School Board Communications With Educator Unions: What's Legal and Illegal in Oregon?

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Overview:

Under Oregon law, the school board is the legal employer of all district employees. So it is the school board that ultimately has to decide to approve or reject any proposed contract with employee unions. Board members are not required to serve on a district's bargaining team, but the Board makes the final decision on union contracts. The Board may designate an attorney or someone else to represent it in the bargaining process, but that person serves as a representative of the Board – the Board cannot delegate its ultimate decision-making power to anyone else.

In general, School Board members are free to talk with district employees about any topic as long as it doesn't compromise individual employee or student confidentiality, and as long as Board members don't act to resolve a complaint outside of established grievance procedures and complaint policies. In addition, under state labor law employers (including Board members) cannot ignore or undermine union leaders by asking employees to pressure their union to agree to certain bargaining proposals. Members of a School Board in Oregon may speak directly to members of a bargaining unit within the school district without fear of violating the law, even if they discuss issues that may be or are part of negotiations, as long as Board Members are not going around the union's chosen negotiators to discuss proposals directly with rank and file employees who are not on the bargaining team. This exception is explained in detail below. But it is a very specific and narrowly defined exception.

What types of communication are permitted under Oregon law?

As examples, the following activities are all completely legal forms of communication that unions and school board members can engage in without any fear of violating the law:

- It is legal for unions to communicate their bargaining proposals directly to school board members, whether by email, phone call or any other media. It is also legal for unions to share their reasoning and evidence for supporting those proposals.

- It is legal for unions to share their analysis of district finances with school board members.

- It is legal for school board members to sit in on and observe any negotiating session (Oregon law mandates that all public sector union negotiations must be open to any member of the public, unless both parties agree to conduct negotiation confidentially).

- It is legal for school board members to attend information sessions where union leaders or educators talk about issues of concern to them, including issues that are or will be subjects of bargaining, so long as there is not a quorum of board members who are deliberating towards a decision on bargaining issues.

- It is legal for school board members to ask educators or union leaders questions about issues of concern, including questions about potential or actual bargaining issues, in order to understand the issue or the union's position more clearly.

- It is legal for school board members to meet with union leaders or educators in order to learn more about issues of concern, including bargaining issues, so long as there is not a quorum of board members who are deliberating towards a decision on bargaining issues.

- Typically, if a school board has an attorney or someone else representing the district in contract negotiation, board members do not engage in side bargaining conversations with union leaders – indicating possible support or opposition to various proposals – in order to not undermine the person the Board has chosen to represent it in negotiations. It is not a violation of the law for Board members to engage in such discussions, but it is generally avoided in order to maintain the integrity of the bargaining process.

What type of communication is illegal under Oregon law?

Oregon Revised Statutes 243.672(1)(e) makes it unlawful for an employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." This includes a prohibition against "direct dealing" with union members.[1] Direct dealing is defined by the Oregon Employment Relations Board (ERB), which relies on federal law under the National Labor Relations Board ("NLRB"). In United Food and Commercial Workers, Local 555 v. Bay Area Hospital, Case Nos. UP-045-20 and UP-004-21 (2023), the ERB explained that direct dealing includes "conduct by an employer that amounts to dealing with the [u]nion through the employees, rather than the employees through the [u]nion." The prohibition on direct dealing includes an employer's attempts "to persuade the employees to exert pressure on the [exclusive] representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests" (citations omitted). In UFCW Local 555, the Hospital directly communicated with unit employees to exert pressure on the Union to change its position on an issue being bargained, and to "submit to the will of the [Hospital.]" The Hospital also presented employees with a proposal that had not been previously communicated to the Union, which is prohibited.

The NLRB has explained that unlawful direct dealing occurs when: (1) an employer communicates directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union.[2] Improper direct dealing is characterized by actions that persuade employees to believe that they can achieve their objectives directly through the employer and thus erode the union's position as the exclusive bargaining representative.[3]

However, an employer is free to communicate its views directly to employees "so long as the communications do not contain a threat of reprisal or force or promise of benefit."[4] In fact, an employer may speak freely to its employees about a wide range of issues including the status of negotiations, outstanding offers, its position in bargaining, the reasons for its position, and objectively supportable, reasonable beliefs concerning future events. [5] In other words, the employer may freely communicate with employees in noncoercive terms, as long as those communications do not contain some sort of express or implied quid pro quo offer. [6]

Employers may also freely inform employees of the employer's bargaining positions.[7] Employers may answer questions about bargaining from employees, and may clarify proposals already before the union.[8]

Conclusion: Local Practice and State Law

Each school board may adopt its own practices around communication with employee unions. During contract negotiations, boards typically want all actual negotiations conversations (meaning actual comments or suggestions about what proposals might be acceptable to one party or another) to be channeled through the Board's chosen representative, whether that is a district administrator or attorney. This does not preclude conversations between Board members and union leaders or rank and file educators designed to enable Board members to learn more about a given issue – even an issue that is a subject of bargaining – as long as those conversations don't involve conveying a position on actual bargaining proposals. In order to respect the integrity of the board's chosen representative, Board members usually refrain from engaging in any conversations that could be construed as going around or undermining the Board's representative. Each Board may decide for itself how to draw this line. But there is no legal barrier to Board members' communication – either with union leaders or rank and file educators – as long as it does not entail "direct dealing" that undermines the union's role as representative of district employees.

This policy brief is published by the University of Oregon Labor Education and Research Center (LERC) and authored by Dr. Gordon Lafer, LERC Co-Director. Lafer served on the Eugene School Board from 2019-23 including serving as Board vice-chair in 2022-23.

Endnotes

1 See Roseburg Professional Firefighters Association v. City of Roseburg, Case No. UP-021-13 at 12, 26 PECBR 111, 122 (2014) and cases cited therein.

2 Permanente Medical Group, 332 NLRB 1143, 1144 (2000), (citing *Southern California Gas Co.*, 316 NLRB 979 (1995); see also *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 8, 16–17 (2019).

3 See Pratt Whitney, 789 F.2d 121, 134 (2d Cir. 1986).

4 NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

5 See, e.g., Gissel Packing, 395 U.S. at 618; Pirelli v. NLRB, 141 F.3d 503, 516 4th Cir. 1998); Facet Enters. v. NLRB, 907 F.2d 963, 969 (10th Cir. 1990); Pratt Whitney, 789 F.2d at 134.

6 See, e.g., Selkirk Metalbestos v. NLRB, 116 F.3d 782, 788 (5th Cir. 1997) (noting that the promise of benefit need be only reasonably inferable from the conduct).

7 See Facet Enters. V. NLRB, 907 F.2d 963, 968-69 (10th Cir. 1990); NLRB v. General Elec. Co., 418 F.2d 736, 756 (2d Cir. 1969); United Techs., 274 N.L.R.B. 609, 609-10 (1985); Adolph Coors Co., 235 N.L.R.B. 271, 277 (1978).

8 American Pine Lodge Nursing v. NLRB, 164 F.3d 867 (4th Cir. 1999)