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AFTER SB 750:

IMPLICATIONS OF THE 1995 REFORM OF OREGON'S PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT

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AFTER SB 750:
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by John Abernathy, Henry H. Drummonds, Paul B. Gamson, Nancy J. Hungerford, Andrea L. Hungerford, Howell L. Lankford, Randy Leonard, Lon Mills, Kathryn T. Whalen, and Tim Williamsn

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Contents

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Issue No. Author and Title

No. 1 Carlton Snow. *Statutory Decisions by Arbitrators.*

No. 2 Nancy J. Hungerford, Henry H. Drummonds, and Paul B. Gamson. *The Continuing Duty to Bargain: Two Views.*

No. 3 Timothy D. W. Williams, Marianne K. McCartney, John H. Abernathy, Martin P. Haney, Walter G. Ellis. *Ability to Pay:A Search for Definitions and Standards in Factfinding and Arbitration.*

No. 4 Rosemarie Cordello Tedesco and Michael Tedesco. *A Labor View of Subcontracting and Partial Closure Bargaining.*

No. 6 John H. Abernathy, Michael H. Beck, Sandra Smith Gangle, George Lehleitner, Timothy D. W. Williams. *Problems in Arbitration: The Neutral's View.*

No. 6 Kathryn T. Whalen and Les Smith. *Oregon's Scope Bargaining: From Schools to Public Safety.*

No. 7 Robert Durham, Burton White, Steven Hecker, Gene Mechanic, Paula Barran, Jeffrey Merrick. *Problems in the Workplace: AIDS, Drug Testing, Sexual Harassment, and Smoking Restrictions.*

No. 8 Marcus Widenor. *Public Sector Bargaining in Oregon: The Enactment of the PECBA.*

No. 9 Carolyn Menagas, Ed Ruttledge, Sylvia Skratek, Timothy Williams. *Exploring Non-adversarial Bargaining and Grievance Mediation.*

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No.11 Ray Marshall, Douglas Fraser, Alice Dale and Jessie Bostelle, William Segura. *Restructuring the American Workplace: Implications for the Public Sector.*

No.12 Paula Barran, Eileen Drake, Thomas Levak, Charlene Sherwood, David Turner, Kathryn Whalen. *Individual Rights in a Collective Bargaining Environment.*

No.13 Jeffrey P. Chicoine, Thomas Doig, Margaret Hallock, Henry Kaplan, Tim Nesbitt, Ed Ruttledge, Greg Schneider, Kenneth Upton. *Oregon Public Sector Collective Bargaining: Entering the Third Decade.*

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Editorial Board

After SB 750:

Implications of the 1995 Reform of Oregon's Public Employee Collective Bargaining Act

Introduction

Marcus Widenor

The year 1995 may be seen in retrospect as a watershed in the history of public employment labor relations in Oregon, not unlike 1973, the year the Public Employee Collective Bargaining Act (PECBA) was passed. The original statute was passed in a year of far-ranging legislative reform enacted by an emboldened Democratic majority in the legislature. Similarly, 1995 marked a swing of the political pendulum, with a Republican majority seeking reform in numerous areas. The resulting "Derfler-Bryant" Act, SB 750, marks the first systematic reform of the PECBA since its inception. This year's monograph—*After SB 750*—examines the statutory changes in detail and speculates on the possible outcomes of reform.

We begin the monograph with a overview of the negotiations process that led to passage of the final bill. Henry Drummonds, associate professor of law at Lewis and Clark Law School, first provides us with a historical and political perspective on the *ex ante* veto negotiations process. He then gives a detailed view of the various proposals and counterproposals that were negotiated between the legislature's majority leadership and the governor's office leading to the final version of SB 750. As the governor's chief negotiator on proposed revisions to the PECBA, Professor Drummonds gives a unique look at legislative history in the making and sets forth his view of the final bill's legislative intent.

We then examine the major aspects of the statutory reform in four crucial areas: scope of bargaining issues, new interest arbitration provisions, new supervisory and managerial definitions, and provisions affecting grievance arbitration. Here we have asked advocates and neutrals to dissect the possible repercussions of the new law in some detail, with an eye towards how practitioners might prepare to operate under the revised statute.

Scope of bargaining issues have been at the heart of some of the most contentious litigation over the interpretation of the PECBA since its passage. Just when it may have appeared that the major issues in the area had been settled, SB 750's changes will require the ERB to revisit its measurement of the factors that determine whether a subject of bargaining is mandatory or permissive. Labor attorneys Kathryn Whalen and Paul Gamson comment on the evolution of the balancing test and examine staffing levels and safety issues as an example of how the new statute is likely to affect decisions in scope of bargaining cases.

Some of the most significant and far-reaching changes under SB 750 involve the introduction of a new form of interest arbitration dispute resolution for public safety personnel—Last Best Offer Package (LBOP). Arbitrators John Abernathy and Tim Williams discuss how this may alter the dynamics of the collective bargaining process for police and firefighters. Their article points to the various areas where ERB may need to implement new rules in order to accommodate this new form of arbitration. They also outline some of the potential problems that arbitrators and advocates may face in adopting the new form.

SB 750's revised definition of supervisory employees and its new designation of managerial employee have potential repercussions concerning which public employees will continue to be included in the recognized bargaining units, with full rights to collective bargaining. Management attorneys Nancy and Andrea Hungerford reflect on how the ERB may or may not implement the definitions already used by the NLRB in the private sector in making supervisory and managerial exclusions. They also analyze and report on the first ERB decision under SB 750's new provisions, *Deschutes County Sheriff's Association v. Deschutes County*.

Our final section treats new language under SB 750 that affects the authority of arbitrators in rights arbitration cases. Arbitrator Howell Lankford gives us an overview of the "public policy" standard in grievance arbitration under NLRA case law and then examines in detail some of the more particular provisions under SB 750. He then explores how the ERB and the parties might attempt to apply the new language when dealing with discipline and discharge cases.

We reserved concluding remarks in the monograph for commentaries by two experienced labor and management advocates, Randy Leonard and Lon Mills. They ably comment on the political context of the 1995 reforms and the possible outcomes. Not surprisingly, they differ markedly in how significant they believe SB 750's changes will be for the rights of labor and management in Oregon's public workplaces.

This year's monograph owes a special thank-you to Henry Drummonds and Elizabeth Large and the rest of the *Willamette Law Review* staff for their permission to reprint Professor Drummonds article, which is scheduled to appear in the next edition of the *Review*. Their cooperation in making the article available to our PERC audience is greatly appreciated.

Special thanks also to this year's monograph editorial board members, Don Brodie from the UO Law School and LERC Associate Professor Emeritus Jim Gallagher. As always, their comments were quite helpful in preparing the monograph.

And finally, my personal thanks to the University of Oregon staff who helped put together the monograph; especially Priscilla Earls in the LERC office and George Beltran's staff at the University of Oregon Publications office.

Marcus Widenor
Editor

A Case Study in the ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law

Henry H. Drummonds[1]

[Picture the President] living in a modest apartment, with perhaps one secretary to answer mail; that is where one appropriation bill could put him [sic], at the beginning of a new term. I saw this [President] as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with [only] those countries where Congress would pay for an embassy. But he [sic] was still vetoing bills.[2]

I. INTRODUCTION

In 1995, Oregon's Democratic Governor, John Kitzhaber, set a modern record by vetoing 52 bills passed by the Republican-dominated Legislative Assembly.[3] These actions constituted a traditional use of the veto power under the constitutional separation of powers doctrine. However, one bill the Governor signed into law demonstrated another aspect of the veto power, its *ex ante*[4] use to shape legislation into a form acceptable to the Executive. Senate Bill 750[5] (also known as the Derfler-Bryant Act)[6] constitutes the first comprehensive revision of

The Labor Education and Research Center thanks the *Willamette Law Review* for permission to reprint Professor Drummonds' article.

[1] The author served as an agent of Oregon Governor John Kitzhaber in veto negotiations leading to the final version of the Derfler-Bryant Act. The author wishes to thank his colleagues, Professor Edward Brunet and Dean James Huffman, for their comments on an earlier draft of this article, as well as his research assistants Thomas Doyle and Stacy Sassaman, who never failed to find the desired material on often short notice.

[2] Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW AND CONTEMP. PROBS. 87, 89.

[3] Jeff Mapes & Ashbel S. Green, *Senate Tries To Brake Light Rail Crash*, THE OREGONIAN, July 29, 1995, at A1. Only Governor Oswald West, in 1911, vetoed more proposed legislation (sixty-three bills) BRENT WALTH, FIRE AT EDEN'S GATE—TOM MCCALL AND THE OREGON STORY 184 (Oregon Historical Society Press 1994). Although Governor Kitzhaber vetoed more than four dozen bills, he signed more than 750 into law. Letter from Bill Wyatt, Chief of Staff, Governor John Kitzhaber, to author (Sept. 20, 1995) (on file with author). One of the vetoes was a line item veto of an appropriation. *Id.*

[4] Ex ante literally means "from ahead" or "from what might lie ahead." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 496 (1989). As used in this Article, the ex ante veto power comes into play when the executive declares an intention to veto proposed legislation unless agreement is reached on significant issues prior to final passage by the legislature.

[5] S.B. 750, 68th Leg., 1995 Or. Laws 286.

[6] 1995 Or. Laws 286.

the Public Employee Collective Bargaining Act (PECBA)[7] since its enactment twenty-three years ago.[8] As the following review reveals, the Derfler-Bryant Act presents a classic example of the second, less visible use of the veto power. Using this power, the Executive functions "as a third branch of the Legislature."[9]

The following summary and analysis is offered with three objectives: (1) to make general observations about the theory and practice of the *ex ante* veto negotiations process, (2) to illuminate the intent of the Governor and veto negotiators as to the various changes in the collective bargaining and related laws, and (3) to elucidate the process by which the Derfler-Bryant Act found its final form.

This Article contains eight parts. Part I sets forth a theoretical perspective on the *ex ante* veto negotiations process.[10] This discussion demonstrates that, contrary to more simplistic notions about the separation of powers doctrine, the Executive plays a critical and legitimate role not only in executing statutory law, but also in making it. Part II discusses the political context in which the Derfler-Bryant Act was initially proposed, modified, and finally agreed upon and enacted.[11] This part also elaborates on the process followed in the veto negotiations. Part III reviews the scope of bargaining issues in the proposed and final legislation.[12] Part IV discusses changes in the bargaining process.[13] Part V examines major revisions in the "end game" aspects of the collective bargaining process.[14] Among these revisions are restrictions on strike and secondary boycott activities for most public employees and changes in the procedures and criteria for interest arbitration for

[7] OR. REV. STAT. §§ 243.650-.795 (1993). S.B. 750 also revised several other statutes. *See infra* Part VII.

[8] 1973 Or. Laws 536. *See generally*, Marcus R. Widenor, *Public Sector Bargaining in Oregon: The Enactment of the PECBA*, 8 LERC MONOGRAPH SER. 1 (1989); Donald W. Brodie, *Public Sector Bargaining in Oregon*, 54 OR. L. REV. 337 (1975). Although earlier Oregon statutes encouraged some collective bargaining (*e.g.* 1963 Or. Laws, 579; Widenor, *supra*, at 1-2), it was not until 1969 that the legislature imposed a theoretical duty to bargain on public employers. 1969 Or. Laws 671; Salem Police Employees Union v. City of Salem, 308 Or. 383, 388, 781 P.2d 335, 337 (1989). The 1969 statute, however, limited the right to strike, contained no unfair labor practice provisions or other enforcement provisions, and was easily evaded by local government employers because the statute applied to them only if the local government had petitioned the newly-created Public Employee Relations Board (now the Employment Relations Board) for determination of a bargaining unit. Widenor, *supra*, at 2-3; Matt Kramer, *New Law On Labor Relations With Public Employees Has "Joker" For Each Side*, THE OREGONIAN, June 28, 1970, at 29. For general discussion of public employee bargaining in Oregon prior to PECBA's adoption in 1973, see Joseph G. Grodin & Mark A. Hardin, *Public Employee Bargaining in Oregon*, 51 OR. L. REV. 5 (1971).

[9] Black, *supra* note, at 88 (quoting Woodrow Wilson, CONGRESSIONAL GOVERNMENT 52 (1884)). In a passage that bears remembering today, Wilson's 19th Century observations added: "The President is no greater than his prerogative of veto makes him, [the President] is, in other words, *powerful rather as a branch of the legislature than as the titular head of the Executive.*" Black, *supra* note, at 88 (quoting Wilson, CONGRESSIONAL GOVERNMENT 260 (1884)) (emphasis added).

[10] *See infra* notes 17-45 and accompanying text.

[11] *See infra* notes 46-77 and accompanying text.

[12] *See infra* notes 78-185 and accompanying text.

[13] *See infra* notes 186-215 and accompanying text.

[14] *See infra* notes 216-278 and accompanying text.

public safety employees forbidden by law from striking. Part VI discusses miscellaneous other changes, including: new restrictions on teacher bargaining units; new definitions for supervisory and managerial exclusions from PECBA; new fee requirements for unfair labor practice cases; new language affecting the enforceability of certain grievance arbitration awards; and creation of a Public Employee Collective Bargaining Task Force.[15] Part VII briefly reviews certain modifications in other laws outside PECBA, including changes relevant to overtime pay and public employees' transfer rights.[16] Finally, Part VIII attempts to draw some general lessons from the *ex ante* veto process from the particular experience of the Derfler-Bryant Act negotiations.[17]

II. THE THEORY OF THE EX ANTE VETO POWER

How did it happen that the final language of the Derfler-Bryant Act was developed, not in legislative hearings or floor debates on amendments, but in private discussions between the Governor, his representatives, and members of the legislative leadership? Moreover, was this process appropriate and consistent with our system of separated powers?

A popular understanding of the separation of governmental powers holds that the legislature makes, the courts interpret, and the executive administers (or "executes") the law.[18] Yet, as the Federal Constitution and its state counterparts clearly reveal, the notion of "separated powers" cannot be applied mechanically and simplistically.

Rather than strictly "separated" powers, our federal and state constitutions enshrine a system of "shared" powers. For example, both the legislature and the executive play a role in executive branch and judicial appointments.[19] Similarly, control of the "purse strings," although initially lying within the control of legislative bodies,[20] also falls within the executive's line item veto power over

[15] See infra notes 279-327 and accompanying text. *See* also S.B. 750, 68th Leg., § 32(1) and (2) (1995). The Governor, Senate President, and Speaker of the House shall appoint members to the Task Force to consider, *inter alia*, "whether statewide salary schedules or bargaining for teachers is appropriate in light of the shift of most funding to the State." *Id.* at § 32(3)(a). The task force shall also study the possibility of further amendments, that would address labor issues for schools, counties, cities, and public safety employees. *Id.* at § 32(3)(b).

[16] *See infra* notes 328-358 and accompanying text.

[17] *See infra* notes 359-363 and accompanying text.

[18] *See, e.g.*, JOHN H. FERGUSON & DEAN E. MCHENRY, THE AMERICAN FEDERAL GOVERNMENT 31-33 (Ninth Edition 1967) (McGraw-Hill); Kilborn v. Thompson, 103 U.S. 168, 190-91 (1880); OR. CONST. art. III, § 1 ("The power of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive . . . and the Judicial . . . ."); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123-24, Vol. 1 (Vintage Books, 1990) ("The President is also the executor of the laws; but he does not really co-operate in making them . . . . He is not, therefore, part of the sovereign power, but only its agent."); *see also* THE FEDERALIST PAPERS, No. 51 (James Madison) (referring to the "necessary partition of power among the several departments").

[19] U.S. CONST. art. II, § 2; OR. CONST. art. V, § 16.

[20] U.S. CONST. art. I, § 7; OR. CONST., art. IV, §§ 1, 17, 18; and art. III, §2; and art. IX, §§ 3, 4, 7.

appropriations in most states (including Oregon).[21] Indeed, in some states, the governor's line item veto power over appropriations extends to the "amendatory veto" by which a governor may "condition his [sic] *approval* of an appropriations bill by returning it to the legislature with suggestions for change."[22] Additionally, the executive exercises a role in the legislative process in other ways, such as in recommending legislation or calling the legislature into extraordinary session.[23]

Nowhere does this system of "shared" power find clearer expression in the constitutional scheme than in the power to veto general legislation.[24] As Lawrence Tribe points out: "[T]he [federal] Constitution on its face contemplates that the Executive will perform a `*legislative*' function when exercising the power to veto legislation."[25] Tribe's point is not new. As then-Professor Woodrow Wilson said in 1884: "[I]n the exercise of the power of veto, which is of course, beyond all comparison [the President's] most formidable prerogative, the President acts not as the executive but as a third branch of the legislature."[26] Charles L. Black, writing

[21] *E.g.*, OR. CONST. art. V, § 15, cl. a. Some states give the governor an "item reduction veto" by which the executive can reduce, rather than nullify, a specific appropriation. Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?*, 75 GEO. L.J. 159, 166 n.30 (1986) (listing ten states). *See also* Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 480-83 (1994) (arguing against the line-item veto but in favor of the "reduction-only veto" in the appropriations process). Whatever the precise category of item veto power enjoyed by state governors, the courts interpret these powers more or less broadly by defining the dimensions of "appropriations item." Fisher & Devins, *supra*, at 169.

The "line item" veto has proven particularly controversial at the federal level. *See generally*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 261, 266-67 (2d ed. 1988); Fisher & Devins, *supra*, at 185-96 (arguing that the item veto is inappropriate at the federal level because, among other things, it "may actually diffuse responsibility by constantly shifting the onus of action to another governmental body. . . ."). For example, relying on a veto, a member of Congress might vote for a popular provision although the legislator knew the provision would prove disastrous if put into effect. Other scholars have supported a federal line-item veto over appropriations. *See, e.g.*, Glen O. Robinson, *Public Choice Speculations On the Item Veto*, 74 VA. L. REV. 403 (1988).

[22] Fisher & Devins, *supra* note, at 166 n.33 (emphasis added) (listing seven states). In contrast, the Oregon Constitution provides for "written objections" to bills when the governor does not sign them. OR. CONST. art. V, § 15, cl. b(1); *see also*, U.S. CONST. art. I, § 7 (requiring the President to present his objections when returning bills to Congress unsigned).

[23] *E.g.*, OR. CONST. art. V, § 11 ("He shall from time to time . . . reccommend (sic) such measures as he shall judge to be expedient"); OR. CONST. art. V, § 12 (the governor "may on extraordinary occasions convene the Legislative Assembly . . . and shall state . . . the purpose for which they have been convened").

[24] The veto power springs from ancient antecedents in Roman and English law. The word "veto" ("I forbid") derives from early Roman law; plebeian tribunes carried power to cancel commands of the consuls which infringed on the rights of citizens. In England, the king or queen retained the right to decline to accept "bills" passed by Parliament until the upheavals of the late 17th Century. J. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473 (1917).

[25] TRIBE, *supra* note, at 19 (emphasis added). The veto power, of course, finds explicit expression as part of the legislative process in the U.S. Constitution. U.S. CONST. art. I, § 7. The Oregon Constitution similarly gives the governor veto power in the legislative process. OR. CONST. art. V, § 15, cl. b. Indeed, in Oregon the governor possesses line item veto power in appropriations matters and over provisions declaring that legislation will take affect as an emergency. OR. CONST. art. V, § 15, cl. a.

[26] Black, *supra* note, at 88.

a century later, gently criticized Wilson for not going far enough. In Black's view, the veto power often makes the President "the *most* important part of Congress."[27]

This sharing of power rests on the realization that each branch of government must be tempered by the "*interdependence* without which independence can become domination."[28] Power sharing, rather than strictly separated realms of authority, in fact constituted a central theme in the ideological premises underlying the American Revolution.[29] From this theme arose the civics textbook notion of "checks and balances."[30]

This formal interdependence of the legislative and executive branches in our constitutional texts finds informal expression, as well. "The threat of [a] . . . veto might be more politically influential than its actual use. . . . Informal negotiations by the Governor and his assistants can result in the deletion of items that will never be recorded in the books as a veto."[31] So it was with the 1995 Derfler-Bryant Act.

In negotiating substantial revisions and numerous deletions from the initial and first amended versions of S.B. 750, Governor Kitzhaber used the veto power for its most obvious modern purpose: "to prevent enactment of harmful [in the Executive's view] laws."[32] Beyond this defensive purpose, however, the Governor

[27] Black, *supra* note, at 89 (emphasis added). Black's argument assumed the absence of an energetic, principled, resistant Congress. Black, *supra* note, at 89.

[28] TRIBE, *supra* note, at 18.

[29] *E.g.*, THE FEDERALIST NO. 39, at 250-57 (James Madison) (Jacob Cooke ed., 1961) (central governments and state to share power); THE FEDERALIST NO. 34, at 209-15 (Alexander Hamilton) (Jacob Cooke ed., 1961) (power of taxation to be shared); THE FEDERALIST NO. 66, at 445-46 (Jacob Cooke ed., 1961) (bicameral sharing of power of impeachment); THE FEDERALIST NO. 9, at 51 (Jacob Cooke ed., 1961) (system of "ballances [sic] and checks"); THE FEDERALIST NO. 47, at 323-24 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 51, 347-53 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 10, 56-65 (Jacob Cooke ed., 1961) (control of faction).

[30] *E.g.*, FERGUSON & MCHENRY, *supra* note, at 31-33 ("Separation of powers is implemented by checks and balances. To mention only a few: The Federal and nearly all state legislatures are bicameral; laws can be passed only by legislatures, but the executive can usually veto them; executive appointments require legislative confirmation; treaties negotiated by the President must be approved by the Senate; and the courts are checked, for example, by possible impeachment of the judges and denial of funds.").

[31] Fisher & Devins, *supra* note, at 195. Of course, the *ex ante* use of the veto power to change legislation is not a new development. *e.g.*, Fairlie, *supra* note, at 492 ("In recent years many state governors have exerted a much more active influence on state . . . legislation than is indicated by the record of bills vetoed.").

[32] J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 446 (1990) (citing *Notes of Debates in the Federal Convention of 1787*, 629 (James Madison); THE FEDERALIST NO. 73, at 492, 495 (Alexander Hamilton) (J. Cooke ed., 1961)). Protection of the executive from encroachment by the legislative branch constitutes a second purpose of the veto power derivable from the FEDERALIST PAPERS. Sidak & Smith, *supra*, at 446.

It should be noted, however, that "distrust of the governor's prerogatives" caused some states to omit the veto power during the earlier days of the Republic. Only two states provided the executive with a veto power before 1789; 25 years later just half the states had approved this power. F. Prescott, *The Executive Veto In American States*, 3 W. POL. Q. 98, 98 (1950). By 1950, the veto power had been conferred in every state except North Carolina. *Id.* Oregon conferred the power in its original constitution of 1859, OR. CONST. art. V, § 15

also wielded the *ex ante* veto power *offensively*: (1) to cause changes in the structure of public employee bargaining and related statutes that, in the Governor's view, serve the public interest;[33] and (2) to promote the Governor's larger legislative agenda (given the repeatedly stated priority the Republican leadership placed on enacting some version of S.B. 750). Thus, the Derfler-Bryant Act became a "collaborative process"[34] between the Governor and Republican leadership, one

(amended 1916); item veto power over appropriations and emergency clauses was conferred in 1916. OR. CONST. art. V, § 15a.

Although some room for debate exists, the early federal veto practice reflected the same cultural distrust of executive power which underlay the early reluctance in the sister states. As Charles Black has convincingly argued, the original understanding of the federal veto power was: (1) to "give the President the means of protecting his own office from congressional encroachment," and, perhaps, (2) to allow the President to fulfill the oath of office by preventing legislation thought to be unconstitutional. Black, *supra* note, at 89. The "original understanding [of Framers was] that the veto would be used only rarely, and certainly not as a means of policy control over the legislative branch, on matters constitutionally indifferent and not menacing the President's independence." *Id.*at 90. For a half century, eight Presidents vetoed only a total of 21 bills (all with, arguably, one of the rationales stated above). Black, *supra* note, at 90-91. When President Tyler began vetoing legislation more frequently and on more explicitly stated policy grounds, he was subjected to an attempt to impeach him led by then-former President John Quincy Adams. *See* Black, *supra* note, at 91.

[33] To illustrate, S.B. 750, as finally enacted, contained "sunshine" provisions which will make the bargaining process for public employees more open. 1995 OR. LAWS ch. 286, § 2 (amending OR. REV. STAT. § 243.672) (elimination of bans on direct communications to governing boards and employees); § 6 (amending OR. REV. STAT. § 243.712) (providing for public disclosure of proposals and "cost summar(ies)" of each party by mediator). *See also* B-Engrossed version of S.B. 750, § 37 requiring labor negotiations to be conducted in executive (i.e., nonpublic) sessions *unless either side requests open* (i.e., public) *meeting*. Although this provision was not included in the final version of S.B. 750, it was embodied in another bill, H.B. 2789, which was enacted. 1995 OR. LAWS ch. 779 (amending OR. REV. STAT. § 192.660). The former law provided for executive sessions if either side requested it. 1995 OR. LAWS ch. 779. Thus, the 1995 Legislature changed the policy from effectively allowing either party to demand negotiations closed to the public to a policy of effectively allowing either party to compel open sessions. Elimination of nonbinding, mandatory fact-finding hearings will make the bargaining process more expeditious and less expensive. Outlawing of secondary boycotts against the private businesses of public representatives will lessen the threat that public officials will make public decisions based on private business interests. Provisions for "win or lose" "interest arbitration" for public safety employees remove the incentive for unions representing such employees to routinely "hold out" for more, as they did under the former law at rates exceeding 700% of the rate for other types of public employees.

[34] As Senator Derfler candidly put it in moving for final passage of the negotiated bill on the Senate floor on June 2, 1995: "The bill we present today is a result of a collaborative effort with the Governor's office. An agreement [with the Governor] has been reached and we are asking for the support of the entire legislature. . . ." *Senate Floor Session*, S.B. 750, 68th Leg., 1995 Or. Laws 286, Tape 190, Side A (June 2, 1995) (statement of Senator Gene Derfler) [hereinafter Senate Floor Session]. *See also*, statement of Representative Watt presenting the bill on final passage in the House of Representatives on June 5, 1995: "[S.B. 750] is a better bill because we have worked closely with the Governor's office in crafting a collective bargaining law which best serves the interest of all three parties involved in public sector negotiations. [We] have spent many hours during the last few weeks with the Governor's office in amending PECBA. . . . The bill we present today is the result of a collaborative effort with the Governor's office. An agreement has been reached. . . ." House Floor Session, S.B. 750, 68th Leg., 1995 Or. Laws 286, Tape 223, Side A (June 5, 1995) (statement of Representative John Watt) [hereinafter House Floor Session].

that reached a "balance"[35] and "fair compromise"[36] that committed both sides to resist more extreme measures.[37]

Accordingly, "[t]he governor's action in approving or vetoing a bill [like S.B. 750] constitutes a part of the legislative process, and the action of the governor upon a bill may be considered in determining legislative intent."[38] However, as will be developed more fully below,[39] most of the intent of S.B. 750 can be derived directly from the statutory language, read in the context of the preexisting case law.[40]

Before turning to the specific provisions of the Derfler-Bryant Act, a further word about the veto negotiations process seems necessary. In the traditional civics book situation, the veto decision is taken *ex post*. That is, the executive decides

[35] As Senator Derfler reported to the Conference Committee which adopted the final version of the enactment on June 1, 1995:

I think the bill that we have today is much better than [earlier versions which had passed the Senate and House] because we have worked not only with the House and Senate leadership but also the Governor's office in crafting a collective bargaining bill and I think the interests of all parties . . . are met. [We] spent the last few days . . . trying to get a balanced bill . . . I think that we reached that position at this point. . . . I think . . . you will find it is going to be an effective bill both for management and labor.

Hearings on S.B. 750 Before the Conf. Comm. on Labor and Gov't Operations, Tape 1, Side A (June 1, 1995) (statement of Senator Gene Derfler) [hereinafter Conf. Comm. Hearings].

[36] Senator Neil Bryant, who with Senator Derfler was the chief spokesperson for the Republican majority during the veto negotiations, explained the compromise as follows on the Senate floor on final passage: "[W]e had weeks of negotiation with the Democratic Governor . . . and his representative, and we shook hands and came to a fair compromise that he is willing to sign." *Senate Floor Session, supra* note, Tape 190, Side B (June 2, 1995) (statement of Senator Neil Bryant).

[37] As Senator Derfler stated in the Conference Committee: "I think if we didn't address this issue during the session perhaps there would be an additional petition out to eliminate [public employee] collective bargaining entirely. . . . I think we have agreed that we would resist any initiative petition that is introduced that would do further damage because I think this does bring balance back into the system." *Conf. Comm. Hearings, supra* note, Tape 1, Side A (June 1, 1995) (statement of Gene Derfler).

[38] NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.05 (5th ed. 1992 & Supp. 1995). *See also* Taplin v. Town of Chatham, 453 N.E.2d 421, 423 (Mass. 1983) ("It is appropriate in construing an ambiguous statute to look to its legislative history, including formal communications from the Governor. . . ."); Skeer v. EMK Motors, 455 A.2d 508, 513 (N.J. Super. Ct. App. Div. 1982) ("Communications from the Executive Branch may be reliable aids to legislative interpretation."); Starkey v. State, 443 A.2d 207, 210 (N.J. Super. Ct. App. Div. 1982) ("The information release by the Office of the Governor clearly shows that . . . the new legislation was to apply to the state retirement plans."); Recreation Lines, Inc. v. Public Serv. Comm'n, 7 A.D.2d 20, 23 (N.Y. App. Div. 1958); Lynch v. State, 19 Wash. 2d 802, 810, 145 P.2d 265, 269 (1944) ("'When referring to what the legislature intended, we must not forget that the governor, when acting upon bills passed by both houses of the legislature, is a part of the legislature, . . . and we cannot therefore consider the intent of the house and senate apart from the intent of the governor'" (quoting Shelton Hotel, Inc. v. Bates, 4 Wash. 2d 498, 506, 104 P.2d 478, 481 (1940)).

[39] *See infra* notes 78-358 and accompanying text.

[40] Portland Gen. Elec. Co. v. Bureau of Labor and Indus., 317 Or. 606, 611-12, 859 P.2d 1143, 1146-47 (1993) ("text" and "context" provide the first guides to legislative intent, followed by "legislative history" and "general maxims of statutory construction"); *see also*, Ecumenical Ministries v. Oregon State Lottery Comm'n, 318 Or. 551, 559-60, 575, 577-78, 871 P.2d 106, 110-11, 119-20 (1994).

whether to veto or sign a proposed enactment after it has passed the legislative body. In this process, particularly where different political parties or majorities control the legislature and the executive office, a form of "chicken" is invited: the legislature may attempt to "log roll" the enactment, loading it with features both undesirable and valued by the executive, forcing a Hobson's choice.[41] If the governor vetoes the measure, she forfeits the perceived value. The legislative majority also forfeits valued features, unless both houses can muster a two-thirds vote to override the veto,[42] an unusual circumstance.[43] On the other hand, if the legislature gauges the governor's tolerance point carefully enough, it will add just the right mix of "value" to induce the governor to sign the bill, while including the maximum number of "undesirable" features acceptable to the Governor, which, of course are desired features to the legislative majority. In this *ex post* situation, the governor may make various declarations about her future intentions, given certain mixes of the "valued" and "undesirable" features, in an effort to steer the mix toward the "valued" elements. No one knows her intentions for sure, however, perhaps not even the governor.

Now consider the *ex ante* model for the veto power. The governor credibly declares a firm intention to veto proposed legislation, unless an express agreement is reached with her on all significant items prior to final passage by the legislature. Now the parties need not operate in the dark, guessing about each other's intentions and tolerance points. In addition, because the parties have ample opportunity to explore each other's perceptions of valuable and undesirable components, they may change the negotiation from a zero-sum game into a non-zero-sum game in which the total satisfaction of both parties is expanded.[44]

In short, the *ex ante* veto negotiations process creates a dynamic that emphasizes the "problem-solving" style of negotiations, searching for "win-win" solutions, as compared to the *ex post* model, which invites a competitive or "distributive" approach that sees gain for one party as loss for the other.[45]

Moreover, the *ex ante* model better recognizes that the *relationship* between the governor and legislative leadership carries positive value. The parties will deal with each other not only regarding the matter at hand, but on dozens, possibly hundreds, of other matters, in the present legislative session, and perhaps in future

[41] "Phrase For No Choice," J. Bartlett, *Familiar Quotations* (15th ed. 1980), p. 917, line 25. The expression apparently originated as follows: "Liveryman Thomas Hobson [1544-1631] obliged customers to take the horse which stood near the stable door" (Richard Steele, *The Spectator*, No. 509, Oct. 14, 1712), p. 917, n.10 J. Bartlett *Familiar Quotations.*

[42] Of course, the legislature can repass a version of the enactment more acceptable to the governor, but in that case the governor has prevailed in the game of "chicken."

[43] In one study of state government, only 22 overrides of 1253 vetoes occurred. The study included some 24,928 bills passed by state legislatures in 1947 in all the states. Prescott, *supra* note, at 103.

[44] *See generally,* ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 2d ed. 1991).

[45] *See generally,* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 74-101 (1989). For a leading work advocating problem-solving as a theoretical model of negotiations, see generally FISHER & URY, *supra* note .

sessions. Nothing angers a legislator more than an *unanticipated* veto of legislation valued by the lawmaker.[46]

Of course, the problem-solving or "collaborative" model for *ex ante* veto negotiations assumes that both sides sincerely desire some legislation. If the governor *wants* to veto legislation to demonstrate power or ideological purity to some faction, no veto negotiations process can change that reality. Conversely, if the legislative majority, with an eye to upcoming elections, is more interested in scoring a political victory by forcing a veto, the *ex ante* process likely will not yield the desired result. Fortunately, in the case of the Derfler-Bryant Act, both sides in the negotiations sought a compromise.

III. THE POLITICAL CONTEXT AND THE VETO NEGOTIATIONS PROCESS

A. The Political Context

As Marcus Widenor ably documented several years ago, the original PECBA was adopted in 1973 in a climate of increased public employee militancy and a rising tide of public employee strikes, both across the nation and in Oregon.[47] "The militant action of public employee unionists kept the issue at the top of the Legislature's agenda . . ."[48] The legislative policy of PECBA, thus, was "[to foster the] `peaceful adjustment of disputes.'"[49] That policy was to be served by "channel[ing] labor disputes into negotiation and mediation and thereby avoid[ing] the impairment and interruption of public services caused by strikes, lockouts, and other forms of economic warfare."[50] In addition, the "unexpectedly

[46] *E.g.,* Jeff Mapes & Ashbel S. Green, *Senate Tries To Brake Light Rail Crash*, THE OREGONIAN July 29, 1995, at A-1 ("Republican legislators have complained loudly over the past week about [Governor] Kitzhaber's 52 vetoes . . . ."); Ashbel S. Green, *Senate Committee Approves of Kitzhaber's Nominees,* THE OREGONIAN, Sept. 7, 1995, at B-4 ("The Republican-controlled committee . . . has delayed action on 27 [appointments] . . . . Republicans still are smarting over Kitzhaber's modern-record 52 vetoes in July."); Jeff Mapes, *GOP May Veto Appointments*, THE OREGONIAN, July 26, 1995, at C-1 ("Oregon Senate Republicans, angered by Gov. John Kitzhaber's large number of vetoes, may retaliate by rejecting some of his appointments to boards and commissions. Sen. Randy Miller, R-West Linn, said Tuesday he cancelled a confirmation hearing scheduled this week after the Governor decided to veto 52 bills . . .").

[47] Widenor, *supra* note, at 31-33.

[48] Widenor, *supra* note, at 31-33.

[49] Salem Police Employees Union v. City of Salem, 308 Or. 383, 395, 781 P.2d 335, 342 (1989); OR. REV. STAT. § 243.656 (3) (1993). The legislative purpose echoed that of the federal Congress in enacting the National Labor Relations Act for private-sector employees in 1935. 29 U.S.C. § 151 (1988) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes. . . .").

[50] Portland Fire Fighters Ass'n v. City of Portland, 305 Or. 275, 283, 751 P.2d 770, 774 (1988); OR. REV. STAT. § 243.656 (1993). The legislative policy of avoiding work stoppages by providing an orderly process for collective bargaining worked well. Although public employers employed approximately 184,000 workers as of 1993, there had been only 31 public employee strikes between PECBA's adoption in 1973 and April 10, 1995; the 31 strikes over that 22-year period must be compared to more than 3900 contract negotiations by Oregon public

liberal turn of the Legislature in the 1973 session" provided another major impetus for Oregon's landmark public employee bargaining legislation.[51]

In sharp contrast, the 1995 Legislative Assembly was among the most "conservative"[52] in recent memory. A newly elected Republican majority in the Oregon Senate and a continuation of Republican rule in the House of Representatives gave the G.O.P. effective control of the purse strings and most policy initiatives. Among these initiatives were proposals to dramatically "re-balance" PECBA in favor of management. These proposals appeared as S.B. 750 and were more particularly known as the Derfler-Bryant bill. While public-sector unions and their allies in the Democratic minority in the Legislature viewed the changes embodied in S.B. 750 as Draconian,[53] proponents of change argued that judicial and Employment Relations Board (ERB) decisions had tilted public-sector labor law too much against management and the interests of taxpayers.[54] Senate President Gordon Smith was quoted in newspaper stories as insisting that legislative funding for state employee wage adjustments was contingent on final passage of some version of S.B. 750.[55] Because the Republican majority controlled the "purse strings" affecting many programs in addition to state employee salaries, passage of some version of S.B. 750 was thought to be crucial to many budget decisions. The state's most circulated newspaper published a commentator's call for a "rebalancing" of PECBA.[56]

employers over the same period that did not trigger strikes. *See* OREGON EMPLOYMENT RELATIONS BOARD, ANNUAL REPORT 3, 5-6 (1995).

[51] Widenor, *supra* note, at 32. The 1973 Oregon Legislature has been described as "the most progressive, pro-labor session in Oregon history. Widenor, *supra* note, at 18 (quoting then-legislative staff member and current Oregon Attorney General Ted Kulongoski). Tom McCall was Governor during the 1973 legislation; he was associated with a broad variety of policy initiatives. *See generally* WALTH, *supra* note . Usage of the word "liberal" above refers to the tradition of governmental regulatory activism associated generally with the New Deal and Great Society; that is, the term is used in its currently popular and not historical sense.

[52] "Conservative" is used here in the currently popular sense. That is, conservatives seek to reduce governmental intervention in markets, often (but by no means uniformly) are associated with "traditional" views on social issues like abortion and sexual orientation, and in general favor readjustment of public policies to reduce tax and other subsidies for nonbusiness interests.

[53] Senator Randy Leonard [President Portland Firefighters Association] commenting on final passage of S.B. 750: "As my good friend the Minority Leader said in the earlier debate on [the initial version of] this bill, any action taken that is inherently unfair and biased toward working class Oregonians will not stand for long . . . . And I want to say that without the Governor's involvement [in the *ex ante* veto process], this would be much more horrible than that it is [sic]." Senate Floor Session, S.B. 750, June 2, 1995, Tape 190, Side B.

[54] *E.g.*, Senate Floor Session, *supra* note, Tape 190, Side A (June 2, 1995) (statements of Senators Gene Derfler and Neil Bryant).

[55] *E.g.*, Ashbel S. Green, *Kitzhaber, GOP Brass Agree on Collective Bargaining Bill*, THE OREGONIAN, June 2, 1995, at C7. Governor Kitzhaber and House Speaker Clarno denied such linkage. *Id. See also* Gail Kinsey Hill, *House OKs Changing Collective Bargaining*, THE OREGONIAN, May 9, 1995, at A1; Steve Law, *Tax Revolt Fire Re-Ignites With Sizemore Plan*, BUSINESS JOURNAL-PORTLAND, May 12, 1995, at 1.

[56] David Reinhard, *Rebalance Collective-Bargaining Law*, THE OREGONIAN, April 20, 1995, at B6.

Further, the controversy over PECBA reflected decreasing public support for public services and public employees.[57] This diminishing support found expression in passage of the Ballot Measure 5 tax limitation initiative in 1990[58] and passage of the Ballot Measure 8 changes in public employee pensions in 1994.[59] Moreover, as indicated by the comments of Senator Derfler in the conference committee deliberations, many people also believed that failure to pass revisions of PECBA during the 1995 Legislative Assembly would trigger a ballot measure initiative or legislative effort "to eliminate collective bargaining [for public employees]

[57] The decline in support for public services and employees is not surprising. For 20 years real (adjusted for inflation) private-sector wages for most of the U.S. population has been falling. *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 474 n.13 (1993) and sources cited therein. *See also Economic Parity Off In Oregon Job Scene*, THE OREGONIAN, Apr. 24, 1995, B-1 (Oregon now leads national trend toward growing income disparity; blue-collar high-wage manufacturing jobs being replaced due to automation and other structural shifts; even those *keeping* jobs in timber and fishing industry have lost ground to inflation; average lumber wages down 21% since 1978 (adjusted for inflation); 60% of all households in Oregon suffered income decline since 1983; most job opportunities today are in low-end service industry jobs); *Educatin Is No Protection from Wage Squeeze, Report Says*, THE WASHINGTON POST, A-20, Sept. 4, 1994 (Economic Policy Institute Study finds that even wages of college-educated men are falling in 1990s, even though country in period of economic expansion; middle class being "squeezed"; Secretary of Labor Reich recently issued similar assessment and stated *re* Middle Class "most . . . hold jobs but are . . . justifiably uneasy about their own standing and fearful for their children's future"; majority of American worse off economically than they were 20 years ago; problem not that small group of "unskilled" workers undergoing adjustment to new economic order but that 75% of work force without college degree undergoing long-term lowering of wages, benefits, and working conditions); *U./S. Workesr Watch Leisure Time Slip Away*, THE OREGONIAN, E-4, Feb. 17, 1992 (average American worker works 140 more hours per year than average in 1972, reporting on J. Schor, *The Overworked American*; ongoing decline in real wages since 1973; *Public Crucial To State's Higher Education*, Dave Frohnmayer, Guest Editorial, THE OREGONIAN, B-7, Mar. 20, 1995 (vast majority of job *growth* in Oregon 1989-1993 was in managerial/professional category; dramatic decline in blue collar jobs; persons with high school education face declining wages; arguing for funding for Higher Education). For more academic discussion, *see* Drummonds, *supra* at 474, and studies cited in notes 12 and 13. *See also Open Your Pay Envelope and Get A Surprise*, BUSINESS WEEK, Apr. 11, 1994, at 20 (1994 WL 2711006) (average U.S. wages [counting the top 20% whose income is increasing] declined since 1986; *Worker Displacement: A Decade of Change*, U.S. Dep't of Labor, 118 MONTHLY LABOR REV. 45, Apr. 1, 1995 (1995 WL 8758380).

