2018 PUBLIC EMPLOYMENT RELATIONS CONFERENCE

Leading Cases

From the Oregon Employment Relations Board

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By:
Adam L. Rhynard, Chair
Lisa Umscheid, Member
Jennifer Sung, Member

Table of Contents

1. ***American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon***, Case No. UP-14-11, 24 PECBR 996 (2012), *rev'd and rem'd*, 265 Or App 288, 336 P3d 519 (2014), *rev'd and rem'd*, 360 Or 809, 388 P3d 1028 (2017).

The Board Decision

The Board held that the City violated ORS 243.672(1)(a) and (b) when a City Councilor advised City employees in a letter to a newspaper "to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors." In doing so, the Board reasoned that a "public employer under PECBA is liable for the actions of its officials" and that, because Campbell "spoke as the City's representative, liability for her remarks [was] ascribed to the City." The Board further observed that Campbell was "a member of a six-person Council in which the City Charter vests all powers. The Council *is* the public employer[,] and Campbell shares that status because she is a member of the Council."

The Court of Appeals Decision

The City appealed the Board's order, and the Court of Appeals reversed. In doing so, the court concluded that Campbell was not the city's "designated representative" within the meaning of PECBA, because the record lacked any evidence that the city had "specifically designated" Campbell to act as its representative. *City of Lebanon*, 265 Or App at 295-96. The court further concluded that, even assuming "agency principles" applied in this context, Campbell could not be a "public employer" under PECBA because she was not acting as an agent when she submitted her letter to the local newspaper.

The Supreme Court Decision

The Supreme Court reversed the decision of the Court of Appeals and remanded the matter to the Board for further proceedings. In doing so, the Supreme Court adopted the "reasonable belief" standard from NLRA case law for determining which individuals constitute a "public employer representative" under PECBA, such that a public employer may be held responsible for the unfair labor practices committed by such individuals. Specifically, when employees of a public employer would reasonably believe that a given individual acted on behalf of the public employer in committing an unfair labor practice, that individual is a "public employer representative" under ORS 243.650(21), and the public employer may be held liable for the conduct of that individual under ORS 243.672(1).

The court added that in applying the "reasonable belief" standard, adjudicators should consider "all factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible." (Quoting *International Association of Machinists, Tool and Die Makers Lodge No. 35 v. Labor Board*, 311 U.S. 72, 80 (1940).). The court further explained:

> "One key factor will be whether the individual acting on behalf of the public entity occupied a high-ranking position within the public entity. As the federal courts have recognized, the potential for interference with employees' labor rights is greatest at the highest levels of authority. Moreover, the greater an individual's general

> policy-making authority, the more likely that employees would reasonably believe that that individual acted on behalf of the entity. Other relevant factors include whether the individual acted in his or her official capacity when he or she committed the unfair labor practice, whether the individual had the power to hire and fire employees of the public entity, and whether the public entity disavowed the actions of the individual. One or more of those factors may be sufficient to authorize the inference that the individual acted on behalf of the public entity and that the entity is therefore liable for the individual's actions."

Applying that "reasonable belief" standard to this case, the court noted that this Board did not address whether Campbell was a "designated representative" of the City, such that the City could be liable for her conduct. The court directed the Board, on remand, to "determine whether city employees would reasonably believe that Campbell was acting on behalf of the city when she wrote her letter urging city employees to decertify the union." In making that determination, the court instructed, this Board "should consider all relevant factors, including, but not limited to, whether Campbell occupied a high-ranking position within the city, whether Campbell had general policy-making authority for the city, whether Campbell had authority to hire and fire city employees, whether Campbell acted within her official capacity as a city councilor when she made her statements, and whether the city disavowed Campbell's statements."[1]

Justice Landau, joined by Chief Justice Balmer and Justice Brewer, dissented. According to the dissent, PECBA provides that it is an unfair labor practice for "a public employer or its designated representative" to engage in any of a prohibited list of actions. ORS 243.672(1). Thus, the dissent added, the law provides that an unfair labor practice may be committed on the one hand by a government entity—"a public employer"—and on the other hand by an individual—"its designated representative." The question in this case is whether Campbell is a government entity or a person designated to represent a government entity.

The dissent concluded that Campbell was neither:

> "Certainly, Campbell is not a government entity. She is a single member of the seven-member governing body of the City of Lebanon. But in no reasonable sense of the term can it be said that she is the City of Lebanon, any more than it can be said that a single one of the 90 members of the Oregon Legislative Assembly is the State of Oregon. Moreover, no party claims that she is the city's 'designated representative.' That should be the end of the matter."

[1]After the matter was remanded to the Board, the parties settled their dispute without further proceedings.

2. ***Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon***, Case No. UP-009-15, 26 PECBR 724 (2016), *aff'd*, 291 Or App 109 (April 4, 2018).

The Board Decision

The Union alleged that the University violated ORS 243.672(1)(e) by refusing to produce the names and content of student reports regarding two Union-represented employees, which the University had used in the disciplinary process of those employees. The University justified its refusal to provide those reports on the ground that they were protected from disclosure by the Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). The University also asserted that the Union's claims were moot because: (1) the parties had settled the underlying grievances; and (2) the University had now provided the Union with all responsive documents.

The Board concluded that the claims were not moot. As to the substance of the claims, the Board held that the University's response to the information request violated (1)(e). In doing so, the Board did not reach the issue of whether the student reports were "educational records" under FERPA. Rather, even assuming that the reports were protected under FERPA, the Board concluded that the University failed to pursue a good-faith accommodation to reconcile the conflict between FERPA and the PECBA.

Grievance 1

Facts – The University issued employee CB a written reprimand, which relied in part on information reported by a student. The Union requested the name and contact information of the student witness who had reported the information. The University refused to provide the information, asserting that such a disclosure was barred by FERPA. Approximately four months later, the University wrote a letter to the Family Policy Compliance Office (FPCO) of the Department of Education, requesting assistance with the information request. The grievance was subsequently settled, and the University withdrew its request for FPCO assistance.

Grievance 2

Facts – The University terminated employee RG after receiving a report from a student. The Union requested information that included all documents, incident reports, and witness names used in making the termination decision. The University refused to provide all of the requested information. Later, the University provided some redacted faculty interviews and a redacted Title IX report. The University did not provide any notes of interviews conducted with the reporting student. Approximately four months after the initial information request, the University sought FPCO assistance. About six months after the FPCO letter, FPCO responded that the documents at issue were protected from disclosure by FERPA.

Conclusion – The Board rejected the University's mootness defense, citing prior case law that a "refusal to provide required information under the PECBA is not rendered moot by the disposition

of a related grievance under the parties' collective bargaining agreement, or by ultimately providing the information."

Turning to the University's response to the information request, the Board began with the well-settled requirement that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes promptly providing an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." Here, there was no dispute that the requested information satisfied this minimal threshold.

Putting aside whether the requested documents were protected from disclosure by FERPA's "education records" provision, the Board explained that the University was not excused from its duty to bargain when faced with possibly conflicting obligations under the PECBA and another law/confidentiality interest. Rather, when faced with such a conflict, the withholding party (here, the University) must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict.

Applying that framework, the Board concluded that the University had not satisfied its obligation to pursue a good-faith accommodation regarding the requested information. Specifically, with respect to both grievances/information requests, the University's first response was a flat refusal to provide the information on the ground that disclosure was precluded by FERPA. That response did not extend an accommodation to the Union or ask the Union to meet to try to work out an accommodation that would meet the Union's PECBA right to the information, as well as the University's concerns under FERPA. As set forth above, good-faith bargaining in these circumstances requires that the University pursue such an accommodation.

