would change its calculation method for reporting unused sick leave to PERS) numerous times without objection by the City. Indeed, the City itself has offered prospective dates regarding when any change would be implemented.[9]

The City did not object to the Association's proposal for a prospective EA88 effective date until June 18, 2018, approximately 14 months after the Association first proposed a prospective EA88 effective date, and two weeks after the Association submitted its LBO. Because the City failed to timely object to the Association's proposal, the City waived its right to contest the inclusion of that proposal in the Association's LBO.[10] Therefore, the Association did not violate ORS 243.672(2)(b) when it included that proposal in its LBO.

Remedy

We turn to the remedy for the City's impact-bargaining violation. Because the City violated ORS 243.672(1)(e), we order the City to cease and desist from that action. ORS 243.676(2)(b). We also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). In these circumstances, the City is directed to bargain with the Association over the impacts of the changed method of calculating unused sick leave for PERS reporting with respect to the two retired employees (Baker and Hicks) and any other similarly situated Association-represented employee who may have retired during the relevant period or who does so before completion of the dispute resolution process.

The Association requests that we order the City to post and email a notice of the (1)(e) violation. We generally order such a posting if we determine that a party's PECBA violation (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

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[9]The City asserts that the Assocation should have been put on notice of some type of implied objection because the City's prior practice "was unlawful" and "the City was required to immediately begin" a change in the disputed practice. As set forth above, however, the City's actions were not so unequivocal. Not only did the City entertain numerous proposals from the Association with some type of prospective date, but the City similarly offered prospective dates regarding EA88 implementation.

[10]We further note that, based on the facts established at hearing, if the City were to raise this new issue (*i.e.*, its contention that the Association's proposed EA88 effective date is prohibited) in the currently scheduled interest arbitration proceeding, such action would be inconsistent with this Board's longstanding prohibition against raising new issues at such a late stage. *See, e.g., Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 18-21 & n 10, 25 PECBR at 657-60 & n 10 (noting "a 'new issue' [is] one that is not reasonably comprehended with prior discussions or bargaining positions, or that does not logically evolve from such discussions or positions" (quotation marks and citation omitted)), and cases cited therein. With respect to the matter before us, the Association did not claim that the City violated subsection (1)(e) by objecting to the Association's proposal as prohibited after the Association submitted its LBO.

number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Not all of these criteria need to be satisfied to warrant posting of a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). Here, we do not find any of our typical criteria satisfied. Therefore, we do not order a posting.

We also decline the Association's request that we impose a $1,000 civil penalty on the City.[11] 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. Here, the record does not establish the circumstances that would warrant a civil penalty.

ORDER

1. The City violated ORS 243.672(1)(e) by not completing its bargaining obligations regarding the impact of the City's decision to change its method of calculating unused sick leave in response to EA88 on Association-represented employees who retired after April 1, 2017.

2. The City shall cease and desist violating ORS 243.672(1)(e) and shall collectively bargain in good faith with the Association over the impact of the City's decision to change its method of calculating unused sick leave in response to EA88 on Association-represented employees who retired after April 1, 2017.

3. The remaining claims, including the City's counterclaim, are dismissed.

DATED: July 30, 2018

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

[11]Because we have found a (1)(e) violation, and not dismissed the complaint, we do not impose a civil penalty on the Association. ORS 243.676(4)(a)(B).