[58] Ballot Measure 5 initiated a "new era" for public employee collective bargaining. *See* Howell L. Lankford, *Oregon Public Sector Collective Bargaining Entering the Third Decade*, 13 LERC MONOGRAPH SER. 11 (1994). Margaret Hallock has explained the new "economics facts of life" under Ballot Measure 5. Margaret Hallock, *Oregon's Tax System and the Impact of Measure 5*, 13 LERC MONOGRAPH SER. 75 (1994). *See also* Ed Ruttledge, *Fallout from Measure 5—The Effects of Ballot Measure 5 on School District Labor Relations*, 13 LERC MONOGRAPH SER. 89 (1994); Tim Nesbitt & Greg Schneider, *State & Local Gov't Bargaining under Measure 5*, 13 LERC MONOGRAPH SER. 127 (1994).

[59] Ballot Measure 8 became the subject of a spate of lawsuits by public employee unions claiming the initiative, which passed by a narrow margin, was unconstitutional for multiple reasons. *E.g.*, Tissue v. State, No. 94C-13963 (Marion Co. Cir. Ct. Case 1994); Morgan v. State, No. 941208563 (Mult. Co. Cir. Ct. Case 1994); State Police Officers Ass'n v. State, No. 94C-14019 (Marion Co. Cir. Ct. Case 1994); Atiyeh v. State, No. 16-95-00123 (Lane Co. Cir. Case 1995); Oregon Salem Police Officers Union v. City of Salem, No. 95C-10338 (Marion Co. Cir. Ct. Case 1995). As of the date of this writing, all of these cases have resulted in declarations that all or part of Ballot Measure 8 is unconstitutional on various grounds. These cases are now before the Oregon Supreme Court under expedited review procedures adopted by the 1995 Legislative Assembly. S.B. 1143, 68th Leg., 1995 Or. Laws 284.

entirely."[60] As Senator Derfler indicated in his report to the conference committee, with passage of the final version of S.B. 750, the Republican leadership agreed to "resist any initiative petition . . . that would do further damage because . . . [the final version of S.B. 750] does bring balance to the system."[61]

B. The Veto Negotiations Process

A brief description of the veto negotiations process may provide context in reviewing Parts III-VII of this Article. As noted earlier, Senators Derfler and Bryant sponsored the initial bill. Because both of these gentlemen served as chairs of powerful legislative committees and worked closely with the legislative leadership,[62] little doubt existed that some version of S.B. 750 eventually would pass both houses. *As initially proposed,* the Derfler-Bryant bill constituted a massive revision of the PECBA.[63] Other sections of the bill sought to amend other statutes affecting public employees,[64] such as the Fair Dismissal Law for school teachers,[65] the public employee "transfer" statutes,[66] and the public employee overtime pay statute.[67]

After forty hours of public hearings on the initial Derfler-Bryant bill,[68] an amended bill passed both the House and Senate by May 8, 1995.[69] Most Republicans voted for the amended bill and most Democrats voted against it.[70] Despite Governor Kitzhaber's firm opposition to many of the bill's provisions,[71]

[60] Conf. Comm. Hearings, *supra* note, Tape 1, Side A (June 1, 1995) (statement of Senator Derfler); Ashbel S. Green, *Kitzhaber, GOP Brass Agree on Collective Bargaining Bill,* THE OREGONIAN, C-7 (June 2, 1995) ("Kitzhaber did say he hoped the will would take the air out of an attempt to refer to the ballot a much harsher limitation of public employee bargaining rights.").

[61] Conf. Comm. Hearings, *supra* note, Tape 1, Side A (June 1, 1995) (statement of Senator Derfler).

[62] Senator Derfler served as chair of the Senate Labor Committee. Senator Bryant served as chair of the Senate Judiciary Committee. Both were appointed by Senate President Gordon Smith, who coordinated his actions with Speaker of the House Bev Clarno throughout the legislative session.

[63] *See* S.B. 750, 68th Leg. §§ 1-11, 23, 30-37 (1995).

[64] S.B. 750, 68th Leg. §§ 12-15, 17, 38 (1995).

[65] OR. REV. STAT. §§ 342.805-.934 (1993).

[66] *Id.* at § 236.605-.650.

[67] *Id.* at § 279.340-.342.

[68] "Over 30 hours of public hearings" were held in Senator Derfler's Labor Committee. Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) (statement of Senator Derfler) (presenting bill for final passage). About 10 hours of additional hearings occurred in the House. House Floor Session, *supra* note, at Tape 223, Side A (June 5, 1995) (statement by Representative John Watt) (presenting the bill for final passage).

[69] S.B. 750, 68th Leg. (1995) (B-Engrossed). There were relatively minor differences in the versions which first passed the House and Senate.

[70] 1995 Regular Session Senate Legislative Calendar (Sixty-Eighth Oregon Legislative Assembly) p. S-116 (Senate vote April 6, 1995—passed 16-13) and p. S-117 (House vote May 8, 1995—passed 42-9) (names of "NO" voters listed).

[71] By letter dated March 21, 1995, Governor Kitzhaber wrote to Senator Derfler stating his objections to the bill in detail. The Governor opposed the strict timelines imposed on bargaining, the elimination of fair share and dues check-off, the radical restrictions on scope of bargaining, the elimination of mandatory interest arbitration and many of the proposed changes in that process, the $1000 per day per employee civil penalty for unlawful strikes, certain limits on arbitration awards involving just cause, many of the proposed changes in the Fair Dismissal Law, the elimination of overtime pay over eight hours per day, and the elimination of public employee transfer rights. Letter from Governor Kitzhaber to Senator Derfler (March 21, 1995) (on file with author). However, the Governor indicated a willingness to seek compromises in many of these disputed areas, and supported certain proposals, including the elimination of mandatory factfinding, some form of managerial employee exemption, the "sunshine" provision repealing the bar on open communications with employees and governing body members, and an "election of remedies" requirement for public school teachers appealing dismissals both through the Fair Dismissal Appeals process and through labor contract grievance procedures. *Id.* Despite these objections, the Republican majority proceeded to pass only a modestly amended version of the initial bill in April (House) and May (Senate).

many of the initial provisions remained intact after amendment. Thus, as detailed below, only modest changes found their way into the bill passed by the House and Senate after the public hearings process. The veto negotiations process began in this setting.

As noted above, relatively minor differences existed in the bills passed by the House and Senate. While the amended bill technically sat in a conference committee during May, Governor Kitzhaber elected to leverage his *ex ante* veto power to attempt to shape the final product coming to his desk. Rather than awaiting the final product of the Republican-controlled legislature and *then* making his veto decision (the traditional *ex post* veto process), the Governor made clear to the Republican leadership that any final bill resembling the initial or amended proposals faced a veto. At the same time, the Governor agreed to sign a modified bill, provided it embodied a negotiated agreement on all terms. At this point, veto negotiations commenced with his office and these ultimately led to an agreement on the final bill. In effect, the Governor became a "third" legislative body.[72]

The Republican leadership agreed to this *ex ante* process. Two preconditions underlay this decision: (1) a two-thirds vote in both houses to override a veto was deemed unlikely; and (2) the Republican leadership placed a high priority on getting a bill passed into law.

Both the Governor and the Republican leadership believed amendments to the PECBA could serve the broader public interest,[73] as well as the interests of public-

[72] *See supra* note 8.

[73] It has become fashionable on both the political left and right to ridicule the notion of a "public interest" or (in Rousseau's term, a "common good." "Progressive-pluralist" voices often pursue their interests through various lobbying organizations and view much of the legislative process as a battle against "business interests." *E.g.,* Frank Michelman, *Laws Republic,* 97 YALE L.J. 1493, 1508 (1988) ("For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own preferences."); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1955). Neoclassical economic conservatives often assume that economic self-interest underlies all rational decision making. *E.g.,* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation,* 92 YALE L.J. 1357 (1983); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1937) (classical economic "liberal" theory now popularly called "conservative" or "neoclassical"). Thus, both "pluralists" and "free market" enthusiasts dispute the notion of "public interest." *See generally* Cass Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988). But the notion of "civic virtue" and a "public interest" that should be the goal of civic and political life has antecedents, in Western culture at least, going back to Aristotle and was a major feature of the ideology underlying the American Revolution. Bernard Bailyn, *What Were the*

sector management, public employees, and public-sector labor unions. Consequently, both sides were motivated to reach agreement.

Although the conference committee consisted of five Republicans and one Democrat,[74] the Governor's office negotiated almost exclusively with Senators Derfler and Bryant. Representative Watt, although a member of the conference committee, participated only in the final negotiation sessions after the other negotiators had already reached agreement on all but a few phrases. Representative Beyer (the only Democratic committee member) and Republican Representative Baum were never present during the veto negotiations, although they were consulted. Senate President Smith worked closely with Senators Bryant and Derfler and was present in the several negotiating sessions.

The Governor was represented throughout the veto negotiations by the author, who consulted closely with the Governor, his staff, and the Attorney General. The Governor and the Attorney General both attended the last negotiation session, which resulted in the final agreement. Because the final bill reflected an extended veto negotiation process and an "agreement" with the Governor that had been acknowledged on the floor of both the House and the Senate,[75] substantive explanations of the agreed-upon language by legislators representing one side in the negotiations should be viewed with caution. As Senator Derfler reported to his Senate colleagues on final passage, "President Smith, Senator Bryant and I have spent countless hours with the Governor's office in amending the bill to balance the interests of employees and employers and the public."[76] Understandably, therefore, efforts to add to the "agreement" by making legislative history on the House and Senate floor on final passage should receive deference only to the extent such history reflects the language of the agreement and the intent of the Governor.[77]

As set forth below, the final agreement reflected compromises and a delicate balancing of public policy judgments. The Governor instructed his veto negotiator to seek changes in the law that would make good public policy without eviscerating the legitimate rights of public employees. For their part, Senators Derfler and Bryant conducted the veto negotiations on behalf of the Republican leadership in a manner that sought to "rebalance" the statutes, but without rigid preconceptions or ideological fervor. At the end of the process, both sides agreed that the final bill improved the PECBA and related statutes, protecting both public

Key Issues In The American Revolution, in MAJOR PROBLEM IN THE FIELD OF THE AMERICAN REVOLUTION (Richard D. Breun, ed. 1992); JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (New York University Press, 1984), 8-9. Many things exist though they are transitory and elusive, a broader public or community interest, for example.

[74] The Republicans were Representatives Baum and Watt, and Senators Bryant, Derfler, and Senate President Smith. The Democrat was Representative Beyer. Conf. Comm. Hearings, *supra* note, Tape 2, Side A (June 1, 1995).

[75] *See* statements of Senator Derfler and Representative Watt, *supra*, note 33.

[76] Senate Floor Session, *supra* note, Tape 190, Side A (June 2, 1995) (statement of Senator Derfler) (presenting bill for final passage).

[77] *See supra* notes 33-37 and accompanying text.

employees and public-sector management, while giving paramount weight to the legitimate interests of the taxpaying public.

While both sides consulted from time to time with various interest groups (public-sector labor unions, the school boards' association, local government groups, etc.), the veto negotiators declined to become mere messengers for these interested parties. Instead, the Governor and the Republican leadership took responsibility to define the balance of public interest determinations, often ignoring the political reaction from these "vested interests" (or, as the framers of our American government termed them two centuries ago, "factions").[78]

IV. CHANGES IN THE SCOPE OF BARGAINING

To understand the veto negotiations involving the Derfler-Bryant bill, one must understand the changes proposed in the initial bill and in the modestly amended bill passed by both houses of the Legislative Assembly and sent to conference.

A. Scope of Bargaining in Initial Bill

The initial bill proposed radical restrictions on the scope of public sector collective bargaining.[79] Because the scope of mandatory bargaining constitutes the "front door" of the collective bargaining process, limitations on the scope of the initial bill were clearly the most significant changes. If subjects never enter the "front door" of collective bargaining, the rest of the bargaining process and "end game" procedures become irrelevant to those subjects.

In the initial bill, only "wages, hours, health insurance *premiums*, holiday *pay*, vacation *pay* and grievance procedures" would remain subject to a duty to

[78] THE FEDERALIST No. 10, 56-65 (James Madison) (Jacob Cooke ed. 1961).

[79] Prior to S.B. 750, the scope of mandatory bargaining under the PECBA included, but was "not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." OR. REV. STAT. § 243.650(7) (1993), *amended by* S.B. 750, 68th Leg., 1995 Or. Laws 286 § 1(7). Two broad readings were given to this language. First, the "catch-all" phrase "other conditions of employment" was interpreted by the Employment Relations Board, applying a balancing test, to include such things as: safety (International Ass'n of Fire Fighters, Local 314 v. City of Salem, 68 Or. App. 793, 684 P.2d 605 (1984)); due process in evaluations (Springfield Educ. Ass'n v. Springfield Sch. Dist., 290 Or. 217, 621 P.2d 547 (1980)); workload (OPEU Local 5-3 v. Oregon, 10 PECBR 51 (1987)); teacher class size (Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992); teacher student contact time (Gresham Grade Teachers Ass'n v. Gresham Grade Sch. Dist. No. 4, 52 Or. App. 881, 630 P.2d 1304 (1981)); order of layoff and recall (Eugene Educ. Ass'n v. Eugene Sch. Dist. No. 4J, 6 PECBR 4849 (1981)); "just cause" for discipline and discharge (Eugene Educ. Ass'n v. Eugene Sch. Dist. 4J, 1 PECBR 446, 448 (1975)); and subcontracting (Foundation of Or. Parole and Probations Officers v. Corrections Div., 7 PECBR 5649 (1983), *recons.* 7 PECBR 5664 (1983).

Second, in interpreting and applying the subjects expressly listed in the statute (other than the catch-all phrase "other conditions of employment"), the balancing test does not apply; any proposal which concerns or relates to such a subject is mandatory. Portland Fire Fighters Ass'n, Local 43, IAFF v. City of Portland, 305 Or. 275, 285, 751 P.2d 770, 775 (1988). Thus, for example, limits on the number of employees who can be on vacation during desirable periods of the year were deemed to be a "matter concerning" vacations notwithstanding the impact on "staffing," a merely "permissive" subject of collective bargaining. *Id.*

bargain.[80] Any subject not specifically *included* fell expressly outside the scope of mandatory bargaining.[81] Further, even if a proposal fell within the narrow category of enumerated subjects, it still would fall outside the scope of mandatory collective bargaining if it "result[ed] from an exercise of governmental policy-making responsibility or the impact thereof."[82] Under the initial bill, traditional subjects of collective bargaining such as the amount of vacation, number of holidays, sick leave, pension entitlements, the existence and benefit structure of medical insurance plans, discharge and discipline standards and procedures, layoff and recall rights, subcontracting, and workload no longer would have been bargainable on a mandatory basis.[83] Indeed, even a proposal on "wages and hours" arguably could have been nonmandatory if the subject in controversy resulted "from an exercise of governmental policy-making responsibility or the impact thereof."[84] Finally, a proposal would no longer be mandatory if it were merely a "matter concerning" an enumerated subject.[85]

Additionally, the initial Derfler-Bryant bill provided that "[t]he use of volunteers to provide services shall not be considered contracting out."[86] Apparently offered in response to ERB decisions that required public employers to bargain over the use of volunteers, this proposal appears to have missed its mark. While ERB precedents did hold that "contracting out" could be a mandatory bargaining matter if a significant and immediate or potential impact on employee jobs, hours, or pay resulted, many of those cases did not involve volunteers.[87] Further, the leading case holding that use of volunteers could trigger a bargaining duty rested not only on a "sub-contracting" theory, but also on the theory that the use of volunteer reserve officers could substantially affect the *safety* of regular police officers.[88] Therefore, by specifying that the use of "volunteers" could not be considered "sub-contracting" under the PECBA, the proposal ironically implied

[80] S.B. 750, 68th Leg. § 1(7) (1995) (proposing to amend OR. REV. STAT. § 243.650 (1993)) (emphasis added).

[81] S.B. 750, 68th Leg. § 1(7) (1995) (proposing to amend OR. REV. STAT. § 243.650 (1993)) ("Employment Relations" does not include any subject not specifically enumerated in this subsection . . . .").

[82] S.B. 750, 68th Leg. § 1(7) (1995).

[83] Subjects which are not "mandatory" matters of collective bargaining may be "permissive" subjects of bargaining. Permissive subjects are fully bargainable only with the mutual consent of management and the union. *See, e.g.*, Salem Police Employees Union v. City of Salem, 308 Or. 383, 390-91, 781 P.2d 335 (1989) (questioning case law distinction between permissive and mandatory); Springfield Educ. Ass'n v. Springfield Sch. Dist., 1 PECBR 347 (1975), *aff'd in part* 24 Or. App. 751, 547 P.2d 647 (1976), *recon.* 25 Or. App. 407 (1976), 549 P.2d 1141, *aff'd*, 290 Or. 217, 621 P.2d 547 (1980). *See generally* Kathryn T. Whalen and Les Smith, *Oregon's Scope Bargaining: From Schools to Public Safety*, 6 LERC MONOGRAPH SER. 1, 4 (1987).

[84] S.B. 750, 68th Leg. § 1(7) (1995) (proposing to amend OR. REV. STAT. § 243.650 (1995)).

[85] *See supra* note 82.

[86] S.B. 750, 68th Leg. § 10 (1995) (proposing to amend the general collective bargaining statutes (OR. REV. STAT. §§ 243.650-.782 (1993))).

[87] Federation of Or. Parole and Probation Officers v. Corrections Div., 7 PECBR 5649 (1983).

[88] Salem Police Employees Union v. City of Salem, 308 Or. 383, 387 n.4, 781 P.2d 335, 337 n.4 (1989).

that sub-contracting, in situations not involving volunteers, would continue to be a mandatory subject of collective bargaining.[89]

Senators Derfler and Bryant proposed elimination of the authority for "dues check-off," the procedure by which employees authorize their employer to remit their union dues directly to the union.[90] In addition, the initial version of the Derfler-Bryant bill would have repealed completely the PECBA's authorization for fair-share agreements requiring nonmembers to make in-lieu-of-dues payments to the union.[91] Such "union security" agreements are common in both public and private sector agreements and have been authorized under the PECBA since 1973.[92] Both the U. S. Supreme Court and commentators recognize the legitimacy of such agreements because the union carries a duty of fair representation of union members and nonunion members alike; without "fair-share" or equivalent payments, a "free-rider" problem exists.[93] The accepted view holds that the union

[89] On the other hand, the explicit scope of bargaining provisions in the initial version of the Derfler-Bryant bill seemed clearly to limit mandatory bargaining to economic matters. S.B. 750, 68th Leg. § 1 (1995) (proposing to amend OR. REV. STAT. § 243.650(7) (1993) and proposing to add OR. REV. STAT. § 243.650(15)).

[90] S.B. 750, 68th Leg. § 38 (1995) (proposing repeal of OR. REV. STAT. §§ 243.776 and 292.055 (1993)). While "dues check-off" is a voluntary process, automatic deduction of dues makes collection an easier process with less potential for arrearages and abrasive interactions with union members.

[91] S.B. 750, 68th Leg. §§ 2, 3, 11 (1995) (proposing to amend OR. REV. STAT. §§ 243.66, 243.672 (1993) and the general collective bargaining statutes (OR. REV. STAT. §§ 243.650-.782 (1993))). Such agreements are authorized in the PECBA under OR. REV. STAT. §§ 243.666(1), .650(10) (1993). Several safeguards exist to protect the rights of non-members subject to fair-share agreements. First, religious objectors find protection in a provision allowing them to contribute in-lieu-of-dues payments to a charity rather than the union. OR. REV. STAT. § 243.666(1) (1993); Gorham v. Roseburg Educ. Ass'n, 39 Or. App. 231, 592 P.2d 228 (1979). Second, a majority of employees may exercise a form of line-item veto of fair-share agreements by "deauthorizing" a negotiated fair-share agreement in a special ERB-conducted election. OR. REV. STAT. § 243.650(10) (1993); Oregon City Fed'n Teachers v. Oregon City Educ. Ass'n, 36 Or. App. 27, 584 P.2d 303 (1978). Third, "political objectors" may require that their "fair-share" payments be utilized only for representational activities and not for political or ideological causes unrelated to the bargaining unit. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Carlson v. AFSCME, 73 Or. App. 755, 700 P.2d 260 (1985); Gregory Hendrix, Comment, *Public Sector Union Security in Oregon and Washington: Political and Religious Exceptions to Fair-Share Agreements*, 19 WILLAMETTE L. REV. 75 (1983). Fourth, "fair-share" payments require an agreement with the public employer and can be enforced only during the term of such an agreement. OR. REV. STAT. § 243.666(1) (1993); AFSCME v. City of Salem, 11 PECBR 422 (1989); N. HUNGERFORD, A. HUNGERFORD, & B. BISCHOF, OREGON LABOR LAW TODAY 4.38 (1995). Fifth, the union owes a duty of fair representation to a non-member included in the bargaining unit, whether or not the unit is covered by a fair-share agreement. *E.g.*, Elvin v. OPEU, 313 Or. 165, 832 P.2d 36 (1992); Carlson v. AFSCME, 73 Or. App. 755, 700 P.2d 260 (1985). Finally, a fair-share agreement must cover all members of a bargaining unit equally, and a union cannot lawfully "gerrymander" the reach of such an agreement. Stevens v. OPEU, 82 Or. App. 264, 728 P.2d 70 (1986).

[92] 1973 Or. Laws 536, § 10(7).

[93] *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 526 (1991) ("We have found such arrangements to be justified by the government's interest in promoting labor peace and avoiding the `free rider' problems that would otherwise accompany union recognition."); Patricia N. Blain, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 230 (1995); Brodie *supra* note, at 365-66.

must have the ability to "tax" nonmembers for this service via a fair-share agreement.[94]

Notwithstanding this consensus in the courts and in academia, fair-share and other forms of union security agreements continue to raise troubling philosophical and legal issues. To require an employee who chooses *not* to join a union to pay money to a private organization not of her choosing goes against an intuitive belief in our culture that employees possess a "right to work" free of such obligations. Since the 1947 Taft-Hartley Act,[95] federal private-sector labor law authorizing such agreements allows the states to override that authorization by enacting "right to work" laws.[96] Twenty-one states have enacted such legislation.[97] Not surprisingly, the percentage of unionized employees in these "right to work" states averages less than half the percentage of unionization in states allowing union security or fair-share agreements.[98]

Taken as a whole, the initial scope of bargaining proposals threatened the demise of the collective bargaining process that had worked to head off strikes and other disruptions of services in more than 99.9% of public employee contract negotiations in Oregon for nearly a quarter of a century.[99] On the other hand, a perception lingered that some public-sector unions, particularly in teacher units, were forcing inappropriate issues to the bargaining table.[100] Unfortunately, the proposed changes applied across the board to all types of public-sector unions. Although some union officials, particularly those representing public-safety employees, seemed mesmerized by "end game" issues (for example, interest arbitration), as a practical matter, the collective bargaining process could hardly serve its historical purpose if disputes about workload, medical and pension plans, vacations, job security, and union security issues were excluded.

[94] *Lehnert*, 500 U.S. at 526 ("We have found such arrangements to be justified by the government's interest in promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany union recognition."); Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 302-03 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977); Carlson v. AFSCME, 73 Or. App. 755, 700 P.2d 260 (1985); *see generally*, Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 230 (1975) (concluding, *inter alia*, that "[p]ublic policy considerations overwhelmingly support the authorization of fair share agreements. . . ."); Brodie, *supra* note, at 365-66.

[95] 29 U.S.C. §§ 171-144, 171-197 (1993).

[96] National Labor Relations Act, § 14-B, 29 U.S.C. § 164(b) (1988). Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (1963). Although the NLRA nominally allows agreements which require union membership after 30 days of employment (*i.e.*, the "union shop"), U.S. Supreme Court case law limits the required membership under the NLRA to the "financial core" obligations of paying dues; this effectively makes such agreements into "fair-share" or "agency shop" agreements. *E.g.*, NLRB v. General Motors Corp., 373 U.S. 734 (1963).

[97] ARCHIBALD COX ET. AL., CASES AND MATERIALS ON LABOR LAW 1117 (11th ed. 1991).

[98] *See e.g.*, BARRY T. HIRSCH & D. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK 1994 (1995).

[99] Oregon Employment Relations Board, *Annual Report* 5-6 (1995) (summary of negotiations results 1974-1993; 3957 contracts mediated; strikes occurred in 31; many additional contracts settled without mediation).

[100] Statements of Senator Derfler to author.

B. Scope of Bargaining in Amended Bill Sent to Conference

The amended, or B-Engrossed, version of the Derfler-Bryant Act acceded to the Governor's insistence that authorization for fair-share and dues check-off continue.[101] Although some broadening of the scope of bargaining language appeared in the similar versions passed by the House and Senate and sent to the conference committee in May, the scope of mandatory bargaining remained vastly restricted. To the initial short list of mandatory economic issues, the B-Engrossed version of the proposal added: "discipline or discharge of nonprobationary employees, sick leave, layoff and recall, personal safety equipment for police officers and firefighters, and issues which directly affect the on-the-job safety of employees."[102] However, no other subjects required bargaining and the list of mandatory subjects remained exclusive. For example, workload, the *number* of vacation days and holidays, the *existence* and scope of medical insurance plans, and pensions still fell outside the mandatory bargaining obligation. Even the limited list of mandatory items still would be trumped if a subject resulted "from an exercise in governmental policy-making responsibility or the impact thereof."[103]

Additional restrictions on the scope of bargaining appeared in another section of the amended bill sent to conference in May. While "discipline or discharge of non-probationary employees" had been added as a generally mandatory subject of bargaining, it did not apply to tenured teachers.[104] Additionally, direct on-the-job safety issues were not to include "any matter *concerning or affecting* duty assignments, staffing levels or class size."[105] The amended bill also added new

[101] *See generally* S.B. 750, 68th Leg. (1995) (B-Engrossed) (removing §§ 2 and 11 from the initial bill); *see also* S.B. 750, 68th Leg. § 3 (1995) (B-Engrossed) (leaving intact relevant portions of OR. REV. STAT. § 243.672 (1993)); S.B. 750, 68th Leg. § 36 (1995) (B-Engrossed) (amending the initial bill so as to not repeal OR. REV. STAT. §§ 243.722, 292.005 (1993)). S.B. 750 aside, the national "right-to-work" debate may soon revisit Oregon. In *Dale v. Kulongoski*, the Oregon Supreme Court reviewed and modified a ballot title for a proposed constitutional initiative measure that would ban "fair-share" agreements. 321 Or. 108, 894 P.2d 462 (1995). The supreme court modified the Attorney General's proposed ballot title to more explicitly state that the proposed initiative measure would "ban requiring public employees to pay share of union representation costs"; the court further amended the proposed "summary" of the initiative to explicitly state that under the measure, "unions must represent [nonunion] employees without charge." *Id.* at 115, 894 P.2d at 465.

[102] S.B. 750, 68th Leg. § 1(7) (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.650(7) (1993)).

[103] S.B. 750, 68th Leg. § 1(7) (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.650(7) (1993)).

[104] S.B. 750, 68th Leg. § 1(7)(a) (1995) (B-Engrossed) (proposing to add OR. REV. STAT. § 243.650(17)(a)). S.B. 750, 68th Leg. §§ 1(7) and 13 (1995) (proposing to amend ORS 342.850 (1993) to add a new subsection (9) which provided that disputes arising under a collective bargaining agreement "relating to just cause . . . may only be made to the district school board," and which further provided that the courts, arbitrators, and ERB retained no jurisdiction over such disputes).

[105] S.B. 750, 68th Leg. § 1(17)(b)(C) (1995) (B-Engrossed) (emphasis added). These restrictions effectively would overrule judicial and ERB precedent establishing that class size, manning requirements for fire trucks, and vacation scheduling were mandatory subjects of collective bargaining. *E.g.*, Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992); Portland Fire Fighters Ass'n Local 43 v. City of Portland, 305 Or. 275, 751 P.2d 770 (1988); International Ass'n of Firefighters, Local 314 v. City of Salem, 68 Or. App. 793, 684 P.2d 605 (1984).

language specifying that the use of "reserve police personnel that does not require layoff shall not be considered contracting out for services."[106] This new language appeared to reverse at least part of the holding in the *Salem Police Employees Union* case,[107] which concluded that a reserve officer program constituted a mandatory subject of bargaining.

Even with the House and Senate changes creating the amended bill, the version of the Derfler-Bryant bill sent to the conference committee in May still entailed a major curtailment of the subjects and workplace issues resolvable through the processes of collective bargaining. This curtailment threatened to diminish the PECBA as a mechanism for the peaceful resolution of labor disputes through collective bargaining. Still, some changes in the scope of bargaining appeared to be inevitable in a mutually agreed-upon bill.

C. Scope of Bargaining in Final Bill That Emerged from the Veto Process

The veto negotiators adopted a completely new approach on the scope of bargaining and totally disregarded the earlier versions of S.B. 750 described above. Five basic principles underlay the final agreement:[108] (1) restoration of (i) the broad

[106] S.B. 750, 68th Leg. § 10 (1995) (B-Engrossed) (proposing to amend the general collective bargaining statutes (OR. REV. STAT. §§ 243.650-.782 (1993))).

[107] Salem Police Employees Union v. City of Salem, 308 Or. 383, 781 P.2d 335 (1989). As discussed earlier, however, ERB's decision that implementation of such a reserve police officer program constituted a mandatory subject for good faith bargaining rested not only on a "subcontracting" rationale, but also on a safety impact rationale, *id.* at 387 n.4, 781 P.2d at 337 n.4.

[108] The final scope of bargaining language provides as follows:

> (7)(a) `Employment relations' includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.
>
> (b) `Employment relations' does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to the effective date of this 1995 Act.
>
> (c) After the effective date of this 1995 Act, `employment relations' shall not include subjects which the Employment Relations Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment.
>
> (d) `Employment relations' shall not include subjects that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment.
>
> (e) For school district bargaining, `employment relations' shall expressly exclude class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers,the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Site Councils established under ORS 329.705, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.
>
> (f) For all other employee bargaining except school districts, `employment relations' expressly excludes staffing levels and safety issues (except those staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.
>
> S.B. 750, 68th Leg., 1995 Or. Laws 286 § 1(7) (codified at OR. REV. STAT. § 243.650(7) (1995)).

definition of scope of bargaining from then-current law, including a nonexclusive list of expressly enumerated subjects, (ii) the general catch-all phrase "other conditions of employment," and (iii) the broadening language that "matters concerning" those subjects were also included; (2) specifically excluded subjects; (3) statutory incorporation by a grandfather clause of all topics declared permissive in prior case law; (4) recognition of ERB's continuing authority to apply the balancing test[109] to decide when a subject falls within "employment relations" as a "condition of employment"; and (5) addition of an express *de minimus* exclusion from the duty to bargain.

1. Restoration of Current Language on Scope of Bargaining

The broad language of the existing law was restored as a baseline. This approach resuscitated the concept of a nonexclusive list of specifically enumerated subjects, coupled with the general catch-all phrase "other conditions of employment." The veto negotiators were well aware that, under this pre-existing language and Supreme Court case law, the catch-all phrase "conditions of employment" (but not the expressly enumerated subjects) was subject to a balancing test.[110] Additionally, the agreement expressly retained from existing law the concept that "matters concerning" the expressly enumerated subjects were mandatory subjects of bargaining.[111]

2. Specifically Excluded Subjects

The veto negotiators agreed to the concept of specific lists of excluded subjects.[112] These specific exclusions were divided into those affecting "school district(s)" and those affecting all other public employers.[113]

a. School Districts

(1) Class Size

The crown jewel of the scope of bargaining exclusions for school districts was class size. Since enactment of the PECBA in 1973, class-size disputes triggered much litigation.[114] In the seminal scope of bargaining cases, ERB and the courts

[109] *E.g.*, Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 279-80, 840 P.2d 657, 660 (1992) ("ERB . . . adopted a balancing test in which it weighed the impact of a bargaining proposal on management prerogatives against the effect of the proposal on employment conditions of the affected employees . . . . The court [in an earlier case] approved ERB's balancing approach . . . .") *see generally* HUNGERFORD ET AL., *supra* note, at 5.6.

[110] Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992); Portland Fire Fighters Ass'n v. City of Portland, 305 Or. 275, 751 P.2d 770 (1988).

[111] *E.g., Portland Fire Fighters Ass'n*, 305 Or. at 282, 751 P.2d at 773.

[112] *See* OR. REV. STAT. § 243.650(7)(e) & (f) (1995).

[113] *See id.*

[114] *See, e.g., infra* notes 114-120 and accompanying text.

declared class size a merely "permissive" subject of good faith bargaining.[115] However, the *impacts* of class size on teachers (e.g., in terms of proposals for extra pay and/or extra preparation time) constituted mandatory subjects of bargaining.[116] Other aspects of teacher workload, such as student contact time, fell on the mandatory side of the scope of bargaining controversy.[117]

In 1990, however, ERB reversed its prior rulings and held that class size—and not just its impacts on pay, preparation time, and daily student contact time—was a mandatory subject of collective bargaining.[118] The veto negotiators agreed to reverse this specific class-size ruling by statute. In doing so, the negotiators were well aware that prior case law on the impacts of class size would remain undisturbed.[119]

The class-size debate suffers from some fundamental conceptual confusion on both sides. Class size and teacher salary levels constitute two sides of the same coin. Given a fixed pool of money, higher enrollments inevitably mean either more teachers at relatively lower salaries or relatively fewer teachers at higher salaries. The converse also obtains: lower class sizes require more teachers, which spreads funds available for salaries and related benefits more thinly. The trade-off between salaries and class size exists in every contract negotiation, whether explicitly acknowledged by the parties or not. For this reason, perhaps, ERB's 1990 class-size ruling resulted in few class-size provisions in teacher contracts. Specifically, in the fiscally tight environment after passage of the Ballot Measure 5 tax limitation in 1990, teachers and school boards simply lacked the resources to "purchase" lower class sizes (by hiring more teachers) without unacceptable erosion of salaries. Teachers legitimately argued that they were in the best position to elevate public awareness of the impacts of large class sizes. School managers countered that teachers could provide this input outside the formal collective bargaining process

[115] Springfield Educ. Ass'n v. Springfield Sch. Dist., 1 PECBR 347, 358, 361 (1975); Eugene Educ. Ass'n v. Eugene Sch. Dist., 1 PECBR 446 (1975); South Lane Educ. Ass'n v. South Lane Sch. Dist., 1 PECBR 459 (1975); cases consolidated and aff'd in part, 24 Or. App. 751, 547 P.2d 647, *recon.*, 25 Or. App. 407, 549 P.2d 1141 (1976).

[116] *E.g.*, Gresham Grade Teachers Ass'n v. Gresham Grade Sch. Dist., 5 PECBR 2771, 2786 (1980).

[117] Gresham Grade Teachers Ass'n v. Gresham Grade Sch. Dist., 5 PECBR 2889, 2894 (1980); *Springfield Educ. Ass'n*, 1 PECBR at 361.

[118] Tualatin Valley Bargaining Council v. Tigard Sch. Dist, 11 PECBR 590 (1990), *aff'd*, 106 Or. App. 381, 808 P.2d 101 (1991), *rev'd* and remanded for reconsideration, 314 Or. 274, 840 P.2d 657 (1992), on remand prior decision adhered to 14 PECBR 321, *aff'd*, 128 Or. App. 59, 874 P.2d 118 (1994). In its initial ruling reversing the earlier precedents, ERB felt bound by an Oregon Supreme Court decision in a case involving vacation scheduling (Portland Fire Fighters Ass'n., Local 43 v. City of Portland, 305 Or. 275, 751 P.2d 770 (1988)), but the supreme court remanded the case, requiring ERB to apply a balancing test in determining whether class size effects on teacher working conditions outweighed their impacts on educational policy. *Id.* at 285, 751 P.2d at 775. On remand, ERB applied the "balancing test" and adhered to its ruling that class size presented mandatorily bargainable issues. *Portland Fire Fighters Ass'n*, 14 PECBR 321 (1993). The Court of Appeals affirmed ERB's ruling for a second time. *Portland Fire Fighters Ass'n*, 128 Or. App. 59, 874 P.2d 118 (1994).

[119] All class size, preparation, and student contact time issues would have become permissive under the initial and first amended versions of the Derfler-Bryant Act. *See* S.B. 750, 68th Leg. § 7 (1995) (proposing to amend OR. REV. STAT. § 243.712 (1993)); S.B. 750, 68th Leg. § 7 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.712 (1993)). *See also* notes 77-97 and accompanying text.

and that, in any event, class sizes (under the constraints of any particular budget year) were largely a function of enrollment which was outside the management's direct ability to control. The Governor agreed to restore the law in this area to its pre-1990 status.[120]

(2) Reasonable Rules About Grooming and Personal Conduct at Work

Besides class size, the negotiators agreed to other specific exclusions. The Republican leadership made a convincing case that some issues trivialized the collective bargaining process. After much discussion, "reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct" were excluded from mandatory bargaining.[121] The veto negotiators agreed that public employers should be freed from bargaining obligations concerning "reasonable" employer rules in this area.[122]

(3) Student Discipline Standards and Procedures

In 1979, ERB ruled that most, but not all, aspects of student discipline policies were permissive subjects of collective bargaining.[123] The veto negotiators agreed that this entire subject unambiguously should fall outside any duty to bargain.

(4) Time Between Student Classes

The veto negotiators also agreed expressly to exclude "the time between student classes" from the collective bargaining obligations.[124] This exclusion arose from bargaining demands regarding high school student schedule changes that decreased the amount of time between classes by as little as one minute.[125] Such a decrease in recess periods often results in a slight increase in student contact time for teachers. Student contact time, as noted above, long ago fell on the mandatory side of debate over the scope of bargaining.[126]

The veto negotiators agreed to write a limited exception to the obligation to bargain over student contact time. Changes in between-class recess periods for

[120] *See* OR. REV. STAT. § 243.650(7)(e) (1995).

[121] *See id.* This specific exclusion arose from *Junction City Police Ass'n v. Junction City*, in which ERB held, *inter alia*, that a unilaterally adopted smoking policy constituted a "matter concerning" a "condition of employment." 11 PECBR 732 (1989). In explaining this ruling, the Board explained that "[l]ike drinking coffee or chewing gum, smoking is simply one of many *personal* activities which employees often engage in during the performance of their duties." *Id.* at 739.

[122] In the event of a dispute over whether a rule in the "personal pursuits" area is "reasonable," ERB will have to resolve it. Of course, this new restriction to the scope of mandatory bargaining does not apply to rules which purport to regulate "personal conduct" matters away from work. This provision reversed parts of Junction City Police Ass'n v. Junction City, 11 PECBR 732 (1989) in which similar matters of "personal pursuits" were held to be mandatory subjects of collective bargaining during "performance of work duties." HUNGERFORD ET AL., *supra* note, at 5.36.

[123] Lincoln County Educ. Ass'n v. Lincoln County Sch. Dist., 4 PECBR 2519 (1979). The subject remained, of course, a permissive subject of collective bargaining.

[124] *See* OR. REV. STAT. § 243.650(7)(e) (1995).

[125] Statements of Senators Derfler and Bryant to the author during the veto negotiations.

[126] *E.g.* Springfield Educ. Ass'n v. Springfield Sch. Dist., 1 PECBR 347, 361 (1975); Gresham Grade Teachers Ass'n v. Gresham Grade Sch. Dist., 5 PECBR 2889, 2894 (1980).

students no longer would be bargainable, notwithstanding some insubstantial effect on teacher-student contact time.[127] The negotiators specifically agreed *not* to exclude student contact time generally from the duty to bargain. The choice of language to be included in a new version of a statute carries particular significance when prior judicial and agency decisions have definitively interpreted that general language (e.g., "conditions of employment").[128]

(5) School Site Councils

The Oregon "Educational Act For The 21st Century" (Educational Reform Act)[129] established, *inter alia*, "21st Century Schools Councils"[130] at the "school building level."[131] These local "school councils" consist of teachers, classified or noncertificated employees, administrators, and parents. Under the Act, a majority of each site council "shall be active classroom teachers."[132] Local school councils, "to the extent practicable," carry the following duties: the establishment of "school goals"; the development and use of indices for measuring teaching and learning conditions; the administration of grants-in-aid for the professional development of employees; the development and implementation of "plan[s] to improve the professional growth and career opportunities" of school staff; the improvement of the "instructional program"; and certain other duties.[133]

The Senate Bill 750 veto negotiators agreed to exclude expressly the "selection, agendas, and decisions" of local school councils from any collective bargaining obligation.[134] This accorded with the veto negotiators' understanding that the

[127] Of course, increases in *student* class time do not automatically necessitate an increase in *teacher* student contact time. For example, the *school day for students* might be extended one-half hour by scheduling a "special subjects" or "study hall" teacher for the added time, and not by increasing any particular teacher's student contact time. Gresham Grade Teachers Ass'n v. Gresham Grade Sch. Dist., 52 Or. App. 881, 888, 630 P.2d 1304, 1308 (1981) (distinguishing an increase in instructional time for *students* from an increase in "the length of time a *teacher* is required to spend with students." (emphasis added)). The veto negotiators left this distinction from the prior case law undisturbed and, in fact, codified it. *See* OR. REV. STAT. § 243.650(7)(e) (1995).