Moreover, after the University secured a letter from FPCO that FERPA precluded the disclosure of some of the information (which could arguably justify the claimed conflict between FERPA and the PECBA, as well as a legitimate and substantial confidentiality interest), the University still did not pursue a good-faith accommodation regarding the requested information. The Board added that, in addition to the myriad proposals or compromises that the University could have suggested beyond FERPA, FERPA itself allows disclosure of otherwise protected information, with student consent. The University acknowledged that it did not seek the consent of any of the at-issue students.

Because the University did not establish that it pursued a good-faith accommodation regarding the requested information, the Board held that the University violated (1)(e).

The Court of Appeals Decision

The court affirmed the Board's order. Before the court, the University asserted two assignments of error: (1) a challenge to the ALJ's determination that the withheld information was not protected by FERPA; and (2) that "ERB misapplied PECBA by ruling that the University must request student consent and waiver of their privacy rights under FERPA as part of the duty to accommodate under ORS 243.672(1)(e)."

The court concluded that neither of those asserted errors provides grounds for reversing the Board's order. With respect to the first assignment of error, the court observed that the error focused on the ALJ's determination that the at-issue records *were not* protected by FERPA, but that the Board's order was predicated on the assumption that the records *were* protected by FERPA. The court added that:

> "[t]o the extent that the University can be understood to contend that ERB was required to decide the FERPA issue, and could not evaluate SEIU's unfair labor practice claim as it did—by assuming without deciding that the records were confidential under FERPA—the university has supplied no authority for the novel proposition that ERB erred in taking that approach to decision making. Thus, the university's first assignment of error does not demonstrate any error by ERB."

Turning to the second assignment of error, the court concluded that it was "based on a misreading of ERB's order." The Board's order, the court explained, did not say that PECBA required the University in every case to ask for student consent to disclose records. Rather, the Board's order "identified the possibility of requesting student consent for disclosure as one of the many options available to the university to meet its obligation to accommodate SEIU's request, by way of illustrating the deficiencies in the university's efforts to accommodate SEIU here."

3. ***Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon***, Case No. UP-022-16, 27 PECBR 112 (2017), *appeal pending*.

Summary

The Union filed an unfair labor practice complaint alleging that the District violated ORS 243.672(1)(g) by refusing to process or arbitrate two grievances. Regarding the "M.N. Grievance," the District contended that a non-bargaining unit employee lacked standing to file a grievance claiming that the District violated a seniority provision by terminating him instead of returning him to his prior bargaining unit position, and therefore the grievance was not arbitrable. In the "Shuttle Grievance," the Union contended that the District must use bargaining unit employees to operate certain community shuttles, and the District contended that the shuttles were outside the scope of arbitrable labor relations because they were funded only pursuant to certain federal and state grant programs. Applying the "positive assurance test," the Board determined that it must order arbitration of both grievances, and that the District violated (1)(g) by declining to arbitrate them.

Shuttle Grievance

Facts – The parties' collective bargaining agreement (CBA) contained a provision that required the District to use bargaining unit employees to operate "lines of the District." Pursuant to certain federal and state transportation funding grant programs, the District had been receiving grant funds and distributing them to third-parties through a competitive grant-funding process. Among the projects funded through this grant process were three community shuttles that were operated by a third-party non-profit organization, and designed to meet commuters' need for transportation services in areas or at times not served by the District's conventional, fixed-route bus and train service (*e.g.*,

for reverse commuters). The Union filed a grievance claiming that the District was violating the CBA's "lines of the District" provision by failing to use bargaining unit members to operate those community shuttles. The District declined to process or arbitrate the Shuttle Grievance, noting that the District distributed only grant funds to the shuttles (not District general funds), and that the shuttles did not use District-owned equipment. The District essentially argued that, because it had only a grantor-grantee relationship to these third-party shuttles, the shuttles could not be lines of the District and were outside the scope of labor relations.

The Union contended that the CBA's grievance and arbitration clause was broad in scope and covered grievances to enforce the "lines of the District" provision (noting that the parties had arbitrated such grievances in the past). The express terms of the arbitration clause covered "all grievances related to any alleged violation of any provision" of the CBA. The CBA expressly excluded three types of grievances from arbitration, but the District did not contend that any of those express exclusions applied to the lines of the district provision or the Shuttle Grievance. The Union further contended that the District's arguments went to the merits of the grievance, not its arbitrability.

Conclusion – The Board reviewed the reasons why PECBA policy strongly favors arbitration and discussed the legal standard that the Board applies to determine whether to order arbitration of a particular grievance, which is referred to as the "positive assurance test." The Board explained, "The positive assurance test creates a 'presumption of arbitrability' that can be overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration." (Citing *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-59-86 at 10, 9 PECBR 9367, 9376 (1987).) The Board also reiterated that in applying this test, the Board interprets only the scope of the arbitration clause, and it does not consider the merits of the underlying grievance. If the arbitration clause is "susceptible to an interpretation that covers the underlying grievance[,] * * * or if there is any ambiguity," then the Board "must order arbitration."

Applying this test, the Board concluded that the arbitration clause unambiguously covered grievances concerning the CBA's "lines of the District" provision. The arbitration clause plainly covered any and all disputes arising under the CBA, and the only express exclusions were not applicable. The Board also engaged in a limited review of the District's evidence regarding the nature of the shuttle funding (while declining to review proffered evidence relevant only to the grievance merits, i.e., interpretation of the lines of the District provision) to determine whether it was the "most forceful evidence of a purpose to exclude" the Union's grievance from arbitration. In concluding that the District's evidence did not meet that standard, the Board noted that the shuttles were "not so completely different from the District's own operations and so unrelated to the work performed by bargaining unit members that [the Board could] conclusively find, on this record, that they [we]re outside the realm of labor relations contemplated by PECBA." Additionally, although the District asserted that it was "merely a conduit" for federal grant funds, the Board found that the District "did not establish through 'the most forceful evidence' that its role [wa]s, in fact, so limited." As a result, the District's evidence was insufficient to overcome the presumption of arbitrability. Finally, the Board addressed the District's argument that the grant-funding programs at issue precluded an arbitrator from awarding a viable remedy, explaining that such a contention, even if true, was not a

basis for refusing to arbitrate, citing *Service Employees International Union, Local 503, Oregon Public Employees Union v. City of Hermiston*, Case No. UP-57-01 at 10, 19 PECBR 860, 869 (2002).

M.N. Grievance

Facts – The "M.N. Grievance" related to the termination of a non-bargaining unit employee. The employee had been a member of the bargaining unit, and at the time that he was promoted to a non-bargaining unit position, the CBA provided that promoted employees retained their seniority, without any time limit. However, between the time of M.N.'s promotion and termination, the parties amended the seniority provision of the CBA to impose a five-year limit on the seniority retention. At the time that the District terminated M.N. (for performance reasons that did not rise to the level of misconduct), he had been working in a non-bargaining unit position for over five years. When M.N. asked to be returned to a bargaining unit position, the District refused, and M.N. filed a grievance. After the initial filing, the Union pursued the grievance on M.N.'s behalf. The District refused to process the grievance, contending that M.N. lacked standing to file a grievance under the CBA's grievance and arbitration provisions, both because M.N. had been terminated at the time he filed the grievance, and because he was no longer a bargaining unit employee at the time he was terminated.

