Your Unfair Labor Practice Case: What Happens Next?

Presented by the Employment Relations Board

May 30, 2018

1. **Brief Overview of the Employment Relations Board**
2. **Overview of structure and composition of ERB**
* Three Board Members appointed by the Governor and confirmed by the Senate
* Staff of three administrative law judges (ALJs) who adjudicate unfair labor practice, representation, and State Personnel Relations Law (SPRL) cases
* State Conciliator and staff of two mediators who provide mediation as part of the collective bargaining process, and assist in resolving grievances, unfair labor practices, and SPRL appeals. The Conciliation Service staff also offers training on interest-based collective bargaining and labor-management committee cooperation.
1. **ERB’s areas of responsibility**
* Adjudicating public sector unfair labor practice cases
* Administering public sector employee representation
* Mediating disputes, including as part of the PECBA collective bargaining process
* Providing training, such as how to engage in interest based bargaining
* Adjudicating SPRL appeals
* (Rarely) administering the Oregon private sector labor relations law
1. **Brief Overview of Common ULP Charges**
	1. **What is an unfair labor practice?**
* A type of conduct that is prohibited by the Public Employee Collective Bargaining Act (PECBA), enacted in 1973
* Public employer unfair labor practices are defined in ORS 243.672(1)
* Labor organization and public employee unfair labor practices are defined in ORS 243.672(2)

**B. Frequently alleged employer unfair labor practices**

* ORS 243.672(1)(a): Interfere with protected activity (such as union organizing, filing a grievance, displaying union insignia, strike planning, striking, etc.)
* ORS 243.672(1)(c): Discriminate to encourage or discourage union membership
* ORS 243.672(1)(e): Fail to bargain in good faith—*e.g.*, fail to bargain in good faith during contract negotiations, fail to engage in midterm bargaining before changing employment conditions (unilateral change), fail to provide information in response to a PECBA information request
* ORS 243.672(1)(g): Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award

**C. Other employer unfair labor practices**

* ORS 243.672(1)(b): Dominate, interfere with or assist in the formation, existence or administration of any employee organization
* ORS 243.672(1)(d): Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony in an ERB proceeding
* ORS 243.672(1)(f): Refuse or fail to comply with any provision of PECBA
* ORS 243.672(1)(h): Refuse to reduce to writing and sign a collectively bargained agreement
* ORS 243.672(1)(i): Violate ORS 243.670(2), which prohibits the use of public funds to oppose or support a union organizing campaign, or to take certain actions against employees who participate in hearings under this section

**D. Labor organization unfair labor practices**

* ORS 243.672(2)(a): Interfere with, restrain or coerce any employee in the exercise of any statutory right (the duty of fair representation)
* ORS 243.672(2)(b): Refuse to collectively bargain in good faith
* ORS 243.672(2)(c): Refuse or fail to comply with any provision of PECBA
* ORS 243.672(2)(d): Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of any arbitration award
* ORS 243.672(2)(e): Refuse to reduce to writing and sign a collectively bargained agreement
* ORS 243.672(2)(f): Engage in any unconventional strike activity (including sitdown, slowdown, rolling, intermittent or on-and-off again strikes)
* ORS 243.672(2)(g): Picket at the residence or business premises of any member of the governing body of a public employer
1. **Procedure in ULP Cases**

**A. Initiating a case**

1. Timeliness

A party must file a complaint for a violation of PECBA “not later than
180 days following the occurrence of an unfair labor practice.” ORS 243.672(3). PECBA incorporates a discovery rule, under which
the Board determines when a party knew or, in the exercise of reasonable diligence, should have known that an unfair labor practice occurred. *Rogue River Education Association v. Rogue River School District*,
244 Or App 181, 260 P3d 619 (2011). The application of the discovery rule is “fact specific and depends on the nature of the allegations in the particular complaint.” *District Council of Trade Unions v. City of Portland*, Case No. UP-023-14, 26 PECBR 525, 536 (2015).

 2. Filing

A ULP case begins when the complainant files the complaint with ERB and pays the $300 filing fee. Complaints that are filed without a filing fee will not be considered. OAR 115‑035‑0000. Complaints must be filed on a form approved by the Board (and available on the Board’s web site).

 3. Content

The Board’s rules do not contain pleading requirements similar to those in state or federal court. Most parties attach to the Board-required form a document that alleges the relevant facts and legal theories in a format similar to a state or federal court complaint. Although there is no specific pleading standard in the Board’s rules, the complaint must allege facts and identify legal theories with sufficient detail to permit the ALJ to determine whether there are issues of fact or law that warrant a hearing. *See* OAR 115‑035-0005 (investigation of complaint); OAR 115‑035‑0010 (amendment of complaint).

A party must specify each section and subsection of PECBA allegedly violated by the respondent. A party who omits a claim from its complaint will generally not receive a ruling from the ALJ or the Board on the omitted claim. For example, if a complainant alleges that the respondent interfered with employees’ exercise of protected rights in violation of subsection (1)(a), but does not specifically claim that the respondent failed to bargain in good faith in violation of subsection (1)(e), the Board will not find a (1)(e) violation even if the record could support such a finding. (Under some circumstances, a complainant may amend the complaint to add a claim. *See* OAR 115-035-0010.)