[128] *E.g.*, State v. Clevenger, 297 Or. 234, 683 P.2d 1306 (1984); Billings v. SIAC, 225 Or. 52, 357 P.2d 276 (1961); U.S. Nat'l Bank v. Heggemeier, 106 Or. App. 693, 810 P.2d 396 (1991).

[129] *See generally*, OR. REV. STAT. §§ 329.005-.975 (1993).

[130] *Id.* at §§ 329.675-.745 and 329.790-.820.

[131] *Id.* at § 329.705(1).

[132] *Id.* at § 329.705(3)(a).

[133] *Id.* at § 329.705(1), (4).

[134] OR. REV. STAT. § 243.650(7)(e) (1995). An error in drafting the final language by the Legislative Counsel's Office creates an arguable ambiguity. The "selection agendas, and decisions of 21st Century Schools Site Councils under ORS 329.705" was excluded from mandatory collective bargaining. As adopted, the statute authorizes two distinct bodies: "21st Century Schools Councils" (subsections 1-4, 6) and "district site committees" (subsection 5). Inclusion of the word "site" in the final version of the Derfler-Bryant Act blends the statutory name for the two bodies. *Id.* § 329.705. The intent of the veto negotiators was to exclude the local "21st Century Schools Councils" from mandatory collective bargaining.

Educational Reform Act never was intended to modify or impose collective bargaining obligations under the PECBA.[135]

(6) The School or Educational Calendar; Standards of Performance or Criteria for Evaluation of Teachers; School Curriculum

Veto negotiators also agreed to exclude expressly from the duty to bargain certain other topics that already were generally accepted as nonmandatory subjects of collective bargaining. These included the school or educational calendar,[136] the school curriculum,[137] and standards of performance or criteria for evaluation.[138] In presenting the compromise reached with the governor, Senator Bryant candidly explained to the conference committee: "Some of the items in [new ORS 243.650(7)(e) and (f)] are [already] considered permissive . . . even though they are listed as being expressly excluded under the Act."[139] By including these already permissive items in the expressly enumerated exclusions, veto negotiators sought merely to foreclose all argument by advocates as to the state of the preexisting case

[135] As Senator Bryant explained in presenting the agreement with the Governor for final passage in the Senate: "Issues related to site councils . . . were never intended to be mandatory subjects." Senate Floor Session, *supra* note, Tape 191, Side A (June 2, 1995) (statements of Senator Neil Bryant). *See also* H.B. 2991, 68th Leg., 1995 Or. Laws 660 (explicitly stating that local school councils do not supplant the school board as the ultimate decision maker in Oregon school districts).

[136] The 1975 decision in *Springfield Educ. Ass'n v. Springfield Sch. Dist.* ruled that "school calendar" proposals constituted permissive bargaining items. 1 PECBR 347, 362-63 (1975). On the other hand, because the term "vacations" was and remains an expressly enumerated mandatory subject, the *amount* of vacation time remains a mandatory subject. Eugene Educ. Ass'n v. Eugene Sch. Dist., 46 Or. App. 733, 740, 613 P.2d 79, 83 (1980) (emphasis added). And, since the Oregon Supreme Court's decision in Portland Fire Fighters Ass'n, Local 43 v. City of Portland, 305 Or. 275, 284-85, 751 P.2d 770, 774-75 (1988), the *scheduling* of vacations is a "matter concerning" vacations, and hence a mandatory subject of collective bargaining.

[137] The school curriculum also fell on the non-mandatory side of the scope of bargaining controversy under pre-existing case law. *Springfield Educ. Ass'n*, 1 PECBR at 357.

[138] Springfield Educ. Ass'n v. Springfield Sch. Dist., 3 PECBR 1950 (1978), *aff'd*, 42 Or. App. 93, 600 P.2d 425 (1979), *aff'd*, 290 Or. 217, 235-40, 621 P.2d 547, 559-62 (1980) (affirming ERB ruling that the "mechanics" and "bases" for evaluation are non-mandatory bargaining subjects). However, "procedural fairness" (for example, notice of the bases for and results of evaluation, the right to written evaluations, the right to object to evaluations, and the right to request evaluations) constitute a mandatory subject of collective bargaining, 290 Or. at 237 n.9, 621 P.2d at 560 n.9, as is a proposal that evaluation criteria be "clearly defined." *Id.* at 239-40, 621 P.2d at 561-62. *See also*, East County Bargaining Council v. Centennial Sch. Dist., 6 PECBR 5556 (1982), *aff'd*, 69 Or. App. 47, 658 P.2d 452 (1984) (bargaining to enforce statutorily-required evaluation procedures through labor contract grievance procedure constitutes mandatory subject of bargaining).

However, the newly enumerated exclusion for "standards of performance or criteria for evaluation *of teachers*" raises an interesting question: whether by negative implication this exclusion for teachers renders such performance and evaluation criteria for *non-teacher* employees of school districts (bus drivers, clerical, custodial employees), a mandatory subject of bargaining. There was no discussion by the veto negotiators of this point, nor other indication in the legislative history.

[139] Conf. Comm. Hearings, *supra* note, Tape 1, Side A (June 1, 1995) (statements of Senator Bryant).

b. Other Public Employers

(1) Staffing Levels and Safety Issues (Except Those Not Having a Direct and Substantial Effect on the On-The-Job Safety of Employees)[140]

Staffing decisions long have raised controversial issues under the PECBA.[141] While the level of staffing for delivery of public services is generally a nonmandatory subject of collective bargaining, when such decisions substantially affect employee safety or workload, ERB and the courts hold the proposal mandatory.[142] Where such a direct and substantial effect on safety or workload has not been shown, ERB cases have held staffing proposals nonmandatory.[143]

The veto negotiators extensively discussed this issue. For example, they agreed that, if staffing of police squad cars in high-crime hours and areas of Portland directly and substantially affected officer safety, the matter should be subject to mandatory bargaining with the police officers' union. However, a proposal impacting safety in some remote manner might not have a direct and substantial effect requiring mandatory bargaining. For example, a proposal that an employer provide the newest and most powerful high-tech weapons, or reduce officers' stress by sending them to Maui for rest and recovery, would not necessarily directly and substantially affect safety. In this regard, the veto negotiators chose to adopt a "direct and substantial effect on safety" test rather than the "balancing test" utilized in some prior ERB cases.[144]

Similarly, the veto negotiators desired to exclude "safety" proposals that, in reality, did not produce a direct and substantial effect on safety. For example, a proposal that a city purchase, for safety reasons, a 1995 firetruck to replace a 1994 model might not have such a direct and substantial effect and, therefore, would not require mandatory bargaining.

(2) Scheduling of Services Provided to the Public

After extensive discussions, the veto negotiators agreed to distinguish the scheduling of *services* from the scheduling of *employees*.[145] The Governor and

[140] *See* OR. REV. STAT. § 243.650(7)(f) (1995).

[141] *See generally* Whalen, *supra* note, at 31-34.

[142] For example, a proposal to require a minimum number of firefighters on trucks sent to fires is a mandatory subject for good-faith bargaining. International Ass'n of Firefighters, Local 314 v. City of Salem, 7 PECBR 5819 (1983), *aff'd*, 68 Or. App. 793, 684 P.2d 605 (1984).

[143] *E.g.*, Executive Dep't v. Oregon State Police Officers' Ass'n, 8 PECBR 7874, 7907-7910 (1985) (regarding proposals to require two officers in state police cars during specified hours, ERB balanced effect on officer safety against management staffing prerogatives and found the proposal nonmandatory). *See also*, Salem Police Officers Union v. City of Salem, 308 Or. 383, 387 n.4, 781 P.2d 335, 337 n.4 (1989) (noting certain aspects of police reserve officer program mandatory because they had "immediate" effects on safety of regular police officers).

[144] *See, e.g., Oregon State Police Officer's Ass'n*, 8 PECBR 7874 (1985).

[145] *But see*, Senator Bryant's statement before the Senate on final approval of the compromise language negotiated with the Governor: "Currently public employers are not required to bargain over the services provided to the public... The language [of the agreement with the Governor] said scheduling of services. Because the PECBA is about employees and *we intend by this language to mean the scheduling of employees* who are providing services... what we mean... is that the nature, type, level, and quantity of service, and when the service is provided... are permissive subjects under this bill. . . . The how, when and where (sic) the employer *schedules employees* to provide that service is intended to be permissive." Senate Floor Session, *supra* note, Tape 190, Side A (June 2, 1995) (statements of Senator Neil Bryant) (emphasis added). With all respect to Senator Bryant (who recently was named as one of three outstanding state legislators in the nation, *Hot Topics: National Group Names Bryant Outstanding Freshman*, THE OREGONIAN, July 21, 1995, at C4.), the language agreed to by the Governor ("scheduling of services") cannot fairly be read, especially in light of the prior case law, to mean "scheduling of employees." As the above-quoted excerpt from his floor statement shows, Senator Bryant simply blended the concept of deciding when and how much to provide services (permissive) with the concept of which employees will be scheduled to provide those services (mandatory). Under PGE v. Bureau of Labor and Indus., 317 Or. 606, 859 P.2d 1143 (1993) and Ecumenical Ministries v. State Lottery Comm'n, 318 Or. 551, 871 P.2d 106 (1994), the legislative history of an enactment cannot supplant the intent manifested by the language and context of the enactment; this should be particularly so where the enactment results from a negotiated agreement and only one side is presenting the legislative history.

Republican leadership agreed that scheduling of services provided to the public properly belongs to the governing body and managers working for the public employer. However, scheduling of *employees* within these service hours should be a mandatory subject of bargaining. For example, the veto negotiators expressly agreed that seniority-based bid systems for desirable vacation slots, shifts, days off, and the like should be mandatory topics of good faith bargaining.[146]

In public safety employment, controversy surrounds the question whether the number of vacation slots available during desirable times of the year constitutes a mandatory subject of good faith bargaining.[147] The veto negotiators discussed this issue at length but reached no agreement on the topic. They left the matter to be settled by existing case law and ERB's and the courts' interpretation of the phrase "scheduling of services,"[148] read in light of *inclusion* of the subject of "vacations" and "matters concerning" vacations in matters subject to collective bargaining.

(3) Determination of Minimum Qualifications Necessary for Any Position

Minimum qualifications arguably have fallen on the permissive side of the collective bargaining ledger since the PECBA's adoption in 1973.[149] To remove any doubt, the veto negotiators agreed that public policy requires that defining

[146] *E.g.*, Portland Fire Fighters Ass'n, Local 43 v. City of Portland, 305 Or. 275, 751 P.2d 770 (1988) (reversing ERB decision that number of vacation slots was non-mandatory; pointing out that the proposal constitutes a "matter concerning" a specifically enumerated mandatory subject, *i.e.*, vacations). All of the phrases relied upon in *Portland Firefighters* remain in the amended statute.

[147] *Id.*

[148] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 1(7)(f) (codified at OR. REV. STAT. § 243.650(7)(f) (1995)). Of course, public services can be provided at any given level without removing the number of vacation slots from the bargaining table. First, under the PECBA, good faith bargaining carries no obligation to agree or make any concession; a public employer remains free to "just say no." OR. REV. STAT. § 243.650(4) (1995). Second, even if a union successfully bargained a specific number of desirable vacation slots, the public service can be provided by the use of overtime, part-time, and temporary employees, or additional hires, as is common in the private-sector. Third, the language of the new statutory exclusion ("scheduling of services") simply does not suffice to modify the express agreement that "matters concerning" "vacations" would continue to be generally bargainable.

[149] *E.g.*, Springfield Educ. Ass'n v. Springfield Sch. Dist., 1 PECBR 347, 351 (1975) and Eugene Educ. Ass'n v. Eugene Sch. Dist., 1 PECBR 446 (1975) (proposals regarding transfer rights and assignment permissive); Springfield Educ. Ass'n v. Springfield Sch. Dist., 3 PECBR 1950, 1957 (1978) (basis, criteria, and performance standards for evaluation permissive).

minimum qualifications for any job must be a management prerogative. However, this does not change current law specifying that unions may bargain for the right of employees who meet such minimum qualifications to be selected on the basis of seniority or other nondiscriminatory factors.[150]

(4) Criteria for Evaluation or Performance Appraisal; Reasonable Dress, Grooming and At-Work Personal Conduct Requirements Regarding Smoking, Gum Chewing and Similar Matters of Personal Conduct at Work

These exclusions merely replicate those for school district bargaining discussed above.[151]

(5) Assignment of Duties

The original scope of bargaining rulings in 1975 held that assignment of duties to any position fell on the permissive side of the scope of bargaining ledger.[152] Oregon courts and ERB endorsed these conclusions in later rulings.[153] The veto negotiators agreed expressly to incorporate this case law in the enumerated exclusions.[154]

[150] *E.g.*, "It is not the intention to prohibit or to stop the current practice of allowing people to bid for positions or jobs on the basis of seniority." Conf. Comm. Hearings, *supra* note, at Tape 1, Side A (June 1, 1995) (Senator Bryant); "Whether seniority must be taken into consideration by the employer in an assignment of duties is a mandatory subject of bargaining. . . ." Senate Floor Session, *supra* note, Tape 191, Side A (June 2, 1995) (Senator Bryant).

[151] *See supra* Part III(C)(2).

[152] South Lane Educ. Ass'n v. South Lane Sch. Dist., 1 PECBR 459, 462 (1975); Eugene Educ. Assn. v. Eugene Sch. Dist., 1 PECBR 446, 451 (1975); Springfield Educ. Ass'n v. Springfield Sch. Dist, 1 PECBR 347, 357, 365-66 (1975).

[153] Executive Dep't v. Oregon State Police Officers' Ass'n, 8 PECBR 7874, 7900, 7912 (1985). Proposals for premium pay based on duty assignment, however, triggered a mandatory bargaining obligation. *Id.*; *Eugene Educ. Ass'n*, 1 PECBR at 451. Similarly, notice procedures regarding assignments fell on the mandatory side. *South Lane Educ. Ass'n*, 1 PECBR at 463. "[P]roposals primarily concerned with allowing bargaining unit members to take advantage of *promotional opportunities* are mandatory" subjects of collective bargaining; promotional opportunities are distinguished from mere "duty assignment" proposals. Springfield Police Ass'n v. City of Springfield, 134 Or. App. 26, 31, 894 P.2d 546, 550 (1995) (emphasis added).

[154] Senator Bryant's statements on this issue, in presenting to the conference committee the agreement reached with the Governor and later on the floor of the Senate, again evidenced some confusion. At the conference committee hearing on the compromise, Representative Beyer asked whether the "assignment of duties" exclusion eliminated the bargaining obligation over seniority systems affecting assignment. Senator Bryant replied: "It is not the intention to prohibit or to stop the current practice of allowing people to bid for positions or jobs based on seniority." Conf. Comm. Hearings, *supra* note, at Tape 1, Side A (June 1, 1995) (statements of Senator Bryant). The next day on the floor of the Senate, Senator Bryant stated: "Yesterday at the conference committee, I may not have been clear when I said subparagraph (f) [ORS 243.650(7)(f)] did not intend to prohibit positions or jobs from being bid on seniority . . . . This would not be prohibited, but [the] subjects of assigning employees to positions or jobs is [sic] still a management right under the bill and permissive. The employer is not required to negotiate the assigning of employees to particular jobs or positions, *but will continue to be required to negotiate seniority. Whether seniority must be taken into consideration by the employer in an assignment of duties is a mandatory subject of bargaining,* but not how someone is to be assigned to the position." Senate Floor Session, *supra* note, at Tape 191, Side A (June 2, 1995) (statements of Senator Neil Bryant) (emphasis added). In fairness to Senator Bryant, some of the distinctions and case law in this area are rather arcane.

(6) Workload When the Effect on Duties is Insubstantial

It does public employees little good to bargain about pay if they also do not have a right to bargain about their workload. A four percent pay increase means one thing if workload remains constant, but quite another if accompanied by a twenty-five percent increase in workload. Of course, to say that workload falls within the scope of mandatory bargaining does not mean that public employers cannot insist on increases nor can they "just say no" to proposals to cut or limit workloads. The point is not that public employee workloads are too high or too low, but that the appropriate level of workload, considering pay and other benefits, is most often an appropriate part of the mandatory good faith bargaining process.[155]

Any change in assigned duties can affect workload. Changes and flexibility in assigned duties may be crucial to the efficient delivery of public services. Thus, while substantial changes in workload raise appropriate issues for collective bargaining, insubstantial changes caused by varied duty assignments cross the line into nonmandatory bargaining territory. The veto negotiators wrote these concepts into the final version of the Derfler-Bryant Act.[156]

3. Subjects Previously Declared Permissive

In veto negotiations, the Republican leadership exhibited an understandable reluctance to agree to the system of expressly enumerated exclusions just reviewed. Senator Bryant expressed concern that, by adopting the principle of enumerated exclusions, coupled with the restoration of the broad language in pre-existing law, the final bill might imply that other currently permissive subjects of bargaining would become mandatory.[157] To answer this concern, the language that now appears as ORS 243.650(7)(b) was drafted.[158] The negotiators simply intended to "grandfather in" all topics that were already permissive under current law.

While some permissive topics were included in the specifically enumerated exclusions, it was not practical to list every permissive subject or ruling in that provision of the bill. Consequently, a general reference to currently permissive items was necessary. This approach appealed to the Republican veto negotiators because it set existing permissive rulings in statutory stone. The Courts and ERB, therefore, are foreclosed from changing existing *permissive* rulings in the future.

Similarly, the Governor's intention was merely to freeze existing permissive rulings in place. Because ERB carries the primary responsibility to decide whether

[155] *E.g.*, Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992) (in the context of a teacher class size proposal, the supreme court required ERB to apply the balancing test under the facts and circumstances rather than applying a generic approach); OPEU, Local 503 v. Oregon, 10 PECBR 51, 79 (1987).

[156] *See* S.B. 750, 68th Leg., 1995 Or. Laws 286 § 1(7)(f) (codified at OR. REV. STAT. § 243.650(7)(f) (1995)) ("For all other employee bargaining except school districts, 'employment relations' expressly excludes . . . workload when the effect on duties is insubstantial . . . .").

[157] Statement to author during veto negotiations.

[158] Oregon Revised Statute § 243.650(7)(b) (1995) provides: "'Employment relations' does not include subjects determined to be permissive, non-mandatory subjects of bargaining by the Employment Relations Board prior to the effective date of this 1995 Act."

subjects allegedly falling under the catch-all phrase "conditions of employment" are permissive or mandatory after application of the balancing test,[159] the grandfather clause referred to ERB. It did not refer, for example, to court rulings that apply a limited standard of review.[160] The intended meaning of the grandfather clause was that subjects held permissive by ERB *in rulings not reversed by the Courts* would continue to be permissive. This accords with fundamental principles of administrative law: an agency decision or interpretation of law reversed by the Courts becomes a nullity.[161] The reference to prior "ERB" rulings in ORS 243.650(7)(b) means prior lawful rulings in accordance with applicable law—nothing more or less.[162]

4. The Balancing Test Exclusion

The scope of bargaining compromise rested on a fourth principle. Although unreversed and unremanded ERB rulings that a particular subject was merely a "permissive" subject of bargaining were set in statutory stone, the labor board should also remain free to re-apply the balancing test and, as circumstances might warrant it, declare permissive those subjects that are currently mandatory. Thus, the Governor agreed to language that provided: "After the effective date of this 1995 Act, `employment relations' shall not include subjects that the Employment Relations Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment."[163]

[159] *E.g.*, Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992); Springfield Educ. Ass'n v. Springfield Sch. Dist., 290 Or. 217, 621 P.2d 547 (1980).

[160] *E.g., Tualatin Valley Bargaining Council*, 314 Or. at 279, 840 P.2d at 660; Springfield Educ. Ass'n v. Springfield Sch. Dist., 290 Or. 217, 621 P.2d 547 (1980).

[161] *See* ORS 183.482(8)(a) ("If the court finds that the agency has erroneously interpreted a provision of law . . . it shall: (A) Set aside or modify the order, or (B) Remand . . . for further action under a correct interpretation of the law."

[162] *Cf. Springfield Educ. Ass'n*, 290 Or. at 217, 621 P.2d at 547 (holding ERB scope of bargaining ruling on "conditions of employment" language interpret "inexact terms" subject to judicial review and reversal if agency erroneously interprets law); OR. REV. STAT. § 183.482(8)(a). However, Senator Bryant, on the Senate floor, stated that "subsection (b) [of ORS 243.650(7)] . . . clarified that all subjects which the Employment Relations Board has "ever determined to be permissive prior to this act are intended to REMAIN permissive *regardless of any actions that may have been taken by a court in reviewing the ERB determinations*." Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) (statements of Senator Bryant) (emphasis added). Neither in the veto negotiations nor in his initial presentation to the Conference Committee of the agreement with the Governor did Senator Bryant articulate this rather unusual interpretation. Conf. Comm. Hearings, *supra* note, at Tape 1, Side A (June 1, 1995). As Senator Bryant acknowledged, the Republican leadership made a "huge concession" to the Governor on scope of bargaining. Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) (statement of Senator Bryant). The bill presented to the House and Senate was expressly acknowledged to be the bill agreed to by the Governor. The terms of that agreement cannot be changed by a "sandbag" attempt to improve its terms (from the perspective of the sponsors of the legislation) via creative legislative history. In Senator Bryant's words: "[W]e had weeks of negotiations with the Democratic Governor of this state and his representative, and we shook hands and came to a fair compromise that he is willing to sign." Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) (statements of Senator Bryant). It is the agreement as negotiated and presented to the Conference Committee, not an agreement later embellished with partisan legislative history, which was enacted into law.

[163] OR. REV. STAT. § 243.650(7)(c) (1995).

This language was adopted in light of case law that clearly indicates ERB's "balancing test" authority applies only to the catch-all statutory phrase "other conditions of employment," not to subjects specifically enumerated in the definition of "employment relations."[164]

Apparently, however, confusion still existed regarding this provision. On the floor of the House, in presenting the agreement with the Governor to the House for final passage, Representative Watt stated:

> We have reinstated into the law a balancing test between (sic) management prerogative and employee wages and benefits (sic), which is the test used prior to the Tigard School District class size case. The test . . . will be applied to everything listed in subsection (a), (e), and (f) of this definition . . . . The Board will also be required to apply the balancing test in determining whether an issue involving benefits, hours, vacation, sick leave, grievance procedure(s), and other conditions of employment are mandatory or permissive.[165]

Representative Watt's statement concedes too much. The agreement reached with the Governor did *not* contemplate that ERB would apply the "balancing test" to the specifically enumerated *permissive* subjects of subsections (e) and (f) (the subsections articulating the express exclusions for school districts and other public employers). If Representative Watt's statement were true, then school curriculum, class size, and other specifically enumerated nonmandatory subjects would not be excluded from mandatory bargaining on a generic or per se basis but would be subject to proposal-by-proposal "balancing," based on the circumstances and the record of each case. While the Governor might have agreed to such a concession by the Republican leadership, in all fairness, Representative Watt's surprising interpretation would result in less than the Republican leadership bargained for in its agreement with the Governor.[166]

A less obvious misunderstanding of the "balancing test" language of new ORS 243.650(7)(c) came from Senator Bryant when he presented the agreement on the Senate floor for final passage. Senator Bryant erroneously stated: "The [balancing test] will be applied to everything listed in [subsection] (a) of this definition. The Board will be required . . . to apply the balancing test in determining whether an

[164] *E.g. Tualatin Valley Bargaining Council*, 314 Or. at 274, 840 P.2d at 657; Portland Fire Fighters Ass'n, Local 43 v. City of Portland, 305 Or. 275, 282-83, 751 P.2d 770, 773-74 (1988).

[165] House Floor Session, *supra* note, at Tape 223, Side A (June 5, 1995) (statements of Representative Watt).

[166] As discussed earlier, *see supra* note 73 and accompanying text, Rep. Watt simply was not present during 95% of the veto negotiations, and was not present at all when the scope of bargaining compromise was hammered out with Senators Derfler and Bryant. It is not surprising, therefore, that he may have gleaned an imperfect understanding of the agreed-upon language. In fairness to Rep. Watt, the author, who has had far more experience with the PECBA, also became aware of drafting ambiguities that were not fully appreciated during the press of negotiations. The author gained a new understanding of the almost unbelievable challenge facing legislators who must struggle to understand and vote upon, not just one complicated bill, but dozens in the concluding weeks of a legislative session.

issue involving benefits, hours, vacations, sick leave and grievance procedures are mandatory or permissive."[167]

There is reason to think that Senator Bryant either succumbed to the understandable temptation to attempt to modify the agreement with the Governor through expansive legislative history, or that he too (also understandably) misinterpreted the prior case law. First, in the conference committee presentation a day earlier, Senator Bryant did not mention that the "balancing test" in subsection (c) applied to the specifically enumerated subjects of mandatory collective bargaining in subsection (a).[168] Second, by retaining the specific language of subsection (a), previously interpreted by the Oregon Supreme Court as allowing ERB "balancing" to determine only whether proposals fell within the catch-all phrase "conditions of employment,"[169] the legislature must be presumed also to have chosen to incorporate these prior definitive interpretations of the statutory language.[170] Why else would the legislature, especially given prior case law and interpretation of the statute, have retained in ORS 243.650(7)(a) specifically included subjects if it meant they were subject to a "balancing test" applied by ERB? Third, and more conclusively, both in the conference committee and on the Senate floor, Senator Bryant clearly stated that the balancing test language "will reinstate the pre-*Tigard*[171] case law."[172] The *Tigard* class size case, however, did not *change* the "balancing test"; rather, in that case, ERB first declined to apply the "balancing test" and held that class size was a mandatory "workload" proposal (and, therefore, a "condition of employment" under prior labor board precedents).[173] The supreme court reversed and remanded to ERB because the

[167] Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) (statement of Senator Neil Bryant).

[168] Hearings on S.B. 750 Before the Conf. Comm. on Labor and Gov't Operations, *supra* note, June 1, 1995. Statement of Senator Bryant: "[T]his amendment will reinstate the pre-*Tigard* case law of balancing [sic] test that ERB used before that time.").

[169] *See supra* note 78.

[170] *E.g.*, State v. Clevenger, 297 Or. 234, 244 (1984) ("In enacting subsequent legislation, the legislature is considered to be aware of this court's decisions . . . ."); Sager v. McClendon, 296 Or. 33, 36, 672 P.2d 697, 699 (1983) ("When statutory provisions are ambiguous, it is our duty to interpret them in a manner consistent with the intention of the legislature as expressed in the legislative history of the statutes, in the policy expressed in the enactment of other statutes, and consistent with previous decisions of this court."); State v. Waterhouse, 209 Or. 424, 436, 307 P.2d 327, 333 (1957) ("[I]t is likewise presumed that the statute was enacted 'in the light of such existing judicial decisions as have a direct bearing upon it.'"); Ecumenical Ministries v. Or. State Lottery Comm'n, 318 Or. 555, 559 n.6, 871 P.2d 106, 111 (1994); PGE v. Bureau of Labor, 317 Or. 606, 611, 859 P.2d 1143, 1146 (1993) ("Context" is "first level" guide to interpretation of statute.).

[171] Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 314 Or. 274, 840 P.2d 657 (1992).

[172] Conf. Comm. Hearings, *supra* note, at Tape 1, Side A (June 1, 1995) (statements of Senator Bryant); Senate Floor Session, *supra* note, at Tape 190, Side A (June 2, 1995) ("We have reinstated into the law a balancing test between management prerogatives and the employees' wages and benefits, *which is like the test used prior to the Tigard School District class size case.*") (statements of Senator Bryant).

[173] Tualatin Valley Bargaining Council v. Tigard Sch. Dist., 11 PECBR 590 (1990), *aff'd* 106 Or. App. 381, 808 P.2d 101 (1991).

labor board had *not* applied the balancing test to the specific circumstances of the *Tigard* class size dispute.[174]

Most conclusively, the "pre-*Tigard* case law," which Senator Bryant declared that S.B. 750 "will reinstate," clearly limited the balancing test to the determination of whether a proposal fell within the "catch-all" phrase "condition of employment." Thus, in the 1988 *Portland Fire Fighters*[175] case (decided the year *before* the *Tigard* class-size dispute erupted), Justice Lent, writing for a unanimous supreme court, stated unambiguously:

> The difficulty with ERB's "balancing test," at least with respect to matters concerning subjects [specifically] enumerated in ORS 243.650(7), is that the test allows a public employer to refuse to bargain over a matter so long as the ERB deems the matter to be of greater importance to the employer than to its employees. . . . In conclusion the ERB erred in applying its 'balancing test' to a proposal concerning a matter [specifically] enumerated in ORS 243.650(7).[176]

Indeed, in the seminal *Springfield Education* case in 1980, the supreme court had made it clear that the "balancing test" applied to the phrase "conditions of employment." In interpreting that catch-all phrase, ERB was to "replicate" the nonexclusive, specifically enumerated subjects, by utilizing the "balancing test" to identify "only those subjects which embody the same characteristics as [the specifically enumerated subjects] and no others."[177]

In summary, the pre-*Tigard* class-size case law, which Senator Bryant told the conference committee, and the full Senate, S.B. 750 would "reinstate," clearly limited the balancing test to the general catch-all phrase "conditions of employment." This interpretation also squares with the "language and context" analysis under the *PGE* and *Ecumenical Ministries* line of statutory construction cases.[178]

5. The de Minimus Exclusion[179]

Veto negotiators agreed to a final principle relating to scope of bargaining: public employers should not be burdened with bargaining obligations over matters that had a merely "*de minimus*" or "insubstantial" effect on public employee working conditions. Presenting this language for final passage, Representative Watt gave the following examples:

> A Corrections Division decision to subcontract transportation of prisoners between Oregon and other states: since this was found to be an infrequent duty, the impact on the bargaining unit would be insubstantial. Another

[174] 314 Or. at 284-86, 840 P.2d at 663-64.

[175] Portland Fire Fighters Ass'n, Local 43 v. City of Portland, 305 Or. 275, 751 P.2d 770 (1988).

[176] *Id.* at 284-85, 751 P.2d at 774-75.

[177] Springfield Educ. Ass'n v. Springfield Sch. Dist., 290 Or. 217, 233-34, 621 P.2d 547, 558-59 (1980).

[178] *See supra* note 39.

[179] OR. REV. STAT. § 243.650(7)(d) (1995).

example that would be considered to have a *de minimus* or insubstantial impact . . . would be an increase in student contact time of just a few minutes a day.[180]

Senator Bryant provided the conference committee and Senate with these same examples.[181] He added the following example, as well: "when an employer subcontracts psychiatric aide work where there is already a prior practice of subcontracting the work."[182] All of the examples are consistent with the discussions between the veto negotiators. Of course, ERB will have to make the *de minimus* determination in disputed cases.[183]

6. Conclusion

The final agreement on scope of bargaining in the Derfler-Bryant Act restored much of the existing language and case law. This occurred because the veto negotiators recognized that a broad range of disputes must be resolvable through collective bargaining if the statute is to serve its purpose: channeling workplace disputes into a process that avoids work disruptions ninety-nine percent of the time.[184] Some specific exclusions were agreed to because of persuasive arguments by the Republican leadership.[185] A grandfather clause was inserted to cover all existing nonmandatory subjects. The agreement preserved ERB's existing "balancing test" authority regarding new issues arising under the catch-all language "conditions of employment." In addition, a general *de minimus* exception explicitly was provided. These changes were far more modest and targeted than the initial and first amended versions of the bill, which would have broken a process that has achieved its purposes.

[180] House Floor Session, *supra* note, at Tape 223, Side A (June 5, 1995) (statements of Representative Watt).

[181] House Floor Session, *supra* note, at Tape 223, Side A (June 5, 1995) (statements of Representative Watt).

[182] House Floor Session, *supra* note, at Tape 223, Side A (June 5, 1995) (statements of Representative Watt).

[183] In addition to the changes in the scope of bargaining definition in OR. REV. STAT. § 243.650(7) (1993) discussed in this part, the final bill retained from the earlier versions the provision that the use of "volunteers" and "reserve police personnel that does not require layoff shall not be considered contracting out." S.B. 750, 68th Leg., 1995 Or. Laws 286 § 14 (codified at OR. REV. STAT. § 243.716 (1995)). As set forth earlier, this language clearly assumes that subcontracting generally remains a mandatory subject of bargaining. *See supra* notes 61-64, 74-75 and accompanying text. Further, where the use of volunteers or reserve police personnel directly and substantially affects employee safety, such use would trigger mandatory bargaining obligations. *E.g.*, OR. REV. STAT. § 243.650(7)(f) (1995); Salem Police Employees Union v. City of Salem, 308 Or. 383, 387 n.4, 781 P.2d 335, 337 n.4 (1989).

[184] *See supra* note 98.

[185] *See* notes 111-162 and accompanying text.

V. CHANGES IN THE BARGAINING PROCESS

A. The Initial Bill

In addition to the radical changes in the scope of bargaining originally proposed, the Derfler-Bryant bill proposed many changes to the bargaining process.

1. Regular Contract Negotiations

First, the bill proposed a ninety-day limit on the bargaining process prior to mediation.[186] Second, the bill retained the PECBA's requirement of fifteen days of mediation but removed ERB's authority under the former statute to require mediation for a longer period.[187] Third, the bill required the mediator, upon either party's declaration of impasse after mediation, to make public a cost summary accompanying proposed contract language on all outstanding issues.[188] Fourth, the initial version of S.B. 750 completely eliminated from the PECBA the factfinding process, by which a mutually-selected neutral party holds a hearing and issues nonbinding public recommendations for settlement of the bargaining dispute.[189] Fifth, the bill proposed elimination of the largely ignored provision in former ORS 243.702(2) that contract negotiators "make every reasonable effort to conclude negotiations . . . at a time [that] coincide[s]" with the budget process for public employers.[190]

2. Mid-Contract Bargaining

In addition to the changes in the contract bargaining process outlined above, the initial Derfler-Bryant bill imposed other significant limits on mid-contract, or "interim," bargaining. Mid-contract bargaining obligations can arise under the PECBA in several situations: for example, when some term of a contract cannot be

[186] S.B. 750, 68th Leg. § 7 (1995) (proposing to amend OR. REV. STAT. § 243.712 (1993)).

[187] *Id. Cf.* former OR. REV. STAT. § 243.712(2)(b) (1993) (*amended by* OR. REV. STAT. § 243.712(2)(b) (1995)).

[188] S.B. 750, 68th Leg. § 7 (1995) (proposing to amend OR. REV. STAT. § 243.712 (1993)); *cf* former OR. REV. STAT. § 243.712(2)(b) (1993) (*amended by* OR. REV. STAT. § 243.712(2)(b) (1995)). The "cost summary" requirement was new.

[189] S.B. 750, 68th Leg. §§ 1, 38 (1995) (proposing to repeal OR. REV. STAT. § 243.722 (1993)). While some unions long have favored elimination of the costly "factfinding" procedure, the Oregon Education Association stoutly defended the utility of the procedure. Employment Relations Board statistics show that only 3% of contract negotiations going to mediation were ultimately settled by acceptance of the factfinders' proposals for settlement. However, another 14% of such negotiations settled after rejection of the factfinder's proposals by one or both of the parties, but without a strike or interest arbitration procedure. OREGON EMPLOYMENT RELATIONS BOARD, ANNUAL REPORT 5 (1995). Many of these later settlements were widely thought to be based in part on compromises proposed by factfinders (with some modifications by agreement of the parties). Factfinding for public safety employees (police, firefighters, correctional officers, and "911" operators) was eliminated in 1987 inasmuch as disputes involving those employees are subject to interest arbitration in any event. 1987 Or. Laws 84 § 1 (codified at OR. REV. STAT. §§ 243.712, 243.722, and 243.742 (1987) (amended by S.B. 750, 68th Leg., 1995 Or. Laws 286 § 6).

[190] S.B. 750, 68th Leg. § 5 (1995); *see*, former OR. REV. STAT. § 243.702(2) (1993) (*amended by* OR. REV. STAT. § 243.702(2) (1995)).

performed or is declared invalid;[191] or when the contract remains silent on a "condition of employment" and the employer proposes or makes a unilateral change in working conditions.[192]

The initial version of S.B. 750 proposed to limit mid-contract bargaining obligations to forty-five calendar days.[193] This version further required mediation only with the agreement of both parties.[194] At the end of this forty-five-day period, the union would have been forbidden by law from striking,[195] and the public employer would have been free to implement its final offer "without further bargaining."[196]

3. "Communications" Unfair Labor Practices

In addition to these obviously controversial changes in the contract negotiation and "mid-contract" bargaining processes, Senators Bryant and Derfler proposed elimination of the "communications" unfair labor practice provisions of the PECBA.[197] This proposal proved less controversial. These provisions sought to prevent "end runs" around the designated bargaining representative. However, they had little practical effect and were enforceable only by "cease and desist" orders.[198] For example, because nothing prevented union or employer negotiators from talking about bargaining issues in radio, television, or newspaper forums directed to the public, it proved futile to bar the persons most concerned, the rank and file employees and members of a governing board, from directly communicating about the issues.

B. First Amended Bills Sent to the Conference Committee

1. Regular Contract Negotiations

The amended bills sent to conference in May retained the ninety-day bargaining timeline, coupled with elimination of factfinding.[199] The B-Engrossed

[191] OR. REV. STAT. § 243.702 (1995).

[192] Mid-contract disputes in this latter situation arise most often when an employer attempts to make a "unilateral change" in a "condition of employment" on some subject not covered by the collective bargaining agreement, and the union has not waived its right to bargain by contract or inaction. AFSCME, Local 2752 v. Wasco County, 4 PECBR 2397, 2400 (1979), *aff'd*, 46 Or. App. 859, 613 P.2d 1067 (1980); Eugene Educ. Ass'n v. Eugene Sch. Dist., 2 PECBR 1101 (1977). The "unilateral change" law under the PECBA generally follows private-sector NLRB precedents. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962); May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945). *See generally*, Nancy J. Hungerford & Henry H. Drummonds, *The Continuing Duty to Bargain*, 2 LERC MONOGRAPH SER. 1 (1983) (updated 1986 by Paul B. Gamson).

[193] S.B. 750, 68th Leg. § 9(1) (1995) (proposing to amend the general collective bargaining statutes (OR. REV. STAT. §§ 243.650-.782 (1993)).

[194] *Id.* at § 9(4).

[195] *Id.* at § 9(5).

[196] *Id.* at § 9(4).

[197] OR. REV. STAT. §§ 243.672(1)(i), (2)(f) (1993); *see*, S.B. 750, 68th Leg. § 3 (1995).

[198] OR. REV. STAT. § 243.672(4) (1993).

[199] S.B. 750, 68th Leg. § 7 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.712(1), (2)(b) (1993)).

bill did clarify that the ninety-day negotiation period could be extended by mutual consent, and that the ninety days would begin "when the parties meet for the first bargaining session and each party has received the other party's initial proposal."[200] The bill continued to provide for public disclosure of final offer contract language and cost summaries following fifteen days of mediation.[201] The amended bill also continued to allow partial implementation of final offers upon final impasse, as well as other unilateral changes "not inconsistent" with the employer's final offer.[202] The proposed legislation also eliminated any duty on the part of the public employer to provide step or merit pay increases or insurance premium increases.[203]

2. Mid-Contract Bargaining

The forty-five-day timeline for mid-contract bargaining survived intact in the amendments initially sent to conference committee.[204] The proposed statutory ban on mid-contract strikes also remained.[205] In fact, most of the changes proposed in the initial version of the Derfler-Bryant bill remained intact as the bill headed to conference committee.

C. Changes Agreed to in the ex Ante Veto Negotiations

1. Regular Contract Negotiations

The Derfler-Bryant Act's elimination of mandatory factfinding constitutes, perhaps, the biggest change to public employee collective bargaining.[206] The veto negotiators, however, decided to maintain the factfinding process when both parties agree to its use.[207] Elimination of mandatory factfinding should expedite the bargaining process and make it less expensive. Indeed, some unions, as well as most of public-sector management, agreed that these changes should introduce efficiencies into a process that, until now, was encumbered with formal procedures.[208]

[200] *Id.* (proposing to amend OR. REV. STAT. § 243.712(1) (1993)).

[201] S.B. 750, 68th Leg. § 7 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 247.712(2)(b) 1993)).

[202] S.B. 750, 68th Leg. 7 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.712(2)(c) (1993)).

[203] S.B. 750,68th Leg. § 7 (1995) (B-Engrossed) (proposing to add OR. REV. STAT. § 243.712(2)(c)).

[204] S.B. 750, 68th Leg. § 9 (1995) (B-Engrossed) (proposing to amend the general collective bargaining statutes (OR. REV. STAT. §§ 243.650-.782 (1993))).

[205] *Id.*

[206] Under former ORS 243.712, factfinding was mandatory with the exception of public safety employees. Between 1974 and 1993 approximately 700 factfinding hearings were held in Oregon public section bargaining disputes; about 3% led directly to settlement. Employment Relations Board Annual Report 5 (1995) [hereinafter ERB Annual Report]. Of course, a factfinder's recommended actions were not binding on the parties. OR. REV. STAT. § 243.722 (1993).