Conclusion – Again applying the positive assurance test, the Board concluded that the M.N. grievance must be arbitrated. The scope of the arbitration clause was clearly broad enough to cover the subject of the M.N. grievance (alleged violation of the seniority provision), and no express exemption applied. Regarding the standing issue, the Board noted that the arbitration clause was susceptible to an interpretation that permitted any employee (not just currently employed, bargaining unit employees) to file grievances, and that also permitted the Union to cure any standing issue by pursuing the grievance itself. In so holding, the Board clarified that prior cases that declined to order arbitration after applying the "arguably arbitrable" standard instead of the positive assurance test were no longer good law.

4. ***Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)***, Case No. UP-024-17, 27 PECBR 146, *recons*, __ PECBR __ (2017).

Summary

The Association's unfair labor practice complaint alleged that the District violated its duty to bargain in good faith under ORS 243.672(1)(e) by pursuing a prohibited subject of bargaining when it continued to propose, over PAT's objection, a paid-sick-leave proposal for the substitute-teacher bargaining unit that conflicted with the paid-sick-leave mandates of ORS 332.507. The District maintained that ORS 332.507 did not apply to substitute teachers, and therefore its proposal (and its conduct in pursuing the proposal) was lawful. The Board concluded that ORS 332.507 did not, as the District contended, exclude substitute teachers from its coverage, and that the District's proposal involved a prohibited subject of bargaining because it was directly contrary to that statute.

Additionally, the District asserted in its post-hearing brief that it was withdrawing the at-issue proposal, and that that action required dismissal of the case as moot. The Board clarified that the

judicial doctrine of mootness applies only to courts, not administrative agencies. The Board then determined that dismissal, under the circumstances presented, was not "necessary and proper" under PECBA.

Mootness

Facts – The Board granted PAT's request for expedited processing of the case, and the full Board conducted the evidentiary hearing. The Board authorized the parties to submit post-hearing briefs. The District, in its post-hearing brief, asserted that it was withdrawing its sick-leave proposal and argued that the case was therefore moot. The Board permitted PAT to respond to the mootness issue, and PAT contended that the matter was not moot.

Conclusion – The Board first noted that "mootness" is a term of art that applies only to the courts, and that the standards for when a *court* might dismiss a case as moot did not apply to administrative agencies, citing *Wallace v. State ex rel PERS,* 249 Or App 214, 220-21, 275 P3d 997, *rev den*, 352 Or 342 (2012), and *Thunderbird Hotels, LLC v. City of Portland,* 218 Or App 548, 556-57, 180 P3d 87 (2008).

The Board then considered whether PECBA authorizes the Board to dismiss matters as "moot." PECBA does not expressly reference "mootness," although it authorizes the Board to dismiss a complaint if no issue of fact or law warrants a hearing. ORS 243.676(1)(b). Likewise, ORS 243.766(3) directs the Board to "[c]onduct proceedings on complaints of unfair labor practices by employers, employees and labor organizations and take such actions with respect thereto as it deems necessary and proper." Although the Board recognized the possibility "that a concept of 'mootness' fits within these statutory directives, and that [the Board is] authorized to dismiss a complaint on grounds akin to mootness," the Board declined to "decide all the contours that would shape that statutory authority" in this case. The Board decided only that it was *not* necessary and proper to dismiss PAT's complaint as requested by the District, for two reasons.

First, under ORS 243.676(2), if the Board finds that a respondent "has engaged in or is engaging in any unfair labor practice charged in the complaint," the Board is required to state its findings of fact, issue a cease and desist order, and take affirmative action to effectuate the purposes of PECBA. Because the statutory language ("has engaged in") contemplates that an unfair labor practice has occurred and potentially ceased, "the mere fact" that the District had withdrawn the disputed proposal did not automatically warrant dismissal. Second, the Board noted that the timing and manner of the District's withdrawal of the proposal did not establish that it would be necessary and proper to dismiss. Specifically, the District had declined to withdraw its proposal at the table, despite PAT's protests for over eight months. Further, the District withdrew its proposal only in its post-hearing brief after the evidentiary record closed, "rather than at the bargaining table where the scope of the withdrawal and the District's position regarding the applicability of ORS 332.507 to substitute teachers could more readily and meaningfully be assessed."

Prohibited subject of bargaining

Facts – In 2016, after the Oregon legislature enacted the Oregon Sick Leave Law (commonly referred to as "SB 454"), the parties engaged in interim bargaining over implementation of that statute to a bargaining unit comprised of substitute teachers, and they agreed to a memorandum of understanding. In the course of preparing for the subsequent successor contract bargaining, PAT's representative became aware of a much older statute, ORS 332.507, that requires public school districts to provide certain paid sick leave to "each school employee," and further provides that "school employee" includes "all employees of a public school district."

At the start of bargaining, PAT explained to the District that it believed that ORS 332.507 set the floor for substitute teachers' sick leave, and that any sick leave proposal would have to comply with that statute's mandates. When the parties first exchanged written contract proposals, the District submitted a paid-sick-leave proposal that it designed to comply with the Oregon Sick Leave Law, but not ORS 332.507. When PAT objected, the District explained that it would need to consult with its counsel to determine whether it agreed that ORS 332.507 applies to substitute teachers. (The parties did not disagree regarding the application of ORS 332.507 to other teachers in the District, who are represented by PAT in a separate bargaining unit.) The parties agreed that PAT's counsel would provide the District with PAT's legal opinion on the issue, and PAT's counsel did so through the District's counsel.

In the following months, PAT continued to follow up with the District regarding application of ORS 332.507 to the substitute teachers, but the District indicated only that it was still assessing its legal position. After approximately eight months, the District submitted another sick-leave proposal that was essentially the same as its original proposal. When PAT asked the District for an explanation, the District stated only that its position was that ORS 332.507 did not apply to substitutes, and it declined to provide any further explanation.

Conclusion – To determine whether the District's proposal was "contrary to" ORS 332.507 and therefore a prohibited subject of bargaining, the Board interpreted the statute applying the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Specifically, the Board reviewed the text and context of the statute and found that, "by its terms, ORS 332.507 applies to 'all employees of a public school district,'" which includes substitute teachers. The District did not dispute that substitute teachers are District employees or that the District is a public school district, but nevertheless argued that the "substitute teachers are not the type of employees included in the statute." After considering the District's arguments, the Board found that nothing in the statute's context or legislative history was sufficient to overcome the statutory text's express inclusion of "all employees," which is the best indicia of legislative intent. Because the District admitted that its proposal would be insufficient to comply with ORS 332.507 if the statute were applicable to substitute teachers, the Board concluded that the proposal was contrary to the statute and therefore a prohibited subject of bargaining.

The District also argued that its conduct was lawful because it is not required to bargain a contractual term that incorporates ORS 332.507 into the parties' CBA. The Board agreed that while

"sick leave is a mandatory subject of bargaining that must be bargained upon request, PECBA does not require a party to enshrine other statutory obligations as specific contract articles in a collective bargaining agreement." The Board explained, however, that "should a party choose to pursue a proposal (or counterproposal) concerning certain terms and conditions of employment, that proposal cannot conflict with a statute." Thus, the issue was "not whether the District must agree to incorporate statutory requirements into a collective bargaining agreement, but whether the District may insist on a sick-leave proposal that conflicts with a statute. It may not."

Finally, the Board addressed the District's argument that ORS 332.507 lacked clarity regarding how to apply its mandates to substitute teachers, and that bargaining would be more complex as a result. The Board explained that any such difficulties did not allow the District to pursue a proposal that conflicts with ORS 332.507. Moreover, the Board noted that "the parties have already demonstrated their ability to satisfactorily bargain mutually agreeable terms that apply ORS 332.507 to other District employees who are not traditional, full-time employees," and that "pushing complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions in circumstances that initially looked daunting or even hopeless."