Additionally, a party should explain all of its legal theories, and may allege “alternative” legal theories. For example, there are two ways in which an employer can violate ORS 243.672(1)(a): Under one theory, the employer engages in conduct “because of” employees’ protected activity. Under the other theory, the employer engages in conduct that “interferes with” employees’ “exercise of” protected rights, and the employer’s motives are irrelevant. A complainant alleging a (1)(a) violation should specify whether it is relying on one theory or the other, or both. In some circumstances, however, when the parties have litigated the case as though a legal theory were alleged in the complaint, the ALJ and the Board will consider that theory. For example, in *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-52-11, 25 PECBR 263, 275 n 10 (2012), the complainant pleaded a subsection (1)(a) claim, but did not specifically plead a “because of” violation of (1)(a). However, the complainant argued the “because of” theory at hearing and in its post-hearing briefing. Under those circumstances, the Board considered the “because of” theory, but noted that parties “should exercise caution . . . in drafting complaints under ORS 243.672(1)(a) and should specify which legal theory they are relying on.” *Id.* Nonetheless, when a claim can be analyzed under multiple legal theories, the Board has reserved the right to address an alternate legal theory, even if that theory was not expressly presented by the parties. *District Council of Trade Unions v. City of Portland*, Case No. UP‑023‑14, 26 PECBR 525, 537 n 9 (2015).

A party also has a duty to pursue claims throughout the unfair labor practice proceeding. For example, when a party alleges a claim in its complaint, but does not present evidence of it at hearing and does not brief the claim in its post-hearing brief, the Board may treat the claim as abandoned and dismiss it on that basis. *See District Council of Trade Unions v. City of Portland*, Case No. UP-023-14, 26 PECBR 525, 526 n 2 (2015).

As discussed in more detail below, the same principles apply to the pleading and pursuit of affirmative defenses by the respondent. For example, if the respondent does not specifically plead an affirmative defense in its answer to the complaint, or if the respondent fails to discuss an affirmative defense in its brief, the Board may decline to consider it. *See* OAR 115-035-0035(1); *see also Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, 6 PECBR 4726, 4733–34 (1981) (citing former OAR 115-035-0055).

 4. Amendments to the Complaint

The complainant may voluntarily amend the complaint at any time before service of the complaint. *See* OAR 115-035-0010(2). In addition, when a complaint appears to present an issue of fact or law, but the complaint contains insufficiently detailed allegations or inadvertent omissions, the ALJ may ask the complainant to amend the complaint. If the complainant does not timely amend the complaint (within 10 days of the ALJ’s request), without showing good cause for its failure to do so, the ALJ may dismiss the complaint. *See* OAR 115-035-0010(1).

During the investigatory phase of the case (see below), the respondent may also submit a motion to make the complaint more definite and certain.

If the ALJ determines that the complaint presents an issue of fact or law that warrants a hearing, the ALJ serves the complaint on the respondent. After service, the complainant may amend the complaint only upon a showing of good cause. *See* OAR 115-035-0010(2).

Amendments may be sought at later stages of the case. To determine whether to permit a late amendment, the ALJ will consider the nature of the amendment, including whether the amendment alleges a new legal theory but does not greatly expand the evidence presented at the hearing. The ALJ will also take into account whether the respondent objected, whether any surprise or prejudice to the respondent can be cured by additional days of hearing or allowing the amendment of the answer, whether the purpose of the amendment is a litigation tactic, and the impact of the amendment on the orderly presentation of evidence or other practical concerns. *Wy’East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP‑16‑06, 22 PECBR 668, 669-72 (2008), *rev’d and rem’d*, 244 Or App 194, 260 P3d 626 (2011). *See also* *Eagle Point Education Association/OEA/NEA v. Jackson County School District No. 9*, Case No. UP-61-09, 24 PECBR 943, 945-46 (2012).

When a complaint is amended, the respondent is given a reasonable period of time to amend its answer. OAR 115-035-0010(2).

**B. The investigation by the ALJ**

1. Overview

When a complainant files an unfair labor practice complaint, the complainant does not serve it on the respondent. (Thus, filing a ULP complaint with ERB differs from filing a civil complaint in state or
federal court, where plaintiffs typically must serve their complaint on
 the defendant.) Instead, the filing of a complaint begins an investigatory process conducted by the assigned ALJ. The ALJ will investigate the factual and legal issues described in the complaint to determine
whether there are issues of fact or law that warrant a hearing. *See*
ORS 243.676(1)(b); OAR 115-035-0005. The ALJ will formally “serve” the complaint on the respondent only if the ALJ determines, after investigation, that the complaint presents an issue of fact or law that warrants a hearing.

To begin the investigation, the ALJ will send a copy of the complaint to the respondent so that the respondent can see what the case is about. (Although the respondent receives a copy of the complaint during the investigation, this does not count as formal “service” of the complaint.) The ALJ will ask the respondent to provide any relevant factual information and an informal statement of the respondent’s legal position regarding the allegations. This information, typically submitted in letter form, is referred to as an “informal response.”

The ALJ may request additional information from the respondent or from the complainant. The ALJ may also talk to the parties to discuss the legal and factual issues raised by the complaint.

 2. Informal responses from respondent and complainant

Respondents submit informal responses directly to the investigating ALJ, typically by email or U.S. Mail. An informal response is usually a letter that describes the party’s legal arguments and position on the facts at issue in the case. Parties typically also submit relevant documents. Relevant documents may include correspondence, emails, memoranda, minutes, reports, photographs, diagrams, or other documents that relate to, support, or refute the facts alleged in the complaint.

The information submitted during the investigatory phase of a ULP case is confidential. *See* OAR 115-035-0005. The submitting party is encouraged, however, to disclose informal responses to the other party to refine or narrow the issues in dispute and to provide both parties information in the event that they wish to try to settle the case.

The ALJ will determine whether the complaint appears to present an issue of fact or law that warrants a hearing. There is no hearing held in connection with this decision. If the respondent’s informal submission indicates that a hearing is *not* necessary, the ALJ will give the complainant an opportunity to submit factual information or legal argument to show cause why the complaint should be served. The complainant may submit written argument and supporting documents. Like the respondent’s informal response, any materials submitted by the complainant are confidential. *See* OAR 115‑035‑0005.

The Board will expect the parties to provide information when requested, and may decline to consider information submitted at a later phase of the proceeding (such as a petition for reconsideration) that a party could have provided during the investigatory phase but did not. *See, e.g.*, *ILWU Local 8 v. Port of Portland*, Case No. UP-037-14, 27 PECBR 1 (2017) (Reconsideration on Remand).

