

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-038-21

(UNFAIR LABOR PRACTICE)

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

Daryl Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

Sylvia Van Dyke, Senior Assistant Attorney General, and Neil Taylor, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On September 10, 2021, the Oregon State Police Officers Association (Association) filed an unfair labor practice complaint against the State of Oregon, Department of State Police (State). The complaint alleges that the State violated the duty to bargain under ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by Executive Order 21-29 (EO 21-29), or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29. The Association requested expedited consideration of this matter under OAR 115-035-0060. The State opposed that request. On September 20, 2021, after considering the parties' submissions, the Board issued a letter ruling granting the request for expedited consideration. The Board assigned the matter to Administrative Law Judge (ALJ) Martin Kehoe, who conducted a hearing on October 6, 2021. Per mutual agreement, the parties submitted post-hearing briefs on October 13, 2021, at which point, the record closed. The matter was then transferred to the Board for the issuance of an order.

For the reasons explained below, the Board concludes that the State did not violate ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by EO 21-29, or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29. Consequently, we dismiss the complaint.¹

RULINGS

The rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization within the meaning of ORS 243.650(13) and the exclusive representative of a mixed bargaining unit of strike-permitted and strike-prohibited employees of the Oregon State Police, a department of the State.
2. The State is a public employer as defined in ORS 243.650(20).
3. Consistent with ORS 243.696, the Department of Administrative Services (DAS) represents the State in collective bargaining.
4. The Association and the State are parties to a collective bargaining agreement, effective July 1, 2019 to June 30, 2023.
5. On March 8, 2020, Governor Kate Brown issued Executive Order 20-03, declaring a state of emergency in response to the COVID-19 pandemic, pursuant to ORS 401.165. During all times relevant to this matter, that state of emergency was ongoing.
6. By mid-2021, vaccines against COVID-19 were readily available and free of cost to any Oregonian above the age of 12.
7. On June 25, 2021, Governor Brown issued Executive Order 21-15, rescinding many of the prior executive orders that had imposed various public health measures, effective June 30, 2021.
8. In or about July and August 2021, there was a large surge in the number of patients hospitalized because of COVID-19, largely due to the spread of the coronavirus Delta variant. The vast majority of hospitalized individuals with COVID-19 were unvaccinated.
9. On or about August 11, 2021, Governor Brown made a public announcement signaling her intent to issue an executive order that would require Executive Branch employees to be vaccinated against COVID-19.

¹In light of the October 18, 2021, deadline set forth in EO 21-29, on October 14, 2021, this Board issued a letter to the parties to provide initial notice that the Board would dismiss the complaint and issue a final appealable order explaining our reasons as expeditiously as possible.

10. On August 11, 2021, in response to the Governor's announcement, the Association's counsel, Daryl Garrettson, emailed DAS and demanded to bargain over the vaccination requirement "before the implementation" of the requirement.

11. On August 13, 2021, Governor Brown issued EO 21-29, pursuant to her "authorities under Article V, section 1, of the Oregon Constitution, the emergency invoked in Executive Order 20-03, and ORS 401.168."

12. EO 21-29 requires Executive Branch employees (and certain contract workers) to be fully vaccinated against COVID-19 by October 18, 2021. The order defines "fully vaccinated" as "having received both doses of a two-dose COVID-19 vaccine or one dose of a single-dose COVID-19 vaccine and at least 14 days have passed since the individual's final dose of COVID-19 vaccine." The order allows for exceptions "for individuals unable to be vaccinated due to disability, qualifying medical condition, or a sincerely held religious belief." The order specifically prohibits any employee "from engaging in work for the Executive Branch after October 18, 2021," if the employee has not been fully vaccinated. The order also specifically prohibits the Executive Branch from permitting any employee to engage in work for the Executive Branch after October 18, 2021, if the employee has not been fully vaccinated and provided proof thereof, as required by the order. The order requires affected employees to provide their employer with either proof of vaccination, or a written request for one of the specified exceptions, by October 18, 2021. The order also provides, "Employees who fail to comply with this directive will face personnel consequences up to and including separation from employment. * * * Timelines in this Executive Order may be extended at the Governor's discretion." The order further states, "Pursuant to ORS 401.192(1), the directives set forth in this Executive Order shall have the full force and effect of law, and any existing laws, ordinances, rules and orders shall be inoperative to the extent they are inconsistent with the directives set forth in this Order."