Order on Reconsideration

After reiterating that the matter was not moot, the Board addressed the four ways in which the District contended that the Board had erred: (1) we should have concluded that the legislative history establishes that ORS 332.507 is inapplicable to substitute teachers; (2) we should have concluded that PAT did not object to the District's sick-leave proposal; (3) we should have concluded that the District's actions did not amount to unlawful pursuit of a prohibited subject of bargaining; and (4) we incorrectly determined that the District could not make a lawful proposal based on the Oregon Sick Leave Law, ORS 653.601 *et seq*.

On reconsideration, the District recognized that the plain language of the statute encompasses "all" of its employees. In light of that, the District had a difficult task before it to override that plain language. The District argued that it accomplished that task by way of legislative history establishing that the use of the term "all" was a "scrivener's error," and that the legislature intended that term to be "regular." The Board reviewed the legislative history and determined that, at certain points during the legislative process in the Senate, amendments were approved in a committee hearing to retain the phrase "regular employees," but that the legislation ultimately used the phrase "all employees." Significantly, Board explained, the change from "regular" to "all" occurred before the Senate vote and before the bill was even introduced in the House. Additionally, it did not appear that the House considered passing anything other than a bill that used the phrase "all employees." Moreover, the legislative history also indicated that, when used, the modifier "regular" would modify classified employees, not teachers.

Under those circumstances, the Board disagreed with the District's contention that the legislative history overrode the plain and unambiguous text of the statute. Although it is conceivable, the Board explained, that the legislature inadvertently used the term "all" when it meant to use the term "regular," the legislative history did not convincingly make that case. Accordingly, the Board

adhered to its prior conclusion that ORS 332.507 did not categorically exclude all substitute teachers from that statute's mandates.

The Board next addressed the District's argument that the matter had not yet ripened. The Board agreed with the general framework set forth by the District—*i.e.*, that generally an unfair labor practice concerning the unlawful pursuit of a prohibited subject of bargaining will not ripen until a party objects to the offending language, and the proposing party elects not to modify the proposal to satisfy that objection. The Board disagreed, however, that those elements were not satisfied in this case. Specifically, the Board was satisfied that the District was: (1) aware that PAT objected to the District's sick-leave proposal as unlawful, and (2) aware of the basis of that objection.

The Board then turned to whether the District continued to pursue the objected-to proposal notwithstanding the objection. In answering that question in the affirmative, the Board explained that on the parties' final bargaining session to date, the District continued to pursue the sick-leave proposal that formed the basis of PAT's objection. The District stated that it was doing so because it had reached a conclusion that its proposal was lawful. That conclusion was based on the District's stated assertion that ORS 332.507 excluded substitute teachers from its coverage. PAT pressed the District for further explanation, but the District only reiterated that its proposal reflected its position that ORS 332.507 did not apply to substitute teachers.

Finally, the Board addressed the District's argument that the District intended to make a sick-leave proposal that complied with the Oregon Sick Leave Law, but did not intend to propose a sick-leave provision that conflicted with ORS 332.507. Because "of the overlap of the two laws," the District asserts, a proposal "could have complied with all applicable laws." The Board agreed with the District that it could have advanced a proposal that "complied with all applicable laws."

The Board disagreed with the District's argument that a proposal that concededly did not satisfy the requirements of ORS 332.507 is pursuable, so long as it satisfied some other statutory provision (here, the Oregon Sick Leave Law).

5. ***Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department—Yamhill Count***y, Case No. RC-003-17, __ PECBR __ (March 14, 2018), *Ruling on Motion to Stay*, __ PECBR __ (May 4, 2018), *appeal pending*.

Summary

The Board determined that a new bargaining unit comprised of all unelected employees of the Department employed in the Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by PECBA, was an appropriate unit. Because a majority of those employees authorized Oregon AFSCME Council 75 (AFSCME) to be the exclusive representative of that unit, the Board certified the unit.

Facts – AFSCME filed a card-check petition to represent a new bargaining unit comprised of all unelected employees of the Department employed in the Yamhill County Circuit Court, excluding employees defined as managerial, supervisory, or confidential by PECBA. AFSCME contended that the statutory unit determination factors—including employees' community of interest; wages, hours, and working conditions; the desire of the employees; and the history of collective bargaining—warranted finding a unit comprised solely of Yamhill County Circuit Court employees appropriate. The State of Oregon, Oregon Judicial Department (Department) objected to the petition, contending that the proposed unit was inappropriate, and that only a wall-to-wall unit of all Department employees would be appropriate. Although AFSCME agreed that a wall-to-wall unit would be appropriate, even preferable, AFSCME maintained that the proposed unit was also *an* appropriate unit.

Standards for Decision

The Board began by explaining that PECBA defines an "appropriate bargaining unit" broadly as any "unit designated by [this] Board * * * to be appropriate for collective bargaining." ORS 243.650(1). Additionally, a "bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board." OAR 115-025-0050(1). PECBA also expressly provides that the Board may determine a unit to be appropriate in a particular case "even though some other unit might also be appropriate." ORS 243.682(1)(a). Therefore, the Board noted, PECBA does not require that a petition set forth the most appropriate unit, only an appropriate unit. *Id.*

The Board next explained how it makes an appropriate-unit determination, namely by considering "such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a). The Board then noted that those statutory factors are not exclusive, and that the Board may also weigh other non-statutory factors, including its administrative preference for certifying the largest possible appropriate unit. In weighing those factors, the Board has the "discretion to decide how much weight to give each factor" in any particular case. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). The Board reiterated that its "analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015).

Application of Factors in this Case

Beginning with the community of interest, wages, hours, and working conditions of the proposed unit, the Board observed that there was no dispute that the Yamhill County Circuit Court employees shared a community of interest with each other, as well as with other Department employees, particularly other circuit court staff. The question, therefore, was whether the Yamhill County Circuit Court employees had a community of interest that is sufficiently distinct so that those employees alone constitute an appropriate bargaining unit.

In answering that question in the affirmative, the Board reasoned that the Yamhill County Circuit Court employees (1) all worked in a single building, (2) frequently interacted with each other, (3) frequently interchanged with each other, (4) commonly covered for each other, and (5) commonly transferred to different positions within Yamhill County Circuit Court. In contrast, the Board noted, those employees (1) generally did not know employees who worked in other courts, (2) only occasionally interacted with employees in other courts, (3) did not provide or receive coverage from other courts' employees, and only infrequently transferred between Yamhill County Circuit Court and other courts (or the Office of the State Court Administrator).

The Board further observed that, under the Department's administrative structure and personnel rules, each circuit court's presiding judge and trial court administrator have administrative and supervisory authority only over the employees in their respective courts. In exercising that authority, the Yamhill County Circuit Court presiding judge and trial court administrator had adopted a number of personnel policies and practices that acutely affected the petitioned-for employees, and only those employees. For example, the Yamhill administration adopted policies or practices restricting the use of accrued leave time, eliminating adjusted work hours or "flex-time," and limiting flexible or part-time work schedules. Because of the Yamhill County Circuit Court employees' extensive interaction and interchange with each other, their relative isolation from other court employees, and their court-specific administration and working conditions, the Board concluded that those employees' community of interest was significantly stronger than, and distinct from, their community of interest with other Department employees.

Turning to the parties' history of collective bargaining, the Board noted that there had been multiple efforts by AFSCME and at least one other union to organize all Department employees in a wall-to-wall unit. Those attempts occurred approximately 30 years ago, 14 years ago, and six years ago. The Department asserted that this factor was not applicable in this case because the record did not establish that the Yamhill County Circuit Court employees (1) previously attempted to obtain labor representation, (2) voted or signed authorization cards in previous organizing attempts, or (3) would be more greatly affected than other Department employees if unable to organize as a single bargaining unit. The Board rejected the Departments argument, reasoning that the Board has not previously required such evidence when assessing the history-of-collective-bargaining factor.