3. Practical Tips for Submitting an Informal Response to a Complaint or Show Cause Order:

* Submit an objective, complete and fact-based response.
* Provide a factual response to every allegation, and any other information that you consider relevant.
* Be as specific as possible about the actions at issue, relevant dates, and involvement of individuals.
* If the ALJ asks specific questions, answer those questions as directly and objectively as possible.
* Explain the background of the dispute, if relevant to the claims or defenses in the case.
* Explain the organizational structure and roles of individuals, if relevant.
* Clearly explain any pertinent background information about involved programs, legal requirements or restrictions, or intergovernmental agreements or arrangements.
* Include and clearly identify relevant documents.
* Provide any applicable policies or procedures.
* Clearly explain your legal position in response to the other party’s contentions.
* Submit your response by the deadline established by the ALJ, or seek an extension from the ALJ before the deadline date.
* If you have questions about the information the ALJ is seeking or have other questions about the process, contact the ALJ directly.

**C. Service or dismissal of the complaint**

If the ALJ determines that the complaint does not present an issue of fact or law that warrants a hearing, the ALJ will recommend that the Board dismiss the complaint. The Board makes dismissal decisions without oral argument.

When deciding whether to dismiss a complaint, the Board assumes that the well‑pled facts in the complaint are true. *Clackamas County Employees’ Association v. Clackamas County*, Case No. UP-53-09, 23 PECBR 571, *recons denied,* 23 PECBR 711, *Rep. Costs Order*, 23 PECBR 737 (2010). The Board may also rely on undisputed facts discovered during the investigation. *Id.* The Board decides whether a fact is in dispute regardless of the characterization by the parties. *Laborers’ International Union of North America, Local 483 v. City of Portland*, Case No. UP‑12‑06, 22 PECBR 12, 13 (2007).

If the ALJ determines that the complaint presents an issue of fact or law that warrants a hearing, the Board (not the complainant) will serve the complaint on respondent.

**D. The respondent’s answer and affirmative defenses**

The respondent must file an answer and submit its $300 filing fee within 14 calendar days from the date of service by the Board. ORS 243.672(3); OAR 115‑035-0035(1). The date of filing is the date the answer is received by the Board and the filing fee is paid. OAR 115-010-0010(10); OAR 115-010-0033(1)(b). A respondent who fails to submit a timely answer and answer filing fee will not be permitted to present evidence at the hearing as to the facts alleged, unless the party makes a showing of good cause. OAR 115-010-0050(5). The respondent will be restricted to making legal arguments. *Id*.

The answer must contain or attach the supporting data required by OAR 115‑035‑0035(2), including the names or initials of involved individuals, dates and places, relevant documents, and information in support of any affirmative defenses.

The respondent must specifically admit any undisputed allegations. OAR 115‑035‑0035(1). The respondent must deny the disputed allegations, either particularly or generally. Unless the respondent states in the answer that it is without knowledge, allegations not denied are deemed admitted unless the respondent shows good cause to the contrary.

The respondent must also allege any applicable affirmative defenses. An affirmative defense, if proven by the respondent, will cause a claim to be dismissed even if the facts supporting that claim are true. The Board generally will not consider defenses not alleged in the answer. *See* OAR 115-035-0035(1) (respondent “shall set forth any affirmative defenses”); *Barkley and AFSCME Local 2451 v. City of Klamath Falls,* Case No. UP-43-09, 24 PECBR 457, 468 (2011) (affirmative defense of failure to exhaust grievance procedures was not alleged in the respondent’s answer and therefore was untimely and not considered by the Board).

The Board’s rules do not contain a list of affirmative defenses that must be alleged. Affirmative defenses have developed through the Board’s opinions. Common affirmative defenses include, but are not limited to, untimeliness, issue preclusion, good faith bargaining, business necessity, emergency (as an exception to the duty to bargain), untimely demand to bargain, lack of procedural or substantive arbitrability, failure to exhaust a contractual grievance process, privilege, waiver, and estoppel.

***Practical Tips:***

* Answers may be submitted by email, but are not considered filed until the filing fee is paid. Ensure that you arrange for the filing fee in sufficient time to submit it by the filing deadline.
* Include all supporting data required by OAR 115-035-0035(2).
* If the respondent intends to seek a civil penalty or filing fee reimbursement, the answer must contain the information required by OAR 115-035-0075 (see below).
* Ensure that you allege all applicable affirmative defenses.

**E. Notice of hearing and prehearing deadlines**

The ALJ will issue a notice of hearing and prehearing order, which will set (or confirm) the date set for the hearing, and identify the prehearing deadlines. (Typically, the ALJ will confer with the parties to determine a mutually acceptable hearing date before formally issuing the notice of hearing.) The ALJ may propose an issue statement and, if so, will ask the parties to submit their suggested changes to the issue statement before the hearing.

The prehearing order includes various instructions to the parties and lists the prehearing deadlines. Among other deadlines, by at least seven days before the hearing date, the parties are required to mail or deliver to each other a list of witnesses who will testify in the disclosing party’s case-in-chief. In addition, also by at least seven days before the hearing date, the parties are required to mail or deliver to each other a list of all exhibits they will offer in their case-in-chief, as well as one copy of the exhibits. In the notice of hearing, the ALJ will instruct the parties to review the other party’s exhibits and be prepared to identify the exhibits to which the party has no objection.

***Practical tip:*** The prehearing order contains a lot of important information. Read the prehearing order carefully, and follow all of the ALJ’s instructions. If a party fails to comply with a requirement specified in the prehearing order, that party may be barred from presenting a witness or evidence as a result. The issue statement defines the issues that the ALJ and the Board will consider; parties should consider the issue statement carefully and timely raise any objections or concerns to the statement before hearing.

