EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-048-20

(UNFAIR LABOR PRACTICE)

OREGON MILITARY DEPARTMENT, Complainant, v. IAFF, LOCAL 1660, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Neil Taylor, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Complainant.

Julie Reading and Mike Tedesco, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Respondent.

On December 21, 2020, the Oregon Military Department (OMD), an executive branch agency of the State of Oregon, filed an unfair labor practice complaint against the International Association of Firefighters, Local 1660 (IAFF PANG or Union), the labor organization that represents the bargaining unit of firefighters located at the Portland Air National Guard Military Base (Portland Airbase). The complaint alleges that IAFF PANG violated ORS 243.672(2)(b) by submitting to interest arbitration a last best offer that includes a prohibited subject of bargaining. Initially, OMD did not request expedited consideration of this matter, however, on February 16, 2021, the parties jointly requested that this Board expedite the complaint under OAR 115-035-0060. The Board granted that request by letter ruling issued on February 19, 2021. The parties agreed to present the case on stipulated facts and exhibits, without a hearing. The parties submitted the stipulated facts, exhibits, and briefs on April 9, 2021, at which point, the record closed.

The issue in this case is whether IAFF PANG's retirement benefit proposal is a prohibited subject of bargaining, such that IAFF PANG violated ORS 243.672(2)(b) by including that proposal in its last best offer. Specifically, OMD contends that IAFF PANG's retirement benefit proposal is prohibited by the Oregon Pay Equity Act, because the proposal would create a compensation difference between firefighters employed by OMD at the Portland Air National Guard Military Base and firefighters employed by OMD at a different location, Kingsley Field Air Force Base. For the reasons discussed below, we conclude that IAFF PANG's retirement benefit proposal is not a prohibited subject of bargaining, and therefore, IAFF PANG did not violate section (2)(b).

RULINGS

The parties initially agreed to set April 2, 2021, as the due date for stipulations, exhibits, and briefs. On April 1, 2021, the Board issued a letter ruling granting OMD's unopposed request for an extension of the due date to April 5, 2021. On April 5, 2021, OMD requested a second extension of the due date to April 9, 2021, however, the Union agreed to an extension only to April 7. The Board issued a letter ruling on April 5, 2021, finding sufficient good cause to extend the deadline to April 9, 2021. IAFF PANG did not pursue an objection to that ruling in its brief.

FINDINGS OF FACT

1. The State of Oregon, Oregon Military Department, is a public employer under ORS 243.650(20). OMD employs firefighters at two airbases, the Portland Air National Guard Military Base, which is located in Portland, and the Kingsley Field Air Force Base (Kingsley Field), which is located in Klamath Falls.

2. IAFF PANG is a labor organization as defined in ORS 243.650(13) and is the exclusive representative of a bargaining unit of firefighters who are employed by OMD and work at the Portland Airbase.

3. A different labor organization, the Klamath Falls Firefighters Association, Local 3340 (IAFF KFFA), is the exclusive representative of a different bargaining unit of firefighters who are employed by OMD and work at Kingsley Field.

4. The IAFF PANG and IAFF KFFA bargaining units perform comparable work utilizing the same firefighter classifications. All represented bargaining unit employees are male. The record does not contain any other information regarding any employee's protected class status under the Oregon Pay Equity Act.[1]

5. The firefighters at the Portland Airbase and Kingsley Field assume regular fire suppression and prevention duties at their respective airbases, along with military aircraft crash rescue functions due to their attachment to military bases. The firefighters receive extensive

[1]The Oregon Pay Equity Act defines a protected class as "a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age." ORS 652.210(5).

training in military operations and procedures, military aircraft, and specialized equipment used in crash rescues.

6. OMD and IAFF PANG were parties to a collective bargaining agreement, the term of which was July 1, 2015 to June 30, 2019.

7. OMD and IAFF KFFA are parties to a different collective bargaining agreement, the term of which is July 31, 2019 to June 30, 2021. When OMD and IAFF KFFA were negotiating that agreement, they were anticipating the passage of Senate Bill 1049 (SB 1049) and subsequent legal challenges to it. Therefore, IAFF KFFA reached an agreement with OMD including a "ditto" or "me too" clause. Negotiated and signed in 2019, the "me too" provision states:

> "Section 2. The Parties agree that if the IAFF-PANG negotiated agreement includes additional provisions pertaining to Article 11 – Retirement, SB 1049 or other PERS related compensation, then such provisions shall be extended to the IAFF-KFFA unit with the same effective dates."