Preference for Larger Units; Avoidance of Undue Fragmentation

The Board next considered its administrative preference for certifying "the largest possible appropriate unit." *Douglas County*, CC-004-14 at 34, 26 PECBR at 391. The Board explained that this preference was rooted in avoiding undue fragmentation of the workforce into excessive bargaining units, as such a result is contrary to many of the policies underlying PECBA; specifically, the preference (1) promotes workplace stability, and prevents the undue burden that would fall on public employers if they had to engage in bargaining sessions for the many splinter groups on a round-robin basis, (2) reduces the number of potential labor disputes and work stoppages, and (3) creates greater equality of bargaining power between public employers and public employees. The Board cautioned however, that this administrative preference should not be blindly applied so that it unreasonably takes precedence over the representation rights of employees; rather, the

administrative preference should be weighed, along with the statutory factors, to determine the appropriateness of a particular unit under the circumstances of the case.

Applying that framework, the Board first agreed with the Department that allowing a straight district-by-district approach in a manner that resulted in approximately 27 different bargaining units (one for each judicial district) would result in undue fragmentation. That, however, would not be the necessary result of finding the petitioned-for unit appropriate, and the Board cautioned that the decision in this case should not be interpreted as allowing such fragmentation. The Board explained that it was not required to continue approving district-based bargaining units just because this Board has approved one. With respect to any future petitions, the Board stated that it could, if the unit determination factors warranted, require any additional proposed unit to accrete to the existing unit, instead of creating another separate unit. The Board further explained that granting this petition will result in only one bargaining unit, which does not constitute undue fragmentation.

The Board also recognized that the Department currently had many centralized systems and statewide rules and that the Department was concerned that approving the proposed unit could (1) force it to create two sets of rules (one for represented employees, and one for unrepresented employees), and (2) potentially interfere with court operations, including, for example, by impairing the Department's ability to ensure all employees use eCourt or have employees stay late to accommodate a particular hearing. The Board explained that a certification order does not require the Department to agree to any particular contract term, only to collectively bargain in good faith on mandatory subjects of bargaining. The Board further explained that PECBA does not exempt employees from performing their job duties or complying with work rules (whether the employees organize court-by-court or wall-to-wall).

The Board next addressed the Department's argument that only a wall-to-wall unit would be consistent with the Legislature's intent in consolidating the circuit courts, particularly, its intent to create a "uniformly administered system of justice." ORS 1.001. The Board responded that it had not located a statutory directive establishing that the Legislature intended to prohibit Department employees from organizing in anything but a single, wall-to-wall bargaining unit. The Board further noted that the statutory language in ORS 243.696(2) designating the Chief Justice as the Department's representative in collective bargaining negotiations with the "exclusive representatives of all appropriate bargaining units" (plural) indicated at least the possibility of multiple appropriate bargaining units in the Department. The Board also noted that, rather than exempting the Department from any of PECBA's requirements, the Legislature expressly provided that the Department was "subject to collective bargaining to the extent provided in ORS 243.650 * * * to 243.782," and that the statutes exempting Department officers and employees from the State Personnel Relations Law "shall not be construed to reduce or eliminate any collective bargaining rights those officers and employees may have under" PECBA.

Dissent – Board Member Umscheid dissented. Beginning with the well-settled proposition that the Board has the discretion to decide how much weight to give the statutory factors in ORS 243.682(1) and the administrative preferences used to assess whether a proposed bargaining unit is appropriate, Member Umscheid explained that she would exercise that discretion differently

and conclude that the petitioned-for unit is not an appropriate unit. Member Umscheid identified four aspects of the majority opinion that she disagreed with.

First, the dissent reasoned that the well-established preference in State cases for the largest possible appropriate unit, when considered together with the statutory factors, tipped the balance against finding the petitioned-for unit appropriate. The dissent detailed the "unique history" of State employee organizing, which resulted in the Board previously characterizing the preference for the largest possible unit as "particularly significant" in State cases. *Association of State Professional Employees v. Department of Revenue and Oregon Public Employees Union*, Case No. RC-55-95 at 8, 16 PECBR 615, 622 (1996). The dissent stated that the preference for the largest possible appropriate bargaining unit in State cases remained vital and had not been disavowed over the course of its more than 40-year development (and had recently been reaffirmed by the Board). The dissent further explained that, historically, the Board applied the preference to avoid creating or exacerbating fragmentation in the executive branch, which was highly fragmented in the early years after the enactment of PECBA. In light of that history, the dissent reasoned, the preference should be given its full weight in State cases such as this one—where we are considering a petition to form a small unit in an otherwise unrepresented component of State government that provides a statewide service.

The dissent also rejected the suggestion that giving significant weight to the preference for the largest possible unit in this particular case would supplant the statutory factors, an outcome that the Board has cautioned that we should avoid. The dissent explained that, in this case, some of the statutory factors weighed in favor of granting the petition, such as the clear community of interest among the employees who work in the Yamhill County Circuit Court, and others weighed against granting the petition, such as the lack of a clearly distinct community of interest and the absence of recent attempts to organize a larger unit in the judicial branch. In such circumstances, the dissent reasoned, applying the administrative preference did not supplant the statutory factors, but merely functioned to tip the balance against creating a small unit.

The dissent next stated that policies of PECBA also counseled against finding the unit appropriate. The dissent emphasized as particularly pertinent the risk of setting the stage for unequal bargaining power. Because the employees in the proposed unit work for an operationally integrated State employer that provides a single statewide service at multiple locations throughout the state, the dissent cautioned that the risk of unequal bargaining power weighed strongly against finding this unit appropriate.

In response, the majority agreed with the dissent that the Board's large-unit preference was particularly applicable to cases involving the State. The majority countered, however, that the Board also typically gives this preference less weight in cases involving unrepresented employees. The majority further noted that, even with respect to the State, the Board had not applied this preference to eliminate or prohibit bargaining units that comprise only part of an agency, much less an entire branch of government. Ultimately, the majority concluded, the Board's administratively created larger-unit preference was just that—a preference—not a statutory requirement—and did not mean, in this case, that the smaller proposed unit was inappropriate, particularly considering that unrepresented employees were petitioning to form a new bargaining unit.

The dissent next addressed its second area of disagreement with the majority—namely, that the risk of additional significant fragmentation in this workforce should be weighed more heavily. Noting that the majority's prediction of unmanageable additional units might prove to be correct, the dissent stated the Board should decline to approve a small unit such as this unless it has some confidence that potential future units would be relatively limited.

Third, the dissent concluded that the employees in the Yamhill County Circuit Court did not have a clearly distinct community of interest to support finding a departmental unit appropriate. The dissent agreed that there were some local differences from courthouse to courthouse—as could be expected in any public agency where employees perform their work in multiple locations and work under different supervisors—but disagreed that the Yamhill County Circuit Court employees' community of interest, wages, hours, and other working conditions were sufficiently distinct so that the Yamhill County employees constitute an appropriate bargaining unit. Specifically, the dissent disagreed with the majority's assessment of the reach and significance of those differences, and instead concluded that the differences, when viewed in context with the far more substantial similarities with unrepresented employees, did not warrant finding this small unit appropriate for collective bargaining.