[207] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 6(2)(c) (codified at OR. REV. STAT. § 243.712(2)(c) (1995)).

[208] The leadership of the teachers' union, however, opposed this change on the ground that the neutral factfinder's recommendations, while seldom leading directly to settlement of bargaining disputes, often developed a general framework for an eventual settlement. The Republican leadership maintained that non-binding procedures such as factfinding merely

A factfinder's nonbinding recommendations and report may offer a helpful process when both parties agree to its use. Although ERB statistics show that factfinders' reports directly settled only three percent of bargaining disputes, an additional fourteen percent of contract disputes settled subsequent to findings.[209] These settlements substantially reflect compromises suggested by factfinders.

Veto negotiators retained the concept of a bargaining timeline from the earlier versions of the Derfler-Bryant Act but extended that timeline from ninety to 150 days. In addition to the changes discussed above, veto negotiators added to the B-Engrossed version of the bill, which passed the Senate and House, the proviso that: "Any period of time in which the public employer or labor organization has been found by ERB to have failed to bargain in good faith shall not be counted as part of the 150-day period."[210] This provision, however, cannot be invoked by a party failing to bargain in good faith.[211]

The final bill retained provisions for public cost summaries, final offers, and elimination of the communications unfair labor practices.[212] These provisions fall within the "sunshine" concept that both the public and persons most concerned with a bargaining dispute, and not just professional negotiators and union activists, should be fully informed.

2. Mid-Contract Bargaining

The forty-five-day timeline in the initial and first amended versions of the Derfler-Bryant Act was extended in the veto negotiations to ninety days.[213] The statutory bar on mid-contract strikes proposed earlier was removed so that both parties have a potential remedy in mid-contract disputes.[214] The veto negotiators agreed to these revisions based on the twin perceptions that a bargaining process often takes several months, even in the mid-contract situation, and the threat of a strike, if agreement fails, often drives the parties to reach agreement.

3. "Communications" Unfair Labor Practices

The veto negotiators agreed to eliminate the "communications"[215] unfair labor practice provisions as proposed by Senators Derfler and Bryant.

prolonged the process, and that public employers often settled more out of exhaustion than voluntary agreement.

[209] ERB Annual Report, *supra* note, at 5. The provisions regarding the neutrality of arbitrators (*see infra* note 227 and accompanying text) were written into the now-optional factfinding procedures, as well. Further factfinders, unless otherwise agreed, must use interest arbitration criteria, as amended by S.B. 750. *See infra* notes 272-278 and accompanying text.

[210] OR. REV. STAT. § 243.712(1) (1995).

[211] *Id.*

[212] S.B. 750, 68th Leg., 1995 Or. Laws 286, §§ 2, 6 (repealing former OR. REV. STAT. § 243.672(1)(i), (2)(f) (1993)).

[213] *See* S.B. 750, 68th Leg., 1995 Or. Laws 286 at § 13 (codified at OR. REV. STAT. § 243.698 (1995)).

[214] *See supra* notes 193-196 and accompanying text.

[215] *See* OR. REV. STAT. § 243.672(1)(i), (2)(f) (1993).

VI. END GAME PROCEDURES

A. The Initial Bill

1. General Provisions

The Derfler-Bryant bill also called for substantial changes in the rights of the parties after the bargaining and mediation processes end. First, the public employer's rights on final impasse would be expanded significantly. While the proposed legislation retained the thirty-day cooling-off period,[216] and the public employer's right to implement its last offer after such period, the legislation expressly allowed the employer to implement "all or part" of that offer or "other changes . . . not inconsistent with its final offer."[217] Second, step or merit increases could be denied after expiration of the previous agreement.[218] Increases in insurance premiums would be borne by the employees without regard to whether those items were issues in the bargaining dispute and without regard to the "status quo" doctrine or the parties' previous contractual understanding.[219] These changes in prior law promised to strengthen substantially the leverage public-sector management could bring to bear in end-game disputes.

2. Proposed Changes Applicable to Employees Allowed to Strike Lawfully

The Derfler-Bryant bill proposed a new "$1000 per day" fine for illegal strike activity.[220] This fine would have been assessable against both the union and "each public employee who participates in an illegal strike."[221]

3. Proposed Changes Applicable to Public Safety Employees

First, for public safety employees forbidden by law from striking,[222] the initial version of the Derfler-Bryant Act proposed optional interest arbitration[223] with the public employer.[224] If the public employer chose not to seek interest arbitration of

[216] S.B. 750, 68th Leg. § 7 (1995); *see* former OR. REV. STAT. § 243.722(3) (1993).

[217] S.B. 750, 68th Leg. § 7(2)(c) (1995) (proposing to add OR. REV. STAT. § 243.712(2)(c)).

[218] *Id.*

[219] *Id. See generally, In re* Multnomah County Educ. Serv. Dist., 6 PECBR 5341 (1982).

[220] S.B. 750, 68th Leg. § 30 (1995) (proposing to amend OR. REV. STAT. § 243.726(4) (1993)).

[221] *Id.*

[222] OR. REV. STAT. § 243.736 (1993) (police, firefighters, correctional officers and "911" operators are forbidden by law from striking).

[223] "Interest arbitration" must be distinguished from "grievance arbitration." Interest arbitration submits a dispute over what the terms of a collective bargaining agreement should say to adjudication by a third-party neutral. Timothy D.W. Williams, *The Ability to Pay: A Search for Standards in Factfinding and Arbitration*, 3 LERC Monograph Ser. 2, n.1 (1984). In contrast, "grievance arbitration" typically involves disputes over the meaning or application of an already written collective bargaining agreement. ARCHIBALD COX ET AL., LABOR LAW CASES AND MATERIALS 742 (11TH ED., 1991)

[224] S.B. 750, 68th Leg. §§ 31-32 (1995) (proposing to amend OR. REV. STAT. §§ 243.736, 243.742 (1993)).

an unresolved bargaining dispute, the police, firefighters, correctional officers, or "911" operators involved apparently would have been allowed to strike lawfully.[225]

Second, Section 33 of the proposed bill added new statutory requirements: that an interest arbitrator be "unbiased," as well as "disinterested"; that a list of the arbitrator's prior Oregon awards be provided to the parties; and that a process be established requiring ERB to determine the "neutrality" of the arbitrator when challenged. These proposals generated little controversy.[226]

Third, the Derfler-Bryant bill proposed "final offer" or "last best offer" interest arbitration.[227] Under the prior law, the parties presented their positions on each issue, and the arbitrator was free to craft a compromise on each issue in her award. Under the "final offer" concept, the arbitrator would be required to "select only one of the last best offers submitted by the parties."[228]

Fourth, the Derfler-Bryant bill required that the loser pay the cost of arbitration.[229]

Fifth, the bill substantially amended the criteria the interest arbitrator was required to apply.[230] It proposed a system of priorities among the multiple criteria. The first priority was "the interest and welfare of the public *as determined by the governing body of the public employer.*"[231] Also at the first level of priority was "financial ability of the unit of government to meet [proposed] costs, without requiring the reduction of programs or staff and giving due consideration and weight to the other services provided by, *and the other priorities of the unit of government.*"[232] As to "financial ability," the Derfler-Bryant bill declared that an "unexpended cash balance or cash carry-forward or reserves resulting from under expenditures . . . or operating efficiencies . . . shall not be considered as available."[233] After the first priorities of public interest and ability to pay, the second proposed priority in the initial Derfler-Bryant bill was "the ability . . . to attract and retain qualified personnel."[234]

[225] *Id.* While § 32 clearly stated that public safety employees would have the right to strike if the public employer declined interest arbitration, § 31 of the original Derfler-Bryant bill inconsistently stated that a strike would be unlawful "if the public employer has *not* petitioned for interest arbitration." Apparently inclusion of the word "not" was an inadvertent error. It is open to question whether the sponsors really seriously proposed to allow public safety officers to strike, or merely to deny them interest arbitration of bargaining disputes by a neutral. Perhaps the intent was to deny *both* a strike and an interest arbitration remedy.

[226] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(2) (1993)). Some arbitrators, however, object to the new procedures.

[227] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(3), (5) (1993)).

[228] *Id.*

[229] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(6) (1993)).

[230] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(4) (1993)).

[231] *Id.* (emphasis added).

[232] *Id.*

[233] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(4) (1993)).

[234] *Id.*

Only after considering these "level one" and "level two" priority factors was the arbitrator to turn to lower priority factors, such as "overall compensation" of the employees and "comparison of the overall compensation of other employees performing similar services . . . ."[235] Moreover, the fourth ranking "comparability" factor was limited to Oregon employers in communities with "nearly the same population" *and* within the "geographic labor market of the public employer."[236] Only after consideration of the fifth and sixth levels of priority, under the initial version of the Derfler-Bryant bill, could the arbitrator consider the Consumer Price Index and the "stipulation of the parties."[237] In addition, by deleting the "catch-all" factor in the prior law,[238] the bill limited arbitration criteria to the factors discussed above, in the priorities indicated.[239]

Finally, the restrictions on the scope of mandatory bargaining discussed earlier,[240] arguably represented the most significant limitation on interest arbitration. Only disputes over "mandatory" subjects could be arbitrated; under the initial version of the Derfler-Bryant bill, those subjects were limited to "wages, hours, health insurance *premiums*, holiday *pay*, and vacation pay," subject to vague and debatable exceptions.[241]

B. End Game Provisions in the First Amended Versions Sent to Conference Committee

Many of the proposals described above for changes in "end game" procedures also found their way into the amended bills sent to the conference committee in May.

1. General Provisions

The proposals discussed above in Part V-A remained largely intact in the bill sent to conference.

2. Employees Permitted to Strike Lawfully

The amended bill expressly incorporated prior case law holding that lawful strikes could occur only "over mandatory subjects of bargaining."[242] The bill sent to

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Former OR. REV. STAT. § 243.746(4)(h) (1993) (*amended by* OR. REV. STAT. § 243.746(4)(h) (1995)) ("Such other factors . . . which are normally and traditionally taken into consideration in the determination of wages, hours, and conditions of employment . . . in the public service or in private service").

[239] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746 (4) (1993)).

[240] *See supra* Part III.

[241] S.B. 750, 68th Leg. § 33 (1995) (proposing to amend OR. REV. STAT. § 243.746(4) (1993)). Apparently "grievance procedures," although included as a "mandatory" subject in the definition of "employment relations," nonetheless would be excluded from interest arbitration. *Compare* §§ 33 and 1 of S.B. 750, 68th Leg. (1995) (proposing to amend OR. REV. STAT. § 243.650(7) (1993)). *See supra* Part III(A).

[242] S.B. 750, 68th Leg. § 30 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.726(2) (1993)). *See, e.g.*, Redmond Sch. Dist. v. Redmond Educ. Ass'n, 3 PECBR 1564 (1977).

conference committee continued the initially proposed restrictions on "reopeners": strikes could not occur lawfully, unless "the collective bargaining agreement [had] expired."[243]

The amended version of the Derfler-Bryant bill also limited court-ordered interest arbitration. As in prior law, a finding that a strike would create a danger or threat to the health, safety or welfare of the public still would result in mandatory arbitration of the dispute.[244] However, the arbitration now would be pursuant to the new criteria provided in the interest arbitration sections of the proposed legislation. The proposed $1,000-per-day fine for unlawful strikes was retained for unions but deleted for individual public employees.[245] However, this concession was offset somewhat by new language making the labor union fine applicable whenever a labor organization "participates in, *encourages*, organizes, *or assists* in an illegal strike."[246]

3. Public Safety Employees Subject to Interest Arbitration

The bill sent to conference committee in May restored the right of public safety employees (forbidden by law from striking[247]) to engage in interest arbitration.[248] The bill continued to provide for new procedures to ensure the neutrality of

[243] S.B. 750, 68th Leg. § 30 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.726(2) (1993)). The proposed law limited the right to strike to periods after expiration of the labor contract, making "reopener" clauses potentially worthless, inasmuch as the union would be forbidden from striking over "reopener" issues. *Cf.* AFSCME, Locals 626 & 2831 v. Lane County Bd. of Comm'rs, 45 Or. App. 161, 607 P.2d 1212 (1980), *aff'd*, 46 Or. App. 645, 612 P.2d 759 (1980) (reversing ERB order that contractual no-strike clause barred strike on reopener because parties had agreed to arbitrate all disputes over meaning of "reopener" and "no-strike" clauses). Of course, without a "reopener," a union cannot lawfully strike to change the terms of an existing contract. Oregon State Employees Ass'n v. Oregon, 21 Or. App. 567, 585 P.2d 1385 (1975).

[244] S.B. 750, 68th Leg. § 30 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.726(3)(c) (1993)).

[245] S.B. 750, 68th Leg. § 30 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.726(4)(a) (1993)).

[246] *Id.* (emphasis added). Under this language *unions other than the striking union* potentially could become ensnared in the mandatory $1000 per day civil fine for "sympathy" or "solidarity" assistance activities. Oregon Revised Statutes § 243.732 (1993), however, already made sympathy *strikes* by public employees unlawful. On public employees' right to strike, *see generally*, Rona Pietrzak, *Some Reflections on* Mackay's *Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87 (1989); John T. Kehoe, Comment, *Applying Private Sector Law to the Public Sector Strike in Oregon*, 56 OR. L. REV. 251 (1977); Brodie, *supra* note, at 342; Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REF. 313 (1993).

[247] In general, these employees are police officers, firefighters, corrections officers, and "911" operators. OR. REV. STAT. § 243.736 (1993). Other public employees included in "mixed" bargaining units with public safety employees are also forbidden from striking. AFSCME Locals 2623-A, 2623-B, and 1911-B v. Executive Dep't, 52 Or. App. 457, 479-80, 628 P.2d 1228, 1242-43 (1981). S.B. 750 appears to strengthen the "mixed unit" rule: the amended statute now expressly says arbitration may be requested for bargaining units with, *i.e.*, including, public safety employees. OR. REV. STAT. § 243.742(2) (1995).

[248] S.B. 750, 68th Leg. § 32 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.742(2) (1993)).

arbitrators and continued to require "final offer" arbitration.[249] Arbitration, under the amended version, still was limited to the slightly expanded list of mandatory subjects of bargaining.[250] For example, staffing requirements on firetrucks and in squad cars would have been merely permissive subjects of bargaining, notwithstanding an effect on safety. Similarly, the number of holidays and vacation days and the existence and provisions of medical insurance and pension plans would have been nonmandatory subjects of good faith bargaining. The amended bill initially sent to the conference committee left intact the drastic changes in the interest arbitration criteria set forth in the initial Derfler-Bryant proposal.[251] Finally, the amended proposal eliminated the public policy statement favoring interest arbitration and requiring that the PECBA's mandatory interest arbitration provisions be "liberally construed."[252]

C. Final Bill Resulting from Veto Negotiations

1. General Provisions

The veto negotiators compromised the dispute described earlier[253] over *status quo* obligations that arise during a bargaining dispute.[254] In general, the status quo still must be preserved "until completion of impasse procedures."[255] Pending such completion, increases in insurance premiums will be borne by employees "unless the expired contract provides otherwise."[256] Conversely, merit and step pay increases "shall be part of the status quo unless the expiring contract *expressly* provides otherwise."[257]

[249] S.B. 750, 68th Leg. § 33 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.746(3), (5) (1993)). The bill was still ambiguous on whether the "final offer" arbitration would proceed "issue by issue" or on a "package" (all issues) basis.

[250] S.B. 750, 68th Leg. § 33 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.746(4) (1993)).

[251] S.B. 750, 68th Leg. § 33 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.746(4) (1993)). *See supra* notes 180-198 and accompanying text. For consideration of how ERB and the courts review interest arbitration awards for compliance with the statutory criteria, see AFSCME Local 2623-A, 52 Or. App. at 465-66, 628 P.2d at 1234-35; Medford Firefighters Ass'n, Local 1431 v. City of Medford, 40 Or. App. 519, 526, 595 P.2d 1268, 1272 (1979). ERB has primary jurisdiction over disputes regarding the enforceability of interest arbitration awards. Tracy v. Lane County, 305 Or. 378, 752 P.2d 300 (1988).

[252] S.B. 750, 68th Leg. § 32 (1995) (B-Engrossed) (proposing to repeal OR. REV. STAT. § 243.742(1) (1993)). The amended Derfler-Bryant bill sent to the conference committee in May also continued the initial version's limitation of the employer's status quo obligation during the arbitration process. Step and merit pay increases would be withheld and increased insurance premiums would be paid by the employee pending the award. S.B. 750, 68th Leg. § 34 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.756 (1993)).

[253] *See supra* notes 186-190 and accompanying text.

[254] OR. REV. STAT. § 243.712(2)(d) (1995).

[255] OR. REV. STAT. § 243.712(2)(d) (1995).

[256] *Id.*

[257] *Id.*

2. Provisions for Public Employees Permitted to Strike Lawfully

The $1,000-per-day fine for unlawful strikes was completely eliminated in the veto negotiations.[258] Unlawful strikes will continue to be subject to ERB cease and desist orders and backed up by circuit court contempt powers.[259] An unfettered right to strike drives the good faith bargaining process, which results in settlement without strikes in ninety-nine percent of all Oregon bargaining disputes.[260]

However, additional significant limitations on public employee strikes were written into the Act during the veto negotiations. Abusive and unconventional strike activities (sitdown, slowdown, rolling, intermittent, or on-and-off-again strikes) now expressly constitute unfair labor practices, provided such activities would be "unprotected" for private-sector employees under the National Labor Relations Act.[261] The limitation applies to labor organizations, not to individuals or groups of employees.[262]

Additionally, secondary picketing of private businesses or residences of governing body members now constitutes an unfair labor practice, similar to the private-sector restriction on secondary boycotts under the NLRA.[263] This restriction applies only if an object or effect of such picketing is to cause loss of business or deliveries to the governing body member's private business.[264] In agreeing to this provision, the Governor concurred with Senators Derfler and Bryant that decisions by governing body members with respect to a labor dispute involving a public body should not be subject to economic coercion via picketing of the governing body member's private business. Picketing against the Governor and other statewide elected officials was exempted from the new secondary picketing prohibition; picketing against state legislators was included.[265] The secondary

[258] While engaging in an "illegal strike" might not be a socially commendable activity, it is not always possible to say with certainty when a strike may be declared lawful or unlawful. *Compare* Eugene Sch. Dist. v. Eugene Educ. Ass'n, 9 PECBR 9455 (1987), *with* Redmond Sch. Dist. v. Redmond Educ. Ass'n, 3 PECBR 1564 (1977). Prior law limited ERB's authority to imposition of cease and desist orders backed up by circuit court civil contempt powers. OR. REV. STAT. § 243.726(4) (1993). The prospect of taking, say, a 1000-person bargaining unit out on a strike for 10 days would expose the union and employees to aggregate mandatory fines exceeding $10,000,000. Even the largest and most affluent unions might balk at such exposure (to say nothing of individual strikers who would have faced not only the normal loss of pay during a strike, but the potential of a $7000 per week civil penalty). As a practical matter, such penalties would have eliminated the right to strike. Since the potential for an effective end game remedy drives the collective bargaining process, these provisions would have eroded good faith negotiations, as well.

[259] *See* OR. REV. STAT. § 243.726(4) (1995).

[260] ERB Annual Report, *supra* note at 1-6 (reporting strikes in 1% of all disputes not settled prior to mediation).

[261] *See* OR. REV. STAT. § 243.672(2)(f) (1995). Of course, most such activities have long been "unprotected" for private sector employees under the NLRA. *See*, THE DEVELOPING LABOR LAW, 1110-1113 (Patrick Hardin et al. eds., 3d ed. 1992).

[262] OR. REV. STAT. § 243.672(2)(f) (1995).

[263] NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988 & Supp. V).

[264] *See* OR. REV. STAT. § 243.672(2)(g) (1995).

[265] *Id.* State Legislators are part of the governing body of a public employer when the collective bargaining negotiation or dispute is between the State of Oregon and a labor organization. *Id.*

picketing restriction expressly was made subject to rights of free speech and assembly guaranteed by the U.S. and Oregon Constitutions.[266]

Finally, the veto negotiators added new language clarifying that the statutory right to strike covers: contract "reopener" disputes; renegotiation of contract terms declared invalid or that cannot be performed; and mid-contract bargaining generally.[267] The final bill eliminated language from the earlier versions of the Derfler-Bryant bill that allowed public employers, on reaching an impasse, to make unilateral changes implementing not only "all or part" of their "final offer," but also *other* changes "not inconsistent" with such final offers.[268]

3. Interest Arbitration for Public Safety Employees

Veto negotiators ultimately agreed to the "final offer" arbitration concept. The negotiators added language clarifying that the new system would be "final offer *package*" arbitration.[269] In this system, the arbitrator picks the entire "final offer" package of one of the parties and does not make an award on an issue-by-issue basis.

The veto negotiators, in adopting the "final offer package" system, sought to encourage the parties to reach voluntary agreements without interest arbitration. The new system creates powerful incentives to move toward the other party's position; the former system invited the parties, especially public safety employee unions and the lawyers representing them, to "hold out" on the theory that the arbitrator would compromise the positions of the parties in making her award.[270]

Other major changes in the interest arbitration criteria were negotiated.[271] In a major change from the earlier versions of the Derfler-Bryant bill, the final

[266] *See* OR. REV. STAT. § 243.672(2)(g) (1995).

[267] *See* OR. REV. STAT. § 243.726(2)(d) (1995).

[268] *Compare* S.B. 750, 68th Leg. § 7 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.712 (1993)) to S.B. 750, 68th Leg., 1995 Or. Laws 286 § 6 (codified at OR. REV. STAT. § 243.712 (1995)).

[269] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 10 (codified at OR. REV. STAT. § 243.746 (1995)).

[270] Under the old system, a rational advocate would frequently advise taking a dispute to interest arbitration, even with a "fair" offer on the table, because at least a "little more" could reasonably be expected from the arbitrator; seldom, if ever, would an interest arbitrator award *less* than the public employer's table offer on a given issue. Empirical data supported Senators Derfler and Bryant contention that too often public safety employee unions had "nothing to lose" by "holding out" and subjecting contract disputes to interest arbitration. Although only 5% of public safety employee disputes resulted in interest arbitration, there have been *seven times* as many interest arbitrations as strikes under the PECBA—and these interest arbitration disputes arose in far fewer bargaining units than those subject to the right to strike. ERB Annual Report, *supra* note, at 5, 6. Language was also added to the "final offer package" provisions to eliminate or reduce "sandbagging," *i.e.*, leaving an especially aggressive position on the table until the "eleventh hour" (and then switching to a more reasonable position just before the deadline for "final offers") in order to encourage the other side to adopt an aggressive (and likely losing) position in interest arbitration. *See* OR. REV. STAT. § 243.746(3) (1995).

[271] *See supra* notes 230-239 and accompanying text. Under the final bill, however, the parties remain free to voluntarily agree on alternative or additional procedures and criteria for arbitral consideration as long as the process is "substantially equivalent" to the statutory procedure and criteria. OR. REV. STAT. § 243.762 (1995).

agreement between the Governor and Republican leadership provided that only one criteria would receive "priority" consideration—the "interest and welfare of the public." Moreover, the value of this sole priority factor would not be "determined by the governing body" but would be determined by the arbitrator.[272]

The "ability to pay" factor remained in the final bill but was not entitled to the priority it had been given in the earlier versions. Moreover, the final bill focused on "reasonable financial ability"—i.e., ability to pay, as determined by the arbitrator. In evaluating "reasonable financial ability," the interest arbitrator must give "due consideration and weight" to the other services provided by the unit of government, as well as other priorities, as determined by the governing body. Only a "reasonable" operating reserve "against *future* contingencies" (not including reserves for labor contract settlements) remains unavailable for settlement.[273]

The "ability . . . to attract and retain qualified personnel at the wage and benefit levels provided"[274] was retained from the earlier versions of the bill but lost its "priority" status. Although some firefighter spokespersons bitterly opposed this provision, from the *public's* point of view it cannot be denied that such a market-based factor constitutes one relevant consideration in a "neutral" award.

The Derfler-Bryant "comparability" language was modified to allow state agencies, Portland, and Multnomah County to make comparisons to other states. Otherwise, comparisons must be made to jurisdictions "of the same or nearest population range" within Oregon.[275] This "comparability" limitation does not preclude use of other traditional benchmarks, such as labor market, per capita income, and similar criteria.

Finally, the general "other factors" criteria in former ORS 243.746(4)(h) was retained "*if in the judgment of the arbitrator*" the specifically designated statutory factors do not provide "sufficient evidence for an award."[276] The final version also allows the parties to agree on other criteria.[277]

It is important to note that the major expansion in the mandatory scope of bargaining from earlier versions of the Derfler-Bryant bill meant that far more issues would enter through the "front door" of collective bargaining. Unless a subject becomes a mandatory subject of good faith bargaining by entering through the front door, the back door of interest arbitration stays locked.[278]

[272] OR. REV. STAT. § 243.746(4)(a) (1995).

[273] *Id.* at § 243.746 (4)(b) (emphasis added). The prior versions of the Derfler-Bryant bill removed consideration of "unexpended cash balances and cash carry-forwards" from the "ability to pay" issue. S.B. 750, 68th Leg. § 33 (1995) (B-Engrossed).

[274] S.B. 750, 68th Leg. § 33 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.746 (1993)); OR. REV. STAT. § 243.746(4)(c) (1995).

[275] OR. REV. STAT. § 243.746(4)(e) (1995).

[276] *Id.* at § 243.746(4)(h).

[277] *Id.* at § 243.706(2) (restored after earlier versions of the bill deleted this self-governance provision).

[278] On interest arbitration generally, see H. Kaplan, *Interest Arbitration and Factfinding: Some Principles and Perspectives*, 13 LERC MONOGRAPH SER. 19 (1994). On "ability to pay" arguments, see Timothy Williams et al., *The Ability to Pay: A Search for Definition and Standards in Factfinding and Arbitration*, 3 LERC MONOGRAPH SER 1. (1984).

VII. MISCELLANEOUS OTHER CHANGES IN THE PECBA

A. Supervisory Definition

The initial Derfler-Bryant bill proposed two major changes to the new language that excluded "supervisors" from public employee status.[279] First, the term "supervisor" would include employees who have responsibility to "evaluate" or "participate in performance reviews" of "other public employees."[280] Second, the bill deleted from the former definition of supervisor the provision that expressly stated that "the exercise of any function . . . enumerated in this subsection shall not necessarily require the conclusion that the individual . . . is a supervisor . . ."[281]

[279] OR. REV. STAT. § 243.650(17) (1993) ("'Public employee'... does not include... supervisory employees...."); S.B. 750, 68th Leg. § 1(17) (1995) (proposing to amend OR. REV. STAT. § 243.650(17) (1993)). In an uncontroversial change, the Derfler-Bryant bill also excluded "incarcerated persons" from the PECBA. *Id.*

[280] S.B. 750, 68th Leg. § 1 (1995) (proposing to add OR. REV. STAT. § 243.650(21) (1995)).

[281] S.B. 750, 68th Leg. § 1 (1995) (proposing to repeal OR. REV. STAT. § 243.650(14) (1993)). By making explicit that the performance of any one of the enumerated supervisory duties did not compel a finding of supervisory status, the former PECBA merely followed traditional case law under the National Labor Relations Act. Under the NLRA, the Board

> refrain[s] from construing supervisory status 'too broadly' because the inevitable consequence of . . . a [broad] construction [of the supervisory exemption] is to remove the individual from the protections of the Act. . . . On the other hand, it has long been recognized that the supervisory definition is phrased in the disjunctive. [Though] possession of any one indicia of supervisory status *provides a sufficient basis for finding supervisory authority*. . . . In determining the existence of supervisory status, the Board must first determine whether the individual possesses any of the 12 indicia of supervisory authority *and, if so, whether the exercise of that authority entails 'independent judgment' or is 'merely routine.' If the individual independently exercises supervisory authority, the Board must then determine if that authority is exercised 'in the interest of the employer.'*. . . The statutory term 'in the interest of the employer' connotes the employer's expectation of loyalty from individuals to whom it has delegated certain authorities. . . . ([I]n 'leadman' cases . . . when a skilled and experienced employee—*e.g.*, a journeyman pipefitter *assigns work to and directs* a less skilled helper or apprentice, there is scant risk of a conflict of interest between the employer and the employees which would test the loyalty of the leadman.) By contrast, when . . . leadmen . . . effectively recommend or impose *discipline*, or effectively recommend or grant *promotions* and/or *wage increases*, the possibility that the interests of the employer and employees may diverge is obvious, and the employer can legitimately demand the loyalty of the . . . leadman. Accordingly, . . . the authority . . . to *assign and direct* other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status, whereas the authority to *promote, demote, award raises, or discipline* (or to effectively recommend those actions) is invariably found to confer supervisory status.
>
> Beverly Enterprises-Ohio D/B/A Northcrest Nursing Home, 313 N.L.R.B. No. 54, 142 LRRM 1341 (1993) (emphasis added).
>
> Thus, under the NLRA, the mere presence of one of the statutorily enumerated indicia of supervisory status is a necessary prerequisite to, but does not compel, a finding of supervisory status. Independent judgment must be used. And under the NLRA's "interest of the employer/divided loyalties" analysis, some of the enumerated factors receive less weight than others. *E.g., id.* at n.13.
>
> Even participation in the disciplinary process does not lead inevitably to a finding of supervisory status under the NLRA. *Id.*, at n.30, n.35. Participation in evaluations leads to supervisory status only when such participation leads directly to a change in job status. *Id.* Finally, under the NLRA, the party claiming supervisory status bears the burden of proof. *Id.*

The amended bill that emerged after public hearing continued these proposed changes in the supervisory exclusion.[282]

These proposed changes seemed designed to lay the basis for an argument that the PECBA's supervisory exclusion should follow the recent decision of the U. S. Supreme Court in *Health Care and Retirement Corporation of America*.[283] In this case, the Supreme Court shocked many management and union representatives by broadly interpreting the NLRA's supervisory exclusion to reach "charge nurses," including both licensed practical nurses and registered nurses.[284] As Justice Ginsburg pointed out in her dissent, the majority's opinion had "implications far beyond . . . this case."[285]

The veto negotiators agreed to adopt *verbatim* the NLRA "supervisor" definition for private sector employees.[286] The negotiators discarded the language, initially proposed, regarding participation in the evaluation process.[287] As set forth above, NLRA case law does not make the presence of any one statutory factor decisive.[288] The veto negotiators essentially agreed that the private sector's definition of supervisor should be sufficient for the public sector.

Veto negotiators tailored the NLRA definition in two ways. First, negotiators added clarifying language that stated existing law: failure to assert supervisory status once does not prevent assertion of supervisory status later. If an employee is a supervisor, the employee is not a public employee entitled to PECBA rights. Second, the veto negotiators expressly agreed to negate any implication that, by adopting the NLRA definition, S.B. 750 meant to exclude nurses not traditionally

[282] S.B. 750, 68th Leg. § 1 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.650 (1993)).

[283] NLRB v. Health Care and Retirement Corp. of Am., 114 S. Ct. 1778 (1994). The law prior to the *Health Care and Retirement Corp.* case is summarized in THE DEVELOPING LABOR LAW, *supra* note, at 1608-15. "The legislative history . . . indicates that the [NLRA] definition of supervisor was meant to exclude only those individuals `vested with such genuine management prerogatives as the right to hire and fire, discipline, or make effective recommendations with respect to such action.'" THE DEVELOPING LABOR LAW, *supra* note, at 1610 (citing S. REP. No. 105, 80th Cong., 1st Sess. 4 (1947)); National Welders Supply Co., 129 N.L.R.B. 514 (1960)). The NLRB determines supervisory status on a case-by-case basis. THE DEVELOPING LABOR LAW, *supra* note, at 334 Supp. 1.

[284] *Health Care and Retirement Corp.*, 114 S. Ct. at 1778 (1994).

[285] *Id.* at 1792. NLRB decisions after *Health Care and Retirement Corp.* tend to ignore it, and continue to find employees who perform one or more of the enumerated supervisory tasks not to be supervisors under the Act. *See, e.g.*, Bakersfield Californian & Bakersfield Newspaper Guild, Local 202, 316 N.L.R.B. 1211 (1995) (finding Assistant Features Editor, Ass't Photo Director, Ass't Metro Editors, Ass't News Editor/Copy Desk Chief, Ass't News Editor/Night, and Ass't News Editor/Wire all to be non-supervisory employees notwithstanding the fact they clearly performed some of the tasks enumerated in the supervisory definition). And even after the Supreme Court ruling in *Health Care and Retirement Corp.*, the lower appellate courts continue to defer to the NLRB's expertise-based "supervisory" determinations. *E.g.*, Northeast Utilities Serv. Corp. v. NLRB, 35 F.3d 621, 625 (1st Cir. 1994) ("the `infinite and subtle gradations of authority' existing in the workplace entitle the Board to wide latitude in determining which employees fall within the definition of `supervisor.'").

[286] OR. REV. STAT. § 243.650(23) (1995). *Cf.* NLRA, § 2(11), 29 U.S.C. § 152(11) (1988 & Supp. V).

[287] *See supra* notes 280-281 and accompanying text.

[288] *See supra* notes 281-285.

classified as supervisors. This rejected the U.S. Supreme Court's aberrant holding in *Health Care and Retirement Corporation of America*.[289]

B. Managerial Exclusion

Although the NLRB and federal courts long ago recognized a managerial exclusion under the National Labor Relations Act,[290] ERB never had adopted such an exclusion under the PECBA.[291] The initial version of the Derfler-Bryant bill proposed to insert a broadly worded managerial exclusion into the statute.[292] Among other effects, this new language threatened to prevent faculty members at Oregon colleges and universities (and conceivably community colleges) from asserting any right to bargain collectively.[293]

The amended bills initially sent to the conference committee slightly modified the proposal for the new managerial exclusion, to require "discretion . . . beyond

[289] *See supra* notes 283-285 and accompanying text.

[290] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947). "Managerial employees" are "much higher in the management structure" than supervisors; Congress "regarded [managers] as so clearly outside the [NLRA] that no specific exclusion was thought necessary." *Bell Aerospace*, 416 U.S. at 283-84. "Managerial employees must exercise discretion within, or even independently of, established employer policy and *must be aligned with management*." *Id.* at 286-287 (emphasis added). Managers under the NLRA must make decisions regarding the direction of the employer's enterprise; simply making supplementary policies or exercising discretion within, or in conformity with, pre-established policy is not enough. Miller Elec., 301 N.L.R.B. 294 (1991); Bakersfield Californian & Bakersfield Newspaper Guild, Local 202, 316 N.L.R.B. 1211 (1995); Post Newsweek Stations of Fla., Inc., Station WPLG-TV, 217 N.L.R.B. 14 (1975). Making technical decisions or giving professional advice does not establish managerial status. Case Corp., 304 N.L.R.B. 939 (1991). Individuals with wide discretion for financial expenditures, hiring and firing of employees, and negotiation of contract terms frequently fall within the "managerial" category. *Bakersfield Californian*, 316 N.L.R.B. 1211 (1995) (employee with authority to control quality, stop production, make minimal expenditures, adjust billings, and approve advertising not manager); General Dynamics Corp., 213 N.L.R.B. 851 (1974).

[291] ERB, however, has sometimes taken managerial status factors into account in "community of interest" determinations in cases involving the question of the "appropriate bargaining unit." OR. REV. STAT. §§ 243.650(1), .666(3), .682 (1993); OR. ADMIN. R. 115-25-050 (1993); Executive Dep't v. OPEU, 12 PECBR 59 (1990).

[292] S.B. 750, 68th Leg. § 1 (1995) (proposing to amend OR. REV. STAT. § 243.650 (1993) to include a new subsection 14 and new language in subsection 17 defining "public employees"). The initial bill defined "managerial employee" as follows:

> `Managerial employee' means an employee who possesses authority to formulate and carry out management decisions, *or to routinely [not effectively] recommend management policies*, or who represents management's interests by taking or recommending [not effectively recommending] discretionary actions that effectively control or implement employer policy. Nothing in this definition shall be construed to require that managerial employees act in a supervisory capacity in relation to other employees as a condition of managerial status.

S.B. 750, 68th Leg. § 1(14) (1995) (proposing to amend OR. REV. STAT. § 243.650(14) (1993)).

[293] NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980) (reversing NLRB ruling that faculty members at a private university which fell within NLRA jurisdiction were not managers; held, that tradition and reality of faculty participation in university governance made them "managers").

the routine discharge of duties."[294] Otherwise, the proposal for a broad managerial exclusion remained intact.

The veto negotiators further modified the proposed new exclusion from collective bargaining rights by limiting the exclusion to the state service. To be excluded, a state employee manager must formulate and carry out "management decisions" or must "represent management" in "discretionary" actions, "beyond the routine" discharge of duties.[295] This language attempts to state a narrow exception that reflects NLRA precedents while specifically disapproving of the U.S. Supreme Court ruling in *NLRB v. Yeshiva Univ.*[296]

C. Appropriate School District Bargaining Units

The Employment Relations Board long ago declared a preference for "wall-to-wall" bargaining units.[297] In *Welches Education Association v. Welches School District*, ERB extended that principle to authorize combined teacher and nonteacher bargaining units.[298] This ruling resulted in mixed units of teachers, bus drivers, clericals, and custodians in several dozen school districts. The Derfler-Bryant legislation proposed to bar such mixing of licensed teachers with nonteacher personnel in bargaining units.[299] This provision remained in the amended bills sent to conference committee.

The veto negotiators agreed in principle that mixing professional teachers with nonprofessional school employees in bargaining units was problematic.[300] Given

[294] S.B. 750, 68th Leg. § 1 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.650 (1993)).

[295] The new language of OR. REV. STAT. § 243.650(16) (1995) provides:

> `Managerial employee' means an employee who possesses *authority to formulate* and carry out *management decisions* or who represents management's interest by taking or effectively recommending *discretionary actions* that control or implement employer policy, *and* who has *discretion* in the performance of these management responsibilities *beyond the routine discharge of duties*. A `managerial employee' need not act in a supervisory capacity in relation to other employees. Notwithstanding this section, `managerial employee' shall not be construed to include faculty members at a community college, college, or university.

(Emphasis added). *See also* OR. REV. STAT. § 243.650 (19) (1995).

[296] 444 U.S. 672 (1980). *See supra* note 294. On the NLRA exclusion for managers, see generally, David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989). For a leading public-sector precedent, *see* Cook County State's Attorney v. Illinois Local Labor Relations Bd., 149 L.R.R.M. (BNA) 2656 (Ill. S. Ct., June 22, 1995) (noting that assistant state's attorneys are managerial employees as a matter of law).

[297] University of Or. Chapter, Amer. Fed'n of Teachers v. University of Or., 10 PECBR 265, 274, *aff'd*, 92 Or. App. 614, 618, 759 P.2d 1112, 1114 (1988).

[298] Welches Educ. Ass'n v. Welches Sch. Dist. No. 13, 12 PECBR 304, 315-16 (1990).

[299] S.B. 750, 68th Leg. § 1(1) (1995) (proposing to amend OR. REV. STAT. § 243.650(1) (1993)).

[300] OR. REV. STAT. § 243.650(1) (1995). The National Labor Relations Act forbids mixing professionals with non-professionals "unless a majority of such professional employees vote for inclusion in such unit." NLRA, § 9(b), 29 U.S.C. § 159(b) (1988 & Supp. V). Until 1990, ERB declined to certify mixed teacher/nonteacher units. The dam broke in a case involving a school district with only 42 public employees. *Welches Educ. Ass'n*, 12 PECBR 304. One effect of mixed units is to raise the prospect of more effective strikes, and to increase bargaining power in these units.

scarce dollars available for salaries and other benefits and the predominance of teachers in such mixed units, the danger seemed substantial that settlements for nonteacher personnel would be traded for additional monies for teacher salaries. However, mixed units create economies of scale.

The veto negotiators were more concerned with stopping the trend toward mixed units than with breaking up existing mixed units. Consequently, existing mixed units were grandfathered.[301] They added clarifying language to the bill, making it explicit that nurses, counselors, therapists, psychologists, child development specialists, and those holding similar positions were to be included in the teacher bargaining unit.[302] Furthermore, negotiators crafted an exception for very small school districts with fewer than fifty employees.[303]

D. Enforcement of Arbitration Awards

Initially, the Derfler-Bryant bill eliminated binding grievance arbitration to enforce school district collective contract provisions relating to "just cause, evaluation procedures, or procedures for resolving student or staff complaints."[304] The school board would make the final decision in all such matters.[305]

Additional restrictions on the enforceability of arbitration awards found their way into the amended bill that passed the House and Senate in May. The restrictions regarding teacher grievances "relating to just cause, evaluation procedures, or procedures for resolving student or staff complaints" remained.[306] The amended bill added new language, applicable to all public employees, making grievance arbitration awards unenforceable in discipline cases when the arbitrator relied on prior inconsistent treatment "of the same or similar conduct."[307] This new language apparently arose out of testimony in the hearings process regarding

[301] OR. REV. STAT. § 243.650(1) (1995).

[302] *Id.*

[303] *Id.*

[304] S.B. 750, 68th Leg. § 13 (1995) (proposing new subsection (9) to OR. REV. STAT. § 342.850 (1993), part of the teacher Fair Dismissal Law).

[305] *Id.* The proposed amendment expressly would have withheld jurisdiction from the Employment Relations Board or an arbitrator over such grievance matters. Given the trend to arbitrate teacher discipline matters rather than rely on the statutory Fair Dismissal process, and the general trend toward alternative dispute resolution ("ADR") in employment law, this proposal seemed to flow "against the wind." OR. REV. STAT. §§ 342.805 -.934 (1993).