8. SB 1049 is a comprehensive piece of legislation intended by the Oregon Legislature to address the increasing cost of funding the Oregon Public Employee Retirement System (PERS) by providing relief to public employers for escalating PERS contribution rate increases. Beginning July 1, 2020, SB 1049 requires that PERS members earning more than $2,500 per month have a portion of their six-percent Individual Account Program (IAP) contributions redirected to a new Employee Pension Stability Account (EPSA) for each member. Funds from the EPSA are used to pay for part of the employee's pension benefits at retirement. Contributions to the ESPAs are required when the PERS system is less than 90-percent funded.

9. On or around January 18, 2019, OMD began negotiations with IAFF PANG to bargain the 2019–2023 successor agreement. The parties bargained in good faith for more than 150 days, as prescribed by the Public Employee Collective Bargaining Act (PECBA).

10. On February 11, 2020, IAFF PANG declared impasse. The parties had been unable to reach agreement on hours of work, retirement, and safety equipment and uniforms.

11. OMD and IAFF PANG selected an arbitrator in March 2020. The parties then engaged in mediation and informal discussions in June of 2020. The parties were ultimately able to come to an agreement on the remaining proposals except for IAFF PANG's proposal on retirement.

12. IAFF PANG's last best offer (LBO) retirement proposal would modify the existing CBA as follows:

> "Retirement Contributions.
> "**A**. ~~On behalf of employees, the State will continue to 'pick up' the six percent (6%) employee contribution payable pursuant to law. Effective February 1, 2019, compensation plan salary rates for PERS participating members shall be increased by six and nine five one hundredths percent (6.95%) to be paid in addition to the cost of living adjustment described in Article 10. At that time~~, bargaining unit

employees will ~~begin to~~ make their own six percent (6%) contributions to their PERS account or the Individual Account Program as applicable. Employees' contributions shall be treated as 'pre tax' contributions pursuant to Internal Revenue Code Section 414(h)(2).

"**B. Pursuant to SB 1049 (2019), PERS will divert some of the six (6%) percent employee contributions referenced in paragraph A from the bargaining unit members' employee accounts in the PERS Individual Account Program (IAP). SB 1049 (2019) will divert 2.5 percent from the IAP account of PERS Tier 1 and Tier 2 members and 0.75 percent from the IAP account of OPSRP members.**

"**To maintain Tier 1, Tier 2, and OPSRP bargaining unit members' retirement security in their IAP accounts, pursuant to ORS 238A.340, the Employer will make a three (3%) employer contributions to the employer account in the IAP for each employee who is a PERS Tier 1, Tier 2, or OPSRP members on January 1, 2021.**

"**C. The Employer may deduct from an employee's salary 0.5% to help offset the cost of the 3% employer contribution referenced in paragraph B.**

"Example: If 2.5% of the 6% employee contribution is being diverted from an employee's individual employee account in the IAP, then the Employer will contribute 3% as employer contributions to the IAP under ORS 238A.340 and may deduct 0.5% (3% minus 2.5%) from the employee's salary.

"**D. If for any reason, including but not limited to legislative action, order of any court of competent jurisdiction or ballot measure (initiative or referral), the Employer contributions to the IAP pursuant to ORS 238A.340 are prohibited or the full six (6%) employee contribution to the employee account in the IAP is returned and/or reinstated, the parties agree to bargain the impact of those changes pursuant to the fast track process in ORS 243.698.**

"~~Contributions to Individual Account Programs. Effective February 1, 2019, compensation plan salary rates for PERS OPSRP participating members shall be increased by six and ninety five one hundredths percent (6.95%) At that time, bargaining unit employees will begin to make their own six percent (6%) contributions to their PERS account or the Individual Account Program as applicable. Employees' contributions shall be treated as 'pre tax' contributions pursuant to Internal Revenue Code Section 414(h)(2).~~" (Emphases in Original.)