Finally, the dissent concluded that the absence of any recent attempt to organize a larger unit in the Department weighed against finding the petitioned-for unit appropriate. The dissent noted that, although the Board has never expressed any requirement that unsuccessful organizing attempts must have occurred within a specific time period, evidence of recent unsuccessful organizing attempts tended to show that, if the petition is not granted, the employees seeking representation could effectively be precluded from obtaining it. Here, the dissent concluded, we did not have that type of record, as the most recent known organizing attempt was six years ago. The absence of more recent attempts to organize the Department, the dissent concluded, should weigh against finding this unit appropriate.

6. ***Oregon School Employees' Association v. Ashland School District***, Case No. UP-037-16, __ PECBR __ (May 3, 2018).

Summary

The Board dismissed the complaint filed by Oregon School Employees' Association (Association), alleging that Ashland School District (District) violated PECBA by various actions, including (1) sending direct email communications to members that the Association alleged violated ORS 243.672(1)(a), (b), (c), and (e), (2) reducing the working hours of the Association's president in violation of ORS 243.672(1)(a) and (c), and (3) making a proposal that the Association viewed as regressive and dealing directly with Association-represented employees in violation of ORS 243.672(1)(b) and (e).

District Communications with Association-Represented Employees

Facts – Much of the complaint concerned three emails sent by the District Superintendent (on November 18, 29, and 30, 2016) to Association-represented employees. These emails were sent in

the midst of ongoing successor bargaining and a disagreement about whether to include Transportation Work Rules (a set of procedures that govern the work of bus drivers, who comprise a small segment of the overall bargaining unit) as part of the agreement. The District did not want the Transportation Work Rules to be codified in the agreement, whereas the Association wanted them as part of the agreement. Additionally, this was the first agreement negotiated by the Association's new leadership, with the prior leadership taking a sometimes vocal position opposed to that of the new leadership on both the Transportation Work Rules issue, as well as other bargaining positions and priorities. The contested emails were also preceded by Association communications regarding the status of ongoing bargaining, including some emails that accused the District of bargaining in bad faith, not respecting the collective bargaining agreement, and not treating employees in the Transportation Department fairly or respectfully.

Although the contested emails sent by the District Superintendent were lengthy and concerned numerous issues, the Association identified several passages that it singled out as "particularly chilling" or especially unlawful, including the following:

> "It is unfortunate that with current OSEA Chapter and field representative leadership that the Ashland School District finds itself with such dissension. This is a new and sad commentary on the bargaining process for our District. Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved.
>
> "In the past under prior OSEA Chapter leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment for all its members."
>
> "In the past under prior OSEA leadership the District and OSEA maintained a collaborative relationship that resulted in contracts being negotiated in a timely manner as well as fair, consistent, and equitable treatment of all members. Classified employees are valued and respected by all of us and we are hopeful for a signed agreement in the coming days."
>
> "It is unfortunate that with current OSEA Chapter and field representative leadership that the Ashland School District finds itself with such dissension. This is a new and sad commentary on the bargaining process for our District. Former local OSEA Chapter leadership and many current classified employees who have worked here for many years have always found a way to resolve differences amicably and in the best interests of all involved. It is our hope that the current OSEA leadership will find a pathway to reach resolution as quickly as possible."

One of the emails further stated that "under prior OSEA Chapter leadership," the parties maintained a collaborative relationship that resulted in "timely" contracts and "fair, consistent, and equitable treatment of all members." The email also twice described the District's November 17 proposal about the Transportation Work Rules as a "middle ground."

Beginning with the "in the exercise" claim under ORS 342.672(1)(a), the Board explained that such a claim requires proving that the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity (the Board also noted that because of how the claims were pleaded, it would address the Association's motive-based allegation under ORS 243.672(1)(c)). In finding that the emails in this case did not meet that standard, the Board first noted that many of the statements were facts. The Board explained that the natural and probable effect of distributing factual information did not typically tend to coerce or intimidate employees.

Moving to the other statements, the Board disagreed with the Association's contention that they would naturally and probably chill employees in the exercise of their PECBA-protected rights. Explaining that the test is an objective one that considers the totality of the circumstances, the Board emphasized that the parties were engaged in ongoing collective bargaining and that both parties disseminated communications that advocated, occasionally with forceful language, their particular positions. Viewed objectively, and taking the totality of the circumstances into account, the Board concluded that the natural and probable effect of the emails would not be to chill employees in the exercise of their PECBA-protected rights.

The Board also held that the emails did not violate ORS 243.672(1)(b). A public employer violates that provision when it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. To prevail, a complainant must demonstrate interference that directly affects the labor organization itself. Here, the Board concluded that the emails did not rise to the level of a (1)(b) violation. The Board began with the uncontested proposition that PECBA does not unconditionally bar public employers from communicating with bargaining unit members about employment relations during collective bargaining. The Board added, however, that not all employer communications during bargaining are permissible under PECBA. With respect to (1)(b), the Board looks to see whether those communications constitute dominating, interfering with, or assisting in the formation, existence, or administration of a labor organization. The Board noted that it has found (1)(b) violations where the employer communications amount to direct dealing with employees (and bypassing the exclusive representative), as well as when an employer involved itself in an ongoing internal union election by telling an employee that one union candidate was "evil" and that he should tell another bargaining unit member to vote for the opponent.

The Board distinguished the emails in this case from prior (1)(b) violations. The Board explained that it assessed the emails by considering all the circumstances during the period in which they were sent, including the fact that they were communications sent by email (as opposed to in-person remarks), the fact that bargaining unit members and the Association's attorney also distributed communications during this period (adding to an overall environment of spirited debate about the status and progress of bargaining), and the overall message conveyed by the Superintendent's emails, which included substantial factual information about bargaining, the parties' proposals, and the stand-alone agreement related to the near-retirees. Although the Board found some cumulative import to the emails, it concluded that, on this record, the emails did not result in actual interference with the existence or administration of the Association. The Board also concluded that the emails were not sufficiently analogous to employer communications that the Board had previously

found proscribed by section (1)(b), including those that amounted to directly dealing with employees.[2]

Finally, with respect to the emails, the Board dismissed the Association's claim under ORS 243.672(1)(c), which prohibits a public employer from discriminating in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. To prove a violation of subsection (1)(c), a complainant must prove protected activity, employer action, and a causal connection between the two. The Board examines the reason for the employer's conduct and will find a violation of this statutory provision only if the employer acted with a discriminatory motive, intending to undermine employees' exercise of PECBA-protected rights.

The Board concluded that the Association did not demonstrate that the emails were sent for a purpose prohibited by (1)(c). Rather, on balance, the Board found that the emails largely appeared motivated by the District's desire to provide its perspective on the ongoing status of the parties' negotiations (and to dispute some of the Association's perspective on those same negotiations, which had been communicated to the District's employees).

Reduction in the Hours of the Association's President

The Board next addressed the Association's allegation that the District violated ORS 243.672(1)(a) when it reduced the work hours of Association President Burnett in November 2016. In dismissing that claim, the Board found that Burnett's driving hours changed in November 2016 because a special needs student's transportation needs changed. The Board further observed that special needs bus drivers' driving assignments and hours changed frequently (at least monthly). On such a record, the Board concluded that a change based on the District's legitimate operational needs would not objectively chill employees in the exercise of protected rights as alleged by the Association in its (1)(a) claim.

With respect to the Association's motivation-related claim under ORS 243.672(1)(c), the Board reasoned that the Association had not disputed the District's reason for the change or offered any credible evidence establishing that the District's explanation was not the real reason for the schedule change. Accordingly, the Board concluded that the Association had failed to meet its burden to demonstrate that the District acted with an unlawful motive, and dismissed the (1)(c) claim with respect to the hours reduction.