[306] S.B. 750, 68th Leg. § 13 (1995) (B-Engrossed) (proposing to add OR. REV. STAT. § 342.850(9) to the teacher Fair Dismissal Law).

[307] S.B. 750, 68th Leg. § 6 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.706(1) (1993)). The new language provided:

> Contract grievance procedures . . . that empower an arbitrator to review the discipline or discharge of employees shall prohibit the arbitrator from relieving a grievant of responsibility for wrongdoing or from otherwise modifying employer-imposed discipline or discharge based in any way upon the employer's previous different treatment of the same or similar conduct.

S.B. 750, 68th Leg. § 6 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.706 (1993)). Prior consistent enforcement of employer standards and policies long ago became generally accepted as a component of "just cause for discipline." *E.g.*, FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 683-87 (4th ed. 1985).

certain arbitration awards that reinstated, on the ground of prior inconsistent treatment, public safety officers who had been discharged after charges of egregious conduct.[308]

The veto negotiations led to new language relating to arbitration awards.[309] First, the negotiators dropped the earlier proposed restrictions on arbitration of teacher cases.[310] Second, the negotiators explicitly recognized a general public policy exception to enforceability: no award involving misconduct is enforceable, unless it complies "with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified *and* egregious use of physical or deadly force, and *serious* criminal misconduct," all *"related to work."*[311]

Again, the Governor and Republican leadership looked to private-sector precedents, recognizing a narrow public policy exception to arbitration award enforceability.[312] For almost twenty years, the PECBA cases have followed private-sector case law regarding the enforceability of arbitration awards.[313] Additionally, Senators Derfler and Bryant argued that certain arbitration awards in discipline cases seemed to ignore the public policy limitation.[314] Consequently, ERB will interpret and apply the new explicit statutory limitation under its duty to enforce arbitration awards in all cases, including discipline cases.[315]

In misconduct cases, the veto negotiators also agreed to further limits on arbitration awards based on disparate treatment "for the same or similar conduct."[316] Although the new language may have only codified existing case law, the PECBA now explicitly reminds arbitrators and the parties that

> (a) some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense;
>
> (b) public managers have a right to change disciplinary policies [in misconduct cases] at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees, and the change does not otherwise violate a collective bargaining agreement.[317]

[308] Statements of Senator Bryant to author.

[309] *See* OR. REV. STAT. § 243.706 (1995).

[310] *See supra* notes 305-306.

[311] *Id.* § 243.706(1) (emphasis added).

[312] *E.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

[313] *E.g.*, Corvallis Sch. Dist. v. Corvallis Educ. Ass'n, 35 Or. App. 531, 581 P.2d 972 (1978) (invoking the famous "Steelworkers Trilogy" private-sector cases in deciding a PECBA arbitration enforcement dispute); *see generally*, Carlton J. Snow, *The Steelworkers Trilogy in Oregon's Public Sector*, 21 WILLAMETTE L. REV. 445 (1985).

[314] Statements to author during veto negotiations.

[315] OR. REV. STAT. §§ 243.672(1)(g), (2)(d) (1995).

[316] *Id.* § 243.706(1).

[317] *Id.* § 243.706(1). For example, a prior unpunished rape or serious sexual assault should not justify a "disparate treatment" defense. There is simply, in such a case, no reasonable reliance by the offending employee on a prior failure to discipline for similar offenses. Substantial theft provides another example. Of course, any such change must be made in accordance with applicable law including any bargaining obligations under the PECBA.

E. Filing Fee and Statute of Limitations

The initial version of S.B. 750 also proposed several major procedural changes in the PECBA. The 180-day statute of limitations[318] would have been shortened to ninety days.[319] A $500 filing fee ($100 to file an answer) would have been imposed.[320] The bills sent to conference committee after passing the House and Senate in May restored the 180-day statute of limitations and reduced the proposed $500 filing fee to $250.[321] The veto negotiators accepted these changes but added a proviso for fee reimbursement when a complaint or answer is made frivolously or in bad faith.[322]

F. Public Employee Collective Bargaining Task Force

The negotiators created a task force to study further certain public employee collective bargaining issues.[323] First, the Task Force will study the appropriateness of a statewide salary schedule and statewide bargaining for school teachers.[324] Although this question cuts against Oregon's long tradition of local control of school districts,[325] the State's assumption of most funding for schools, as a result of the Ballot Measure 5's tax limitation, argues for connecting decision making to decision making regarding salary expenditures.[326] Second, the Task Force will address whether the PECBA should be amended further to "address separately labor relations issues for schools, cities and counties, and public safety employees."[327]

VIII. CHANGES OUTSIDE THE PECBA

The Derfler-Bryant bill proposed substantial changes to three statutes, in addition to those reviewed above for the Public Employee Collective Bargaining Act. These include: (a) the teacher "tenure" or Fair Dismissal Law;[328] (b) the public employee overtime pay statute;[329] and (c) the public employee transfer statutes.[330]

[318] *Id.* § 243.672(4).

[319] S.B. 750, 68th Leg. § 3 (1995) (proposing to amend OR. REV. STAT. § 243.672 (1993)).

[320] *Id.*

[321] S.B. 750, *supra* note 4, at § 3.

[322] OR. REV. STAT. § 243.672(3) (1995).

[323] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 32.

[324] *Id.*

[325] *E.g.*, Olsen v. State, 276 Or. 9, 23, 554 P.2d 139, 146 (1976).

[326] No solution to this dilemma is readily apparent. Only time will tell if the Task Force can resolve it.

[327] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 32.

[328] OR. REV. STAT. §§ 243.805-.934 (1993).

[329] *Id.* § 279.340.

[330] *Id.* §§ 236.605-.640.

A. Teacher Fair Dismissal Law

The initial Derfler-Bryant bill proposed a major reduction in the rights of school teachers faced with dismissal. First, the initial bill granted to school boards sole jurisdiction to hear appeals invoking rights in collective bargaining agreements.[331] Second, in dismissal cases before the Fair Dismissal Appeals Board,[332] the bill proposed to limit substantially the Appeals Board's authority to reverse a dismissal.[333] For example, Appeals Board review of inefficiency or inadequate performance would have been limited to a substantial evidence standard rather than a *de novo* standard. Third, Fair Dismissal Law provisions regarding the layoff and recall of tenured teachers faced substantial revision. The proposed amendments: (1) limited evaluation of relative competence and merit to the last three years' teaching experience; (2) required that school boards make merely an effort to transfer affected teachers (rather than the existing "every reasonable effort" standard); and (3) made the school board's power to override seniority, based on its own competence and merit determinations, nonwaivable in collective bargaining agreements.[334]

These proposed changes survived in the bills initially sent to conference in May[335] but were dropped in the agreement between the Governor and Republican leadership. The Governor, however, agreed that teachers facing dismissal should not have "two bites at the apple"—one before the Fair Dismissal Appeals panel and a second before a grievance arbitrator. Because dual remedies can be expensive and time-consuming for all parties, an election of remedies requirement was written into the final agreement.[336] Finally, the new law expressly allows the union to waive fair dismissal rights in a collective bargaining agreement.[337]

[331] S.B. 750, 68th Leg. § 13 (1995) (proposing new subsection (9) to OR. REV. STAT. § 342.850 (1993)). Such appeals included those "relating to just cause, evaluation procedures, or student or staff complaints." *See supra* note 261 and accompanying text.

[332] *See* OR. REV. STAT. §§ 342.805-.934 (1993). The Fair Dismissal Appeals Board sits in three-person panels constituted for each case. One member is a school board member of another school district, one a teacher from another school district, the third a representative of the public. *Id.* at § 342.905(3).

[333] S.B. 750, 68th Leg. § 12 (1995) (proposing to amend OR REV. STAT. § 342.905 (1993)). The proposed changes also would have eliminated the provision regarding inconsistent and arbitrary applications of school district policies. Relatively few dismissal cases in recent years have passed through the Fair Dismissal Appeals process.

[334] S.B. 750, 68th Leg. § 14 (1995) (proposing to amend OR. REV. STAT. § 342.934 (1993)). These proposed changes proved controversial. For example, limiting "merit and competency" determinations to the last three calendar years' teaching experience threatened to disadvantage many teachers who have interrupted their professional careers to have and raise children.

[335] S.B. 750, 68th Leg. § 14 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 342.934 (1993)).

[336] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 16 (codified at OR. REV. STAT. § 342.910 (1995)). The school district must specifically assert the right to require the election.

[337] *Id.*

B. Public Employee Overtime

Senators Derfler and Bryant also proposed more flexibility for public employers in the payment of overtime. For private-sector employees, the federal Fair Labor Standards Act (FLSA)[338] has long required overtime pay at "time and one-half" rates for hours exceeding forty in any one workweek.[339] Former ORS 279.340, however, required Oregon public employers to pay overtime rates for all work exceeding eight hours in a workday.[340] The Derfler-Bryant bill proposed to conform the state law for public employers to the generally applicable federal forty-hour standard.[341] This proposal remained in the amended bills initially sent to the conference committee.[342]

In the veto negotiations, the Governor agreed to provide more flexibility to public managers by adopting the rule for overtime pay required in the private sector under the federal FLSA.[343] Public safety employees remain subject to the special overtime pay rules set forth in section 7(K) of the FLSA.[344] Of course, all public employees may bargain for more favorable overtime rules in their labor contracts than the statutory minimums. This right was expressly written into the final Derfler-Bryant Act.[345]

C. Transfer Rights

Public employees, of course, can bargain in labor negotiations for transfer rights if their work is assumed by a different public employer.[346] In addition to these negotiated rights, Oregon statutes guaranteed certain transfer rights, including: (1) a right to be transferred whenever a different public employer assumed the governmental function or service involved;[347] (2) the right to continue to participate in the same retirement program and to retain seniority accrued with

[338] 29 U.S.C. § 201-219 (1988 & Supp. V).

[339] *I d.* at § 207. This is the federal rule for most private sector employees (although many exemptions exist). Since Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985) and the Fair Labor Standards Act of 1985, the same 40-hour rule applies to most public employees (although "comp time" may be substituted for overtime pay). Rhinebarger v. Orr, 839 F.2d 387 (7th Cir. 1988). Public safety employees (police, firefighters, and correctional officers), however, are subject to special overtime rules under the federal act. FLSA, § 7(K), 29 U.S.C. § 207(K) (1988 & Supp. V). Many employees receive overtime pay rates for work over 8 hours in a workday under the provisions of voluntary employer policies and/or collective bargaining agreements.

[340] There was an exception for "4-10's" work schedules—10 hour days for 4 days. Former OR. REV. STAT. § 279.340(2) (1993) (*amended by* OR. REV. STAT. § 279.340(1), (2) (1995)). This exception required overtime compensation for any employment in excess of 10 hours in one day. *Id.*

[341] S.B. 750, 68th Leg. § 15 (1995).

[342] S.B. 750, 68th Leg. § 15 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 279.340 (1993)).

[343] OR. REV. STAT. § 279.340(1) (1995).

[344] *See supra* note 286.

[345] *See* OR. REV. STAT. § 279.340(2) (1995) (as amended by S.B. 750, 68th Leg. § 26).

[346] *E.g., Oregon State Police*, 8 PECBR 7874, at 1916 (1985).

[347] OR. REV. STAT. § 236.610(1) (1993).

the transferring public employer;[348] (3) the right to a comparable position with the receiving public employer, or a lesser position if no comparable position exists, or layoff status with priority for recall if no such lesser position exists;[349] (4) the right to the same salary, even if the receiving public employer's salary schedule is lower;[350] (5) the right to retain all accrued sick leave and up to eighty hours of vacation leave;[351] and (6) the right to continue medical insurance coverage without pre-existing condition exclusions.[352]

The Derfler-Bryant bill initially proposed repeal of these transfer statutes.[353] This proposal also survived in the bills sent to the conference committee.[354] However, the veto negotiators rejected the proposals. After some rewriting and clarification of existing provisions, the negotiators agreed to three changes in the current statutes.

First, the negotiators limited to twelve months the right of transferred employees to suffer no salary or benefit loss if the receiving public employer's wages and benefits are lower than those of the transferring public employer.[355] No such statutory right exists for private-sector employees whose jobs are transferred to other employers. Although the Governor sought to preserve a longer transition period for affected employees, Senator Derfler insisted that twelve months was long enough for a transferred employee either to find new employment or to accept the wage and benefit structure of the transferee public employer. This argument ultimately prevailed.

Second, the final compromise deleted former ORS 236.650 requiring that the provisions of the transfer statutes "be liberally construed."[356]

Third, although not strictly a public employee transfer issue, the final agreement repealed ORS 279.315, which required public employers who subcontract public services to private employers to require their sub-contractors to provide medical insurance benefits.[357]

Public employee transfer rights, however, remain a mandatory subject of bargaining in the intergovernmental transfer context.[358]

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[348] *Id.* at § 236.620(2),(3).

[349] *Id.* at § 236.630.

[350] *Id.* at § 236.610(2).

[351] *Id.*

[352] *Id.* at § 236.620(3). *See generally,* Davis v. Wasco Intermediate Educ. Dist., 286 Or. 261, 593 P.2d 1152 (1979).

[353] S.B. 750, 68th Leg. § 38 (1995). In addition, Senators Bryant and Derfler proposed repeal of former OR. REV. STAT. § 279.315 (1993) requiring, in "contracting out" situations, that a private entity assuming functions or services of a public employer provide "health care benefits" to its employees. S.B. 750, 68th Leg. § 38 (1995).

[354] S.B. 750, 68th Leg. § 36 (1995) (B-Engrossed) (proposing to amend OR. REV. STAT. § 243.772 (1993)).

[355] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 21 (codified at OR. REV. STAT. § 236.610 (1995)).

[356] S.B. 750, 68th Leg., 1995 Or. Laws 286 § 34.

[357] *Id.*

[358] Federation of Or. Parole & Probation Officers v. Oregon, 132 Or. App. 406, 888 P.2d 597 (1995).

IX. CONCLUSION—SOME RUMINATIONS ABOUT S.B. 750 AND THE EX ANTE VETO NEGOTIATIONS PROCESS

Union leaders and public-sector managers both have expressed disappointment over the final version of the Derfler-Bryant Act. This suggests that Senators Derfler and Bryant correctly characterized the agreement with the Governor when they told the Legislative Assembly in June that it achieved a "balance."[359]

One of the persistent problems in our public institutions, as in collective bargaining itself, is to view political controversies as a zero-sum game, in which "points" scored on one side or the other necessarily mean a loss to the other side. Yet all of us, as members of a civic society, share common interests. Our selfish or narrowly conceived personal interests and ideological convictions are real, but this should never obscure the vital importance of joining perspectives and finding solutions that bind us together.[360] Doubtless, some public managers will be disappointed at the scope of bargaining and bargaining process revisions in the final Act. Labor unions vehemently object to the new supervisory and managerial exclusions, the new limitations on abusive strike and secondary boycott activities, and the interest arbitration changes.[361] But has the public's interest been served? And do not public managers and unions share a common interest in accepting changes that will make collective bargaining better and more credible to the taxpaying public, more responsive to the evident need for adjustments in our public institutions in a constantly changing world?

In my view—beyond the merits of arguments surrounding any particular change—the *ex ante* veto negotiations process presented a unique opportunity for forging new understandings and perspectives, for increasing the possibilities for the public good. What general lessons arise from the particular experience of the DerflerBryant Act?

First, while no model can explain completely a complicated negotiation like this one, the problem-solving rather than competitive model of negotiations predominated. This approach yielded gains from information-sharing, deepened understanding of the goals, perceptions, and priorities of each side, and a new awareness of possibilities for common ground not apparent at the outset.

Second, although one could import the competitive or zero-sum model into a negotiation of this sort, doing so would have deflected the parties toward a self-defeating focus on "scoring" the results. Indeed, a competitive model of negotiations might easily have resulted in a game of legislative "chicken," with each side, at some point, adopting a position and waiting for the other to blink. As was seen in the relatively high number of traditional vetoes (fifty-two) by Governor Kitzhaber during the 1995 legislative process, this game can result in

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[359] *See supra* notes 33-36.

[360] *See generally* Linda Hirshman, *The Virtue of Liberality in American Communal Life,* 88 MICH. L. REV. 983 (1990).

[361] Various conversations with author.

surprises, strained relationships, lost opportunities, and costly future consequences. The *ex ante* veto negotiations process encourages, if it does not quite require, a collaborative and cooperative effort.

Several preconditions must exist for the process to work. Both sides must sincerely desire an agreement, for whatever reasons. If either the governor or the legislative majority places primary value on grandstanding to please constituencies or interest groups, a problem-solving, *ex ante* veto negotiations process is unlikely to be of value. The parties must keep in mind that they are involved not in a single and isolated transactional negotiation, but in an ongoing relationship in which they will be dealing on many other issues in the same (and perhaps future) legislative session. Furthermore, the governor must credibly communicate that he will veto the legislation in the absence of agreement. Finally, while consultation with affected groups is necessary and appropriate, the negotiation, in fact, must be conducted by the legislative leadership and governor in a mutual search for common ground, not as mere proxies for interest groups.

Let us look at some examples in the S.B. 750 negotiations. At the start of the legislative process, the sponsors of S.B. 750 clearly meant to limit collective bargaining by imposing radical restrictions on the scope of bargaining. Yet, as Senator Bryant expressed on final passage, the sponsors had made "huge" modifications of their position on scope of bargaining by the conclusion of the veto negotiations. Modest, rather than major, changes in "scope" were agreed to (with the arguable exception of the teacher "class size" issue).[362]

Why did such a change in position occur? To a great extent, it was because the legislative majority's negotiators—primarily Senators Derfler and Bryant—wanted to "do the right thing" and develop changes that withstand the test of sound public policy. Three central and indisputable facts underlay the scope of bargaining resolution in S.B. 750: (1) the PECBA process has worked well for twenty-two years to resolve all but a tiny fraction of bargaining disputes by mutual, voluntary agreement, rather than by strikes or other disruptions; (2) as the United States and Oregon Supreme Courts have pointed out, a relatively broad scope of bargaining serves the basic purpose of channeling workplace dispute through the PECBA's dispute resolution processes; and (3) public managers, like their private-sector colleagues, can "just say no." Collective bargaining does not require concessions on any particular item.

The Governor also approached the negotiations with a view to the broader community interest, rather than as a game for point-scoring with labor union and other constituencies. The Governor agreed that a faster, less expensive, and more open bargaining process made sense and was attainable without fundamentally harming the PECBA as a dispute resolution process. Thus, the final agreement eliminated mandatory advisory factfinding, adopted bargaining timelines, and permitted the free exchange of views between public employees and public officials. Finally, the Governor made concessions on scope issues that were either deemed to be trivial items for bargaining or emotion-charged with little practical effect (e.g., class size).

[362] *See supra* notes 113-120 and accompanying text.

The "end game" process also focused the negotiators on the broader interest rather than "bean counting" for labor or management. The restrictions on strike activities mirror those that govern private-sector employees (e.g., slowdowns, sitdowns, and "rolling" strikes). The ban on picketing private businesses or members of school boards, city councils, and other public governing boards could be objectionable only to those with no knowledge about secondary boycotts or no concern about public decisions driven by private business interests. While addressing these abuses, the veto negotiators avoided adopting punitive and heavy-handed sanctions that would threaten legitimate strike activities.

The changes in interest arbitration procedures reflected the same search for broader rather than narrowly conceived interests. It was certainly peculiar that public-safety units demanded interest arbitration more than seven times as often as regular bargaining units took bargaining disputes to strikes, even though there are far fewer public safety bargaining units. Without doubt, under the old system some lawyers and unions insisted on interest arbitration for understandable, but nonetheless self-interested, reasons: why settle if one could, in the phrase which L.B. Day, former state senator, once included on Teamster Local 670 jackets, "get more" in arbitration.[363] The new final offer package arbitration process should curtail this practice. Additionally, as a practical matter, it should create a dynamic of moving toward the other party's position.

The new criteria for interest arbitration also have generated criticism by those who believe the old system worked to their advantage. But how can one argue that the public interest should not be the first priority in every interest arbitration award? Or that reasonable ability to pay should not be a factor? Or that the willingness of qualified employees to work at the offered wage and benefit level is not relevant to an award? The intensity of the criticisms of the new criteria provide one measure of the one-sidedness of perspective that results from the competitive model prevalent among interest arbitration advocates. In the long run, nothing could be more destructive of political support for collective bargaining, as a process, than a short-sided focus on preserving one's perceived advantage without regard to broader interests.

To be sure, as a major revision of the PECBA, S.B. 750 may need further fine-tuning as problems find the light of experience. However, as Senator Derfler said in presenting the final bill, a basic balance now has been achieved, and all parties now can join in resisting attempts in the future to damage a process that still works.

[363] At the time (1977), the author was an attorney for Local 670, and proudly wore the jacket to many gatherings, including one ERB hearing.

SCOPE OF BARGAINING AFTER SENATE BILL 750

Kathryn T. Whalen and
Paul B. Gamson

INTRODUCTION

Henry Drummonds has provided a comprehensive review of the changes created by Senate Bill 750. This portion of the monograph will focus on the new, qualifying language to the definition of employment relations contained in ORS 243.650(b)-(f). Subjects are mandatory for bargaining only if they fall within this definition. These comments will discuss issues concerning the qualifiers and speculate about how the Employment Relations Board (ERB) might interpret some of the changes.

Obviously, no one knows for sure how the board will interpret and apply the changes. More than twenty-two years of case law that laid the foundation for the analysis of scope questions has now been undercut by SB 750, leaving no stable structure in which practitioners can take refuge. We can only speculate about how the rebuilding process will occur.

ANALYTICAL FRAMEWORK

Questions regarding SB 750 should be decided using the same general analysis that applies to any other question of statutory interpretation. The main goal is to identify and implement the intent of the legislature. The Oregon Supreme Court uses a three-level analysis to determine legislative intent,[1] and the ERB has adopted the same analysis.[2] First, the court examines the text and context of the statutory language at issue. It reviews the plain meaning of the language and considers it in the context of the larger statutory scheme. If the legislative intent is unclear from the text and context, the court then moves to the second level of analysis where it reviews the legislative history of the statutory language at issue.

The legislative history of SB 750 is unusual because of its heavy reliance on direct negotiations between the governor's office and the legislature, as opposed to negotiations within the legislative body itself. The enacted version is dramatically different from the initial proposal. Thus, many of the discussions or statements made at hearings on the original bill may have little bearing on the meaning of the compromise bill that finally emerged from the legislature.[3] Most of the language in

[1] *PGE v. Bureau of Labor and Industries*, 317 Or 606-612, 859 P2d 1143 (1993).

[2] E.g., *OSEA Declaratory Ruling*, 15 PECBR 645, 656 (1995) (Member Hein, dissenting).

[3] It can be instructive, however, to review language that was in earlier versions of the bill but was removed before final enactment. We can assume removal of the language was intentional and was a part of the compromise reached between the governor and the legislature. ERB should refrain from interpreting SB 750 in a manner that restores language that was intentionally removed from the bill.

SB 750 was the result of negotiations between the governor and several legislators who were proponents of the bill. Professor Drummonds' excellent article offers an insider's view of the process and provides crucial insights into the legislative intent behind SB 750. It is a definitive review of the legislative history.

If neither text and context nor legislative history sufficiently reveals the intent of the legislature, the court then moves to the third step. Here, it applies general rules of statutory construction to help resolve any remaining ambiguity. Some of the rules are contained in statute, e.g., ORS Chapter 174, and many others are found in the case law.

The language and structure of SB 750 suggests a series of questions to ask in determining whether a subject is mandatory for bargaining:

Is The Subject Of The Proposal Specifically Included Or Excluded From The Statutory Definition Of Employment Relations?

Matters that are specifically included (direct or indirect monetary benefits, hours, vacations, sick leave, [and] grievance procedures) are mandatory subjects of bargaining.[4] Conversely, excluded subjects are permissive.[5] Parties are still permitted to bargain over these permissive subjects, but they are not required by law to discuss them. In a unilateral change situation, an employer is obligated to bargain over the mandatory impacts of a permissive subject before it implements a change.[6]

If the subject of a proposal is specifically listed or is included by necessary implication, that is the end of the inquiry. If it is not listed, the ERB then moves to the next question:

Has ERB Previously Declared The Subject Permissive?

If so, the subject continues to be permissive.[7] If there is no such decision, then proceed to the next question:

[4] ORS 243.650(7)(a); *Portland Firefighters v. City of Portland*, 305 Or 275, 775 P2d 770 (1988). Some subjects are mandatory by necessary implication from the lists. For example, the legislature has excluded "staffing levels and safety issues (except those staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees...)." ORS 243.650(7)(f). The unmistakable implication of this language is that anything which does have a direct and substantial effect on employee safety is mandatory.

[5] ORS 243.650(7)(e), (f).

[6] *FOPPO v. Corrections Division*, 7 PECBR 5649, 5654 (1983). Professor Drummonds' account of the specifically included and excluded subjects under SB 750 is quite comprehensive, so we will not comment further here. Instead, we concentrate on the two final questions regarding the balancing test and the *de minimis* standard.

[7] ORS 243.650(7)(b).

On Balance, Does The Subject Have A Greater Impact On Management's Prerogative Or On Employee Wages, Hours Or Other Terms And Condions Of Employment?

The so-called balancing test is discussed below in more detail. It applies only to subjects that are not specifically enumerated. Essentially, a subject is permissive if the scale tips toward the employer's side.[8] If the balance is toward the employee's side, then proceed to the final question:

Does The Subject Have More Than A De Minimis Or Insubstantial Impact On Employee Working Conditions?

The de minimis test is also discussed below in more detail. If the impact on employees is insubstantial or de minimis, the subject is permissive.[9] If there is more than a de minimis impact, and if all of the other tests are satisfied, then a subject is mandatory for bargaining.

SUBJECT VERSUS PROPOSAL

In addition to answering the above four questions, the ERB must decide whether to apply them to general subjects or to specific proposals. The answer to this question will have a profound impact on scope analysis.

Prior to the *Tigard* class size case, ERB considered only general subjects to be either mandatory or permissive.[10] A subject's status as mandatory was not affected by the particular language of a proposal that addressed the subject.[11] Even a union's unreasonable proposal regarding a mandatory subject of bargaining does not justify an employer's refusal to bargain.[12]

In its first *Tigard* decision, ERB applied this test. It held that class size was a measure of a teacher's workload, and that workload was a mandatory subject for bargaining. This brought howls of protest from the management community. They successfully convinced the Supreme Court that ERB must consider a "*proposal* . . . in light of the workplace involved and the effect of the *proposal* on the employees working therein."[13] Thereafter, in scope of bargaining cases, ERB no longer looked at subjects, but instead considered whether particular proposals were mandatory or not.[14]

[8] ORS 243.650(7)(c).

[9] ORS 243.650(7)(d).

[10] *Tualatin Valley Bargaining Council v. Tigard School Dist.*; 11 PECBR 590(1989) aff'd 106 Or App 381(1991). Reversed and remanded, 314 Or 274 (1992), on remand 14 PECBR 321(1993). Aff'd without opinion 128 Or App 59, rev. denied 320 Or 272(1994).

[11] *IAFF Local 314 v. City of Salem*, 7 PECBR 5819, 5825 (1983).

[12] *OPEU v. Executive Dept.*, 10 PECBR 51, 73 (1987).

[13] 314 Or at 286 (emphasis added).

[14] 14 PECBR 21, 332.

SB 750 apparently abandons the *proposal* analysis. In at least six different places in SB 750, the Legislature added the word *subject* to the language on scope of bargaining. In doing this, SB 750 appears to revert back to a pre-*Tigard* analysis in which subjects, rather than proposals, are either mandatory or permissive. However, as we discuss below, limiting the analysis to subjects may raise practical difficulties, especially in regard to safety proposals and application of the de minimis test.

REFLECTIONS ON THE BALANCING TEST

The balancing test is not new with SB 750. In the very first volume of the PECBR, in its scope trilogy, ERB adopted a balancing test to determine whether a subject is mandatory.[15] Under the test, a subject which has greater impact on the employer's interests is permissive; a subject which has greater impact on the employees' interests is mandatory. The Supreme Court upheld the balancing test as one (but not the only) appropriate way to identify whether a subject is mandatory for bargaining.[16] SB 750 has now enshrined this test in the statute.

There is not much useful advice to give the practitioner regarding the balancing test. Most ERB pronouncements on the topic are conclusory. That is, ERB reviews the factors on each side of the balance, and then informs us, in conclusory fashion, which side is weightier. Appellate cases provide no help. *Springfield* approves the use of the balancing test, but leaves its application to ERB. *Portland Fire Fighters* says only that the balance does not apply to enumerated subjects. *Salem Police Employees Union v. City of Salem,*[17] does not discuss or apply a balancing test, and even questions the validity of the mandatory–permissive dichotomy. *Tigard* instructs ERB to apply the balance to a particular proposal rather than to a general subject, and it remands the matter to ERB to apply the balance. None of these appellate cases provide insight as to how the balance should be applied. They leave the application to ERB.

Even with the lack of guidance provided by the appellate cases, practitioners should still review existing ERB cases and attempt to draft proposals in terms of subjects ERB has already balanced as mandatory. If ERB has already balanced a subject, urge it to follow its prior decision. Next, if a case reaches litigation, make a thorough factual record of the impacts a subject has on your side of the scale. That will allow ERB to justify a decision in your favor. Beyond that, there is little to say that will be of use in trying to apply the balancing test in the field to predict whether a subject is mandatory or permissive. The balancing test is not a helpful tool in deciding scope of bargaining cases. Even ERB has recognized that it has

[15] Springfield Education Ass'n v. Springfield School Dist.. No. 19, 1 PECBR 347 (1975); Eugene Education Ass'n v Eugene School Dist. No. 4J, 1 PECBR 446 (1975); South Lane Education Ass'n v. South Lane School Dist. No. 45J, 1 PECBR 459 (1975). The cases were consolidated for appellate review as Springfield Education Ass'n. v. School Dist., 24 Or App 751, 547 P2d 647, reconsidered, 25 Or App 407 (1976), on remand, 3 PECBR, 1950, (1978), aff'd 42 Or App 93 (1979), modified, 290 Or 217 (1980).

[16] *Springfield Education Association. v. School District,* 290 Or 217, 621 P2d 547 (1980).

[17] 308 Or 383 (1989).

little predictive value.[18] Arguing that something weighs more heavily on one side of the scale or the other is a statement of conclusion rather than an analytical tool. It does little to help practitioners determine whether the subject of their proposal is mandatory. It is the explanation ERB and the courts use to justify the outcome, but it does not tell us how they got there. Application of the balancing test to a specific subject necessarily requires ERB to assign weights to the various factors the parties placed on either side of the scale. The legislature offered no guidance to the board on how it should assign these weights. Consequently, the balancing test relies on the subjective determination of the board members as to the relative weight of any particular factor.

Take, for example, the question of how many different classes a teacher can be assigned. Teaching five classes in a day with the same subject matter will be significantly different from teaching five classes with different subject matter in a day. From a teacher's point of view, this determination will affect job stress, job performance, the amount of preparation needed, the number of nights and weekends needed for work, and job satisfaction. The school district may argue that it has a right to assign teachers where they are needed.

How is the balance to be struck? The factors the parties place on the scale do not come with labels to identify how much each weighs. ERB must assign a weight to each of these interests before it can perform the balances required by the statute. How much weight should ERB assign to each? This is the crucial question that will determine the outcome of the case, yet the legislature offers absolutely no guidance.

To paraphrase the old saying, "The weight is in the eyes of the scalemaster," in this case the members of the ERB. In assigning weights, ERB members can do little more than fall back on their subjective sense of fairness and their underlying political ideology regarding the importance of management functions versus employee rights. Under this system, the weight given to a concern is whatever a majority of the board says it is.

Over the past twenty-two years, the PECBA has evolved a fair and effective standard for scope of bargaining issues. After some early rounds of litigation over scope issues, labor and management settled into a long period of relative stability and predictability where most litigation was over fine-tuning issues. SB 750 will undoubtedly knock the instrument out of tune and foster new rounds of expensive and time-consuming litigation. The absence of meaningful standards seems to insure that answers will come only through litigation.

THE DE MINIMIS EXEMPTION

Another change under SB 750 is the provision exempting "subjects that have an insubstantial or de minimis impact on public employee wages, hours, and other terms and conditions of employment."[19] This provision is puzzling for several

[18] *Tualatin Valley Bargaining Council v. Tigard School Dist 23J,* 14 PECBR 321, 338 n. 13 (1993) (Order After Remand), aff'd without opinion 128 Or App 59, rev. Denied 320 Or 272 (1994).

[19] ORS 243.650(7)(d).

reasons. First, the statute already contains a balancing test which should weed out any de minimis subjects. The balancing test weighs the impacts of a subject on employees against those on the employer. If a subject has a de minimis impact on employee working conditions, it will survive the balancing test only if the impact on employer prerogatives is even less significant. At a practical level, the parties would not fight over a matter so meaningless to each of them. The fact that the parties are willing to spend their limited time and resources fighting over a subject tends to indicate it is not de minimis.

Second, the statute applies to de minimis *subjects*. It is difficult to understand how a subject (rather than a specific proposal) can logically be considered "insubstantial or de minimis." ERB has long applied its balancing test to determine that certain subjects are mandatory for bargaining. Examples include safety, student contact time, layoff and recall, just cause, and subcontracting. Further, the statute on its face applies only to "subjects." It is possible that a specific proposal concerning any one of those subjects could arguably be considered de minimis, but that is not what the statute says. As discussed above, a subject's status as mandatory is not affected by a particular proposal concerning that subject.

During the floor debate on SB 750, Senator Bryant gave an example that unwittingly illustrates this confusion. He suggested that several minutes of teacher–student contact time would be de minimis.[20] But that example concerns a particular proposal involving the general subject of student contact time. The de minimis nature of the particular proposal does not convert the subject of student contact time into a permissive subject. The statute is clear. Only subjects can be considered de minimis. It will be a rare situation where an entire subject (as distinguished from a particular proposal regarding a subject) is considered "insubstantial or de minimis."

Putting these conceptual difficulties aside, ERB addressed the de minimis issue in two cases prior to the passage of SB 750. In *FOPPO v. Corrections Division*, ERB held that an employer had no obligation to bargain over subcontracting that had "only a slight or remote impact on the bargaining unit."[21] In *AFSCME v. Polk County*, ERB held that this de minimis exception applies only to subcontracting, but not to other scope issues.[22]

Private sector cases indicate that a refusal to bargain over an issue that is de minimis in nature may limit the extent of the available remedy, but it does not mean that no violation took place. [23]

"De minimis" is a relative term. One hundred dollars could be significant to a homeless person but would be insubstantial to General Motors. A determination will also depend on whether the de minimis impact is judged in relation to a single

[20] House Floor Session, SB 750, June 5, 1995 (Tape 223-A).

[21] 7 PECBR 5649, 5656 (1983).

[22] 11 PECBR 114, 122 (1988).

[23] E.g., *Facet Enterprises, Inc. v. NLRB*, 907 F2d 963, 983 (10th Cir., 1990).

individual or by its impact on the entire bargaining unit. *FOPPO* indicates that ERB will look at the impact on the entire bargaining unit.[24]

Continuing with Senator Bryant's example of a several-minute increase in a teacher's student contact time illustrates the difference. Three minutes per day for a typical school year of 175 student contact days amounts to 525 minutes, or 8-3/4 additional hours of added student contact time in a year. At an hourly rate of $15, this amounts to $131.25. One can argue about whether this amount is de minimis to the individual employee. But *FOPPO* indicates that we must consider the impact on the entire bargaining unit. In a medium-sized unit with 200 members, for example, the amount at stake is $26,250. The time has not yet arrived when this amount could be considered a trifle.

The de minimis exception is beneficial to the extent it eliminates the expenditure of time and money on truly unimportant issues. There is no precise formula on where to draw the line. Any line drawing should be done with an eye to the furtherance of the purposes and policies of the PECBA. The broad legislative purpose of the act is to channel labor disputes into the collective bargaining process.[25] Doubtful or close cases should therefore be decided in favor of bargaining to ensure these beneficial effects.

STAFFING LEVELS AND SAFETY ISSUES FOR NON-SCHOOL EMPLOYEES

A scope of bargaining issue that illustrates a potential problem posed by SB 750 is the question of whether staffing levels are a mandatory subject of bargaining.

ORS 243.650 (7) (f) provides that for non-school district bargaining, "employment relations" expressly excludes staffing and safety issues *"except those staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees."* Most of the ERB case law dealing with safety issues and staffing levels has arisen in the public safety arena. Under the old law, ERB provided some indication of the meaning of direct, and also what constitutes a substantial effect on safety.

Direct Effect

In *Polk County v. Polk County Deputy Sheriff's Association*, the board addressed whether a union proposal that set minimum staffing at two patrol deputies and two corrections officers per shift was mandatory because of its impact on safety.[26]

Applying the balancing test, the board concluded that this proposal was permissive. ERB said:

> The Association, while apparently agreeing that staffing decisions *per se* are permissive subjects, argues that its proposal was prompted only by safety

[24] 7 PECBR at 5656.

[25] *Portland Firefighters Association v. City of Portland*, 305 Or 175, 283, 775 P2d 770 (1988).

[26] 6 PECBR at 4642 6 PECBR 4641 (June 1981).

concerns and is therefore a mandatory subject. This argument misses the mark. Assuming, without deciding, that a safety/staffing proposal could be framed in "mandatory" terms, the Association has not done so here. The issue of safety is not raised *directly* by the language of the proposal but only by extrinsic evidence offered to show the *intent* of the proposal; and since the proposal is unambiguous, and clearly permissive, we have no occasion to consider such evidence. (Emphasis added.)[27]

More recently, ERB evaluated a proposal which sought to increase the safety of correction employees working at Oregon State Penitentiary (OSP) by providing for a concealed weapons depository at work where they could check in and out concealed weapons carried to and from work.[28]

The board did not apply the balancing test in this case, but instead analyzed the proposal to see if it was of like character to the subjects listed in the statutory definition of employment relations and therefore mandatory. In finding the proposal permissive, the board reasoned:

One major characteristic the enumerated subjects share is their *direct connection to the employer-employee relationship.* The subject matter of the Association's proposal is the establishment of a concealed weapons depository. Under the facts of this case, the proposal does not concern the employer-employee relationship *in the direct manner necessary* to constitute a condition of employment. *The proposal does not concern the health and safety of employees while they are performing their duties. Nor does it concern an off-duty activity required by the employer as a term of continued employment or as a reasonably necessary adjunct of the employment itself.*[29]

These cases demonstrate that the board has construed "direct" to mean that (1) the proposal at issue expressly raises a safety issue; and (2) the proposal concerns the health and safety of employees *while they are performing their work or activities required by the employer in connection with their work.* This latter requirement indicates how ERB may define the new statutory term of on-the-job safety. That is, "on-the-job" means while employees are performing work or performing activities required by their employer in connection with their work. Practitioners still should be mindful of these requirements in advancing safety proposals today.

Substantial Effect

Once again, the board's results in prior cases may be useful in determining what constitutes a substantial effect on employees' on-the-job safety. In the past, ERB declared that the subject of safety was mandatory, but ERB balanced particular safety proposals to see if there was a greater effect on safety than on management prerogatives.[30] More recently, rather than balance, ERB determined if

[27] 6 PECBR at 4650.

[28] *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, ERB UP-91-93, 14 PECBR 832, 843 (October–December 1993).

[29] Ibid., at 867.

[30] E.g. see: *IAFF local 314 v. City of Salem and Darrell Dearborn*, ERB C-61-83, 7 PECBR 5819 (1983).

a particular safety proposal was a sham proposal—that is, a proposal whose true nature is permissive, but which masquerades as a mandatory subject of bargaining. If not a sham, the safety proposal was found to be mandatory.[31]

As Professor Drummonds points out, the new "direct and substantial effect" test requires no balancing—only that the staffing level or safety issue has a direct and substantial effect on the on-the-job-safety of employees.[32] The focus is not on comparison of impacts between the employer and employees. The only relevant inquiry is whether there is a direct and substantial impact on safety. However, if a proposal previously has been found on balance to have a greater effect on conditions of employment than on management prerogative, the same language should meet the "direct and substantial effect" on safety.

For example, in *IAFF Local 314 v. City of Salem and Darrell Dearborn*, supra, ERB applied the balancing test to a safety proposal and found the proposal to be mandatory. The safety proposal had as a goal that all in-service engine and truck companies in the fire department have a minimum of three personnel.[33] In finding the proposal mandatory, ERB said:

. . . the City contends the proposal is in reality a "staffing" proposal (permissive) rather than a safety proposal. Again, we do not agree. The proposal does require the City to maintain its practice of assigning three fire fighters to a company. Expert testimony presented at the hearing on this case was unanimous that any *change* in the number of fire fighters assigned to a company would present an immediate threat to the safety of the remaining fire fighters. This is so because of the interdependent nature of the fire fighters' duties. The City already has exercised its prerogative to determine company staffing levels. Maintenance of those levels—or, in the alternative, a change in them—must be bargained because of the considerations of safety that clearly are involved. Section 21.3 is mandatory.[34]

The board's result in the *IAFF Local 314* case indicates that the maintenance of *existing* staffing levels in order to avoid an immediate threat to the on-the-job safety of remaining employees *as shown by competent, material evidence* would meet the direct and substantial effect test.