13. Nettie Pye, Statewide Labor Relations Manager for DAS, was assigned to represent the State in all bargaining related to the implementation of EO 21-29 for Executive Branch employees.

14. On August 25, 2021, Pye emailed representatives of multiple unions that represent Executive Branch employees, including the Association. Pye notified the unions that the State would be emailing all Executive Branch employees later that day to let them know that "the processes to give proof of vaccination or request exceptions to vaccination requirements" were open in Workday, the State's electronic personnel information system. Pye also attached to the email the State's COVID-19 Vaccination Requirement Policy, the vaccination exception request questionnaire, the religious belief accommodation process overview, the Americans with Disabilities Act (ADA) medical exemption provider form, and the procedure for requesting a vaccination exemption. Finally, Pye stated, "If you are included in this email, we have received your Demand to Bargain," and indicated that she either had already or would soon reach out to schedule impact bargaining.

15. The COVID-19 Vaccination Requirement Policy attached to Pye's August 25 email restates the vaccination requirements and related provisions set forth in EO 21-29.

16. On August 27, 2021, another DAS labor relations manager contacted Garrettson about scheduling bargaining.

17. On August 30, 2021, Pye emailed the Association and stated, in relevant part:

“The State’s position is that the vaccine mandate, the date designated to be fully vaccinated by and the exception processes are prohibited subjects of bargaining as the Governor’s Executive Order carries the force of law. The Executive Order is based on an emergency as identified in a separate Executive Order and on the Governor’s statutory and constitutional powers.

“The State remains willing to bargain the impacts of the Executive Order.”

18. On August 31, 2021, Garrettson responded to Pye and explained that the Association disagreed with the State’s position regarding the legal effect of EO 21-29 and the State’s bargaining obligations.

19. On September 1, 2021, Garrettson emailed Pye to inquire further about the State’s position. Specifically, Garrettson stated that he understood Pye’s August 30 email to be indicating that the State was refusing to bargain over the decision to require vaccinations, but willing to bargain over the impacts of that decision. Garrettson asked whether the State was willing to bargain over three specific topics: 1) the implementation date of the requirement, *i.e.*, the October 18, 2021, deadline; 2) the consequences for a bargaining unit employee who fails to meet the deadline, *i.e.*, “whether termination of employment is the appropriate consequence”; and 3) the reasons or basis for exemptions.

20. On September 7, 2021, Pye responded to Garrettson and stated, “You are correct, DAS is negotiating the impact” of EO 21-29, but that the “state will not bargain the decision, believing the [EO] carries the force of law and the state is continuing to move forward with the October implementation deadline and the two exceptions listed in the EO. That being said, DAS remains steadfast in its intent to meet with the Association and negotiate the impact of the [EO] to the extent it can prior to and after the deadlines required under the [EO].” Pye also indicated that the State had received and was in the process of discussing proposals “on a variety of topics” from unions across the state.

21. On September 10, 2021, the Association filed the unfair labor practice complaint in this matter.

22. As of the date of the hearing in this matter, the State and the Association had met twice to bargain over the impacts of the vaccine requirement.