13. The 2019-2021 CBA between OMD and IAFF KFFA that covers the bargaining unit of firefighters who work at Kingsley Field does not include a retirement contribution provision like the one proposed by IAFF PANG.

14. In 2017, the Oregon legislature enacted the Oregon Pay Equity Act (also commonly referred to as the Oregon Equal Pay Act). In 2019, the legislature amended the pay equity law, including by adding a provision that expressly refers to collective bargaining agreements.

15. In early December 2020, the parties agreed to ask this Board to resolve the issue of whether IAFF PANG's LBO retirement proposal was a mandatory subject or prohibited because of Oregon's pay equity act.

CONCLUSIONS OF LAW

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

2. IAFF PANG's retirement benefit proposal is not a prohibited subject of bargaining, and therefore, IAFF PANG did not violate ORS 243.672(2)(b) by including that proposal in its last best offer.

Under PECBA, it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. ORS 243.672(2)(b). Section (2)(b) mirrors ORS 243.672(1)(e), which makes it an unfair labor practice for a public employer to refuse to bargain in good faith with an exclusive representative of its employees. A party violates (1)(e) or (2)(b) if it insists on bargaining over a proposal that is a prohibited subject of bargaining, and it does so over the other party's objection. *International Association of Fire Fighters, Local 1159, v. City of Lake Oswego*, Case No. UP-015-18 at 14 (2018). A proposal 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).

In this case, OMD contends that IAFF PANG violated section (2)(b) by insisting on bargaining over its retirement benefits proposal, which OMD contends is a prohibited subject of bargaining. IAFF PANG does not dispute that it insisted on bargaining over the proposal by including it in the last best offer that it submitted pursuant to the interest arbitration process set forth in ORS 243.746.[2] Nor does IAFF PANG contend that OMD failed to object to the retirement benefit proposal at issue. The parties dispute only whether the retirement benefit proposal is a prohibited subject of bargaining.[3]

OMD contends that IAFF PANG's retirement benefit proposal would create a compensation difference between firefighters who work at the Portland Airbase and firefighters who work at Kingsley Field, and that the compensation difference would violate Oregon's Pay Equity Act. The material facts underlying OMD's contention are undisputed. IAFF PANG's proposal would increase the amount that OMD contributes to the PERS Individual Account Program (IAP), in order to mitigate the impact of SB 1049, which redirects a portion of employees' IAP contributions to the Employee Pension Stability Account when the PERS system is less than

[2]At the end of the collective bargaining process for strike-prohibited employee bargaining units, including the IAFF PANG bargaining unit, PECBA provides for disputes to be resolved through interest arbitration. ORS 243.742-243.762. Under PECBA's interest arbitration procedure, each party must "submit to the other party a written last best offer package on all unresolved mandatory subjects" before the interest arbitration hearing. ORS 243.746(3). Here, the parties stipulated that if the Board determines that the retirement proposal is not a prohibited subject of bargaining, then the parties will proceed to interest arbitration on IAFF PANG's retirement provision alone.

[3]There is also no dispute that the subject of IAFF PANG's retirement proposal is otherwise mandatory for bargaining.

90-percent funded. In essence, IAFF PANG's proposal would require OMD to increase the employer contributions to affected employees' IAP accounts, to make up for the reduction of funds in those accounts caused by SB 1049. The collective bargaining agreement between IAFF PANG and OMD covers only those OMD firefighters who work at the Portland Airbase. OMD firefighters who work at Kingsley Field, which is located in Klamath Falls, are in a separate bargaining unit that is represented by a different union, IAFF KFFA, and covered by a different collective bargaining agreement—an agreement between OMD and IAFF KFFA. The OMD-IAFF KFFA agreement does not include a provision equivalent to IAFF PANG's retirement proposal. Consequently, if IAFF PANG's retirement proposal is incorporated into the OMD-IAFF PANG agreement, it potentially could cause OMD to compensate firefighters who work at the Portland Airbase more than it compensates firefighters who work at Kingsley Field.[4] The firefighters at both locations are in the same classifications and perform work of comparable character. OMD does not allege that the potential compensation difference between the Portland Airbase and Kingsley Field firefighters would be based on a protected class, and there is no evidence to that effect.[5]