In contrast, in *Executive Department, et al v. Oregon State Police Officers' Association*, ERB ruled that a proposal that required two police officers per patrol car at nights was, on balance, a permissive subject of bargaining.[35] ERB said:

Concerning Subsection (a), we must balance the effect of the proposal on officer safety against its effect on management's right to establish manning

[31] See *City of Portland v. Portland Police Commanding Officers Association*, UP-19-90 & UP-26-90, 12 PECBR 424, 462-463 (1990).

[32] We credit Professor Drummonds account of the legislative history rather than the scripted comments of Representative Watt and Senator Bryant on the House and Senate Floors.

[33] 7 PECBR at 5822.

[34] Id at 7 PECBR at 5829.

[35] 8 PECBR 7874 (1985), Id at 8 PECBR 7909-7910.

> levels to determine if the proposal is a mandatory safety proposal or a permissive staffing proposal. The findings of fact reflect that, on the one hand, there nearly always is sufficient time to arrange backup for a trooper whose personal safety may be at risk; while, on the other hand, the Association proposal would have an extensive effect on the State's staffing situation.[36]

In essence, the board found that the evidence did not show a substantial safety risk because there were existing methods for protecting the personal safety of officers and that the proposal would have a significant effect on staffing.

While a safety proposal deemed mandatory pursuant to a balancing test seems likely to meet the direct and substantial effect test, what about proposals (like the *OSP* proposal above) that have been found to be, on balance, permissive? Could such proposals meet the new direct and substantial effect test? Quite possibly. Since there is no balancing, that is, no assessment of the effect on management prerogatives, there is a single evidentiary focus—the proposal's effect on workplace safety. However, unions must be able to persuasively demonstrate that the proposal has direct and substantial effect on safety. In the above *OSP* case, ERB was not convinced because the evidence showed existing, alternative means that sufficiently protected employees. If a union can demonstrate problems with existing procedures, and that the personal safety of employees is jeopardized, the result should be different.

For example, in *Oregon Public Employees Union v. State of Oregon, Executive Department*, ERB held that a proposal which required adequate security equipment *or* another person to accompany an employee in the transport of patients in a motor vehicle to be mandatory.[37] The board specifically found that the Union had demonstrated a substantial concern for employee safety and that the employer had failed to disprove such concerns.[38] The ERB said:

> We find that the Union showed that the transportation of patients/clients by the affected employees, because of the very nature of the patients/clients involved and the kinds of transportation involved, implicates employee safety to a substantial extent . . .
>
> Although the proposal does deal with "staffing" or "assignment" in some measure, the State did not show, or even contend, that the presence of an additional employee during patient/client transportation would not have a significant effect on employee safety. In addition, the two subsections of the proposal are phrased in the disjunctive, with the State having the total discretion to either provide security equipment (a provision that the State impliedly concedes is mandatory),* or assign another person to accompany the employee.(*, footnote ommitted)[39]

[36] Id at 8 PECBR 7910.

[37] 14 PECBR 746 (1993).

[38] Id at 14 PECBR 774.

[39] Id at 14 PECBR 774-75.

In summary, existing board case law provides general guidance for practitioners in identifying "staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees." For a safety proposal to be mandatory, the proposal (1) must expressly raise a safety issue on its face; (2) must concern safety while workers are engaged in work activities or activities required by the employer in connection with work; and (3) must be supported by competent and persuasive evidence showing a substantial effect on safety (e.g., evidence showing that the proposal will create a safer work place than what presently exists or contribute to the maintenance of a safe workplace). However, like the amorphous balancing test, what constitutes a direct and substantial effect on safety depends not only on the evidence but on the eye of the beholder. Thus, who decides a case is a critical component to the outcome on these scope issues.

CONCLUSION

With the SB 750 changes, ERB is back at the drawing board. Practitioners have only the guideposts of prior case law, the express language of the newly modified statute and the legislative history, which except for the article by Professor Drummonds is sketchy and one-sided at best. The standards articulated in SB 750 for determining scope questions are largely subjective and conclusory in nature. We also have the added unpredictability of change in the composition of the

ERB. What can be expected? Perhaps only one thing for certain: litigation.

Last Best Offer—Total Package: Oregon's New Form Of Interest Arbitration

John Abernathy and
Tim Williams

INTRODUCTION

For the past twenty-two years, the protective services in Oregon have been able to appeal unresolved bargaining disputes to conventional interest arbitration.[1] That has now changed with the passage of Senate Bill 750. Interest arbitration is still possible but in a different form. Conventional interest arbitration has been replaced by last best offer package (LBOP) interest arbitration. This paper is divided into two parts; the first examines the six major statutory changes that implement LBOP interest arbitration. The second part considers how these changes will affect unions, public employers, and interest arbitrators—it will focus on the "So what?"

STATUTORY CHANGES

The Type Or Form Of Interest Arbitration And The Arbitrator's Authority Are Different

The statutory changes made by SB 750 are as follows:

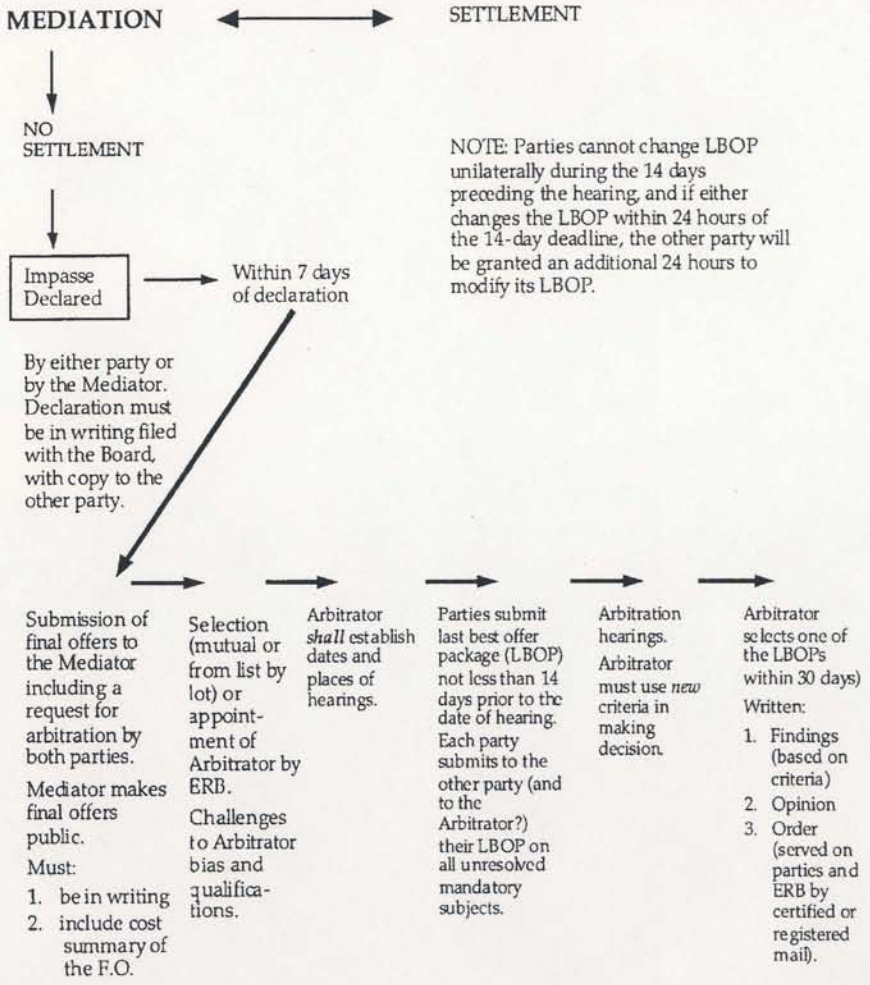
- the form of arbitration and the authority of the arbitrator
- the process of appealing a bargaining dispute to interest arbitration
- selection of the arbitrator
- submission of disputes to interest arbitration
- the new and/or revised arbitration criteria established by SB 750
- the priority of the new criteria

Each will be discussed below.

Under conventional interest arbitration, the parties submit the issues in dispute to the interest arbitrator and present evidence on an issue-by-issue basis. The arbitrator has the authority to evaluate the evidence and to make a finding and award on each issue. An examination of conventional interest arbitration awards in Oregon from 1973 to 1995 shows that on some issues the employer's position prevailed, on other issues the union's position prevailed, and on a number of issues the arbitrator awarded either an alternative or

[1] Oregon was not the only state to have conventional interest arbitration. The states of Alaska, Maine, Nebraska, New York, Pennyslvania, Rhode Island, Vermont, Washington, and Wyoming and the city of New York all have conventional interest arbitration. See Arvid Anderson and Loren Krause, "Interest Arbitration: Standards and Procedures," in *Labor and Employment Arbitration*, Vol. 3, ed. Tim Bornstein and Ann Gosline, New York: Matthew Bender, 1988-93, p. 63-19.

Timeline from Mediation to the Interest Arbitration Hearing



Selecting An Arbitrator Is Different

Under SB 750, there are three ways an arbitrator can be selected or appointed. First, the parties may select their own interest arbitrator. Advocates for the parties who know the experienced interest arbitrators on the Oregon Conciliation Service's roster of arbitrators have, in the past, used this method to select an arbitrator. Often each advocate would suggest five or seven names of individuals; the names that appear on both lists become the list that advocates use to strike names. They may continue to mutually select their interest arbitrators under SB 750.

However, if they do not select an interest arbitrator within five days after filing the written petition for arbitration, ERB is required to submit to the parties a list of seven (previously five) qualified, disinterested, unbiased persons. The terms qualified and disinterested were in the old statute; the term unbiased is new. Along with a list of names, ERB must also submit a list of Oregon interest arbitrations and factf-indings for which each interest arbitrator whose name appears on the list of seven has issued an award. Each party then alternately strikes three names from the list. The order of striking shall be determined by lot. The remaining arbitrator on the list of seven shall be designated as the "arbitrator."

If the parties do not designate the arbitrator by striking names and notify the board of their designation within five days of receipt of the list, the board shall appoint the arbitrator from the list. However, if one party strikes three names and the other party fails to do so, the board shall appoint the arbitrator from the four names remaining on the list.

These changes in the selection process are mainly procedural and the parties should be able to adapt to them within a short period.

However, ORS 243.746 (2) was further amended to permit the parties to challenge the bias and qualifications of arbitrators selected by lot or appointed by ERB. Paragraph (b) states:

> The concerns regarding the bias and qualifications of the person designated by lot or by appointment may by challenged by a petition filed directly with the board. A hearing shall be held by the board within 10 days of filing of the petition and the board shall issue a final and binding decision regarding the person's neutrality within 10 days of the hearing.

Readers should note that Paragraph (b) does not apply to arbitrators mutually selected by the parties. This is a troublesome provision for arbitrators and could affect the number of labor arbitrators willing to serve as interest arbitrators in Oregon, as we will discuss below.

Submitting A Dispute To The Interest Arbitrator Is Different

ORS 243.746 (3) provides that not less than 14 calendar days prior to the date of the hearing, each party shall submit to the other party a written last best offer package (LBOP) on all unresolved mandatory subjects.

This provision does not say that these last best offer packages will be sent to the arbitrator, but arbitrators probably will ask for them. ERB may need to formulate a rule requiring the parties to submit their LBOPs to the arbitrator at that 14-day submission.

SB 750 also provides that if either party provides notice of a change in its position within 24 hours of the 14-day deadline, the other party will be allowed 24 hours to modify its position. Again, there is no requirement that the party making changes in its position at this 24-hour point provide the arbitrator or ERB with a notice of this change. This is another area where ERB needs to consider a new rule.

What does this 24-hour change period mean and why was it included in SB 750? Presumably this means that, if within 24 hours of the 14-day deadline, a party modifies its LBOP, then the other party gets 24 hours to modify its LBOP. It appears that the steps of submitting final offers to the mediator and the mediator making those final offers public (not less than the 30-day waiting period prior to arbitration), when combined with the 24-hour change-your-mind-right-before-the-arbitration-hearing step, are intended to encourage the parties to move their last best offer packages closer together as they near interest arbitration. There is nothing that requires the parties to do so, however. Experience in the first three or four years under SB 750 will provide insights into the choices the parties make in the period before the arbitration hearing. The statute is silent on what role, if any, ERB mediators will play in the thirty or more days waiting period after final offers are made public and prior to the arbitration hearing.[4] Will mediators attempt to mediate during that time? Or will public disclosure of final offers serve to cause the parties to dig in their heels and stand pat? What role, if any, will mediators play if one or both parties change their final offers so that the gap between the parties is narrowed? Can mediation occur during the fourteen days in which LBOP cannot be changed? Again we must wait and see.

The Statutory Criteria Are Different

SB 750 requires interest arbitrators to base their findings and opinions on a new set of statutory criteria. From a case preparation and presentation viewpoint this is probably the most significant change brought about by SB 750. Those new criteria are listed below and identified:

- The interest and welfare of the public
- The ability to pay
- The ability to attract and retain qualified personnel
- Total compensation costs
- Comparison of overall compensation with comparable communities
- The CPI-All Cities Index, commonly known as the cost of living

[4] Unlike fact-finding, there is no cooling-off period when interest arbitration is involved, just a mandatory requirement that the arbitration hearing be scheduled not less than 30 days following the submission of final offers to the mediator. Under the old statute mediators used the cooling-off period to engage in "super" mediation.

- The stipulations of the parties
- Other factors

Each criteria is discussed in turn.

The Interest And Welfare Of The Public

This criteria was also present under conventional interest arbitration but was combined with the financial ability of the unit of government to meet those costs. Conventional interest arbitrators generally regarded this as the ability-to-pay criteria and analyzed the evidence accordingly. If interest and welfare were argued before or considered by the conventional interest arbitrator, it was usually as part of ability to pay. For example:

- a reduction in personnel was not in the public interest because it would adversely affect departmental efficiency and (the city's) fire insurance rating and costs. (The City of Roseburg and IAFF 191, John H. Abernathy, arbitrator, 1982, pp. 26-27).[5]
- where the employer establishes through persuasive evidence that a budget and a long range financial plan have been adopted in a responsible manner, it would not be in the interest and welfare of the public to ignore that evidence. (City of Salem and IAFF 330, Gary Axon, arbitrator, 1989, pp. 26-27).[6]

Apparently the drafters of final offer interest arbitration legislation felt that conventional interest arbitrators were not giving full consideration to "interest and welfare of the public." Consequently, they attempted to make three changes in the law to ensure that interest arbitrators give the interest and welfare of the public more weight. First, they separated interest and welfare of the public from ability to pay—making them two separate and distinct criteria. Second, the earlier version of SB 750 (the Derfler-Bryant Act) would have made the governing body of the public employer the sole determiner of the interest and welfare of the public. Had that version been adopted, it would not have been necessary to have any other criteria because once budget priorities were established, those priorities would have become a gauge of the interest and welfare of the public. In the final version of the statute, the interest arbitrator determines the interest and welfare of the public. Finally, the earlier version of the Act would have given two criteria (interest and welfare and ability-to-pay) top priority over any other criteria and would have established second, third and even fourth levels of priority for the other factors.

Under the final version of SB 750, two of the drafters' goals were achieved. "Interest and welfare of the public" has been separated from ability to pay and was made the first priority. But the interest arbitrator, not the governing body of the public employer determines the interest and welfare of the public.

[5] Levak, Thomas F., Handbook of Oregon Interest Arbitration and Factfinding, 1989.

[6] Ibid.

Ability To Pay

The ability-to-pay criteria, was restated under SB 750 as follows:

> The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.[7]

In this restatement, the ability-to-pay criteria has been enlarged from the one line found in the old statute to eight lines under SB 750, and the following significant changes were made:

- Financial ability to meet the costs of the proposed contract has been changed to reasonable financial ability to meet those costs. This changes the inability-to-pay defense from an absolute inability to pay defense to a relative inability-to-pay defense.
- The interest arbitrator must now give consideration and weight to the other services provided by and other priorities of the public employer as determined by the governing body. Consequently, if a city, for example, places a higher priority on fire protection than on police protection and that priority is clearly reflected in the budget, then the interest arbitrator must give "weight and consideration" to those priorities.
- The interest arbitrator cannot consider as part of the public employer's ability-to-pay "a reasonable operating reserve against future contingencies" except for those operating reserves established to cover the cost of settlement of the labor dispute. In our opinion, the controversy will be about what operating reserve is reasonable.

These changes restrict the interest arbitrator's authority in assessing ability-to-pay on the one hand, but create new areas for dispute on the other. What is reasonable financial ability to pay? How much weight and consideration should be given to other services and priorities? What is a reasonable operating reserve? How many such reserves are necessary?

The Ability of the Unit of Government To Attract and Retain Qualified Personnel at the Wage and Benefit Levels Provided

While this is new as a separate and distinct criterion, in the past it was sometimes argued as one of the "other" factors or as part of the ability-to-pay criteria.

The ability to attract and retain qualified personnel is, in part, a measure of the public employer's competitive wage and benefit position in the local labor market and is therefore reflected in total labor costs. It is also related to the

[7] ORS 243.746 (4) (b).

ability to pay. While wages and benefit levels certainly affect an employee's evaluation of the desirability of a job, employees also use other factors to judge job quality—such as the fairness of supervision, opportunities for advancement, job security, and stability of employment.

Interest arbitrators, at this point, do not know the type of evidence that will be submitted to support or attack the assessment of a public employer's ability to attract and retain employees. Hard evidence on the ability to retain employees should be easy to generate. Certainly turnover rates and the reason for each instance of turnover will be basic for establishing the ability to retain employees. Evidence on the ability to attract new employees will be softer and more controversial. The number of applicants for each new job opening and their distance away from the public employer may be used by public employers to establish the ability to attract new employees. Unions will probably argue that job applicants send applications to dozens of prospective employers, so the total applications may be an inflated number. It should be noted that this criterion is phrased in general terms—"ability to attract and retain employees." It does not say ability to attract and retain employees *in this bargaining unit.* We anticipate this general phrasing will lead to an ongoing controversy as to which data is more relevant—all employees or bargaining unit employees only.

Overall Compensation and Comparables

The fourth and fifth criteria deal with overall compensation as follows:

> The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.
>
> Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in the situations described as follows:
>
> a. For any city with a population of more than 325,000, comparable includes comparison to out-of-state cities of the same or similar size;
>
> b. For counties with a population of more than 400,000, comparable includes comparison to out-of-state counties of the same or similar size; and
>
> c. For the State of Oregon, comparable includes comparison to other states.[8]

Under these two new criteria, overall compensation becomes much more important than it was under the old statute. The definition of overall compensation, stated in criterion d, binds the interest arbitrator. While this

[8] ORS 243.746 (4) (d) (e).

definition lists many specific direct costs, it permits the inclusion of other direct costs. Indirect payroll costs can also be included in arriving at an overall compensation figure, but the statute provides no guide as to which indirect costs are to be used. Public employers will no doubt attempt to include all legislated indirect payroll costs (e.g., Social Security, worker's compensation, unemployment insurance, Medicare). Unions will no doubt try to exclude many, if not all, of the indirect payroll costs.

More importantly, criterion e requires arbitrators to make comparisons in terms of overall compensation. It will no longer be possible for interest arbitrators to consider wages and benefits separately, nor will it be possible for protective services unions to compare individual benefits (e.g., medical insurance, dental insurance, vision insurance, life insurance) to the best individual benefit offered elsewhere. The aggregate comparisons required by overall compensation will, in our opinion, favor public employers. We fully expect public employers to assign monetary values to all benefits, especially sick leave, holidays, and vacations, and to include every benefit in their overall compensation calculations.

The comparability criterion has also been changed to limit comparisons to communities *within Oregon* of the same or nearest population range.[9] This change is designed to stop unions from making the comparison of lower wage and benefit urban communities to higher wage and benefit urban communities, e.g., Hillsboro to Portland, and the similar comparisons of rural to urban communities. Finally, SB 750 decrees that the only factor to be considered in selecting comparable Oregon communities is population—not geography, not similarity of function, not whether the community is rural, urban, or suburban, and not whether the other communities are in the eastern, central, southern, coastal, or valley region of the state. Only population. The continuing controversy will focus on defining the nearest population range.

The next criterion deals with the cost of living as follows:

The CPI–All Cities Index, Commonly Known As The Cost Of Living[10]

Presumably this means the consumer price index for all US cities for urban wage earners, which is produced by the US Bureau of Labor Statistics, Department of Labor. This CPI reflects the price changes over time of a market basket of more than 300 different goods and services including food, clothing, housing, medical care, and transportation. Stating this criterion in this specific way eliminates disputes over which CPI to use—Portland or national. We anticipate that the parties will not always stipulate the percentage change in the

[9] Except for cities with a population of more than 325,000 (such as Portland) and counties with populations of more than 400,000 (such as Multnomah County). These large cities and counties and the state of Oregon can make comparisons with comparable communities and states outside of Oregon.

[10] ORS 247.746 (4) (f).

CPI for the appropriate time period, but under this new criterion it could be done in almost all cases.

The next criterion is:

The Stipulations Of The Parties[11]

This is a carryover criterion from the old law. It permits the parties to stipulate for the arbitration record such undisputed evidence as the percentage change in the CPI, thus permitting the hearing to be used for presenting conflicting facts or evidence.

Other Factors

The final criterion, to be used only if the other criteria do not provide a clear picture, is the "such other factors" criterion, stated now as follows:

> Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.[12]

This is a carryover criterion from the old statute with some elaboration and a new priority level assignment (third level). Given the low priority level of this criterion and its vagueness, we do not expect it to be used very often. In addition to changing the criterion, SB 750 also changed their priority.

Priority Of Criteria Is Different

SB 750 specifically requires arbitrators to give first priority to the interest and welfare of the public and secondary priority to six other criteria, namely:

- ability to pay
- ability to attract and retain qualified personnel at the wage and benefit levels provided
- overall compensation
- comparability of overall compensation
- CPI–All Cities Index
- the stipulations of the parties.

The arbitrator decides the ranking to be given each of the six criteria in the second priority group. If these primary and secondary criteria provide the arbitrator sufficient evidence for an award, the arbitrator does not consider the remaining criterion "such other factors." If not, the arbitrator can consider such other factors as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. One way to

[11] ORS 243.746 (4) (g).

[12] ORS 243.746 (4) (h).

visualize how this priority order of the criteria will affect decision making in interest arbitration is to restate the criteria as questions in the following manner:

1. Does the evidence show that it is in the interest and welfare of the public for the interest arbitrator to award the union's last best offer package?

If the interest arbitrator decides the answer to this question is "no," he/she would not have to address any of the remaining questions (criteria). If, on the other hand, the interest arbitrator decides the answer to the first question is "yes," then she/he must address these questions:

2. Does the public employer have the ability to pay the union's LBOP?
3. Do the wage and benefit levels currently provided by the public employer enable that public employer to attract and retain employees?
4. How does the overall compensation of employees in this bargaining unit compare with the overall compensation received by employees in Oregon communities of the same or nearest in population size?
5. How do the LBOPs of the parties relate to the CPI.
6. How should criteria two through six be ranked?

If after addressing criteria two through six the arbitrator can decide which LBOP to pick, he or she does so. If not, then and only then would the interest arbitrator address the "such other factors" criterion (question).

AFFECT OF CHANGES ON THE PARTIES

The first part of this paper dealt with the six major statutory changes made by SB 750. This section of the paper will address the question, "How will these changes affect unions, public employers, and interest arbitrators?" The answers we have provided are not based on empirical data and are not final. No appropriate data base exists from which internal or external comparisons could be made. Oregon has no history of last best offer package interest arbitration decisions from which in-state trends can be drawn. No other states with final offer interest arbitration statutes have the same final offer to last best offer package as Oregon.

This section will follow the same organization as the first section; topics are different form of interest arbitration, different ways of appealing impasses to interest arbitration, different arbitration selection procedures, different submission procedures, differences in criteria, and different priorities of criteria.

Different Form of Interest Arbitration

This change could affect planning for bargaining, negotiations, and planning for interest arbitration. Some authorities have argued that final offer arbitration works best when the number of issues is low[13] or with single issues[14] and when

[13] Nelson, Nels E., "Final Offer Arbitration: Some Problems," *The Arbitration Journal*, 30-1 (March 1975), pp. 50-58.

confined to economic rather than to non-economic issues.[15] If the parties accept all these positions as valid, then they will want to prepare for LBOP accordingly. At least one negotiator for a public safety union has advised his clients to have no more than three issues in their last best offer package and to make those issues economic ones.

To arrive at interest arbitration with a package of only one, two, or three economic issues requires thorough and objective planning. That planning must start prior to negotiations, establish clear bargaining objectives, and formulate realistic priorities. Unions in the protective services will find it extremely risky under SB 750 provisions to reopen the entire contract or a large number of contract articles. The ultimate risk is that they could lose on *all* of them. Protective service unions can no longer pursue as a priority an issue that affects only 5 or 10 or 15 percent of the bargaining unit. In conventional interest arbitration where each issue was considered individually, it was a low-risk proposition to take issues affecting small minorities of the bargaining unit to conventional interest arbitration. If the union prevailed (in part or entirely), union leaders could claim victory; if not, they could tell the affected minority that they tried. Under LBOP the union must decide whether it wants to put at risk the good of the entire bargaining unit for an issue of interest to only a small percentage of the bargaining unit.

Similarly, public employers will have to evaluate issues where they, in the past, made a stand based "entirely on principle." Previously public employers could attempt to change any contract provisions they found burdensome without having to consider how that issue would affect the rest of the contract. In both situations, public employers will probably find that issues of principle and burdensome contract issues will cost them real dollars to achieve.

The mixing of economic and noneconomic issues may be especially dangerous for both parties. Take the case where an established union coming off a three-year contract reopens ten issues: four economic ones (salaries, insurance, vacations and sick leave) and six noneconomic ones. Will the public employer respond to only those same ten issues? If so, will the employer respond with improvements? With take aways? Or will the public employer use this opportunity to open more economic and noneconomic issues or to counter with take aways on all noneconomic issues?

If a public employer determines to eliminate existing contract provisions, what provisions will likely be targeted? Work rules? Subcontracting? Scheduling work? Scheduling vacations? Overtime distribution? Reporting and call-in? Stand-by pay? How would the loss of any one of these provisions affect the union?

[14] Staudohar, Paul D., "Results of Final-Offer Arbitration of Bargaining Disputes," *California Management Review*, 18-1 (Fall 1975), pp. 56-61.

[15] Scharman, Clifford, "Interest Arbitration: The Current Legal Issues," in *Creative Approaches to Dispute Resolution*, 1982 Proceedings, Fourth Annual Conference, Society of Professionals in Dispute Resolution, October 17-19, 1982, pp. 144-174.

Just from these examples one can see that deciding which issues to reopen and how many is now much more important for protective service unions. Equally important, if not more so, is a realistic assessment by protective service unions of the response strategy of public employers.

As an effective strategy, each party should prepare two interest arbitration cases—an offensive one to support the changes sought and a defensive case to protect against loss. In conventional interest arbitration, protective service unions could emphasize their offensive cases. Their primary concern was what improvements could be won. Even if they lost an issue or two, it was not a total defeat. A loss often meant the continuation of an existing contractual benefit or the continuation of existing language without improvement. Last best offer package interest arbitration does not change the requirement to prepare an offensive and defensive case, but it shifts the emphasis to the defensive case. The first consideration now becomes what a party must do not to lose.

Negotiations are likely to be different for both parties because of the specter of last best package arbitration. Unions, for example, will now have to make hard-nosed, factual risk assessments on each existing language item they choose to open for negotiations. This risk assessment must start with questions such as these: What difficulties are all bargaining unit members having with this language provision? Are these difficulties extremely serious, serious, or just irritating? Does the union want to run the risk of losing the protection currently afforded by this provision? If the union decides to seek a change in this language provision, should resolution occur in bargaining, in mediation, or in last best offer-package interest arbitration?

Employers seeking changes in the language of an existing contract will have to make more complete benefit assessments. What will it cost in total compensation improvements to win in interest arbitration? When should those total compensation improvements be put on the table: in negotiations, in mediation, in their final offer, or in their last best offer package?

These risk/benefit assessments could result in the opening of fewer contract issues for negotiations. The parties may decide that, imperfect as the contract language may be, it is workable. Bargaining may be almost entirely over mandatory economic items.

Bargaining proposals for new language or new benefits pose different questions for protective service unions because there is no existing language or benefit to lose. For new language or benefits, unions should ask: What do we have to give on other issues to get this new language or benefit? Public employers, on the other hand, must now ask risk-assessing questions: What will this new language do to our ability to operate efficiently? How will this new benefit affect total compensation?

The Role of Mediation

Mediation could also be different, especially if the bargaining projections outlined above prove to be true—i.e., fewer total issues, fewer language issues, more emphasis on economic issues, and shorter contract periods. Mediators could find themselves dealing with only three or four economic issues and one or two language issues instead of the larger number of issues they have encountered in the past.

Whether mediation will continue to be a genuine dispute resolution step or just another step on the way to interest arbitration will depend on a number of factors. Perhaps the primary one will be the desires and intentions of the parties. Another factor will be the time the mediator has to deal with an individual case. The statute provides that disputes can be moved to interest arbitration after fifteen days of mediation. What constitutes a day of mediation? Is that the same as a calendar day, so if the case goes to mediation on the thirteenth day of a month, is mediation over after the twenty-eighth? Or does there have to be a mediation meeting between the parties and the mediator in order to have a day of mediation? If so, what if that meeting lasts only a half-day, is that only a half-day of mediation?

If mediators are presented with just a handful of issues, mostly economic ones, and a one- or two-year contract, it is likely that they will be able to judge whether a mediated settlement is possible in a fairly short period of time. Few issues and a short contract period give the mediator fewer trade-offs to get a settlement. The mediator will not be without tools, however. The mediator's knowledge of other settlements—whether negotiated, mediated, or arbitrated—will still be a powerful tool, and the mediator will still serve as a reality checkpoint for some parties.

We simply do not know what mediators will do after they receive final offers from the parties. If the parties' final offers are entrenched and far apart, probably nothing. But if the parties' final offers differ from what they were in mediation and those changes narrow the gap between their positions significantly, then it is possible a mediator might call the parties and suggest that they "make one more attempt to settle this thing."

We do not know what will happen between final offer stage and last best offer package stage. Presumably a party could have one package in mediation, a different final offer, and an even different last best offer. Apparently, the legislature was hoping that unions would lower their package costs and the public employer would raise their offers at each step. There is no guarantee, however, that this would happen. What one party puts forth as its package in mediation could remain the same in its final offer and last best offer package. The specific issues in the package, strategy, and an estimate of what the other party will be doing will affect a party's decision to keep the same package or change it.

Most importantly, the time at which each party becomes vulnerable to the arbitrator's authority is the close of the day prior to the fourteen-day period preceding the arbitration hearing. Either party or both can on the fifteenth day before the scheduled hearing submit a completely new LBOP.[16] This may result

[16] ERB will need to issue a rule as to what form this submission can take—fax, phone call, registered letter, E-mail.

a strategy of keeping a large number of issues, particularly language issues, ve until the last moment. As a result, a party would have only twenty-four urs to adapt its LBOP to what could be substantial changes in the LBOP of the ıer party.

In summary, it is highly likely that the parties will reopen fewer issues in each ntract negotiation, that they will open only high-priority issues, or that most of ? issues that are reopened will be economic ones. In the alternative, the parties ıy open a substantial number of issues, negotiate vigorously for these issues, d then withdraw most of them on the strategic fifteenth day preceding the ɔitration hearing. With either strategy, realistic risk assessment and risk oidance will become much more important considerations as the emphasis ifts from "what improvements can be won in arbitration" to "how to protect d not lose gains achieved previously."

If these predictions prove out, there are likely to be other consequences:

- fewer contracts of more than two-year duration
- more one-year contracts with specified reopeners for the second year
- the death of win-win bargaining or its use only for noneconomic items
- lots of experimentation with this new process for the first few years
- bargaining teams and agents held more accountable

ifferent Process Of Appealing Cases To Interest Arbitration

Most of the changes in this area are procedural and it is expected that the rties will soon adapt to these changes. There are, however, some gaps and ıbiguities in the process that ERB probably needs to address by new, specific ministrative rules. For example, who notifies the interest arbitrator of his or r appointment, the ERB, the parties individually, or the parties collectively?

Will the interest arbitrator be given copies of the parties' final offers? If so, by ıom? Remember, final offers go to the mediator, and LBOPs go to the ɔitrator.

The statute does require that the parties exchange their LBOP fourteen days fore the arbitration hearing. The statute does not expressly state that last best ?er packages should also be sent to the interest arbitrator. Interest arbitrators n and no doubt will ask that the parties do so. But we feel ERB should make is a requirement with a new administrative rule. Also, should ERB or the ?egon Conciliation Service be supplied with copies of the last best offer ckages? If so, will mediators make one final attempt to achieve a negotiated ttlement in the fourteen days prior to the interest arbitration hearing or after e hearing, but before the written decision is filed?

The 24-hour "change-your-mind" provision could be a source of numerous oblems if the parties choose to use it. What constitutes a change will no doubt an issue. Is a change in costing methods a change? Is a change in cost figures ?hange? Or does a change mean the dropping (or adding) of issues? Or the wering of demands or the raising of responses? Who decides when a change s been made? ERB? The arbitrator? Again some provision must be made for forming the interest arbitrator, the other party and ERB of changes made in

that 24-hour window of opportunity. The short time period seems to argue for telephone or fax notification. ERB needs to address these potential procedural omissions.

Will the use of this 24-hour provision delay the hearing date, or will that time be taken from the 14-day period? Again, ERB should consider a rule clarifying this part of the procedures.

Different Arbitration Selection Procedures

Most procedural changes in this section of SB 750 are not significant ones for the parties—seven names on the list of possible interest arbitrators instead of five, the short time period for selection, the power of ERB to appoint if the time frame is not met. The parties should be able to comply with these changes fairly easily.

However, two of the changes in this area are particularly worrisome for interest arbitrators: the requirement that ERB send a list of Oregon fact-findings and interest arbitrations for each prospective interest arbitrator on their list of seven, and the provision permitting a party to the interest arbitration to challenge selected-by-lot or appointed interest arbitrator for lack of qualifications or bias. The first requirement affects inexperienced and out-of-state interest arbitrators, but the second requirement could affect the more experienced, full-time arbitrators.

Inexperienced Oregon interest arbitrators are not likely to have a long list of prior Oregon fact-finding and interest arbitration decisions. The same is likely to be true for most out-of-state arbitrators whose names appear on the ERB roster. To the extent that the parties use Oregon fact-finding and interest arbitration experience as a factor in selecting an arbitrator, inexperienced and/or out-of-state interest arbitrators are less likely to be seleeted to serve. It is the old Catch 22 proposition: Interest arbitrators may not be able to serve in Oregon without experience here, but how do they get that experience?

One could argue that under this requirement experienced Oregon interest arbitrators will more frequently be selected by the parties. If so, that result would be contrary to the current ERB policy of structuring lists of arbitrators to give equal opportunity to all arbitrators whose names appear on the ERB rosters. If ERB sends out a list of seven but all are inexperienced or out of state, will the parties select from that list, request a second list, or mutually agree on an arbitrator whose name is not on the list?

Then there is the question of whether an experienced arbitrator will be willing to serve as an interest arbitrator in Oregon. Some experienced arbitrators on the Oregon roster have already made the decision that they will not serve at all as an Oregon interest arbitrator; others have said they would serve only in cases where they were mutually selected (thus not being subject to challenge for lack of qualifications or bias); the remainder are adopting a wait-and-see attitude.

The reasoning of the not-at-all and the only-if-mutually-selected arbitrators is similar. For most of them, arbitration is their profession and they pursue tit full time. Probably 95 to 98 percent of the arbitration decisions they render each year

are in grievance arbitration cases. Only 2 to 5 percent are interest arbitrations—and not all of those are Oregon interest arbitration cases. These experienced arbitrators also have served as interest arbitrators in Alaska, Washington, Montana, Nevada, and Wyoming. They are assessing the risk of a challenge of their qualifications and impartiality on their annual caseload. They argue that even if ERB dismisses the complaint or completely exonerates the arbitrator, the fact that a challenge was filed could affect their reputation and acceptability as a grievance arbitrator. In their own risk/benefit assessment, they have decided that the benefit of keeping to 95 to 98 percent of their grievance arbitration caseload is not worth the risk posed by this challenge procedure.

These arbitrators recognize the need for arbitrators to be qualified and unbiased. However, they point out that no single set of standards exist to measure arbitrator qualifications. There is no commonly accepted body of knowledge or field of study that a labor arbitrator must master or follow to practice as a labor arbitrator. In fact, a large number of the labor arbitrators on the Oregon roster are attorneys; another large number are not. This group includes economists, communication specialists, retired union leaders, college professors, former mediators, former hearings officers, and persons with human resources backgrounds. Perhaps the major attribute they have in common is prior experience in labor relations in one capacity or another—as an advocate, teacher, mediator, or hearings officer, for instance.

No licensing requirements or qualifying exams exist for labor arbitrators. What is required is experience as an arbitrator and acceptability by the parties. One of the first things beginning arbitrators must do is get their name on one or more rosters of arbitrators, such as those maintained by Oregon's ERB (or similar rosters in other states), the American Arbitration Association, and the Federal Mediation and Conciliation Service. These rosters require the beginning arbitrator to complete a formal application, submit letters of reference from union and management officials and from other arbitrators, provide sample copies of arbitration decisions they have already written, and show that they have been selected in a meaningful number of cases. Thus, one could argue that to get on a roster in the first place requires arbitrators to make a basic showing that they are qualified and unbiased.

Once an arbitrator is selected, his or her performance will determine whether the same parties will pick that arbitrator for another case. Furthermore, the parties share their evaluations of the arbitrator's performance with other employers and unions and with each other. Thus, every time an arbitrator is selected, he or she must past the market test of acceptability.

Those experienced arbitrators who have decided not to serve as interest arbitrators in Oregon or to serve only if mutually selected also expressed concerns about the hearing process SB 750 establishes. Would the arbitrator be informed of the charges made? Is there enough time and information to mount a defense? How could an arbitrator prove a negative, i.e., how could they prove they were not biased? What is to prevent charges of bias being brought by a sore loser from a previous grievance arbitration case to get even with that arbitrator? Will this process result in a single set of qualifications for Oregon interest arbitrators? Finally, they ask if this entire process could be used by a party to delay or obstruct interest arbitration. Why would an arbitrator serve when a party has levied a charge of bias or lack of qualifications? The normal procedure is for the arbitrator to decline to serve in such cases. If a challenged arbitrator resigns, then the selection process must start again.

The wait-and-see group of experienced arbitrators takes the position that the risk to arbitrators by challenges of bias or lack of qualification is more speculative than real at this point. They argue that parties are not likely to make use of this provision very often, if at all. If they are proven wrong, they then can make a decision of what to do.

If inexperienced and out-of-state interest arbitrators are not acceptable to the parties and a large number of experienced Oregon arbitrators are reluctant to serve, who then is left to serve?

Different Award Criteria And Priorities

The major adjustment the parties and interest arbitrators must make under SB 750 is that of moving from the known to the unknown in the area of criteria for awards. Under the old statute these criteria had been argued by the parties and ruled on by interest arbitrators enough times for them to know what they meant: what evidence was persuasive and what evidence was not. Now the meaning of the criteria and the type of evidence that will be persuasive are both unknown.

For example, SB 750 requires interest arbitrators to give first priority to the interest and welfare of the public, but the statute does not provide any definition of this criterion.

In the most general terms, the interest and welfare of the public is something that affects the community as a whole or the majority of that community. Taking that as a starting point, we must ask how this can be measured. One way that immediately comes to mind is through public opinion polls or surveys. But surveys, in turn, generate questions such as: Who prepared the survey? What are their qualifications? What questions were asked? Were those questions "field tested" for clarity? Who was asked to respond to these questions—was it the entire community or a sample? If a sample survey was used, does the sample adequately represent the characteristics of the community? Was this survey done only once or done two or three times so that trends could be ascertained? Even more questions could be asked about informal surveys with open-ended questions. Also, a real difference can exist between what people say in a survey and what they do in a voting booth.

The "interest and welfare of the community" criteria will be a difficult one for the parties to prove and for the interest arbitrator to evaluate.

Overall compensation will play a more important role in last best offer package interest arbitration. The statute requires that both direct and indirect wage and benefit costs be included in overall compensation calculations and defines direct costs in some detail. However, the statute's lack of definition for indirect costs will become a point of contention between the parties and will

present an important decision for the interest arbitrator. For example, is sick leave a benefit only when taken or is it a benefit (protection against possible loss of income while sick) for all employees? Employers will argue the latter interpretation and include the cost of the total number of sick leave days earned in a year in annual overall compensation. Unions will argue that the employer's view and method of calculation would inflate annual overall compensation. The union could also argue that sick leave is not a cost to the employer until used, and not always then.

The new comparability criterion will generate its share of controversy also. For example, is the basis of comparison similar-sized communities in the entire state or just in the geographical labor market of the community involved in the interest arbitration? What locals are comparable for large cities, for large counties, for the state of Oregon? What is the source of comparability data and how accurate is it?

The ability to attract and retain employees is also likely to generate its share of controversy. Public employers will, no doubt, be able to generate turnover data—numbers of turnovers, reasons for turnovers, length of service, etc.—and thereby be able to provide reliable data on retention. The controversy will occur over the public employer's attempt to prove its ability to attract employees.

In the past, public employers have simply presented the number of applications received for each vacancy in a given bargaining unit, e.g., 157 applications for a single vacancy. From that data alone, public employers have argued that the large number of applications per opening proves that it is able to attract new employees at the wage and benefit levels currently in effect. Ratios of applications to openings are not likely to go unchallenged by protective service unions because these unions know that many applicants apply to more than one employer, that some portion of the applications received by an employer are rejected in preliminary screenings by the human resource staff because they were incomplete, or unreadable, for example. Applications remaining after this initial screening are subject to further scrutiny by human resource personnel to see if the applicant's qualifications meet the requirements of the job and if references check out. Still more of the applicants are screened out at this review step.