23. Another union that represents a different bargaining unit of Executive Branch employees, SEIU Local 503, submitted a proposal to the State to create a grace period for employees who started the vaccination process before the October 18, 2021. Under the proposal, such employees would be permitted to remain employed with the State past the October 18 deadline. Until fully vaccinated, those employees would either work remotely or be on leave (and be permitted to use paid leave, if available). Pye determined that the Governor approved of the

proposed grace period. The State and SEIU Local 503 entered into a letter of agreement that provided for that grace period. Subsequently, the State entered into a similar letter of agreement that covers another bargaining unit that is represented by AFSCME. The State would agree to the same grace period for employees in other bargaining units, including the unit represented by the Association.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this dispute.
2. The State did not violate ORS 243.672(1)(e) by refusing to bargain in good faith over the changes in employment terms and conditions required by EO 21-29, or by failing to bargain to completion over the impacts of those changes on mandatory subjects of bargaining before implementing EO 21-29.

As a general rule, a public employer commits a per se violation of ORS 243.672(1)(e) if it unilaterally changes the status quo concerning a mandatory subject of bargaining without first completing its bargaining obligation under the Public Employee Collective Bargaining Act (PECBA). *See Ass'n of Or. Corr. Emples. v. State*, 353 Or 170, 177, 295 P3d 38 (2013); *Portland Fire Fighters' Ass'n, Local 43 v. City of Portland*, 245 Or App 255, 264-65, 263 P3d 1040 (2011). The Association contends that the State violated (1)(e) when it implemented the vaccination requirement and other provisions of EO 21-29, without bargaining over those terms. Additionally, the Association contends that the State violated (1)(e) when it implemented EO 21-29 before the parties completed bargaining over the impacts of the vaccination requirement on mandatory subjects.

The State concedes that it did not bargain over the vaccination requirement or other terms mandated by EO 21-29, and that it implemented those terms before the parties completed impact bargaining. The State, however, maintains that this conduct did not violate PECBA. Specifically, the State contends that because EO 21-29 has the “full force and effect of law,” ORS 401.192(1), the State was legally required to comply with EO 21-29, including by implementing its provisions by its specified deadline (October 18, 2021). Further, the State contends that any proposal that is contrary to EO 21-29, or that would require the State to act contrary to EO 21-29, is a prohibited subject of bargaining. A proposal is a prohibited subject of bargaining, regardless of whether it might otherwise be described as “mandatory” or “permissive,” if it is specifically contrary to a statute, or would require a party to act contrary to a statute. *SEIU Local 503 v. Dept. of Admin. Servs.*, 183 Or App 594, 598, 54 P3d 1043 (2002); *Clackamas Cty. Employees' Ass'n v. Clackamas Cty.*, 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).

In response, the Association contends that the Governor, even when acting under the emergency powers authorized in ORS 401.165 through 401.236, did not have the power to modify the State’s bargaining obligations under PECBA. Further, the Association questions whether a proposal to modify the terms of EO 21-29 qualifies as a “prohibited” subject under PECBA, in light of the fact that the State entered into letters of agreement with other unions that effectively modify the executive order’s vaccination deadline by creating a grace period for employees who had initiated the vaccination process by October 18. The State contends that the grace period was

not a prohibited subject because the Governor granted an exception, as EO 21-29 expressly authorizes her to do. EO 21-29 at 5 (“Timelines in this Executive Order may be extended at the Governor’s discretion. * * * Any decision made by the Governor pursuant to this Executive Order is made at her sole discretion.”).

The parties’ contentions make clear that this case does not turn on the application of PECBA. Rather, this case turns on the scope of the Governor’s emergency powers under ORS 401.165 through 401.236. As set forth below, after reviewing the text of the emergency powers statutes and relevant precedents, including *Elkhorn Baptist Church v. Brown*, 366 Or 506, 466 P3d 30 (2020), we conclude that the Governor’s emergency powers preclude a finding that the State violated ORS 243.672(1)(e), as alleged in the complaint.