The Transportation Work Rules Proposal

The Association also contended that the District violated ORS 243.672(1)(e) by making (from the Association's perspective) an overly harsh proposal on September 12, 2016—to exclude the Transportation Work Rules from the collective bargaining agreement—too late in the bargaining process. It is an unfair labor practice under ORS 243.672(1)(e) for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." The Board considers a number

[2]The Board also dismissed the Association's (1)(e) violation, which was based on finding that the emails constituted direct dealing with the employees.

of factors to determine whether the totality of a party's conduct demonstrates an unwillingness to reach agreement, including (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party's negotiator; (4) the nature and number of concessions made; (5) the failure to explain a bargaining position; and (6) the course of negotiations. Proposals that are "predictably unacceptable" to the union may be evidence of bad faith bargaining if the proposals are "so outrageous that it can be concluded that the employer had no genuine intent to reach agreement."

The Board first addressed the Association's contention that the District's September 12, 2016, proposal was made too late in the bargaining process. The record indicated that as early as June 8, 2016, the District took the position that the rules "not be included within the collective bargaining agreement but instead be published as 'department expectations.'" The District reiterated that view on August 11, 2016. The District made the objected-to proposal on September 12. In that proposal, the District proposed that (1) employees have access to the rules online or by requesting a copy from the transportation supervisor, (2) the District, if it sought to change any of the "existing status quo on mandatory work rules," would notify the Association and bargain with the Association if the Association submitted a demand to bargain within 14 days, and (3) employees and the Association could suggest changes to the rules each spring.

On that record, the Board did not conclude that the District made its September 12 proposal so late in the bargaining process that it failed to bargain in good faith. The record showed that the parties' disagreement about whether the rules were or should be in the collective bargaining agreement developed over time, as the parties used the interest-based bargaining process. Additionally, the District appeared to have communicated its view that the rules should be independent from the collective bargaining agreement on at least June 8 and August 11. The District's September 12 proposal, therefore, was not the first time that the District articulated its view (even if less than perfectly formed) that it wanted to bargain an agreement to place the rules outside the contract. Although the District made the objected-to proposal near the end of the 150-day period, which expired on September 30, 2016, the Board found it significant that the parties were using interest-based bargaining for the entire 150-day period, and had discussed their interests on that issue. In addition, the content of the District's September 12, 2016, proposal was not so harsh that the Board concluded that the District had bargained in bad faith.

The Board also disagreed with the Association's contention that a District email violated (1)(e) by bypassing the exclusive representative to negotiate and seek changes in mandatory subjects directly with employees. Specifically, the Association contended that the District bypassed the Association when the Superintendent sent classified employees an email that communicated that an agreement to pay near-retirees a negotiated compensation increase in 2016 was "contingent" on the Association's agreement on other open articles. The District responded that this was a typographical error and was intended to say that "the agreement was *not* contingent" on the Association's agreement to other open articles.

The Board concluded that the Association had not established that the District intended this paragraph to change the tentative agreement that the Association and the District had already reached with respect to the near-retirees. The record also did not establish that Association members interpreted or reacted to this paragraph as a new proposal made directly to bargaining unit members.

Moreover, by December 1, 2016, both the Association and the school board had ratified the tentative agreement regarding the near-retirees. Thus, to the extent that the Superintendent's email was unclear about the stand-alone nature of the near-retiree agreement, that lack of clarity was resolved by December 1, just 12 days after the Superintendent sent her email. Given these facts, the Board concluded that the District did not violate ORS 243.672(1)(e).

Partial Dissent – Board Member Sung concurred in the order, except with respect to the analysis and conclusions of law regarding ORS 243.672(1)(b) and the November 2016 emails.[3] The dissent would have found that those emails unlawfully interfered with the administration of the Association. As a threshold matter, the dissent noted that the Superintendent expressed her views on the alleged relative merits of the Association Chapter's elected leaders versus their predecessors, in the context of an open, political contest between those two sets of leaders. As a result, the dissent believed the emails warranted closer scrutiny than more typical bargaining advocacy. With this in mind, the dissent found five aspects of the emails and their context that warranted, under the totality of circumstances, a finding that the emails crossed the line from lawful direct communications to unlawful interference with the Association.

First, the Superintendent wrote the emails in her official capacity and used the District email system. The remarks were not merely offhand or isolated, made at the bargaining table, or in the middle of a heated discussion with Association representatives. Moreover, the Superintendent did not speak only to the Association leaders, but rather to all of the bargaining unit employees, and tried to persuade them that the Association should accept the District's proposal regarding the Transportation Work Rules by commenting not just on the parties' bargaining positions, but on the Association's elected leaders.

Second, although the statements at issue were best characterized as the Superintendent's subjective opinions, the Superintendent presented those opinions as if they were objective statements of fact. So presented, and coming from the District's highest-ranking administrator, those subjective assertions were more likely to be perceived by District employees as credible, factual statements. To the extent that the factual accuracy of those assertions could be objectively tested, the dissent found that the assertions were not accurate.

Third, the dissent would find that the statements regarding the Chapter leadership were coupled with material factual inaccuracies and omissions regarding the status of the Transportation Work Rules and the course of the 2016 re-opener bargaining. The dissent then set forth those inaccuracies and omissions and explained why they were material and significant, including that they directly contradicted and thus unfairly undermined the elected leaders.

Fourth, the dissent observed that, although the next Chapter officer election was not yet imminent, there was a political contest occurring between the current and former elected leaders. That active political contest, the dissent would find was, in many ways, akin to a pending union election.

[3]The dissent also would have made various factual findings on whether the emails contained significant and material factual inaccuracies, including findings regarding the historical status of the Transportation Work Rules and the District's conduct during the 2016 re-opener negotiations.

Fifth, the dissent believed that there was sufficient evidence that the Superintendent's emails "resulted in some actual interference" with the administration of the Association. The dissent reasoned that witnesses testified credibly that each email caused an unusually large number of employees to contact the Chapter leaders to question them or express dissatisfaction, often quoting or reflecting statements made by the Superintendent. Further, some employees initiated or supported a petition to recall the current Chapter leaders shortly after the Superintendent sent the emails at issue. That evidence was sufficient in the dissent's view to establish that the Superintendent's emails seriously undermined the Association's ability to perform its duties as exclusive representative, and interfered with a core Association activity: the election of its officers.

Finally, the dissent noted that the Superintendent's statements regarding the Chapter leaders, in the context of direct communications to bargaining unit employees, served no legitimate purpose. The dissent further reasoned that the Superintendent could have aggressively advocated for the District's bargaining position, and even criticized the Association's position, without expressly favoring the Chapter's former leaders or making factually inaccurate statements that further undermined the current leaders.

7. ***Treasure Valley Education Association v. Treasure Valley Community College***, Case No. UP-034-17, __ PECBR __ (January 16, 2018).

Summary

The Board expedited (upon request) a complaint by the Treasure Valley Education Association (Association) alleging that Treasure Valley Community College (College) violated ORS 243.672(1)(e) and (f) by not paying raises that the parties labeled "Cost of Living Adjustments" or "COLAs" to certain Association-represented employees once the parties' collective bargaining agreement expired. The parties agreed to submit the dispute directly to the Board based on the pleadings. The Board concluded that the College violated ORS 243.672(1)(e) and (f) when it declined to pay the COLAs to eligible employees after the collective bargaining agreement expired.

Facts – The College and the Association were parties to a collective bargaining agreement (CBA) that expired in 2017. Article 18 of the CBA set forth the salary paid to Association-represented employees. Section B of the article contains a 15-step "Salary Step Schedule Index" that established the minimum and maximum base salaries, which were based on the employees' education and years of service. Section B also provided the following terms:

> "1. Cost of Living Adjustment (COLA) Increase:
> i. There will be a 2.5% COLA increase each year for each member who has reached their maximum step level or above. All other members shall not receive a COLA.
> "2. The 4.5% increase between steps will be maintained."