Unions are likely to argue that the tally of applications still under consideration after the first two review steps presents a more realistic picture than the total number of applications received. Unions are also likely to argue that the most realistic number to use is the number of applications supervisors are asked to review before interviews are scheduled or the number of applicants called for an interview.

The public employer's ability to attract and retain qualified personnel is in large part a measure of the willingness of employees and prospective employees to change jobs and is therefore related to both ability and willingness to pay. The reality is that public safety personnel are attracted to new positions for a variety of reasons. They include wages, benefits, stability of employment, opportunity for advancement, and reputation of the public employer as a good employer. But intangibles such as lack of stress, more action, better family environment,

climate and weather, and desire for a change may also influence decisions to move to a new job or stay in an existing one. Employees leave existing jobs for a variety of reasons: e.g., unfair supervision, avoidance of disciplinary termination, impending layoffs, changes in departmental philosophy, better opportunities. Thus, employees and prospective employees weigh both the tangible and intangible costs and benefits of changing jobs and do so only as long as the benefits exceed costs. And employers and employees are not always using the same costs and benefits.

General economic conditions also affect the public employer's ability to attract and retain employees. In good economic times with low unemployment levels and increasing wages and benefits, public employers may have difficulty attracting new employees because the employment pool has dried up. Conversely, during bad economic times with high unemployment and falling wages, public employers will find it easier to retain employees because other job opportunities are scarce.

The wage and benefit policy and the hiring philosophy of the public employer also will affect the ability to attract and retain employees. Wage and benefit leaders who hire only the most qualified will find recruitment and retention easier than public employers who decide to provide wages and benefits at the 75, 50 or 25 percent level of the wage leader. These policy decisions relate to ability and willingness to pay and to total compensation.

Finally, the interest arbitrator has the authority to assign weight and importance to the six criteria in the second priority group. The statute provides no specific guidance for this. However, guidance can be inferred from the criteria because all of them relate to economic considerations and not to language issues; three of the criteria are interrelated (ability to pay, overall compensation, and ability to attract and retain); and comparisons are to be made in terms of other communities with relatively equal populations and are limited in geography for most jurisdictions.

The Arbitration Hearing And Award Process Will Be Different

Under conventional interest arbitration, cases were usually presented issue-by-issue with the parties presenting evidence on the criteria they thought applied to that issue. Interest arbitrators then evaluated the evidence and argument on each issue and made written findings and an award on each issue.

This is likely to change under last best offer package interest arbitration. Less hearing time will be spent describing and explaining individual issues but more time will be devoted to presenting evidence and arguments on the new criteria. The order of the hearing is likely to be:

- presentation of LBOPs (the unions, the employer)
- the union's case-in-chief (addressing criteria)
- the employer's case-in-chief (addressing criteria)
- rebuttal cases (union and employer)

More budget data and analysis will be expected by interest arbitrators. The parties and interest arbitrators will have to develop expertise in interpreting and

explaining budget data. Interest arbitrators also will expect controversy over reserve funds and what constitutes a reasonable operating reserve.

Interest arbitrators will now organize and write their reports differently: LBOPs; the union's evidence and arguments; the employer's evidence and argument; and the arbitrator's findings on each criteria. Then the interest arbitrator will arrive at an overall conclusion and make an overall award—choosing one of the LBOPs.

Interest arbitrators may make a specific finding and conclusion on the primary criterion—interest and welfare of the public—before moving to consideration of the other criteria. At least four findings are possible: The parties did not address the primary criterion so no finding is possible, the evidence on this criterion supports the public employer's package, the evidence supports the union's package, or the evidence is inconclusive. At this point we do not know how interest arbitrators will proceed if they find that the evidence on interest and welfare clearly supports the package of one side or the other. Some may treat this as a threshold that must be overcome before proceeding to an analysis of the other criteria; others may not.

The Results Will Be Different

Partial victories are no longer possible in interest arbitration under Oregon's reformed collective bargaining act. Before SB 750 arbitrators did, at times, issue awards that either completely or substantially supported the position of one of the two parties. More likely, awards gave something to each party based on the arbitrator's view of the merits of the cases on each issue. Today, under the statutory revisions, only a total win or a total loss is possible.

How will union bargaining teams and management advocates deal with winning and losing? Constituents will readily accept the win, but will they accept an effort by the advocates to place the blame for a total loss on the arbitrator? Or will those bargaining teams and advocates have to shoulder the entire responsibility for a loss? It is, after all, these teams and advocates who decide what issues to open and what bargaining and impasse strategy to pursue.

Additionally, there is the issue of the impact of LBOP interest arbitration on the parties' relationship. Will LBOP be more harmful, be less harmful, or have no impact on the parties' relationship when compared to traditional interest arbitration? An old adage in labor relations says that negotiating the terms of the agreement is only half of the battle. The other half is living with the agreement. To the extent that the LBOP interest arbitration encourages the parties to reach a negotiated settlement, reasonably it also helps to ensure a higher level of harmony during the term of the agreement. However, for those who go to LBOP arbitration, the adversarial nature of the process may promote high levels of disharmony. Losers may be resentful and retaliatory. Offensive contract provisions that are implemented only because they were a part of the total package may work as a continuing irritant to the parties during the life of the agreement. Arguably, it is likely that for those parties who currently have a good relationship, LBOP interest arbitration will have little if any impact. But for those who have a rocky past, LBOP will push the parties further apart.

CONCLUSION

Interest arbitration for the protective services is a process designed to provide an alternative to a strike when the parties have been unable to reach a settlement during negotiations and mediation. The underlying goals of the process include promoting labor peace, achieving fair settlements, avoiding interruptions in services, and protecting the public interest. But, as pointed out in this paper, the new statute does not necessarily move the negotiation process closer to these goals. The statute has left a number of procedural gaps that must be bridged by ERB and has raised new questions for which only experience can provide answers. The most important of these questions include:

- Final offer arbitration is structured so as to maximize the anxiety of the parties about the outcome of the process. Doing so is supposed to encourage the parties to settle without resorting to interest arbitration. No doubt the anxiety level of the parties will rise under SB 750, but will that fact reduce the number of interest arbitrations and reduce the number of issues brought to arbitration, or will changes in the statute have the opposite effect?
- Will the changes improve the relationship between labor and management or will it encourage a new type of divisive game playing?
- Will the criteria mandated by SB 750 help tune the negotiation/arbitration process towards labor agreements that are more responsive to public interest?
- Will the statute's focus on economic concerns create problems for negotiations over noneconomic matters involving the workplace and work performance?
- Will the changes make it easier or harder for the mediator to bring about a settlement?
- Will the changes make it easier or harder to select the most qualified, experienced, unbiased arbitrators?

Those who drafted Senate Bill 750 believe that their version of LBOP arbitration better achieves affirmative answers to these questions than its predecessor legislation. Time will be needed to determine whether that belief becomes a reality.

Supervisory And Managerial Employees—Will We See More Or Less Of Them?

Nancy J. Hungerford and
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INTRODUCTION

In the multitude of changes proposed by Senate Bill 750, one of the lesser-discussed and noted modifications was the sponsors' attempt to undo past ERB case law that had, over the prior decade, significantly reduced the kinds of positions excluded from PECBA coverage as supervisory. As with many other proposals, compromises were made, but for the most part the sponsors' intended statutory changes were realized.

Professor Henry Drummonds' account of the changes which resulted in the supervisory and managerial definitions is correct and complete, but the footnotes to this section of his article focus on certain NLRB cases which, if followed, would minimize the impact of the change in Oregon's statutory language. When the larger body of NLRB case law is examined, however, it becomes clear that the impact of the SB 750 changes to the supervisory and managerial definitions may be much more far-reaching than Professor Drummonds appears to predict.

Whether the statutory changes will yield significant, substantial changes in the composition of public collective bargaining units will depend on how ERB interprets the revised PECBA. Certainly the possibility exists that ERB will try to find new ways to reach the same, pre-1995 results—the coverage of most public employees by the PECBA and their inclusion in bargaining units. With the changed membership of the ERB and the fresh indication of legislative intent, however, the Board may liberally apply the supervisory and managerial exclusions and substantially restrict the reach of PECBA protection of collective bargaining rights.

In this article we first examine the changes in the definition of supervisory employees and then analyze the new managerial designation under SB 750.

SUPERVISORY DEFINITION

Changes In The Law

In the aftermath of the substantial changes in PECBA made by SB 750, the act continues to define "supervisory employee" as:

> any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection

therewith, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[1]

However, the 1995 Legislature struck the last sentence of the definition that had existed since 1973, which read: "However, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor within the meaning of [the statutes]."[2] This sentence had been interpreted by ERB as granting it the power to disregard actual authority in some of the named functions that were identified as supervisory in ORS 243.650(14) (the so-called secondary indicia), and to recognize as supervisory only those employees who exercised independent judgment in hiring, firing, disciplining, or adjusting grievances (the so-called primary indicia).

Deletion of this final sentence requires that the twelve-part test now be read in the disjunctive—just as the now-identical definition is applied in the private sector under the National Labor Relations Act. In other words, if ERB finds that an employee exercises independent judgment in *any one* of the twelve enumerated areas of authority, then it must conclude that the employee is excluded from the collective bargaining unit as supervisory.

Finally, the 1995 legislature added the following sentences to the supervisory definition:

> Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement shall not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation. Notwithstanding the provisions of this subsection, no nurse, charge nurse or similar nursing position shall be deemed to be supervisory unless such position has traditionally been classified as supervisory.[3]

ERB's Definition Of Supervisor Prior To 1995

Prior to the 1995 change to the PECBA's supervisory definition, ERB considered four of the twelve enumerated criteria—hiring, discharging, disciplining, and resolving grievances—to be the "critical statutory indicia."[4] On the other hand, the authority to transfer, lay off, recall, promote, assign, reward, and direct employees, or to effectively recommend such action, were "secondary indicators." ERB held that "a[n] employee who exercises authority in only the secondary areas does not have sufficient involvement with managerial workplace decisions to be a supervisory employee under the PECBA."[5] Only if one or more primary indicators were found would ERB look to the secondary indicators for additional support for a decision to exclude an employee as supervisory.

[1] ORS 243.650 (23).

[2] ORS 243.650 (14).

[3] ORS 243.650 (23).

[4] AFSCME Local 2831 v. Lane Co., 10 PECBR 575, 582 (1988).

[5] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570, 602 (1990).

Even when considering the "big four," ERB required evidence of significant authority; peripheral involvement or activity was not enough. For example, the occasional participation of an employee on a panel or selection board that interviews applicants was not significant enough involvement in hiring to make that employee supervisory.[6] With regard to discipline and discharge, an employee had to exercise a significant role in initiating discipline, investigating the allegations, fixing culpability, determining the type of discipline, or issuing the discipline.[7] And an employee who settled grievances only at the first level, after an oral presentation at an informal conference, did not engage in supervisory activity, but instead participated in "the type of problem solving frequently performed by a leadworker . . . to settle a minor, everyday disagreement generally involving a routine exercise of judgment in an area where the employer has a clear practice."[8]

ERB Opinions That Will Not Be Altered By The Revised Supervisory Definition

The revision to the supervisory definition in the PECBA will not affect certain of ERB's previous rulings. For instance, it is likely that ERB will continue to hold that an employee who exercises supervisory functions over even a single employee may be considered supervisory, if given sufficient authority over that employee.[9] Similarly, a person who supervises equipment and machinery, but not other employees, will continue to be considered non-supervisory.[10] And, as in the past, changes in job responsibilities may initiate or end supervisory status.[11]

ERB's Adoption Of NLRB Precedent

What substantive changes are initiated by the revised supervisory definition hinges on whether ERB determines that, because the revised definition mirrors the NLRB definition, the appropriate response is to follow, or at least consider, NLRB precedent.

Both the language of the amended supervisory definition and its legislative history suggest that ERB must look to NLRB precedent in applying the new supervisory definition. The definition was modified so that its wording is identical to the NLRB definition, both in phrasing the twelve factors so that they must be read in the disjunctive and in the removal of the final sentence that permitted ERB to find an employee non-supervisory even if one of the twelve criteria was satisfied. Senator Neil Bryant, cosponsor of SB 750, confirmed that the changes were made with the intent to mirror the National Labor Relations Act: "The

[6] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570, 603 (1990).

[7] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570, 607 (1990).

[8] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570, 608 (1990).

[9] Union Co. v. Union Co. Courthouse Employees Assn., 9 PECBR 8686 (1986).

[10] Laborers International Local 85 v. City of Depoe Bay, 4 PECBR 2554 (1979).

[11] Unified Sewerage Agency Employees Assn. v. Unified Sewerage Agency of Washington Co., 6 PECBR 4972 (1981).

supervisor definition which now appears in the bill is the definition of a supervisor which is now included in the National Labor Relations Act."[12]

In its first decision regarding supervisory status of employees since SB 750's amended definition became effective, ERB concluded that the 1995 Legislature had intended it to abandon its primary and secondary approach favoring the big four factors of hiring, firing, disciplining, and adjusting grievances. Instead it would "interpret and apply the [supervisory] definition in a manner consistent with the practices and decisions of the National Labor Relations Board and the federal courts."[13] ERB based this conclusion on the 1995 Legislature's amendment of the supervisory definition to mirror the NLRA definition word-for-word, and the legislature's deletion of the second sentence of the former supervisory definition, upon which ERB's mode of analysis involving primary and secondary indicia was based.[14]

The Impact Of NLRB Precedent

Assuming that ERB follows its announced intent to apply NLRB precedent to the extent of reading the twelve enumerated factors in the disjunctive, the result will most likely be a greater number of findings of supervisory status. The reason for this change is that now an employee need exercise independent judgment in only one of twelve—instead of one of four—criteria.[15]

In *Deschutes County*, ERB noted that applying the amended supervisory definition consistent with the NLRB's interpretation "does not produce for this Board any bright-line test or mechanical matrix that we can use to decide supervisory questions."[16] However, ERB did find "certain general standards, applicable to all cases, used in analyzing private sector status cases." Specifically, for an employee to be considered a supervisor, he or she must have authority to use independent judgment in performing supervisory functions in the interests of management.[17]

When examining whether an employee's activities in one of the twelve enumerated areas qualify him or her as supervisory, the NLRB concentrates primarily on whether the employee exercised independent judgment, instead of mere routine, clerical, or perfunctory tasks or actions of a sporadic nature.[18] The length of time an employee engages in supervisory duties is irrelevant, so long as

[12] Senate Floor Debate, June 2, 1995.

[13] Deschutes County Sheriff's Association v. Deschutes County, 16 PECBR 328 (1966).

[14] "However, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor within the meaning of the [the PECBA and other statutes]."

[15] Billows Electric Supply of Northfield, Inc. v. International Brotherhood of Teamsters, Union Local 331, 31 NLRB 878 (1993).

[16] 16 PERCBR 328, 338.

[17] 16 PECBR 328, 339.

[18] Billows Electric Supply of Northfield, Inc. v. International Brotherhood of Teamsters, Union Local 331, 31 NLRB 878 (1993). See also NLRB v. Island Film Processing Co., 784 F.2d 1446, 1451 (9th Cir. 1986); NLRB v. Bakers of Paris, Inc., 929 F. 2d 1427, 1444-45 (9th Cir. 1991).

"these major supervisory duties constitute regular and frequent portions of the [employee's] responsibilities," and are part of the employee's "primary work product," not merely an ancillary part of his or her job duties.[19]

The biggest change that applying of NLRB precedent will cause is the lesser emphasis on the big four factors. Whether an employee has any authority to hire, fire, or discipline employees or adjust grievances will no longer be determinative of his or her supervisory status. Consistent with the disjunctive reading of the twelve statutory indicia, the NLRB has found employees to be supervisory when they possessed authority in none of the big four areas, so long as they exercised independent judgment in directing other employees' work. [20]

Assigning And Directing The Workforce

Because ERB apparently intends to apply NLRB precedent in examining contentions of supervisory status, a disjunctive reading of the twelve factors enumerated in the statute will require ERB to give equal weight to this factor—one that it has not given much weight to in the past. Application of this factor may have the effect of expanding the supervisory field of employees.

The NLRB has repeatedly determined that the exercise of independent judgment in either assigning or directing employees' work constitutes supervisory status.[21] Assigning and directing other employees' work includes being in charge of a particular crew or shift, assigning employees to particular tasks, and exercising independent judgment in overseeing the work of those employees.[22] Employees "responsibly direct [other] employees" when they are the most senior employees on duty during evenings and weekends, because if they were not supervisors, then

[19] Detroit College of Business v. Detroit College of Business Faculty Assn., MEA/NEA, 296 NLRB 318, 321 (1989).

[20] Atlanta Newspapers v. John Long, 306 NLRB 751 (1992).

[21] Dale Services Corp., 269 NLRB 924 (1984); NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 940-41 (5th Cir. 1993); contrast Beverly Enterprises-Ohio D/B/A Northcrest Nursing Home, 313 NLRB No. 54, 145 LRRM 1214 (1993). In Beverly Enterprises, the NLRB held that, regardless of their authority to assign and direct employees, nurses (LPNs and RNs) were not supervisory. Some may attempt to argue that this holding establishes that, according to the NLRB, the authority to assign and direct workers is insufficient to constitute supervisory duties. However, an identical holding reached by the NLRB that same year regarding the non-supervisory status of LPNs was reversed by the Sixth Circuit. Manor West, Inc., 311 NLRB No. 67, 145 LRRM 1178 (1993), rev'd sub nom., Manor West, Inc. v. NLRB, 60 F.3d 1195 (6th Cir. 1995). Further, the Supreme Court recently noted that the NLRB has found assignment and direction of employees to be insufficient evidence of supervisory status only where the employee whose supervisory status is in question is a "professional":

> [T]he NLRB classifies as supervisors individuals who use independent judgment in the exercise of managerial or disciplinary authority over other employees. But because professional employees often are not in management's 'front line,' the 'undivided loyalty' concern is somewhat less urgent for this class of workers. The [NLRB] has therefore determined that the exercise of professional judgment 'to assign and direct other employees in the interest of providing high quality and efficient service' does not, by itself, confer supervisory status.
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> NLRB v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778, 1788 (1994) (Ginsberg, J., dissenting) (citations omitted).

[22] Atlanta Newspapers v. John Long, 306 NLRB 751 (1992).

the workplace would be without supervision at those times.[23] The above holds true even when the supervisory employee performs many of the same duties as the other employees.[24]

ERB's decision in *Deschutes County* indicates its willingness to place equal weight on an employee's assignment and direction of employees as an indicator of supervisory status.[25] Reliance on these indicia is new for ERB. In the past, evidence of such indicia was considered only secondary and alone insufficient to confer supervisory status. In the first application of the amended definition, ERB found that the sergeants in Deschutes County possessed extensive authority in assigning and directing deputies, including assigning and reassigning deputies to patrol districts; assigning schedules and cases to deputies; authorizing overtime, time off, and vacation scheduling; and calling in replacement deputies when deemed necessary. ERB noted as significant the fact that "[s]ergeants generally exercise all these authorities without first consulting any superior officer."[26]ERB's conclusion that the sergeants assigned and directed other employees formed the basis for its determination that the sergeants were supervisory.

"Secondary Indicia" Of Authority To Assign And Direct Work

Although not determinative, the NLRB has noted that one indicator of a supervisory employee's authority to assign and direct other employees' work is whether the other employees, and indeed the supervisory employee himself, think of the supervisory employee as a supervisor or "boss."[27] Thus, press operators were properly classified as supervisors because they exercised independent judgment in supervising the operation of the presses by their crews and by making decisions with respect to the operation of the press, including the decision of whether to stop the press.[28] The NLRB determined that the press operators were supervisors because the decisions they made regarding their crews' work had "significant consequences for the employer and its employees."[29]

In *Deschutes County*, ERB also indicated an intent to look at such "secondary indicia," as identified in NLRB precedent, including attendance at management meetings, and whether an employee is the highest ranking employee on duty and considered by himself or herself and others as the "boss" of that shift. Although

[23] Dale Services Corp., 269 NLRB 924 (1984); NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 940-41 (5th Cir. 1993).

[24] Dale Services Corp., 269 NLRB 924 (1984).

[25] ERB previously decided in *Deschutes County*, under the old supervisory definition, that the police sergeants were nonsupervisory. On reconsideration after the PECBA amendments, and confronted by the same facts, ERB found the sergeants supervisory.

[26] 16 PERCBR 328, 342-43.

[27] NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 943 (5th Cir. 1993).

[28] McClatchy Newspapers, Inc. v. Graphics Communications Union District Council No. 2, Local 60C, 307 NLRB 773, 779 (1992).

[29] Ibid; see also Atlanta Newspapers v. John Long, 306 NLRB 751 (1992) (lead crewmembers were supervisory because they had "significant authority over and responsibility for their crews with respect to the assignment of work to them and their direction in carrying out their tasks . . . [and] this authority required the use of independent judgment.")

evidence of these "secondary indicia" alone does not indicate supervisory status, ERB found, as the NLRB has in its case law, that their presence will support a finding of an exercise of independent judgment in one of the twelve enumerated indicia.[30]

Hiring

Of course, the big four indicia will continue to play a leading role in ERB's determination of whether an employee is supervisory. The bigger question is whether ERB will adopt the NLRB's less stringent standard of what consititutes independent judgment in the arena of hiring. When assessing the sergeants' hiring authority in *Deschutes County*, ERB examined no NLRB case law, but instead held consistent with its previous rulings that police sergeants did not exercise supervisory authority in the area of hiring, even though they participated on oral interview panels, because that participation was ad hoc and irregular. The sergeants served on the panels with superior officers, and there was no indication that such participation would continue in the future. These factors rendered the sergeants' participation "far too diluted and removed from the actual [hiring] decision to be considered an effective exercise of independent judgment."[31]

ERB's decision in *Deschutes County* indicates that, unlike previous NLRB decisions, ERB may not place much weight on an employee's participation in an interview panel, but may instead continue to follow its previous rulings in that regard. ERB had previously held that service on interview panels that score test questions is insufficient to establish hiring authority, especially where superior officers also participated, because such participation indicates retention of authority by upper management, rather than delegation of any hiring authority to other employees.[32]

Discipline

The last of the statutory indicia to play a role in the *Deschutes County* decision was the sergeants' ability to discipline and discharge other employees. The NLRB has found employees who had the authority to issue oral warnings or written reprimands to be supervisory, even if it was not clear whether they could effectively recommend termination.[33] The NLRB has stated that the authority to give oral reprimands "indicates the exercise of independent judgment because the lead operators decide whether to deal with a problem employee themselves or to bring the situation to the attention of upper management through the formal disciplinary process."[34]

[30] 16 PERCBR 328, 343.

[31] 16 PECBR 328, 340.

[32] Gresham Police Officers Assn. v. City of Gresham, 14 PECBR 247, 256-57 (1992); Tualatin Police Officers Assn. v. City of Tualatin, 12 PECBR 413, 422 (1990).

[33] McClatchy Newspapers, Inc. v. Graphics Communications Union District Council No. 2, Local 60C, 307 NLRB 773, 779 (1992); NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 940-43 (5th Cir. 1993).

[34] NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 940-43 (5th Cir. 1993).

ERB's decision in *Deschutes County* indicated a less-than-wholesale acceptance of oral reprimands alone as an indicator of supervisory status. Instead, ERB will look for evidence of independent judgment:

> If our decision had to be based only on the sergeants' role in oral counseling of employees and reporting of offenses, this Board would be unlikely to find the sergeants to be supervisors. It is significant, however, that sergeants are expected to, and do, exercise independent judgment in deciding whether to suspend deputies...[which] tends to imply that the Department allows and expects sergeants to exercise similar discretion in deciding whether a situation should be rectified with an oral reprimand or whether more severe discipline to be imposed by a superior officer is necessary.[35]

Leadworkers

One potential controversy that has arisen in response to the revised supervisory definition is whether leadworkers will now qualify as supervisory employees. An employee who may qualify as a leadworker is often an employee with a title like head secretary or head custodian, who possesses little or no authority in most of the twelve supervisory indicia, but may have authority in one of the areas that ERB has, in the past, placed little emphasis on, such as assigning and directing other employees' work. The SB 750 revision has caused some labor organizations concern that management will now attempt to exclude all "head" positions from bargaining units. In response, labor argues that such leadworkers are not meant to be included in the new supervisory definition, as they exercise supervisory authority sporadically, if at all, and without any concurrent exercise of independent judgment.

Although NLRB has not explicitly held that a leadworker may be supervisory if he or she satisfies the statutory standard, many of its holdings have involved employees who could be classified as "lead" or "head" employees. For instance, NLRB has held that, in certain instances, employees classified as lead crewmembers,[36] lead operators,[37] and senior operators[38] were supervisory because, as the most senior employees on duty during a particular shift, they exercised independent judgment in assigning and directing other employees' work. Thus, while the mere label of "lead" employee or "head" employee is not determinative of whether that employee is supervisory, and while the NLRB still looks to whether the employee fulfills the statutory standard in making its determination, the duties often performed by lead workers may include them in the supervisory category if NLRB precedent is followed.

The U.S. Supreme Court has also held that "head" or "lead" employees may be supervisory. In a recent decision, the Court ruled that charge nurses are supervisory.[39] To avoid a similar result, the Oregon Legislature added a sentence to

[35] 16 PECBR 328, 341-42.

[36] Atlanta Newspapers v. John Long, 306 NLRB 751 (1992).

[37] NLRB v. McCullough Environmental Services, Inc., 5 F.3d 923, 940-43 (5th Cir. 1993).

[38] Dale Services Corp., 269 NLRB 924 (1984).

[39] NLRB v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778 (1994).

SB 750's supervisory definition that explicitly excludes "nurse[s], charge nurse[s], or similar nursing position[s]."[40] Although the Supreme Court's determination in *Health Care* concerned only charge nurses, the broader language incorporated into SB 750 to exclude any nurse "unless such position has traditionally been classified as supervisory" would appear to prevent the application of the private sector case law to any question regarding the supervisory status of nurses. However, a charge nurse fills a role comparable to other leadworkers, such as a head secretary or a head custodian. The legislature's failure to explicitly mention all leadworkers, instead of only charge nurses, may be interpreted as an intent to include such employees in the supervisory definition.

This interpretation, however, is belied by pieces of the SB 750 legislative history, including comments on the senate floor by Senator Bryant that, under the revised definition, leadworkers will not necessarily qualify as supervisory: "I want to clarify that employees in lead positions are not supervisors unless their work position meets the criteria of supervisor defined in this bill."[41]

Labor organizations and employers may argue about whether a particular employee is really a "leadworker," but in all likelihood ERB will ignore the often misleading and overgeneralized title and will simply determine whether each position at issue qualifies as supervisory by examining whether the position exercises independent judgment in any of the twelve statutory criteria.

LABOR-MANAGEMENT RESPONSES

Labor

Labor organizations will most likely acknowledge that ERB's pre-SB 750 application of the primary/secondary approach to the twelve enumerated criteria can no longer be used in light of the legislative changes in the supervisory definition. However, labor representatives may turn to the independent judgment factor to argue that employees who exercise authority in one or more of the twelve statutory criteria still should not be labeled as supervisory.

For instance, ERB could determine that certain supervisory functions, such as hiring, firing, and discipline, are core functions of supervisors that almost always require the exercise of independent judgment. But other functions, such as assigning and directing employees' work, are secondary functions because they can easily be performed without the exercise of independent judgment. Thus, except in rare instances, employees who exercise authority in any of the areas not identified as core functions would still be non-supervisory, even though they have satisfied at least one of the twelve statutory criteria, because that type of function does not require the use of independent judgment. This approach was espoused by attorney Monica Smith of Smith, Gamson, Diamond & Olney in an amicus brief invited by the ERB in the *Deschutes County* case.

[40] ORS 243.650 (23) (adding new subsection and deleting former ORS 243.650(14)).

[41] Senator Neil Bryant, Senate Floor Debate, June 2, 1995.

Management

In many public work forces, the revised supervisory definition will not lead to any wholesale employer-initiated changes in bargaining unit membership. To date, there is little indication that most groups of public employers are planning to use the revised definition to challenge the inclusion of current bargaining unit members.

However, it is important to note that the new language does not preclude an employer from now attempting to exclude one or more employees from a bargaining unit as supervisory, even if the employer never sought such an exclusion in the past:

> We have also included in the new definition language which clarifies that employees may be considered supervisors even if the employer has not raised the issue in prior negotiations or ERB proceedings.[42] In other words, once that contract ends, if the employer wants to challenge the bargaining group . . . they may.[43]

It is possible that some employers who have attempted supervisory exclusions in the past, and whose efforts were rejected by ERB, will come back for a second try. Or, employers will attempt to undo inclusions that have been ordered by ERB as a result of unit clarification petitions filed by unions. The most likely public employers to pursue the exclusion of employees allegedly supervisory under the new law will be police and fire departments, because ERB has reached seemingly contradictory conclusions about the supervisory nature of sergeants and other "middle managers" in past cases. The results in those cases have turned upon whether the department could show sufficient evidence that sergeants had authority in the big four statutory indicia. However, in most cases where sergeants were found to be non-supervisory, they were nevertheless found to exercise judgment in some of the other, secondary areas.[44] Thus, if ERB uses the NLRB approach of finding any of the statutory criteria sufficient to indicate supervisory status, those ERB decisions adverse to employers should be reversed.

Employers may also find occasions to use the new supervisory definition as a defense to an unfair labor practice complaint. For instance, if a union has filed an action before the ERB alleging that the employer has violated (1)(a) and (c) by interfering with or retaliating because of a bargaining unit member's union activities, the employer may attempt to use the threshold argument that any

[42] The second sentence of ORS 243.650(23) is new: "Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement shall not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation."

[43] Senator Neil Bryant, Senate Floor Debate, June 2, 1995.

[44] See, e.g., IAFF Local 2854 v. Tualatin Rural Fire Protection District, 8 PECBR 6610 (1984) (lieutenants placed in bargaining unit because of limited ability to discipline, even though lieutenants were charged with directing employees at the fire scene); Polk County Deputy Sheriff's Assn. v. Polk County Sheriff's Dept., 15 PECBR 845 (1995) (exercise of lower-level discipline and secondary indicia found insufficient to constitute supervisory status); Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570 (1990).

interference is immaterial, because the employee is supervisory and therefore not protected by the PECBA.

Employers may turn to the revised definition as a defense in other arenas as well, in an attempt to head off potential union attempts to secure additional benefits for individual bargaining unit members. For instance, in response to a union's allegation that a one-of-a-kind employee should be placed one step higher on the salary schedule, an employer may respond by claiming that the position fits under the supervisory definition and therefore is not even properly in the bargaining unit, and thus the salary to be paid is not the concern of the union.[45]

MANAGERIAL EMPLOYEES

Changes In The Law

Prior to the changes enacted by SB 750 in 1995, the PECBA did not contain a managerial exclusion. Now, any employee of the State of Oregon (but not county or local government bodies) who qualifies as managerial is excluded from the collective bargaining unit. As defined in the statute, a 'managerial employee' means:

> an employee of the State of Oregon who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A managerial employee need not act in a supervisory capacity in relation to other employees. Notwithstanding this subsection, 'managerial employee' shall not be construed to include faculty members at a community college, college or university.[46]

ERB'S RESPONSE

ERB Precedent

Although the managerial exception did not exist prior to the 1995 PECBA amendments, ERB often excluded from bargaining units the type of employees who will now be defined as "managerial" by finding that they lacked community of interest with the rest of the bargaining unit members.

Prior to 1995, a majority of the ERB board consistently held that it did not have the ability to create a managerial exclusion from PECBA coverage. However, it often also held that individuals who would fall under such an exclusion, due to

[45] Of course, in units where a specific recognition clause or unit description has been adopted as part of a collective bargaining agreement, if a position is named as currently included in the unit, the employer will have to wait for the agreement to expire before asserting supervisory status of the employee or position.

[46] ORS 243.650(16).

their close alliance with management or their authority to formulate and carry out management decisions, were excluded from the bargaining unit anyway as lacking the necessary community of interest with the rest of the unit members. Most examples of this type of ruling were in police and fire units.[47]

However, ERB was more reluctant to remove existing members of a unit based solely on a lack of community of interest. To reach a finding of such administrative affinity, an employee would have to have a distinctly different community of interest, as a result of the fact that he or she "formulates management policies or has the discretion to take actions that, in effect, control and implement management policies, and such policies have a substantial effect on the way in which unit members perform their jobs or on their conditions of employment." [48]

Referral to community of interest criteria will still be necessary to exclude allegedly managerial employees from bargaining units in cities, counties, special districts, and other local government entities. As a result of compromises reached during the final round of negotiations between the governor and the legislature's Republican leaders over SB 750, the managerial exclusion was limited to state government.

ERB's Adoption Of NLRB Precedent

There is no guarantee at this point that ERB will even look to NLRB precedent for guidance, much less adopt a wholesale application of that precedent. However, it is likely that ERB will at least closely examine the two tests applied by the NLRB in determining whether an employee is managerial.

As was the case prior to the 1995 PECBA amendments, the NLRA does not expressly exclude managerial employees from coverage. However, unlike ERB, the NLRB has elected to construct, through case law, an implied exception for:

> [T]hose [employees] who formulate and effectuate management policies by expressing and making operative the decisions of their employer . . . [those who] exercise discretion within or even independently of established employer policy . . . [and those who] are aligned with management. [Thus] an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.[49]

Two tests have been used by the NLRB in determining whether an employee is managerial. The first test looks to "whether the employee formulates and effectuates his employer's policies or has discretion independent of these policies in the performance of his duties." The second test looks to "whether the employee is so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer and his fellow employees." This second test is narrowly applied and is satisfied only if the employee is "substantially involved in his employer's labor policies."[50]

Regardless of the test applied, "[b]ecause managerial employees are not excluded from coverage under the [NLRA] but rather by an implied exception to the statute . . . the exception must be narrowly construed to avoid conflict with the broad language of the act, which covers 'any employee,' including professional employees."[51] ERB may elect to apply the tests more broadly, however, since managerial employees are explicitly excluded from coverage under the amended PECBA.

Impact Of The Managerial Exception

Because of the explicit nature of the statutory language exempting managerial employees from bargaining unit coverage, in the future it is likely that at least state agencies will now take a direct approach and argue that the managerial exception applies, instead of relying on the community of interest factor. While other public employers may attempt to apply the managerial exception to their own bargaining units, it is unlikely that ERB will rule in their favor, due to explicit references in both the statutory language and the legislative history that limit the exception to state employees. Thus, it is likely that the creation of the managerial exception will cause little, if any, change for public employers and employees other than those employed by the State of Oregon.

In response to SB 750's addition of the managerial exception, the state may now attempt to exclude several types of employees who, in the past, have remained in collective bargaining units contrary to the state's preference. For example, ERB has, in the past, refused to remove three Agriculture Department employees who were essentially running one-person departments because they did not share a sufficient administrative affinity with management.[52] Similarly, ERB has added to the State Police Officer Bargaining Unit police sergeants who were in charge of units or departments, including the arson unit, explosives unit, lottery division, executive security unit, medical services/public information, aircraft

[47] NUPO v. Jackson County Sheriff's Office, 5 PECBR 4490 (1981) (investigation and training sergeants excluded because of "special managerial relationship"); Professional Firefighters Assn. of Clackamas Co. v. Clackamas Co. Fire District No. 1, 6 PECBR 4788 (1981) (senior inspector excluded because of "administrative affinity"); Douglas Co. Professional Firefighters Assn. v. Douglas Co. Fire District No. 2, 2 PECBR 1256 (1977) (fire marshal and training officer excluded because of close alignment with management).

[48] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570 (1990) (Polygraph Unit Coordinator excluded because he might be called upon to perform exams as part of an internal affairs investigation). A managerial employee was defined in SB 750 as an employee of the State who possesses authority to formulate and carry out management decisions or who represents management's interests by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. ORS 243.650(19). A "confidential employee," on the other hand, is "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." ORS 243.650(6) [emphasis added]. Thus, a confidential employee is generally an administrative assistant or clerical person who has no supervisory or managerial responsibility; the confidential status is conferred because the employee has a particular relationship with a person or persons who bear the responsibility for collective bargaining for that public employer.

[49] NLRB v. Yeshiva University N.Y., 444 U.S. 672 (1980).

[50] NLRB v. Case Corp., 995 F.2d 700, 703 (7th Cir. 1993).

[51] David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157, 160 (6th Cir. 1989).

[52] Executive Dept., State of Oregon v. OPEU, 12 PECBR 59 (1990).

program, State Youth Gang Strike Force, and district narcotics task forces. In doing so, ERB concluded that, although some of these individuals coordinated programs, "that is work that can be performed by skilled bargaining unit members."[53] Now, due to the addition of the managerial exception, it is likely that the state will both try and succeed at excluding these types of positions from bargaining units.

CONCLUSION

Changes in the PECBA to broaden the exclusion of supervisory and managerial employees were among the highest priorities for some groups of public employers, especially police and fire departments, but of little interest to others, such as school districts. Thus, the battles over the interpretation of the revised PECBA definitions will likely be waged when law enforcement or fire districts initiate action to exclude middle management employees. It is anticipated that labor unions will not be anxious to jeopardize past wins by filing unit clarification petitions to exclude additional allegedly supervisory employees.

Should ERB signal through early decisions that it will apply the supervisory criteria in the disjunctive and exclude from the unit any employee who exercises any of the twelve criteria, the number of cases filed by employers is likely to increase. ERB's administrative law judges will then hear more testimony about employees' duties to direct and assign other staff, and more challenges about whether those roles require independent judgment or just routine application of employer policy. Employers will be advised to respond to the supervisory and managerial changes by reviewing their employees' job descriptions and ensuring that they are specific and accurate, especially with regard to the employees' responsibility for assigning and directing other workers. In deciding whether to take a dispute to ERB, an employer will no longer focus on an employee's activities in the four primary indicia. Instead, the employer will now look at a broader range of an employee's activities, and the employer's focus will switch to determining whether the employee's actions in any of those areas constitutes independent judgment.

While police and fire units have been the subjects of most ERB decisions about supervisory status, the perception that the definition of supervisory employee has been broadened and will be easier to meet may very well inspire efforts to exclude unit members in cities, counties, and school districts, as well. Most likely targets in the immediate future will probably be those employees who already carry a title or status as "head" or "lead" employees at a work site—head cooks, lead night custodians, printshop foremen, or office managers. However, enthusiasm for this particular change in the PECBA was not generated from public employers except police and fire departments. Thus, other public employers may not be willing to expend any energy or engage in conflict with their unions in order to exclude current unit members in such borderline positions. More aggressive attempts—such as claiming teachers to be excluded from a unit because they supervise a classified aide—are unlikely to arise in the near future.

[53] Oregon State Police Officers Assn. v. Oregon State Police, 12 PECBR 570, 615 (1990).

The unions, on the other hand, will concentrate on establishing a stricter definition of what constitutes independent judgment, and may attempt a "slippery slope" argument, trying to convince ERB that once it starts finding more and more employees excluded as supervisory, it will be too hard to find a clear-cut stopping point.

In short, the debate about who's in and who's out will continue, but the evidence submitted will be different in order to meet the modified definitions of supervisory and managerial employee.

GRIEVANCE ARBITRATION UNDER SB 750

Howell L. Lankford

INTRODUCTION

Fast and final grievance arbitration was one of the many accomplishments of the Ellis-Hein-Mosey Employment Relations Board.[1] The board's case law made the rules for arbitration enforcement so clear and so simple that employers seldom had any doubt that an arbitration award would be enforced. As long ago as 1980, ERB announced in *Willamina Education Association 30 J v. Willamina School District No. 30-44-63J*[2] that it would enforce an award unless:

> (1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them . . . or
>
> (2) Enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements).[3]

To this test, Senate Bill 750 adds two conditions of enforceability. It is not at all clear that there is any real substance to the added conditions, but it seems very likely that the new grievance arbitration provision will encourage enforcement challenges to awards, at least until the board and the courts have clarified the new statutory language. For those who continue to believe that grievance arbitration serves the public interest best when it is fast and final, this change is the one unfortunate consequence of the new grievance arbitration provision.[4]

The frustration (and the fun) in writing about brand new legislation is that the topic is intrinsically loaded with possibilities and short on certainties. Writing about grievance arbitration under SB 750 is no exception. If the new ORS 243.706 is given a fairly moderate interpretation by the ERB and the appellate courts, then SB 750 probably makes few if any substantial changes in grievance arbitration. On the other hand, the new statutory language provides a treasure trove of arguments for

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[1] SB 750 made no change in ERB's statutory authority to consider unfair labor practice complaints alleging that the parties had not abided the terms of an award; so there is no reason to doubt that ERB still has primary authority in enforcement cases.

[2] 5 PECBR 4086, 4100 (1980).

[3] ERB's test was approved by the Court of Appeals in *Willamina Sch. Dist. 30J v. Willamina Ed. Assn.*, 60 Or App 629, 635, 655 P2d 189 (1982). On the face of SB 750 there seems to be no reason to suspect that the *Willamina* test does not survive, with the *addition* of the new statutory conditions of enforceability.