**F. Prehearing information exchange**

After the complaint is served, the parties exchange information through several methods. The parties may exchange requests for information under PECBA and obtain evidence to use at the hearing through this informal method.

The parties may serve subpoenas to compel the attendance of witnesses and to obtain documents. *See* OAR 115-010-0055. Attorneys of record may issue subpoenas pursuant to ORS 183.440. Non-attorneys may ask the ALJ to issue subpoenas, and should do so in sufficient time to allow subpoenas to be served within a reasonable time before the hearing. OAR 115‑010‑0055(5).

The parties may take depositions to perpetuate testimony. Typically, parties take depositions in ULP cases only if a witness will be unavailable to testify at the hearing. A party who wishes to take a deposition must file a motion identifying the name and address of the witness, the materiality of the testimony, the reason why perpetuation is required, and the time the deposition will be completed. *See* OAR 115-010-0065. The ALJ will decide whether to permit the deposition.

Additionally, the Administrative Procedures Act permits discovery depositions in a contested case if the ALJ grants a petition for or orders such a deposition. *See* ORS 183.425. Discovery depositions are not typically requested or permitted in ULP cases, however.

In addition, before the hearing, both parties will receive a copy of the other party’s proposed exhibits. The notice of hearing directs the parties to simultaneously exchange exhibits by seven days before the hearing. *See* OAR 115-010-0068(3). Exhibits offered at hearing that were not mailed or delivered seven days before the hearing will be received only upon a showing of good cause under OAR 115‑010‑0068(4).

By seven days before the hearing, the parties must also exchange witness lists, identifying the witnesses who will testify in the party’s case-in-chief. OAR 115‑010-0068(3). Witnesses whose names were not included on the calling party’s witness list will be permitted to testify only upon a showing of good cause under OAR 115-010-0068(4).

**G. Motions**

Parties in ULP cases may file motions. OAR 115-010-0045. ULP cases are not decided on a summary basis, such as by a summary judgment-like procedure. Parties may use motions practice to obtain other relief, however. Motions may include motions to quash subpoenas, motions for protective orders, or motions for postponements or extensions of time. In all motions except dispositive motions, the moving party must first make a good faith effort to confer with the non‑moving party and describe those efforts in the motion. OAR 115-010-0045(2).

**H. Prehearing conference**

The ALJ will typically convene a prehearing conference. OAR 115-010-0068. Prehearing conferences are typically held via telephone. The parties may present any prehearing matters they seek to have resolved before the hearing, such as issues related to discovery, admissibility of evidence, or protective orders or other methods of handling confidential information.

**I. Hearing before the ALJ**

The ALJ will conduct a contested case hearing to receive exhibits and hear testimony. Most ULP cases are heard in the Board’s hearing room in Salem, but an ALJ may agree to conduct the hearing in other locations when the parties and their witnesses are in distant parts of the state. The ALJ may also allow all or part of a hearing to be conducted by an electronic device, such as telephone or video. OAR 115-010-0043.

The ALJ will audio record the hearing. The parties may order a copy of the audio recording after the hearing. The parties may also have a court reporter transcribe the hearing. If a party chooses to have a certified transcript of the hearing prepared, the party must provide the Board with a certified copy of the transcript without charge. OAR 115-010-0070(7).

The parties typically make oral opening statements. The complainant has the burden of proof and presents its case-in-chief first. The respondent has the burden of proving affirmative defenses, if any. OAR 115-010-0070(5)(b).

The parties are expected to present all relevant evidence during the hearing. The Board will not grant post-hearing motions to supplement the record “unless the evidence is material to the issues and was unavailable or there was some other good and substantial reason the evidence was not presented at hearing.” *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-009-13, 26 PECBR 225, 227 (2014) (quoting *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 609-10 (1998)).

At hearing, evidence of a type commonly relied on by reasonably prudent persons in the conduct of their serious affairs is admissible. OAR 115-010-0050(1). The ALJ will exclude irrelevant, immaterial or unduly repetitious evidence. OAR 115‑010-0050(2).

Hearsay is typically admitted, although it is subject to the ALJ’s evaluation of the weight of the evidence. *Arlington Education Association v. Arlington School District No. 3,* Case No.UP‑65‑99, 19 PECBR 762, 776-78 (2002), *aff’d*, 196 Or App 586, 103 P3d 1138 (2004) (hearsay evidence can be sufficient to support an administrative agency’s decision, citing *Reguero v. Teacher Standards & Practices Commission*, 312 Or 402, 822 P2d 1171 (1991)).

Evidence of decisions, findings, conclusions, orders and judgments related to an employee’s unemployment compensation claim will be excluded pursuant to ORS 657.273. *See Chan v. Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, UP-13-05, 21 PECBR 563 (2006), *recons denied*, 21 PECBR 597 (2007).

The ALJ may receive evidence objected to and reserve ruling until issuance of the recommended order. OAR 115-010-0050(4).

***Practical Tips:***

* Meet with the opposing party before the hearing to discuss objections to any exhibits or testimony and to attempt to resolve any hearing-related issues, such as witnesses’ scheduling needs. The ERB hearing room is typically open at least 30 minutes before the scheduled start of the hearing.
* Witnesses should be available at or outside ERB’s hearing room at least 15 minutes before they are expected to be called in order to avoid “gaps” between witnesses.
* Ensure that witnesses understand that the ALJ may ask a witness questions directly, and that witnesses should cooperate with the ALJ in providing the requested information.
* Consider stipulating to uncontroversial facts, such as job titles and reporting relationships of key individuals, dates of significant events and documents (such as the dates of discipline or agreements), and number of employees in bargaining units (if applicable).

**J. Post-hearing briefing**

In ULP cases, parties typically make closing arguments in writing, which are referred to as “post-hearing briefs” or “closing briefs.” The ALJ will set a briefing schedule, generally requiring briefs to be filed two weeks to 30 days following the hearing. The parties submit simultaneous briefs. Replies are not permitted.