Article 18, Section D, provided the criteria for the initial placement of new employees on the Salary Step Schedule Index. Section E provided that Association-represented employees shall receive a one-step increase each year up to their maximum degree level. Each step provided for a 4.5 percent increase. Section I, the "Modifications" section of Article 18, stated that "[a]ny changes,

modifications, or addendums to this Article shall be mutually agreed upon by the College and the Association. Such agreement shall be reduced to writing and signed by the College and two (2) officers of the Association."

The step increases and COLAs set forth in the CBA were paid by the College on July 1 of 2012, 2013, 2014, 2015, and 2016. As of September 1, 2017, approximately 13 Association-represented employees had reached their maximum step on the salary scale. After the agreement expired, the College continued to abide by the expired CBA's "Salary Step Schedule Index," but did not pay any of the COLAs to eligible employees during the status quo period.

Conclusion – The Board concluded that the College violated ORS 243.672(1)(e) and (f) by not continuing to pay the COLAs to eligible Association-represented employees once the parties' 2012-2017 CBA expired. The Board first addressed the (1)(e) claim, which was based on the College's obligation to maintain the status quo with respect to mandatory subjects of bargaining. In "status-quo" cases, the Board (1) identifies the status quo, (2) determines whether the employer has changed it, (3) determines whether the change concerns a mandatory subject of bargaining, and (4) determines whether the employer exhausted its duty to bargain or satisfied any affirmative defenses. The Board does not necessarily apply these steps mechanically or in a prearranged order and may proceed to a particular step if it would dispose of the matter.

Beginning in this case with the status quo of the COLAs in the parties' contract, the Board first explained that the status quo can be established by an expired collective bargaining agreement, policy, work rule, past practice, or statute. Here, the Board looked to ORS 243.712(2)(d), which addresses the status of "[m]erit step and longevity step pay increases," during the hiatus period:

> "After a collective bargaining agreement has expired, and prior to agreement on a successor contract, the status quo with respect to employment relations shall be preserved until completion of impasse procedures except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. *Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise*." (Emphasis added.)

Here, the Association first contended that the College was required to pay the COLAs because they were, in essence, longevity step pay increases within the meaning of ORS 243.712(2)(d), and therefore part of the status quo. The College contended that the COLAs were not part of the status quo because the contract did not provide that they would be continued after expiration of the contract's term.

To analyze the arguments, the Board reviewed its previous consideration of the meaning of "longevity step" under ORS 243.712(2)(d) in *Independent Association of Linn-Benton Community College Classified Employees v. Linn-Benton Community College*, Case No. UP-029-13 at 5, 26 PECBR 51, 55 (2014). In that case, the Board explained that the phrase "longevity step" was not

defined in ORS 243.712(2)(d), so the Board turned to its definition as a term of common usage in labor relations. The Board stated that "longevity step increases link pay increases to an employee's length of service or seniority."

Applying that definition to this case, the Board looked to the parties' CBA, examining the text of the disputed provision in the context of the document as a whole. Here, the parties did not submit the entire CBA, but just a portion of it. Section B of Article 18, entitled "Salary Step Schedule," included two components.

First, the section stated that the "salary step schedule for Association members shall be as follows," followed by a chart in the form of a Salary Step Schedule Index. The Salary Step Schedule Index was comprised of 15 steps and accompanying salaries, initial placement levels, and maximum levels (based on degrees earned). Employees who had not reached their maximum step received a one-step increase automatically each year, up to the maximum step that corresponded with their academic degree.

Second, directly after the "Salary Step Schedule Index," the CBA provided:

> "1. Cost of Living Adjustment (COLA) Increase:
> i. There will be a 2.5% COLA increase each year for each member who has reached their maximum step level or above. All other members shall not receive a COLA.
> "2. The 4.5% increase between steps will be maintained."

The Board reasoned that both the express text and the context of Article 18 described a two-part step system. Namely, employees' first move up the Salary Step Schedule Index on an annual basis, until they reach the maximum step that corresponds with their academic degree. Each step represents a 4.5 percent pay increase. After reaching their maximum step on the Salary Step Schedule Index, employees receive only the 2.5 percent COLA increase.

Thus, the Board concluded, Article 18 expressly made longevity a prerequisite to a COLA increase. Specifically, Article 18 provided that Association-represented employees received a 2.5 percent annual COLA increase only after they have reached their maximum step. Further, employees moved up the steps on the Salary Step Schedule Index automatically on July 1 of each year—thus linking receipt of a COLA to longevity of employment. In other words, an employee was entitled to a COLA increase only after serving sufficient years to reach the maximum step for the employee's degree level. At that point, the employee ceased to receive the annual 4.5 percent pay increase (required by the Salary Step Schedule Index) and instead received an annual 2.5 percent increase (which the parties labeled a "COLA"). Consequently, because longevity of employment was an express prerequisite to a COLA under this contract, and the COLAs were automatically granted to eligible employees, the Board found that these COLAs were "longevity steps" in that they were automatically granted upon an employee being employed for a specified length of time.

The Board disagreed with the College's contention that the article provided only for a cost-of-living adjustment, as that term is used in labor relations, rather than a longevity-step increase. A true cost-of-living adjustment, the Board explained, is an "increase or decrease in wages based on

the fluctuation of the Consumer Price Index or any local measure of changes in prices." Here, however, the only indicator in the text of Article 18 that the 2.5 percent pay increase is a proxy for the fluctuation in prices—that is, a "cost-of-living adjustment"—was the mere use of the label "COLA." That label, the Board concluded was not dispositive in this case. The Board noted that the parties had agreed to an unusually long five-year contract, but did not include a COLA formula (for example, a specific consumer price index with agreed minimum and maximum rates of increase) that would attempt to approximate inflation in the distant, future years of the contract. Moreover, only employees who had reached their maximum step received the COLA pay adjustment; those who were still advancing through the annual steps in the Salary Step Schedule Index did not receive the COLA. That allocation of the cost-of-living adjustment to only some, but not all, Association-represented employees also supported the Board's conclusion that this particular COLA increase was linked to an employee's length of service or seniority, rather than being a true cost-of-living adjustment.

Under those circumstances, the Board concluded that the COLA increase in this agreement fit within the meaning of a "longevity step pay increase" under ORS 243.712(2)(d). Pursuant to ORS 243.712(2)(d), a longevity step pay increase is "part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise." Here, it was undisputed that the parties did not expressly provide otherwise. As a result, Board held that the COLAs were part of the status quo, and the College violated ORS 243.672(1)(e) by unilaterally changing that status quo when it declined to pay the COLA increases to employees who had reached their maximum salary step.

The Board next turned to the Association's claim under ORS 243.672(1)(f), which makes it an unfair labor practice for an employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782." For the reasons previously explained, the Board found that the College failed to comply with ORS 243.712(2)(d) when it declined to pay the COLA. The College's failure to do so violated ORS 243.712(2)(d) and, by extension, ORS 243.672(1)(f).

As a remedy, in addition to a cease-and-desist order, the Board ordered its usual unilateral-change remedy, which required the College to return to the status quo before the change. Therefore, the Board directed the College to make whole those employees who were entitled to a 2.5 percent COLA pay increase during the hiatus period. This traditional make-whole remedy included back pay, plus interest at the rate of 9 percent per annum, which these employees would have received if not for the College's actions.

The Board declined to order a posting or the reimbursement of the Association's filing fee.