OMD does not specifically identify which provision of the Pay Equity Act that it would violate if it provided the proposed retirement benefit to the Portland Airbase firefighters but not the Kingsley Field firefighters. Rather, OMD broadly argues that compensating the Portland Airbase firefighters differently "compared to a different firefighting bargaining unit in the same classification performing work of comparable character as defined by the Pay Equity Act, stationed at Kingsley Field," would "violate[] the strict pay equity requirements under the Act." As noted above, OMD does not allege, and the evidence does not show, that the potential compensation difference would be based on a protected class. Rather, OMD interprets the Pay Equity Act as broadly prohibiting any compensation difference between employees performing work of comparable character, regardless of whether the difference is based on a protected class. OMD also asserts that the compensation difference would not be based on any of the "bona fide factors" expressly authorized by the Pay Equity Act, ORS 652.220(2). IAFF PANG contends that its proposal would not cause OMD to violate the Pay Equity Act because 1) it would not create a compensation difference that is based on a protected class, and 2) any compensation difference caused by its retirement proposal would be based on the bona fide factor, "workplace locations." ORS 652.220(2)(a)(D).

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[4]IAFF PANG contends that its retirement benefits proposal would not result in any compensation difference between the Portland Airbase and Kingsley Field firefighters, because the IAFF KFFA collective bargaining agreement includes a "me too" provision that requires OMD to extend any retirement benefit provision in the IAFF PANG agreement to the IAFF KFFA bargaining unit. OMD disputes IAFF PANG's interpretation of the "me too" provision in the IAFF KFFA agreement; specifically, OMD contends that the "me too" provision would not apply if the retirement provision is added to the IAFF PANG agreement through interest arbitration. Because we conclude that IAFF PANG's proposal would not cause a compensation difference that violates the Pay Equity Act, we need not resolve this contract interpretation dispute (which involves IAFF KFFA, which is not a party to this case).

[5]OMD does not allege, and there is no evidence, that IAFF PANG's retirement benefit proposal is based on a protected class. Nor is there any allegation or evidence that OMD employs more employees from protected classes in one bargaining unit than the other.

For the reasons explained below, we conclude that the potential compensation difference between the Portland Airbase firefighters and the Kingsley Field firefighters would be based on the bona fide factor, "workplace locations." Consequently, we need not decide whether that compensation difference would violate the Pay Equity Act even though it is not based on a protected class, and we decline to do so.

In order to resolve the parties' dispute, we must interpret and apply the Pay Equity Act. When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. In doing so, we apply the analysis supplied by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 295-297, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-172. We then review any relevant legislative history. *Id.* If we are still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id*.

As noted above, IAFF PANG contends that the potential compensation difference would be based on workplace location, and therefore, would fall within the express exception provided for in ORS 652.220(2)(a)(D). We begin by examining the text of that provision in context. ORS 652.220 provides, in relevant part:

> "(1) It is an unlawful employment practice under ORS chapter 659A for an employer to:
>
> "(a) In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character.
>
> "(b) Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.
>
> "(c) Screen job applicants based on current or past compensation.
>
> "(d) Determine compensation for a position based on current or past compensation of a prospective employee. This paragraph is not intended to prevent an employer from considering the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.
>
> "(2) Notwithstanding subsection (1) of this section:
>
> "(a) An employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:
>
> "(A) A seniority system;
>
> "(B) A merit system;
>
> "(C) A system that measures earnings by quantity or quality of production, including piece-rate work;
>
> "(D) Workplace locations;

"(E) Travel, if travel is necessary and regular for the employee;
"(F) Education;
"(G) Training;
"(H) Experience; or
"(I) Any combination of the factors described in this paragraph, if the combination of factors accounts for the entire compensation differential.
"(b) An employer may pay employees for work of comparable character at different compensation levels on the basis of one or more of the factors listed in paragraph (a) of this subsection that are contained in a collective bargaining agreement."