Governor Brown issued EO 21-29 pursuant to her “authorities under Article V, section 1, of the Oregon Constitution, the emergency invoked in Executive Order 20-03, and ORS 401.168.” Under ORS 401.168(1), “[d]uring a state of emergency, the Governor has complete authority over all executive agencies of state government and the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of this chapter.” The state’s “police power” refers to “the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of the public.” *Elkhorn Baptist Church*, 366 Or at 524 (quoting *Union Fishermen’s Co. v. Shoemaker*, 98 Or 659, 674, 193 P 476 (1920)). Through the exercise of that police power, “a community can ‘protect itself against an epidemic of disease which threatens the safety of its members.’” *Elkhorn Baptist Church*, 366 Or at 525 (quoting *Jacobson v. Massachusetts*, 197 US 11, 27, 25 S Ct 358 (1905)). When issuing EO 21-29, the Governor exercised the state’s police power to “protect state workers, their coworkers, and the public that relies on state services” from COVID-19 and its many impacts. EO 21-29 at 2.

ORS 401.192(1) expressly and unequivocally provides: “All rules and orders issued under authority conferred by ORS 401.165 to 401.236 shall have the full force and effect of law both during and after the declaration of a state of emergency.” Thus, EO 21-29 is a state law, and like any other state law, its express terms are enforceable and must be complied with by the covered agencies and employees.

Further, ORS 401.192(1) expressly and unequivocally provides: “*All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to 401.236 shall be inoperative during the period of time and to the extent such inconsistencies exist.*” (Emphases added.) As explained by Senior Judge Landau in a letter opinion rejecting a motion for emergency relief from the vaccination requirement set forth in EO 21-29, “The legislature * * * may grant the authority to suspend the laws,” and “[t]hat is what the legislature did in ORS 401.192(1) when it granted the governor significant powers during a declared emergency and then provided that ‘[a]ll existing laws, ordinances, rules and orders inconsistent with’ the authority exercised by the governor ‘shall be inoperative.’ Thus, if any laws are suspended under EO 21-29, it is because the governor’s order does so ‘by the Authority of the Legislative Assembly.’” Letter Opinion at 3, entered October 7, 2021, *Oregon Fraternal Order of Police, et al v. Katherine Brown, State of Oregon* (21CV35125) (quoting Or Const, Art 1, § 22). Because EO 21-29 supersedes all existing laws that are inconsistent with the exercise of the governor’s authority under ORS 401.168, we conclude

that the covered agencies and employees must comply with the express terms of EO 21-29 regardless of the parties' bargaining obligations under PECBA (unless the Governor agrees to an exception or modification, as authorized by the order).

That conclusion is confirmed by ORS 401.168(2), which expressly provides that "the Governor has authority to suspend provisions of any order or rule of any state agency, if the Governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency." We understand ORS 401.168(2) to mean that, even if this Board ordered the State to delay implementation of EO 21-29 pending bargaining with the Association, the Governor would have the authority to suspend that order if she determined and declared that compliance with that order would in any way prevent, hinder or delay mitigation of the effects of the COVID-19 health emergency.

In sum, considering the text and context of ORS 401.168, we conclude that when the Governor issues a valid executive order under the authority granted by that statute, that order may effectively define the State's bargaining obligations under PECBA. Thus, in this case, even if there is a conflict between the State's obligations under EO 21-29 and PECBA, then EO 21-29 controls, and the State does not violate (1)(e) by complying with EO 21-29. *Elkhorn Baptist Church*, 366 Or at 527 ("The legislature has also expressly addressed how any conflict between the statutes in chapter 401 and any other laws, ordinances, rules, or orders should be resolved: the statutes in chapter 401 control." (Citing ORS 401.192(1)); Letter Opinion at 3, *Oregon Fraternal Order of Police*).

The Association does not suggest that the plain text of ORS 401.168, ORS 401.192, and EO 21-29 can be interpreted differently. Nor does the Association identify any statutory or constitutional provision that limits the effect that a Governor's executive order issued pursuant to ORS 401.168 can have on the State's bargaining obligations under PECBA. Rather, the Association argues that EO 21-29 violates statutory and constitutional limits on the exercise of the Governor's emergency powers.