[4] I will use the expression "appeal of arbitration awards" even though appeal does not exactly describe the process. To create such an appeal, the employer must refuse to implement an award and the union must file a complaint over that refusal. The employer then—technically—defends its refusal on the grounds that the award was contrary to public policy. It is not at all clear whether a similar process is available to a disgruntled union.

any reasonably creative attorney (and "hard cases make bad law") so it is impossible to say with any certainty that the courts' final reading of ORS 243.706 will be what the author would consider fairly moderate. The discussion below therefore spends little time on the probable, straight-ahead (and, perhaps, fairly boring) interpretation of the new provision and rather more time trying to catalog various possible *im*moderate interpretations which the new language might allow if ERB or a reviewing court were having a bad day.

THE SUPREME COURT'S "PUBLIC POLICY" CASES

The first major addition is the reference to the basis for an appeal of an arbitration award. It is, of course, not really an addition, because violation of public policy was already one of the two express bases on which ERB would refuse to enforce an arbitration award. The "contrary to public policy" argument is well established in the private and federal sectors. The United States Supreme Court recognized it in 1983 in *W. R. Grace & Co. v. Rubber Workers*[5] and reaffirmed that recognition in 1987 in *United Paperworkers International Union v. Misco, Inc.*[6] ERB's case law to date has never addressed the argument, but there is no reason to suppose that ERB and the Oregon appellate courts would have departed from the Supreme Court's *Misco* rule even without the addition of this statutory reference.[7] There is also no reason to believe that this statutory language sets out a rule that differs substantially from the rules of *W. R. Grace* and *Misco*. In short, this reference may well be of no substantial significance.[8] On the face of the U.S. Supreme Court's discussion in those two cases, the public policy basis for appeal of an arbitration award is very narrow indeed.

W. R. Grace & Co. v. Rubber Workers

The company in *W. R. Grace* had a collective bargaining agreement which required seniority layoff; but the company also entered into a consent agreement with the EEOC which required it to keep junior female employees at work. The company therefore laid off some senior, male employees, and it asked the federal district court to approve that choice (specifically, the company continued the employment of female employees, who had been hired as strike replacements, and laid off senior male regular employees). The district court initially held that Title VII allowed the modification of seniority provisions in order to alleviate the effects of past discrimination. The Fifth Circuit eventually reversed. Before that reversal, however, a senior male employee was laid off. He grieved, and the arbitrator held that the company had violated the collective bargaining agreement. The federal district court refused to enforce that award, holding that public policy prevented enforcement of the collective bargaining agreement in the period controlled by the district court's initial order and before the Fifth Circuit's reversal. The Supreme Court agrees that an award should not be enforced if it was contrary to public policy, but the court finds no such policy violation in the case before it, even though the company was complying with the district court order at the time the layoff decision was made. Justice Blackmun notes that the company placed itself in the difficult position by agreeing to two conflicting obligations, one to the union and the other to the EEOC. The court notes:

> Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses.[9]

The Court specifically finds that "voluntary compliance with Title VII also is an important public policy,"[10] but the court finds that policy was not violated by the arbitration award in this case.

United Paperworkers International Union v. Misco, Inc.

Misco[11] arose from an arbitration award reinstating an employee who had been discharged—apparently for use or possession of marijuana—after he was found in the back seat of another employee's car, in the company parking lot, with a marijuana cigarette burning in the front seat ash tray. The arbitrator held that the company had not proved the grievant had possessed or used marijuana. The district court refused to enforce the ward, finding it contrary to the public policy about "general safety concerns that arise from the operation of dangerous machinery while under the influence of drugs," and the Fifth Circuit affirmed. The Supreme Court again reverses the courts below and enforces the arbitration award. Three points are particularly significant in the discussion. First, the court specifically refuses to consider claims that the arbitrator erred in making findings of fact or drawing factual inferences from those findings. A public policy attack on an arbitration award is not an excuse for the reviewing court to tinker with the fact-finding function which the parties have assigned to the arbitrator:

> In any event, it was inappropriate for the Court of Appeals itself to draw the necessary inference [that grievant had been or would be operating

[5] 481 US 757, 766, 103 S Ct 2177, 76 L Ed2d 298.

[6] 484 US 29, 108 S Ct 364, 98 L Ed 2d 286.

[7] The Oregon State Bar's 1991 Labor and Employment Law, Public Sector CLE discussion of enforcing arbitration awards recognized that the W.R. Grace public policy argument would probably be adopted by the ERB and Oregon courts when that issue finally arose. See Section 7.12.

[8] Whether or not this statutory language makes any substantial addition to the PECBA, the public policy defense is a potential treasure chest for creative attorneys. See generally "Arbitration, Contract, and Public Policy," Judge Frank H. Easterbrook in *44th Proceedings of the National Academy of Arbitrators* (BNA, 1991)), for a discussion of some of the typical types of fact situations—ranging from drinking airline pilots to auto mechanics who cannot remember to tighten the lug nuts—that have presented this argument in the private sector.

The fact that this language "adds" to the statute a line of case law that was very likely there already does not mean that the statute will not change the *frequency* of such appeals. Before SB 750, the *W. R. Grace* public policy defense was a fairly obscure matter of private sector Supreme Court case law: management counsel would have had to point it out to a disgruntled client. After SB 750, the public policy defense is set out in the statutory language for all to see, and the disgruntled client is very likely to *ask* counsel "What about the public policy defense?" and counsel will have to explain why (and if) that defense may not be worth the appeal.

[9] US at 770, L Ed 2d at 301.

[10] US at 770, L Ed 2d at 301.

[11] 484 US 29, 108 S Ct 364, 89 L Ed 2d 286 (1987).

dangerous machinery under the influence of drugs]. To conclude from the fact that marijuana had been found in car [occurpied by grievant] that [grievant] had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact-finding about [grievant's] use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [grievant] and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.[12]

Second, the Court of Appeals had refused to enforce the award because the arbitrator would not consider evidence which was not known to the company at the time the discharge decision was made, but the Supreme Court specifically upholds the arbitrator's right to make that determination.[13] Third, the Supreme Court makes it clear that the sort of public policy which will allow a court to refuse to enforce an arbitration award must be a lot more than the reviewing court's personal opinion:

At the very least, an alleged public policy must be properly framed under the approach set out in *W. R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

As we see it, the formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.[14]

THE DIFFERENTIAL TREATMENT STANDARD

The second major addition in 243.706 is the limitation on the use of differential treatment as a basis for moderating or setting aside discipline. Once again, this reference is most notable for how little it departs from the clear majority of arbitration decisions. The "seven tests," which many union and management representatives use as the framework for argument in discipline cases, includes, as item 6, "Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?"[15] Subsection (b) of the new ORS 243.706 is almost a paraphrase of arbitrator Daugherty's own note to that test:

[12] Ibid.

[13] The court gives some broad hints that the company could have avoided this problem by discharging the grievant again after additional evidence came to light.

[14] Ibid.

[15] *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966) is one of the most reprinted arbitration awards of all time. It appears, for example, as an appendix to *Remedies in Arbitration*, Hill & Sinicropi (BNA, 1981). Professor Daugherty's seven tests have developed into a virtual industry of workshop education.

If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding or discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.[16]

This is also what virtually every management labor attorney has told his or her clients since long before SB 750 was first contemplated. It forms the basis upon which management can attempt to recapture its rights if they have been laxly enforced.

Subsection (a), on the other hand, could *not* be lifted right out of the seven tests:

Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.[17]

There are three main features of this provision. First, on its face it applies only to cases involving discipline for egregious misconduct. In fact, merely being egregious is not enough. The expression *so egregious* seems to require an extreme of egregiousness. Second, it seems likely that the misbehavior at issue must be the misbehavior the arbitrator actually finds the grievant to have committed, and not the misbehavior he or she was charged with (*Misco*, discussed above, provides a good example of the importance of the difference between the two). Finally, even in those cases involving misconduct which is extremely egregious, this statutory language is aimed at a single argument: the claim that grievant was misled by the minor discipline administered for similar offenses in the past.[18]

THE INTERESTING DETAILS

Here is the revised statutory language, separated into small significant bites for purposes of discussion:

243.706 (1) A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or {i} *any other dispute resolution process agreed to by the parties.* {ii} *As a condition of enforceability,* any arbitration award that {iii} *orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct* shall comply with {iv} *public policy requirements as clearly defined in statutes or judicial decisions* including but not limited to {v} *policies respecting sexual harassment or* {vi} *sexual misconduct,* unjustified and egregious use of physical

[16] Ibid.

[17] ORS 243.706 (1) (a).

[18] In the terms of Professor Don Brody's classic example, this language assures that an employee may be discharged for pushing a supervisor into the chipper even though the last several employees who pushed a supervisor into the chipper received only written reprimands.

In light of the extreme limitations in this provision, it is probably not fair to say that one of the major accomplishments of SB 750 in the area of grievance arbitration was to make the world safer for inconsistent discipline.

or deadly force and {vii} *serious criminal misconduct, related to work*. In addition, with respect to claims that a grievant should be {iii} *reinstated or otherwise relieved of responsibility for misconduct* based upon the public employer's alleged previous differential treatment of employees for {viii} *the same or similar conduct*, the arbitration award must conform to the following principles:

(a) Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.

(b) Public managers have {ix} *a right to change disciplinary policies at any time*, notwithstanding prior practices, if such managers give reasonably advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.

{i} "any other dispute resolution process agreed to by the parties"

The most obvious legitimate candidate for another "dispute resolution process" is grievance mediation.[19] Grievance mediation has been actively encouraged by ERB's Conciliation Service for the last several years and has been fairly common in the public sector in Oregon for at least a decade. Over that whole period there has been not a hint of any doubt of the propriety of grievance mediation. At best, then, this addition is simply specific legislative authorization of a process which no one ever thought to require such specific authorization. At worst, on the other hand, this addition might undercut a line of well-settled ERB case law. Unlike the NLRA in the private sector, and unlike many collective bargaining acts in the public sector, the PECBA gives the ERB jurisdiction to decide claims of contract violation. On the other hand, the PECBA always provided for grievance arbitration, and the courts established early on that the policy of the act favored resolution of contract disputes through arbitration. The ERB could not simultaneously exercise its own statutory jurisdiction to resolve contract disputes and also encourage the arbitration of those very disputes. Under the 1973 Act, ERB tried to accommodate these provisions by requiring the parties to exhaust whatever contractual procedure they had agreed on. ERB would then generally defer to the result of that procedure, subject to a very limited review. Some contracts, however, end their grievance procedure with an appeal to the employer's governing body, rather than to a neutral of any sort. ERB has generally been quite unwilling to find that such a grievance procedure constitutes a "clear and express waiver" of the union's statutory right to have a grievance addressed by either ERB or an arbitrator. The addition of the new statutory reference to "any other dispute resolution process agreed to by the parties" *might* be offered in support of an argument that ERB's jurisdiction to hear contract violation disputes can be avoided by an *agreement* that, for example, "the decision of the board shall be final."

[19] The Joint Adjustment Board might be another candidate; it is a mechanism even more venerable than grievance mediation

{ii} "As a condition of enforceability"

The fact that the legislature chose to specifically address this entire section to a reviewing body (ERB or an appellate court) immediately presents three interesting question: First, does the section apply at all to arbitrators? This is not an easy question. As the Supreme Court repeats over and over in *W. R. Grace* and *Misco*, the arbitrator's authority comes from the contract. The arbitrator in *W. R. Grace*, in particular, stuck to his guns and enforced the collective bargaining agreement as written despite the company's argument that such an award would be unenforceable. Does this mean that arbitrators should simply ignore the new statute? There may be some arbitrators who would support that extreme view. In the author's opinion, however, when a labor agreement is bargained in the context of an enforcement statute such as ORS 243.706, the bargainers probably intend the arbitrator to issue an award which would be enforceable under that statute.[20] (This obviously does not mean that the arbitrator must buy into the public policy argument offered by one of the parties.)

The second question is not new, but it may become more significant with the new emphasis on enforceability: If a union has a contract right to arbitration, does it therefore have a contract right to an enforceable award? Are there circumstances in which the union could insist that a grievance be arbitrated *again* because an initial award was ruled unenforceable?[21] Finally, does it matter at all whether or not the employer presented its public policy argument *to the arbitrator*, before bringing it to ERB or an appellate court?

{iii} "[O]rders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct"

There is not much room for dispute that the new grievance arbitration provision of SB 750 applies only to grievances involving discipline and discharge. Within that scope, how widely does the new statute apply? Does it apply to *all* sorts of discipline and discharge cases, or only to some? The answer to that question must be found in the awkward statutory phrase "orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct." The expression *"relieves the public employee of responsibility for misconduct"* at least allows the argument that the rest of the provision applies only to those cases in which the arbitrator concludes that the employee did indeed misbehave but then goes on to adjust the discipline for some reason. In that case, the statute would *not* apply at all to those cases in which the

[20] The interim period is more difficult, because current contracts were not bargained in the context of this statutory language.

[21] For example, if a court decided that an award was not to be enforced because there was a clear public policy requiring proof of sexual harassment by only a preponderance of the evidence—rather than the "clear and convincing" standard expressly used by the arbitrator—could the union insist that the grievance be submitted to arbitration again?

arbitrator finds that the employer did not show the grievant misbehaved at all.[22] Moreover, the language also allows the argument that the new provisions do not apply at all to cases in which a grievant is charged not with any particular episode of *mis*behavior, but with a simple failure to perform adequately.

{iv} "[P]ublic policy requirements as clearly defined in statutes or judicial decisions"

The list of the *sources* of public policy pronouncement has an obvious omission: the list does not include administrative rules or administrative decisions. This omission may simply reflect the fact that virtually all public employers have rule-making authority, so, if the list included agency rules or decisions, those employers could end-run the arbitration process by promulgating their own rules to limit an arbitrator's authority. On the other hand, the absence of administrative rules and decisions from this list could have two interesting results. First, there seems to be a strong argument that the omission of administrative rules and decisions means that an arbitration award could not be challenged on the grounds that it was counter to the administrative rules promulgated by the neutral agency charged with regulating a particular type of activity, such as the Board of Police Standards and Training (BPST), the Department of Education, or the Teacher Standards and Practice Commission. Without the language of SB 750, this argument would be more difficult to defend.[23] Second (and more strangely), it could be argued that the omission of reference to public policy promulgated by an administrative agency means that *ERB* cannot promulgate rules limiting the enforceability of arbitration awards (such as ERB's old rule under which it did not defer to arbitration awards which were "repugnant to the purposes and policies of the PECBA").[24] This negative implication would be improper, it seems to me, because ERB occupies a quasi-judicial role in this process of adjudication and review, whereas employer agencies occupy a party role.

{v} "[P]olicies respecting sexual harassment"

Note that the list is not exhaustive. For example, it seems very likely that the legislature intended that harassment on the basis of race or national origin would receive the same treatment as the areas of public policy which are specifically included here.[25] In fact, the battles over the public policy exception for the enforcement of private sector awards has included such diverse areas as traffic safety,[26] fire arms use,[27] and alcohol rules.[28]

There are at least two more interesting questions here. First, does this public policy limitation apply to the choice of burden of proof? In *Stroehmann Bakeries v. Local 776*, for example, the court refused to enforce a private sector arbitration award in a coworker sexual harassment case because the arbitrator did not explore the merits of the charges.[29] Unions which urge the use of the seven tests approach in such cases should be aware of this possibility, because the arbitrator here found the employer had failed to investigate the charges, and the arbitrator reversed the discipline without looking beyond that failure. The court held that approach was inconsistent with the public policy against sexual harassment because, apparently, the arbitrator never got to the merits of the sexual harassment charge at all. It could be argued, pursuing the same line, that an arbitrator who adopts a higher standard of proof in such cases has committed a similar error. Unions frequently argue that the charges in co-worker sexual harassment cases carry such opprobrium that they should require proof by clear and convincing evidence, or even proof beyond a reasonable doubt. But sexual harassment *statutes and court decisions* require proof only by a preponderance of the evidence. It could be argued, therefore, that an arbitration award which explicitly required proof by clear and convincing evidence, and which reinstated a grievant based on a lack of such proof, never really reached the merits of whether or not grievant did what he or she was disciplined for.[30]

Next, note that this provision presents at least the *possibility* of the use of these public policy arguments by a union, as well as by an employer.[31] Court decisions include various discussions of an individual's right to resist harassment or physical force in cases involving a whistle-blowing defense, for example, or cases in which the employee claims to have been resisting or opposing discrimination.[32]

[22] There seems to be no basis for arguing that SB 750 changes the traditional requirement that the employer carry both the burden of going forward and the burden of persuasion in discipline cases.

[23] It would have much easier to argue that such regulatory pronouncements established a public policy basis for rejecting an award under ERB's old *Willamina* test, before the addition of the statutory reference to public policy found (only?) in statutes or in court cases.

[24] See Greater Albany Education Association v. Greater Albany School District No. 8J, 5 PECBR 4158, 4160-4161 (1980).

[25] In fact, the cases the Supreme Court cites in *W. R. Grace* for the "public policy" limitation on enforcing arbitration awards all deal with the enforcement of racially restrictive covenants in deeds to real property. Some of those were valid restrictions when they were made, but they are now unenforceable because they are contrary to public policy.

[26] Failure to tighten lug nuts in *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 f.2d 1200, 132 LRRM 2689 (9th Cir. 1989).

[27] Shooting at a supervisor's car in *United States Postal Service v. Letter Carriers*, 839 F.2d 146, 127 LRRM 2593 (1989).

[28] *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665, 130 LRRM 2014 (11th Cir (1988) and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987).

[29] Stroehmann Bakeries Inc. v. Local 776, International Brotherhood of Teamsters, No. 91-5261 (3d Cir., June 29, 1992), cited in Arbitration and the Law, 1991-92 (American Arbitration Association), pp. 108-109.

[30] The same sort of argument could be made if an arbitrator reduced a penalty for *repeated* acts of coworker sexual harassment. See Interkofer v. Turnage, 973 F. 2d (9th Cir., 1992).

[31] How does a union get such an issue before ERB or a court? The only likely way seems to be by insisting that the employer arbitrate the grievance again. The employer's refusal to arbitrate again *may* then present the issue of whether or not the first award should be unenforced as contrary to public policy. There is no Oregon case allowing such a method for a union's contest of the propriety of an arbitration award; however, no other method suggests itself, and the union would have the advantage of the compelling argument that access to review of awards should not be available to only one side.

[32] Title 7 of the United States Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., protects such resistance. The Ninth Circuit has made it clear that an employee who opposes employment practices reasonably believed to be discriminatory is protected by the opposition clause

{vi} "[S]exual misconduct"

This may be the tail that wagged this whole statutory dog into existence. Henry Drummond's discussion of the legislative history of SB 750 suggests that the legislature's primary concern here was with several cases involving alleged police officer sexual misconduct (sometimes referred to as the "sex in the cars" cases). The problem is that there is apparently neither a *statute* nor a *court decision* establishing the public policy with respect to such sexual misconduct by police officers.[33]

{vii} "[S]erious criminal misconduct, related to work"

The specification that the serious criminal misconduct must be related to work seems to invite a reviewing court to remake the same decision an arbitrator must make in classic off-duty misconduct cases: How intimate must the relation to work be? Criminal activity actually arising from the employment (e.g., theft from the employer) is the easiest case. Criminal activity creating a substantial doubt of the employee's safeness in his or her employment role (e.g., a school employee's conviction of sexual abuse of his or her own children, quite apart from the school) would probably count as well. On the other hand, it is not clear whether the statute would apply, for example, to criminal activity which simply kept the grievant in jail and unavailable for work (e.g., a DWII conviction).

{viii} "[T]he same or similar conduct"

On its face, the statutory language does not seem to apply to the broader—and, from the employers' viewpoint, more pernicious—argument that other employees have received lesser discipline for misbehavior which was not particularly similar to grievant's but which was more serious than grievant's.[34]

{ix} "[A] right to change disciplinary policies at any time."

The obvious question here is whether this right may be bargained away or limited by contract. When an employer bargains a drug policy into the collective

whether or not the practice is actually discriminatory. Gifford v. Atchison, T. & S.F. Ty., 685 F.2d 1149, 1157 (9th Cir., 1982). See also, Graves v. Department of Game, 76 Wn. App. 705 (1994).

[33] The legislative history of the new grievance arbitration language may even present a possible reverse use in arbitration. The concerned employers—or those who claimed to be speaking for them—seem to have gone to the legislature for help without first taking the obvious step to solve the problem themselves, and the legislative response was, in part, to make explicit an employer's right to make rules dealing with the problem. Considering that this problem is apparently perceived as sufficiently serious to justify legislative intervention, it could be argued that a police employer should not be heard to use the "any darned fool" rule to discipline employees for on-duty sexual behavior when the legislature apparently provided the easy tool of disciplinary rule making in response to just that problem.

[34] Unions sometimes argue, for example, that termination is too severe a penalty for repeated errors of judgment because other employees were *not* terminated for such major failings as theft or intentional deceit. It can at least be argued that the new statutory language does not reach this argument because the union's claim is not that the misbehavior in the case at hand is similar to that in the prior cases but only that it is disproportionate.

bargaining agreement, complete with specific work rules, for example, can the employer still change that disciplinary policy at any time by giving prior notice? Similarly, could the inclusion of this statutory right to change disciplinary policies make a union's proposal to bargain over disciplinary policies a non-mandatory matter?

CONCLUSION

In short, if the public is lucky, ERB and the courts will make it clear early on that they are not willing to allow the new ORS 243.706 to be mined for mischief. There is virtually nothing on the face of the statutory language to justify deviation from ERB's well-settled and efficient rules for enforcing arbitration awards. On the other hand, new legislation always presents new uncertainties, and SB 750's revision of the grievance arbitration provisions of the PECBA is no exception. In the words of the ancient curse, we may all have to live through interesting times.

Management Commentary

Lon Mills

As is usual when legislation is subjected to heavy lobbying by representatives most affected, Senate Bill 750 represents a mixed bag for management advocates. Unfortunately, some of the modifications initiated by the Republicans will, in practice, be of greater benefit to labor. More about that later.

While the purpose of this monograph is to focus on the changes brought about by SB 750, management representatives should not forget that PECBA is the embodiment of the original House Bill 2263, passed in 1973. That legislation, modeled after the NLRA, was designed almost exclusively by labor and pushed through the legislature with very little compromise. SB 750 notwithstanding, PECBA is still far from a level playing field.

On the subject of unlevel playing fields, it is noteworthy that Senators Bryant and Derfler were the major players during the critical veto negotiations. Their political and negotiations acumen, although considerable, was not equal to Henry Drummonds given the subject matter of the negotiations. It is equally obvious that the "experts" who were advising the senators throughout the process represented somewhat divergent interests. The different priorities of the state, schools, and other local governments are reflected in varying degrees in the final bill. Compromises necessitated by those differences are also reflected. The author is somewhat amused by Professor Drummonds' heavy emphasis on the collaborative nature of these negotiations. In this case, the Republicans did not know where the veto line was. The governor did not know exactly where the referendum line was. Both hammers were significant negotiating tools. When neither party is willing to risk the consequences of failure at the bargaining table, collaboration comes easily.

Finally, Drummonds states that Senate proposals appeared to dramatically "rebalance" the PECBA in favor of public management.[1] The proponents of change, according to Drummonds, argued that judicial and ERB decisions had tilted the public-sector labor law too much against management and the interests of taxpayers. Again, it is important to remember that PECBA was never a balanced act. It was tilted against management and the taxpayers before the first judicial or ERB decisions. For all SB 750's rebalancing amendments, PECBA continues to be tilted in favor of labor.

COMMENTARY ON CHANGES

In the interest of brevity, these comments will address only those changes which are likely to have the greatest impact on the actual bargaining process.

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[1] Henry Drummonds , "A Case Study in the ex Ante Negotiations Process: The Defler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law," in Marcus Widenor, editor, *After SB 750: Implicating of the 1995 Reform of Oregon's Public Employee Collective Bargain Act*, Labor Education and Research Center: Eugene, 1996, page 22

Scope

While the scope of bargaining has generated considerable activity over the years for lawyers, the courts, and ERB, whether a subject is mandatory or permissive should not be the determining factor for employers in deciding what should be included in a labor contract. The practice under the new definition of employment relations will not be significantly different from the practice under the prior definition. Knowledgeable and responsible employers simply reject proposals that would unreasonably restrict their ability to manage resources. Even protective service unions have been unable to make significant inroads into truly inherent management rights when such efforts have been rationally opposed during bargaining or dispute resolution processes. Thus, the statutory definitions of mandatory or permissive subjects will never be as important as the actual bargaining strategies of the parties.

The Bargaining Process

The ninety-day time frame for interim negotiations is clearly of value to employers. Unions can no longer prevent implementation of interim proposals through manipulation of the bargaining process. It is puzzling, however, that the Republicans agreed to a 150-day minimum time frame for negotiations toward a new or successor agreement. It is highly unusual for anything good to happen to management at the bargaining table. Management normally spends time at the table either saying no to union proposals or making concessions. Neither activity should be viewed as positive for employers. Why, then, would Senators Bryant and Derfler agree to tie employers to the table for as long as five months with no real ability to move the process along? This provision is one example of how reform has actually made the PECBA more union-friendly.

END GAME PROVISIONS

Final Offer Package Interest Arbitration

If there is a crown jewel in the changes effected by SB 750, it is in the interest arbitration provisions applicable to public safety negotiations. Although with the final offer package procedures unions generally remain in a win-or-tie situation and employers remain in a lose-or-tie situation, the potential magnitude of either wins or losses is reduced dramatically. This assumes, of course, that the parties will indeed negotiate closer to their bottom lines prior to actual arbitration. The safety net for public safety unions is not nearly as safe as was the case with issue-by-issue arbitration. Public safety unions will, for the first time, be forced to negotiate realistically over a realistic number of issues. Some employers and unions will learn, early on, that greed kills. While true that, in the past, arbitrators tended to "split the baby," they seldom were able to split it exactly in half. This was particularly onerous to management since the normal "baby" consisted of 80 percent union offensive proposals and 20 percent management defensive proposals. Under the final package concept, one party will get the award and the other will get the dictum. The parties will soon learn to fashion their final package so as to maximize the probability of its selection. The resulting evolution to negotiated agreements, rather than arbitrated agreements, will be natural, quick, and easy. Thus, arbitration is likely to become what it should be—the statutory analog of strike/unilateral implementation.

Interest Arbitration Criteria

As lofty as it sounds, the priority given to the "interest and welfare of the public" will not significantly affect the treatment of that criteria by arbitrators. This criteria has always been given priority consideration when employers have been able to show its relevance to specific union proposals. The most important change in criteria is the definition of comparables for cities and counties. "Comparables" is the criterion most manipulated by arbitrators to support predetermined conclusions. While most criteria, including the definition of comparables, will continue to be vulnerable to massaging, arbitrators should be on notice that too much embellishment will probably result in additional legislation.

OTHER CHANGES

Supervisory Definition

The Employment Relations Board, as revised, will ultimately determine the significance of these changes. Frankly, aside from the obvious value of additional dues, it is difficult to understand why a union would want anyone with true supervisory authority in the bargaining unit. Similarly, management should not want employees excluded unless they exercise effective supervisory authority. If, however, the ERB continues to apply the exclusion standard as it did in the recent Deschutes County Sheriff's case, the category of lead worker will be excluded as supervisory.[2] This will result in a fairly significant exodus of current bargaining unit members.

Managerial Exclusion

In day-to-day management-union relations, the managerial exclusion makes sense. Employees who are not supervisors (have no staff) but who have a strong affinity with management have long been a paradox within an organized work force.

A rational explanation for restricting this exclusion to state services escapes this author. Most likely, it is the result of the previously mentioned divergent interests who were lobbying Senators Derfler and Bryant during the final negotiations. Hopefully, the 1997 Legislature will have a greater interest in extending this exclusion to local governments.

Mixed Units In School Districts

ERB's stated preference for wall-to-wall bargaining units is understandable. However, the extremes to which it has taken this preference evidences either a lack of understanding or a lack of concern for the problems created by mixed units.

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[2] Deschutes County Sheriff's Association v. Deschutes County, ERB Case UC-62-94.

ERB should view this legislation as a signal that it should restrain itself in the designation of wall-to-wall units in state and local governments.

Enforcement Of Grievance Arbitration Awards

These changes, as with several other changes in PECBA, seem to be directed toward specific past employer or arbitrator blunders and probably will have little impact on how the state, schools, and other local governments conduct labor relations business. As Howell Lankford observes, "If the new ORS 243.607 is given a fairly moderate interpretation by the ERB and the appellate courts, then SB 750 probably makes few if any substantial changes in grievance arbitration."[3] Given the heavy reliance by both parties on precedents established by mainstream arbitrators and on the longstanding principles of arbitration reflected in the writings of such authors as Elkouri and Elkouri, neither the ERB or the courts are likely to do much pioneering in this area.

On the surface, the new provision giving employers a limited right to change disciplinary procedures appears significant. However, since the overwhelming majority of contracts include a just cause provision, any disciplinary policy that does not measure up to that standard would violate a collective bargaining agreement.

Changes Outside The PECBA

One aspect of the Derfler-Bryant reform legislation that falls outside the framework of the PECBA itself is also worth noting: the changes in the Teacher Fair Dismissal Law.

Teacher Fair Dismissal

The changes which eliminate the potential for "two bites at the apple" by requiring an election of remedies by dismissed teachers is, arguably, the result of paying too much attention to theory and too little to practice. While the author is not aware of any comprehensive statistics in this area, an educated guess is that few, if any, teachers actually got two bites at the apple, and that none actually benefited from this theoretical loophole. As long as teachers had unwaivable Fair Dismissal Rights, it is relatively easy for school district negotiators to exclude dismissal from the just cause provisions of the labor contracts. The election of remedies takes away the rationale for such exclusion. Given the track record of the Fair Dismissal Appeals Panel versus arbitrators in overturning dismissal decisions, it should be expected that arbitration will become the overwhelming preference for dismissed teachers and their representatives.

FINAL COMMENTS

As noted up front, SB 750 represents a mixed bag for management and labor. The overall impact varies for the state, school districts, and other categories of local government. From this author's perspective, the most significant management gains from the legislation are in the areas of redefining bargaining units, time limits for interim bargaining, and the new final offer package interest arbitration procedures for public safety workers.

There are benefits for labor in SB 750 too, though. The 150-day minimum negotiations time clearly benefits unions by keeping management at the table and raising the cost of collective bargaining for employers without staff negotiators. As I argued above, the Teacher Fair Dismissal provisions will also work to labor's advantage by channeling more dismissals through grievance arbitration under a just cause standard. Even the elimination of the communication bar will probably be, on balance, of greater benefit to labor. Elected officials are much more likely to be influenced by "end-runs" than are rank-and-file bargaining unit members.

Even if the above changes are quite moderate given the potential for change, it must be acknowledged that SB 750 represents the first significant improvements in PECBA, from a management perspective, since 1973. The efforts of Senators Derfler and Bryant and of all the background players should be appreciated and lauded by public employers. One can hope that the proposed task force and the 1997 legislature will continue to work toward a more reasonable balance of PECBA rights and responsibilities.

[3] Howell L. Lankford , "Grievance Arbitration Under SB 750", in Marcus Widenor, editor, *After SB 750: Implicating of the 1995 Reform of Oregon's Public Employee Collective Bargain Act*, Labor Education and Research Center: Eugene, 1996,, page 116..

Labor Commentary

Randy Leonard

The honor of being elected as a state senator is one of the highlights of my adult life. Coming from my background as a firefighter and the elected president of the Portland Firefighters Association, I tackled the duties of my office from the day I took my oath in September 1993, believing with my heart and soul in treating working class Oregonians as fairly and equitably as possible. Senate Bill 750 was only one of a number of pieces of anti-worker legislation that taught me that my view of the world is not shared by a majority of my colleagues in the Oregon legislature in general and the state senate in particular. Although I am still humbled by being fortunate enough to serve in the state senate, my enthusiasm has been tempered by the reality of the legislative process being controlled by ultraconservative Republicans.

Because I am a working firefighter, SB 750 hit closer to home for me than did some of the other rollbacks in Oregon law that the Republicans utilized to restrict or repeal existing rights and programs. Because of how close I am professionally to collective bargaining, particularly from a firefighter's viewpoint, I nearly lost the connection that the "Derfler-Bryant Act" has with the larger Republican agenda, or what is now more popularly called the Republican revolution. To truly understand the underpinnings of SB 750, one must not get mired down in some of the red herring arguments contained within this monograph. In seeking to understand the motivations behind the bill, the reader should resist traveling down a path paved with self-serving themes characterized as veto negotiations. Those arguments are nothing more than intellectual diversions that attempt to cleverly disguise the anti-worker law that SB 750 is. This transparent argument maintains that SB 750 is somehow related to the larger public good because its final version is better than the original.

SB 750 is but one of the outgrowths of the Republican agenda for our state. Because of its balance between workers and management, the 1973 PECBA was an inevitable target for repeal once the right-wing element of the Republican party controlled the legislature. Thus, the original version of SB 750 that passed the Oregon senate actually *allowed* strikes by firefighters and police officers. Negotiations with the Republicans by those actually representing workers' interests were difficult because we knew they were aware that it would have taken years of humiliating wage freezes and rollbacks before firefighters and police officers would have seriously considered going out on strike. Public officials understand and acknowledge that it would go against every grain in a firefighter or police officer to leave the public, whom we are sworn to protect, naked in the face of criminals and natural and medical disasters.

Firefighting and police work are among the most stressful and dangerous occupations one can undertake. Firefighters and police officers cannot and should not, under any circumstances, strike. Regardless of their working conditions or compensation, firefighters and police officers must be on the job twenty-four hours a day, seven days a week defending the public we are sworn to protect. That

is the basis for prohibiting firefighters and police officers from striking and requiring binding interest arbitration as an alternative. Thus, the 1973 PECBA was passed in part because of a strike that was occurring during the regular legislative session by the Klamath Falls police officers who had suffered under years of humiliatingly low wages and benefits. Since that strike and the passage of the PECBA twenty-three years ago, not one illegal strike by a fire or police department has occurred anywhere in this state. That fact was ignored during the deliberations over SB 750.

THE ATTACK ON INTEREST ARBITRATION

In defending their untenable positions, some apologists for SB 750 have been naive enough to rely upon the public pronouncements put forth by the Derfler-Bryant supporters who seek to justify their attack on firefighter and police officer collective bargaining protections by citing the so-called high number of interest arbitrations in public safety employment. Instead of looking at the number of disputes involving firefighters and police officers that ended up in front of an arbitrator as a system that needs fixing, the tax-paying public will tell you that a process that resolves public safety disputes without strikes is evidence of a system that is working well.

In pushing for the virtual gutting of interest arbitration, defenders of SB 750 assumed that fire and police settlements arbitrated under the 1973 PECBA were more generous than those negotiated between managemnt and labor at the bargaining table.

As has become commonplace in the debate over SB 750, that argument flies in the face of the facts. An analysis made by Jim Gallagher in 1983 showed that arbitrated settlements were on average *1.8 percent less* than those negotiated between public safety employees and their employers.[1] While this study was conducted in 1983, the State of Oregon Employment Relations Board has confirmed that the pool of arbitrators it utilizes has remained relatively the same. Therefore, there is no reason to think that there would be any change in negotiated settlements versus arbitrated settlements. Additionally, the Employment Relations Board records indicate that in the thirteen-year period prior to the passage of SB 750, fully 74 percent of all public safety contracts were resolved without the parties going to interest arbitration.[2]

As a labor practitioner under the PECBA and the chief negotiator for the Portland Firefighters Association, I have always been motivated to strike a deal at the table and avoid arbitration, if for no other reason than its prohibitively high cost.

In fact, the Portland Fire Bureau and the Portland Police Bureau, the largest fire and police departments in Oregon, have each had only one interest arbitration ever. In 1983 the Portland Police Association voluntarily agreed to a one-year wage

[1] James J. Gallagher, "Public Safety Interest Arbitration- The Oregon Experience." *CPER*, Institute of Industrial Relations, University of Southern California, Berkeley, June, 1983.

[2] Statistics compiled by the ERB

freeze. During the 1984 negotiations for a successor agreement, the city insisted that the police take another one-year wage freeze. In spite of tireless negotiations by the police union, the City of Portland never moved from its offer of another one-year wage freeze. The police union was left with no alternative but to go to its first and only arbitration.

In 1989 the Portland Firefighters Association went to its only interest arbitration. The Portland City Council proposed that the City of Portland firefighters take a wage freeze after the city council voted itself a four percent wage increase. What was the "outrageous" demand made by the firefighters in front of the interest arbitrator? The same four percent raise the city council had awarded itself.

Both of these examples have been repeated by public employers in communities throughout the State of Oregon. It has been my experience that where abuse of the interest arbitration process has occurred, it has been by the public employer who is attempting to avoid public responsibility for making a good-faith effort to settle a collective bargaining agreement between itself and its firefighters or police officers.

MANAGERIAL AND SUPERVISORY EXCLUSIONS

SB 750 will denigrate the jobs of firefighters and police officers in this state to the dismal level that firefighters and police officers experience in states without collective bargaining. To understand how, one must realize that the most insidious characteristic of SB 750 is who the new law *prohibits* from belonging to a union. Groups of employees who, under the 1973 PECBA, could bargain wage, hour, or working condition issues with their public employers are now excluded from any such bargaining under SB 750. In other words, when I say firefighters and police officers have lost their right to collectively bargain, I mean literally that the new law has been written to enable public employers to remove firefighters and police officers from unions which have historically represented them.

SB 750 accomplishes its primary purpose of denying firefighters and police officers collective bargaining rights through two new definitions whereby public employees are prohibited from belonging to unions. The first new definition is that of managerial employee:

> Managerial employee means an employee of the State of Oregon who possesses authority to formulate and carry out management decisions or who represents management's interests by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A "managerial employee" *need not act in a supervisory capacity in relation to other employees.* (emphasis added)[3]

[3] SB 750, Sec. 1 (amending ORS 243.650 to include a new subsection 16).

Who could read this definition and with a straight face not think it was aimed directly at the Oregon State Police? What police officer for any jurisdiction does not ". . . represent management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties." And note that those employees who fit the definition of managerial employee need not supervise anyone. Thus, if an Oregon State Police officer or sergeant fits the definition of a managerial employee he or she has absolutely no collective bargaining rights in this state. It is hard to believe that leaving a police officer with absolutely no right to bargain his or her wages, hours, or working conditions would somehow be in the public's interest. However, this will be the inevitable result of the new managerial employee language.

Though the managerial employee definition applies to state employees only, the negotiators of SB 750 didn't forget local government firefighters and police officers. The new definition for "supervisory employee"—while using different language—accomplishes the same result for local government firefighters and police officers that the backers of SB 750 envisioned for the Oregon State Police with their new managerial employee definition.[4] We can now look forward to years of hearings before the Employment Relations Board where public employers will attempt to remove from unions firefighters and police officers who they will argue fit the new definitions of managerial and supervisory employees. In fact, because of the passage of SB 750, the Employment Relations Board has already issued an order reversing an earlier policy that allowed the sergeants in the Deschutes County Sheriff's Department to belong to a union under the previous statutory definition of supervisor.[5]

The future for firefighters and police officers in this state under SB 750 is summed up in the last sentence of the ERB's *Deschutes County* order with chilling brevity: "We conclude that sergeants are 'supervisory employees' as defined in ORS 243.650(23) and thus are not public employees who have organizing rights under the PECBA."[6]

ARBITRATION CRITERIA

Another change under SB 750 that tipped the previous level playing field toward management is the criteria arbitrators must now use in deciding between labor and management's "final best offer by package." Of the new criteria created by SB 750, the one that is most detrimental to the interests of public safety workers is that requiring the arbitrator to evaluate: "[c] The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided."[7]

[4] SB 750, Sec. 1 (amending ORS 243.650 to include a new subsection 23).

[5] Deschutes County Sheriff's Assn. v. Deschutes Country, Case No. UC-62-94, (1996).

[6] Ibid.

[7] SB 750 (amending ORS 243.746, Sec. 10, (4), (c)).

Taken by itself, I would agree with Professor Henry Drummonds that as a market-based factor, the wage and benefit level people will work for should be "*one* relevant consideration in a 'neutral' award." The fatal flaw in the logic of all the negotiators of SB 750 was their inability to distinguish between what a firefighter or police officer *would* work for, versus what a firefighter or police officer *should* work for, as determined by a market comparison of comparably sized communities.

Interestingly, the criterion calling for comparison to similar communities remains in SB 750 from the prior collective bargaining law. The continued presence from the 1973 PECBA of the following criterion illustrates a more accurate measure of the market factors arbitrators should consider when making an award: "[e] Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities."[8]

If market forces are important in reaching a neutral award, then what is paid for comparable services by like-size communities is the criterion that will determine that neutrality. The inclusion of criterion [c] was put in SB 750 by the Republicans to intentionally skew what the market pays for fire and police services in like-size communities. In other words, what a twenty-year-old man or woman with a fire science degree will work for to gain experience for moving on to a better-paying firefighting job is dramatically different from what the market pays for a comparable firefighting job in another community. The inclusion of criterion [c] has the effect of a double whammy and undermines the entire theory behind collective bargaining.

Criterion [c] is insidious in that it destroys the integrity of the comparable cities analysis contemplated by criterion [e]. It is criterion [c] that eventually will cause the excellent firefighters and police officers who work in communities throughout this state to seek employment elsewhere in communities that pay market compensation for firefighters and police officers as determined by fair comparisons with like-size communities.

CONCLUSION

Because of the problems experienced by public safety personnel under SB 750, an effort is currently being undertaken by firefighters and police officers throughout Oregon to allow voters to decide whether to return to the PECBA of 1973 or continue living under SB 750. I have found that Oregonians consistently support their firefighters and police officers when we turn to them for help. I don't expect the results of this current effort to be any different.

[8] SB 750 (amending ORS 423.746, Sec. 10, (4), (e)).