In this case, all of the potential difference in compensation (*i.e.*, the difference in retirement contributions) between the Portland Airbase firefighters and the Kingsley Field firefighters would be based on the firefighters' workplace locations. Specifically, the OMD firefighters are in different bargaining units, and covered by different collective bargaining agreements, solely based on their workplace locations. The Portland Airbase firefighters are in the IAFF PANG bargaining unit, and covered by the IAFF PANG agreement, because they are employed at the Portland Airbase location. The Kingsley Field firefighters are in the IAFF KFFA bargaining unit, and covered by the IAFF KFFA agreement, because they are employed at the Kingsley Field location. Under PECBA, IAFF PANG may bargain the terms and conditions of employment only for the firefighters who work at the Portland Airbase, and IAFF KFFA may bargain the terms and conditions of employment only for the firefighters who work at Kingsley Field. And, under PECBA, each bargaining unit is entitled to bargain for different terms and conditions of employment. Thus, IAFF PANG may negotiate compensation for the firefighters who are employed at the Portland Airbase that differs from the compensation negotiated by IAFF KFFA for the firefighters who are employed at Kingsley Field. Because the Portland Airbase and Kingsley Field firefighters are in different bargaining units *based on* their different workplace locations, any resulting difference in their bargained-for compensation is based on the difference in their workplace locations, which is a bona fide basis for a compensation difference under ORS 652.220(2)(a)(D).

OMD argues that the collective bargaining exemption provided for under ORS 652.220(2)(b) does not apply because the applicable bona fide factor (here, workplace location) is not "listed" and "identified" in the collective bargaining agreement. We disagree with the premise of OMD's argument. Because the OMD-IAFF PANG agreement applies only to the firefighters at the Portland Airbase, the disputed compensation provision is, in fact, a workplace-location-based factor that is "contained in" the parties' collective bargaining agreement. *See* ORS 652.220(2)(b). To the extent that OMD is arguing that IAFF PANG's proposal does not fall within the exception provided for under ORS 652.220(2)(b) because the proposal is actually based on SB 1049, and not on workplace location or any of the other factors enumerated in ORS 652.220(2)(a), we also disagree. Even assuming that SB 1049 motivated the proposed compensation increase, if OMD compensates the firefighters who work at the Portland Airbase differently from the firefighters who work at Kingsley Field only because IAFF PANG's proposal causes their location-based collective bargaining agreements to differ, "the *difference* in compensation levels" would be "based on workplace locations," as expressly authorized by ORS 652.220(2)(a)(D)

(emphasis added).[6] OMD does not identify any text, context, legislative history, or maxims of statutory construction that indicate that the legislature did not intend for ORS 652.220(2)(a)(D) to apply under the circumstances presented here, and we have found none.

In sum, OMD employs firefighters at two different workplace locations: Portland Airbase and Kingsley Field. Because the firefighters at each workplace location are in separate, location-based bargaining units, they may negotiate different employment terms in their respective, location-based collective bargaining agreements.[7] Even assuming that IAFF PANG's retirement benefit proposal would create a compensation difference between firefighters who work at Portland Airbase and firefighters who work at Kingsley Field, on the record in this case, the difference would be based solely on their workplace locations, which is a bona fide basis for a compensation difference under ORS 652.220(2)(a)(D).[8] Because IAFF PANG's retirement benefit proposal would not require OMD to act contrary to the Pay Equity Act, it is not a prohibited subject of bargaining. Therefore, IAFF PANG did not violate the duty to bargain under ORS 243.672(2)(b) by including its retirement benefit proposal in its LBO over OMD's objection. Accordingly, we will dismiss OMD's claim.

ORDER

The complaint is dismissed.

DATED: April 27, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

[6]In other words, even if IAFF PANG's retirement benefit proposal is based on SB 1049, the *compensation difference* between the Portland Airbase and Kingsley Field firefighters would be based on workplace location.

[7]We also see no basis for concluding that the Oregon Pay Equity Act mandates a presumption that, when a labor organization and employer are negotiating location-based employment terms that would apply to some, but not all, of the employees who perform comparable work, the *higher or more advantageous* of those terms would be unlawful, as opposed to the *lower or less advantageous* of those terms.

[8]As noted above, OMD does not allege, and there is no evidence, that IAFF PANG's retirement benefit proposal is based on a protected class.