Post-hearing briefs should focus on the application of the legal principles to the specific facts that the party contends were established at the hearing. Although parties are not required to cite to specific locations in the record to refer to testimony or documents, it is helpful to the ALJ if they do so. Parties can request copies of the audio recording of the hearing for this purpose. Some parties retain a court reporter to produce a transcript of the hearing, although this is not typically done.

Post-hearing briefs must comply with OAR 115-010-0077, which prescribes the format for briefs. Briefs may not exceed 30 pages, unless expressly permitted by the Board or the ALJ. OAR 115-010-0077(3).

An ALJ may decline to consider portions of an over-length brief if the party did not obtain prior permission from the ALJ to exceed the 30-page limit. OAR 115‑010‑0077(5). *See, e.g., East County Bargaining Council v. David Douglas School District,* Case No. UP-43-07, 23 PECBR 333, 334 (2009) (party filed 57‑page post-hearing brief without seeking prior approval; because the Board’s rules provide for simultaneous submission of briefs, the ALJ correctly denied the submitting party’s request to revise its brief, but permitted the submitting party to select 30 pages for the ALJ’s consideration); *see also* *Castillo-Middel v. State of Oregon, Department of Human Services,* Case No. MA-013-14(2015) (Board ruled that ALJ acted within his discretion to strike from a 38-page brief the section entitled “Background Information” and the section entitled “Conclusion”; it would have been confusing to excise several small pieces as proposed by the party who submitted the over-length brief, but deleting the last eight pages, as proposed by the other party, would remove the legal arguments, which contain the most helpful information for the ALJ).

The Board may decline to consider a claim or affirmative defense if a party does not brief the issue in its post-hearing briefing. *See Clackamas County Employees’ Association v. Clackamas County and Clackamas County Housing Authority,* Case No. UP-032-15, 26 PECBR 798, 799 n 3 (2016) (Board did not consider the affirmative defenses that the employer alleged in its answer but did not argue in its post-hearing brief); *International Union of Operating Engineers, Local 701 v. Wheeler County*, Case No. UP-010-15, 26 PECBR 687, 691 n 1 (2016) (Employer “did not include a discussion of its grievance procedure exhaustion affirmative defense in its Post-Hearing Brief. Accordingly, we assume the defense has been abandoned and do not address it”).

***Practical Tips:***

* Obtain a copy of the audio recording of the hearing from ERB staff after the hearing. Cite to the testimony (by day and time of the testimony) to support references in the brief to witness testimony.
* Cite to specific exhibits, with page numbers, to support factual contentions supported by documentary evidence.

**K. Recommended order by the ALJ**

After the close of the record, the ALJ will issue a recommended order.

OAR 115-010-0085. The recommended order contains the rulings, findings of fact, conclusions of law, remedies, and order recommended by the ALJ.

To obtain review by the three-member Board, a party must file objections to the recommended order (see below). If neither party objects to the recommended order, the Board will adopt the recommended order as its final order after the expiration of the 14-day period for filing objections. OAR 115-010-0090(4). When the Board adopts a recommended order to which neither party has objected, the final order is precedential unless the Board determines to make some or all of the order non-precedential. OAR 115-010-0090(5).

**L. Objections and oral argument before the Board**

Objections must be filed within 14 days of the date of service of the recommended order. OAR 115-010-0090(1). The Board may extend the time for filing objections upon good cause shown. Objections must be written and specific, and clearly identify which rulings, findings of fact, or conclusions of law should be reviewed by the Board. OAR 115-010-0090(1).

If only one party files objections, the other party may file written cross-objections within seven days of service of the objections. OAR 115-010-0090(2).

**M. Legal memoranda submitted to the Board before or in lieu of hearing**

The Board’s rules permit two types of briefing after objections have been submitted. A party may submit a written argument in aid of oral argument. This document (in the form of a legal brief) is intended to help the Board understand the facts and the application of law at issue in the case. Memoranda in aid of oral argument may not exceed 25 pages. OAR 115-010-0095(2). A memorandum in aid of oral argument must be filed with the Board at least five days before the date set for oral argument. *Id.*

A party can also rely solely on briefing, and submit a memorandum in lieu of oral argument. When a party submits this type of memorandum, the party is relying exclusively on written argument to present the party’s arguments to the Board. The party does not participate in oral argument. OAR 115-010-0095(1). A memorandum in lieu of oral argument (in the form of a legal brief) may not exceed 30 pages, unless the Board approves a longer page limit. *Id.* A memorandum in lieu of oral argument must be filed with the Board at least five days before the date set for argument. *Id.*

**N. Oral argument**

If objections to the recommended order are filed and the parties wish to present oral argument, the Board will schedule oral argument on the objections.

Oral arguments before the Board occur in the Board hearing room in Salem. The parties present legal arguments to the Board. The parties are not permitted to offer additional documentary evidence or testimony. Each party may present for
20 minutes.

At oral argument, the Board Chair will open the hearing and typically ask the parties if there are any preliminary matters before the hearing begins. If not, the objecting party will present oral argument first. The objecting party may reserve some of the 20-minute presentation time to offer rebuttal argument after the non-objecting party’s argument. The Board members may ask the parties to respond to specific questions about the record in the case or the application of the law to the facts.

**O. The Board’s final order**

1. Remedies

If the Board concludes that the respondent committed an unfair labor practice, the Board will order the remedies necessary to effectuate the purposes of PECBA, including a cease and desist order and make whole remedies, such as an order returning the parties to the status quo or reinstating employees with or without back pay. Where back pay or other compensation is owed, the Board may also require the payment of interest at the legal rate of nine percent per annum. *See* ORS 243.676(2)(b), (c); *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14, 26 PECBR 254, 261 (2014) (ordering interest on back pay award).