We begin with the Association's statutory arguments. The Governor's "emergency powers * * * are required to be exercised in a manner consistent with the reason for which they are granted; that is, they must be exercised to address the declared emergency." *Elkhorn Baptist Church*, 366 Or at 525 (citing ORS 401.168(1)). The Association contends that the limited scope of EO 21-29, which applies only to Executive Branch employees (as opposed to all State employees, or all Oregon employees), demonstrates that the Governor did not issue the order to address the declared emergency, but to act "as an employer." However, the Association does not dispute that EO 21-29 mitigates the spread and impacts of COVID-19 by increasing the number of vaccinated individuals. Further, the Association does not identify any provision that prohibits the Governor from considering her responsibilities as the "leader of the Executive Branch" or acting as an employer when deciding how to address the COVID-19 emergency. EO 21-29 at 2. To the contrary, ORS 401.168(1) expressly grants the Governor "complete authority over all executive agencies of state government" during a state of emergency.

The Association also argues that EO 21-29, by requiring employees to disclose their vaccination status to their employer, violates the Americans with Disabilities Act. However, the Equal Employment Opportunity Commission (EEOC), in guidance published in December 2020 and updated in May 2021, has stated that the ADA does not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, which is what EO 21-29 requires.²

We turn to the Association’s constitutional arguments. The Association appears to question whether the statutory delegation of emergency powers to the Governor under ORS 401.165 through 401.236 violates the constitutional prohibition against the separation of powers. For the reasons stated by Senior Judge Landau in *Oregon Fraternal Order of Police*, we conclude that the delegation of emergency powers is constitutional. Letter Opinion at 3-4, *Oregon Fraternal Order of Police*.

Finally, the Association contends that EO 21-29 impairs the collective bargaining agreement between the Association and the State, in violation of the state Contract Clause, Article I, § 21, of the Oregon Constitution, and the federal Contract Clause, Article I, § 10, of the United States Constitution. For both the federal and state Contract Clauses, the Association must, at a minimum, establish that EO 21-29 actually impairs the parties’ contract. *See Hughes v. State*, 314 Or 1, 14, 838 P2d 1018 (1992) (“First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract.”); *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 US 400, 411, 103 S Ct 697, 704 (1983) (“The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” (Quotation marks and citation omitted.)).

The Association contends that EO 21-29 impairs Article 3, Section 2.2 of the CBA, which the Association characterizes as “specifically reserv[ing] to the Association the right to negotiate over changes in the conditions of employment.” However, as the Association acknowledges, Section 2.2 must be read with Section 2.1, which expressly provides: “The Employer is not limited, confined, or restricted by past practice, rule, custom, or regulation in making changes in policies, procedures, rules, and regulations to carry out the mission of the Department.” Further, while Section 2.2 reserves the Association’s right to bargain, the scope of that right is expressly defined by reference to state law: “this article shall not be interpreted to restrict the Association’s right to bargain the impact of mandatory subjects of bargaining or the impact of permissive subjects of bargaining where the Employer is compelled to negotiate over the matter by state law or by law, bargain the decision.” As explained above, the emergency power statutes expressly authorize the Governor to issue executive orders; such orders may supersede the requirements of other state statutes; and such orders have the full force and effect of state law. The CBA does not contractually bar the legislature, or the governor acting under authority delegated by the legislature, from modifying the statutory duty to bargain.

²See EEOC, “What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and the Other EEO Laws,” at K.4 and K.9, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed October 18, 2021).

Consequently, we conclude that the State did not violate PECBA by declining to bargain with the Association over the requirements of EO 21-29. Further, because EO 21-29 set a deadline of October 18, 2021, the State did not violate PECBA by implementing EO 21-29 by that deadline, without first completing impact bargaining.

ORDER

The complaint is dismissed.

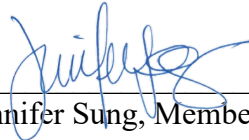
DATED: October 22, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.