The Board may also require the respondent to post a notice informing employees that the Board found that the respondent committed an unfair labor practice. The Board generally will order a posting if it determines that a party’s violation of PECBA: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent’s personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining unit’s functioning; or (6) involved a strike, lockout, or discharge. Not all these criteria need to be satisfied to warrant posting of a notice. *See, e.g., Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002); *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *aff’d without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).

The Board will order the *electronic* posting of a notice “when evidence indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees.” *Portland State University Chapter American Association of University Professors v. Portland State University,* Case No. UP-013-14, 26 PECBR 438, 452 (2015). *See also Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07,23 PECBR 219, 220 (2009) (Ruling on Reconsideration) (adopting standard used by the National Labor Relations Board, requiring an employer to electronically notify employees of its wrongdoing when evidence indicates that this is the customary and preferred method the employer uses to communicate with employees).

2. Civil penalty

Either party may seek a civil penalty in the amount of up to $1,000 per case. *See* ORS 243.676(4). A party who is awarded a civil penalty may seek and be awarded its full amount of representation costs, rather than the capped amounts otherwise permitted (see below). *See* OAR 115‑035‑0055(1)(b)(E).

A party who seeks a civil penalty must include in the complaint or the answer a statement about why a civil penalty is appropriate, with “a clear and concise statement of the facts alleged in support of the statement.” OAR 115-035-0075. A party may move to amend its complaint or answer to include this statement at any time before the evidentiary hearing concludes. *Id.*

The Board may award a civil penalty against a respondent if it finds that the respondent committed an unfair labor practice “repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious[.]” ORS 243.676(4)(a)(A). The Board has defined “egregious” to mean “conspicuously bad or flagrant.” *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College,* Case No. UP-032-14, 26 PECBR 254, 262 (2014) (employer’s refusal to accept and implement an arbitrator’s reinstatement order was flagrant where employer acknowledged that it understood its obligations, but contended that it would not honor them based on a belief that the arbitrator exceeded his authority and the award violated public policy, but those beliefs were “not well founded” and were “contrary to long-settled precedent,” citing *Brookings-Harbor Education Association/OEA v. Brookings-Harbor School District 17C*, Case No. UP-074-11, 25 PECBR 584 (2013), for proposition that arbitration awards are subject to limited review and the public policy exception is “exceedingly narrow”).

The Board may order a civil penalty against the complainant if the “complaint was frivolously filed, or filed with the intent to harass the other person, or both[.]” ORS 243.676(4)(a)(B).

PECBA also requires the Board to order an enhanced civil penalty in one type of claim. If the Board finds against a respondent public employer in a case alleging a violation of ORS 243.670(2), the Board must “impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing.” ORS 243.676(4)(b). ORS 243.670(2) prohibits public employers from (1) using “public funds to support actions to assist, promote or deter union organizing” and (2) discharging, demoting, harassing, or otherwise taking adverse action against any person who seeks to enforce ORS 243.670(2) or who participates in any investigation, hearing or proceeding to enforce this section.

3. Filing fee reimbursement

The Board may, in its discretion, order filing fee reimbursement to the prevailing party in any case in which the complaint or answer is frivolous or filed in bad faith. ORS 243.672(3). A party who requests filing fee reimbursement must include in the complaint or answer a statement about why reimbursement is appropriate, with a clear and concise statement of the facts alleged in support of the statement. OAR 115-035-0075.

4. Representation costs

Representation costs are an award of attorney’s fees to the prevailing party in a ULP case. Until February 1, 2017, a prevailing party seeking representation costs filed a petition and affidavit itemizing and documenting its attorney’s fees. Beginning February 1, 2017, unless a party has been awarded a civil penalty, the Board automatically awards representation costs in the amounts stated in the rule (which are based on the type and length of hearing) without the prevailing party filing a petition. OAR 115‑035-0055. For example, the Board will award $3,000 in representation costs for a case that requires a partial day or full day of hearing time, and $5,000 for a case that requires more than one day of hearing. OAR 115‑035‑0055(1)(b)(C), (D).

A party that seeks an award of representation costs in excess of $5,000 because a civil penalty has been awarded must file a petition within 21 days of the issuance of the Board order that awarded a civil penalty. OAR 115‑035-0055(1)(c), (2)(b). The opposing party may file objections to the petition within 21 days from the date of service of the prevailing party’s petition. OAR 115-035-0055(1)(c).

The Board awards representation costs after the appeal period under ORS 183.482 has run or, if an appeal is filed, upon receipt by the Board of the appellate judgment.

5. Attorney fees on appeal

When the Board finds an unfair labor practice, PECBA requires the
Board to award attorney fees to the prevailing party on appeal. ORS 243.676(2)(e). The prevailing party is the party designated as
such in the appellate judgment. OAR 115-035-0057(3). Attorney fees on appeal are capped at $5,000, unless a civil penalty is awarded in the
Board proceeding and not reversed by the court on appeal. OAR 115‑035‑0057(4).

Petitions for attorney fees must be filed with the Board within 21 days of the date of the appellate judgment. OAR 115-035-0057(1). The opposing party must file any objections within 14 days of the date of service of the petition. OAR 115-035-0057(2).

**P. Post-order proceedings**

1. Petition for rehearing

After the Board issues its order, a party may file a petition for rehearing. OAR 115‑010‑0100. A petition for rehearing must be filed within 14 days from the date of service of the Board order. OAR 115-010-0100(1).

A petition for rehearing asks the Board to return the case to the ALJ so that a party can submit additional evidence. OAR 115-010-0100(2)(a). Petitions for rehearing are granted only if the petitioning party would be unduly prejudiced if the petition were denied. If the basis for the petition is based on previously unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the hearing. OAR 115-010-0100(2)(b).

2. Petition for reconsideration

A party may file a petition for reconsideration to ask the Board to reconsider a ruling, finding of fact, or conclusion of law in a final order. OAR 115‑010‑0100(3). A petition for reconsideration must be filed within 14 days from the date of service of the Board order. OAR 115‑010-0100(1).

When the Board issues a final order without a preceding recommended order (for example, when a ULP case is dismissed by the Board before the ALJ held a hearing, or the Board hears the matter in the first instance), the Board will generally grant a request for reconsideration and grant oral argument. OAR 115-010-0100(3)(b).

When the Board issues a final order after a recommended order was issued by the ALJ, a petition for reconsideration should be limited to (a) a claim of factual error; (b) a claim that there has been a change in the statutes or case law since the issuance of the final order that affects the case; or (c) a claim that the Board erred in construing or applying the law. OAR 115‑010‑0100(3)(c). A petition for reconsideration based on legal and factual issues that the Board addressed in the final order is disfavored. OAR 115-010-0100(3)(c)(C).

3. Motion to compel compliance

A party may file a motion with the Board to compel compliance with the Board’s order in a case. The Board may “[p]etition the appropriate circuit court for enforcement of any order issued by the board” pursuant to PECBA. ORS 243.766(4). In ULP cases, a party may file a motion asking the Board to file such a petition. *See Portland Firefighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-013-10, 25 PECBR 243, 247 (2012) (Compliance Order) (union filed motion for compliance asking the Board to begin compliance proceedings in circuit court in a dispute about retirement credits due to a grievant; the Board issued an order regarding the service credits due and ordered the employer to “comply with this order within 30 days. If it does not, we will initiate compliance proceedings in the appropriate circuit court upon renewed request by the Association for us to do so”).

In other cases, the parties have filed motions to compel compliance without expressly asking the Board to initiate a proceeding in circuit court. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP ‑26‑06, 24 PECBR 397 (2011) (Compliance Order) (in case holding that employer violated ORS 243.672(1)(a) and (b) when it transferred mental health programs to other employers, the Board issued an order prescribing the proper calculation of back pay and back benefits); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-016-11, 24 PECBR 602 (2012) (Compliance Order) (in case holding that employer violated ORS 243.672(1)(e) when it included new issues in its final offer, two-member Board, with one member signing the opinion and the second concurring with the result, but not the reasoning, directed the employer to include specific content in its revised final offer).

**Q. Appeal to the Court of Appeals**

A party may appeal an ERB final order by filing a “petition” in the Oregon Court of Appeals pursuant to ORS 183.482, which confers jurisdiction for judicial review of contested cases on the Court of Appeals. The petition must be filed within 60 days of the service of the order.

On appeal, the court reviews the Board’s orderfor substantial evidence and errors of law, and to determine whether the Board’s analysis comports with substantial reason. *International Longshore and Warehouse Union, Local 8 v. Port of Portland,* 279 Or App 157, 164, 379 P3d 1172, 1176, *rev den*, 360 Or 422 (2016) (citing ORS 183.482(8) and *Portland Firefighters’ Assn v. City of Portland ,* 267 Or App 491, 498, 341 P3d 770 (2014)). *See also American Federation of State County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, 360 Or 809, 819, 388 P3d 1028, 1034 (2017) (the court reviews the Board’s legal conclusions for legal error, citing ORS 183.482(8)).

**R. Stay of the Board’s order pending appeal**

Filing a petition does not stay enforcement of the Board’s order, although the Board may grant a stay upon a showing of (1) irreparable injury to the petitioner and (2) a colorable claim of error in the order. ORS 183.482(3). When the petitioner makes the required showing, the Board must grant the stay unless it determines that “substantial public harm will result if the order is stayed.” ORS 183.482(3)(b). In that case, the denial must “be in writing” and “specifically state the substantial public harm that would result from the granting of the stay.” *Id.*

An irreparable injury “depends not upon the magnitude of the injury, but upon the completeness of the remedy in law.” *Portland Firefighters’ Association, Local 43, IAFF v. City of Portland*, Case No. UP-13-10, 24 PECBR 809, 810 (2012) (Ruling on Motion to Stay) (quoting *Arlington School District No. 3 v. Arlington Education Association*, 184 Or App 97, 102, 55 P3d 546 (2002)). The moving party must show that irreparable harm is “probable.” *Portland Firefighters’ Association, Local 43, IAFF*, 24 PECBR at 810. Speculative claims or allegations of possible harm are insufficient to demonstrate irreparable harm. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District of Oregon*, Case No. UP-039-10, 25 PECBR 431, 432 (2013) (Ruling on Motion to Stay).

The Board has rejected arguments that financial hardship to the employer caused by a make-whole remedy constitutes irreparable harm. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District of Oregon,* Case No. UP-039-10, 25 PECBR 431 (2013) (Ruling on Motion to Stay) (rejecting as unsupported by evidence theemployer’s argument that the alleged $3.6 million cost of make-whole remedy constituted irreparable harm). *See also Oregon AFSCME Council 75, Local 1329 v. Crook County Road Department*, Case No. UP‑045‑10, 25 PECBR 435, 437-38 (2013) (Ruling on Motion to Stay) (rejecting employer’s argument that irreparable harm would result from the length of time it would take to recover back pay from a reinstated employee if the employer ultimately prevailed on appeal).

A colorable claim of error is “established unless the petitioner’s arguments are ‘frivolous or clearly without support in the law.’” *Portland Firefighters’ Association, Local 43, IAFF*, 24 PECBR at 810 (quoting *Chemeketa Community College Education Association v. Chemeketa Community College and Chemeketa Community College Classified Employees Association*, Case No. UC-9-99, 18 PECBR 718, 719 (2000) (Ruling on Motion to Stay)).

**S. Alternative procedures**

1. Expedited complaints (OAR 115-035-0060)

A party may ask the Board to expedite its complaint or a portion of its complaint. To seek expedited handling, the party must file with its complaint an affidavit containing the following information:

1. The reason that the complaint should be expedited;
2. An estimate of the length of any hearing;
3. A statement of the complexity of the issues;
4. Any specific harm, injury or loss that would result if the complaint is not expedited; and
5. A specific statement of any legal authority in support of complainant’s position.

OAR 115-035-0060(2). If the complaint alleges an unfair labor practice during or arising out of collective bargaining, the complaint must also identify the collective bargaining stage at which the alleged unfair labor practice arose or was committed. OAR 115-035-0060(3).

In addition, if the complaint alleges that the respondent violated ORS 243.672(1)(e) or (2)(b) by refusing to bargain over a mandatory subject or unlawfully pursuing bargaining over a permissive or unlawful subject of bargaining, the affidavit must include (a) the precise language of the last bargaining proposal on the subjects in dispute; (b) the date of the proposal; (c) any date that respondent allegedly refused to bargain over the proposal. OAR 115-035-0060(4).

The Board has the discretion to grant a request to expedite a complaint or portion of a complaint. It will consider the factors listed in the rule, including its schedule and workload, the complexity of the facts and issues in the case, the possibility of immediate or irreparable injury, and the relative importance to the parties and the public of a more rapid decision on the question presented. *See* OAR 115-035-0060(7).

When the Board grants the request to expedite a complaint or portion of a complaint, the respondent must file an answer within 10 days of service of the complaint. OAR 115‑035‑0060(5)(a). Normally, the hearing is held before the three-member Board (rather than an ALJ). OAR 115‑035‑0060(5)(b). The Board may permit the parties to submit pre‑hearing briefs. The parties will present oral closing arguments, unless the Board orders written closing briefs. OAR 115-035-0060(5)(c).

The Board will generally issue its order within 45 days of the filing of the expedited complaint. OAR 115-035-0060(6).

***Practical Tips:***

* If you seek expedited consideration of a complaint, ensure that you simultaneously file with the complaint an affidavit containing all of the information required by the rule. This is a frequently overlooked requirement.
* If the dispute concerns a purely legal issue—such as whether a particular bargaining proposal concerns a prohibited subject for bargaining—consider whether a petition for a declaratory ruling may be a preferable way of obtaining a Board ruling. You may ask the Board to expedite the processing of a declaratory ruling petition.

2. Petition for declaratory ruling

A party may also file a petition for a declaratory ruling pursuant to ORS 183.410 and the Attorney General’s Model Rules, OAR 137-002-0010 through 137-002-0060. For example, a party or parties filing jointly may seek a ruling on whether a particular type of conduct is allowable under PECBA or, conversely, would constitute an unfair labor practice.

To initiate a declaratory ruling proceeding, a party must file a petition that contains:

1. The rule or statute that may apply to the person, property, or state of facts;
2. A detailed statement of the relevant facts, including sufficient facts to show petitioner’s interest;
3. All propositions of law or contentions asserted by petitioner;
4. The questions presented;
5. The specific relief requested; and
6. The name and address of petitioner and of any other person known by petitioner to be interested in the requested declaratory ruling.

OAR 137-002-0010. The Board is required to notify the petitioner within 60 days after the petition is filed whether it will issue a ruling.

OAR 137-002-0020(2).

The Board will set a hearing on the petition. Under the Model Rules, no testimony or other evidence may be accepted at the hearing.

OAR 137-002-0040(2). Thus, the hearing in a declaratory ruling case will be conducted like oral argument in an unfair labor practice case—*i.e.*, the Board will hear legal argument from the parties.

The Board may allow or require the parties to file pre-hearing and/or post‑hearing briefs. *See* OAR 137-002-0040(3).

The Board is required to issue its declaratory ruling within 60 days after the close of the record. OAR 137-002-0060(1). Declaratory rulings may be appealed to the Court of Appeals within 60 days after service of the declaratory ruling. ORS 183.480; OAR 137-002-0060.

***Practical Tips:***

* A party acting alone may file a petition for a declaratory ruling, or parties may file a petition jointly.
* A petition for a declaratory ruling can be an effective tool to avoid labor-management disputes or to get an answer to a question without committing an unfair labor practice (for example, on questions that arise in bargaining about whether particular subjects are mandatory, permissive or prohibited subjects).
* Parties may seek expedited consideration of their petition. The Board will give due consideration to requests to expedite cases based on its workload and hearing calendar.

**T. Mediation and settlement**

At any time during the case, the parties may ask the ALJ to transfer the case to ERB’s Conciliation Division. The State Conciliator will assign a mediator and schedule the case for mediation. ERB’s mediators are trained in labor law and have extensive experience in the collective bargaining and contract administration process. The parties may also retain a private mediator.

The ALJ has the discretion to keep the case on the hearing calendar or hold the case in abeyance while the parties participate in mediation.

Mediation communications are confidential to the extent provided in ERB’s rules. Except to the extent provided in the rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing. *See* OAR 115-040-0040 through 115-040-0044.

**U. Consent orders**

At any time before issuance of a final order by the Board, the parties may submit a consent order in which all factual, legal and remedial issues have been settled. OAR 115-035-0070. If the parties do not submit an agreement regarding representation costs, the Board will award representation costs consistent with OAR 115‑035‑0055. Thus, if the parties agree that no representation costs and no civil penalty will be awarded, the consent order must expressly state that agreement. Typically, the parties will use language similar to the following phrase: “Neither party shall be awarded representation costs and no civil penalty shall be awarded.”

For examples of recent consent orders, see *Oregon AFSCME Local 2376 v. Oregon Department of Corrections, Eastern Oregon Correctional Institution*, Case No. UP‑032-11, 24 PECBR 599 (2012); *Metropolitan Exposition Recreation Commission v. ILWU Local 28*, Case No. UP-57-12, 25 PECBR 581 (2013); *Lane Community College Education Association v. Lane Community College*, Case No. UP-045-14, 26 PECBR 520 (2015).