2018 OREGON LABOR LAW CONFERENCE

Leading Cases

From the Oregon Employment Relations Board

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1. ***American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon***, Case No. UP-014-11, 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

In *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 held that the City of Lebanon (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. ***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.

3. ***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, *as adhered to and supplemented on recons*, 27 PECBR __ (2017).

Procedural note:

PAT, the complainant, asked the Board to expedite the processing of the complaint. *See* OAR 115-010-0100 (ERB's rule regarding expedited processing of ULP complaints). The Board granted the request to expedite. As a result, the three-member Board conducted the evidentiary hearing and issued a final order in the first instance (there was no recommended order issued by an administrative law judge). Additionally, because the case was expedited, the Board granted the District's petition for reconsideration in accord with the Board's rule, OAR 115-010-0100(3)(b).

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."

Order on Reconsideration – The District's petition for reconsideration urged the Board to continue applying the mootness standard that courts must follow. The Board, however, explained that it is bound by the courts' directive that their mootness jurisprudence does not apply to administrative agencies, such as ERB. Thus, ERB adhered to its decision regarding mootness.

<u>Prohibited subject of bargaining:</u>

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 – The District argued that the 1977 legislative history of the school employee sick-leave statute showed that there was a mistake in its text, and that the legislature had intended to limit the statute's coverage to "regular" employees, instead of "all" employees. After examining the legislative history, the Board found that the record did not actually convincingly establish that such a mistake was made. The Board also noted court cases explaining that legislative history may not be used to insert "wording in a statute that the legislature, by choice or oversight, did not include." (Quoting *Halperin v. Pitts*, 352 Or 482, 494-95, 287 P3d 1069 (2012).) As a result, the Board adhered to its prior conclusion, based on the statute's plain and unambiguous text, that "ORS 332.507 does not categorically exclude all substitute teachers from its mandates."

The District also argued that no unfair labor practice occurred because 1) PAT had not adequately objected to the District's sick-leave proposal and 2) the District's actions did not amount to "unlawful pursuit" of a prohibited subject. The District noted that "for a scope of bargaining dispute to ripen, the objector must identify the offensive language and state its reasoning, and the proponent must elect not to modify the proposal to satisfy such objections" (citing *Portland Association of Teachers v. Multnomah County School District No. 1*, Case No. UP-10-96 at 3, 16 PECBR 422, *recons*, 16 PECBR 429, 430-31 (1996)). The Board agreed that the District cited the correct legal standard for this type of unfair labor practice, unlawful pursuit of a non-mandatory subject of bargaining. However, unlike the District, the Board found that all of the conditions for the ULP were met in this case.

Regarding the adequacy of PAT's objection, the District argued that PAT did not sufficiently identify the offensive language in the proposal or state its reasons for objecting. In making that argument, the District focused on two emails sent by PAT's counsel to the District's counsel. The Board, however, explained that those emails were only part of PAT's objection, and that PAT had also expressed its objections in bargaining. The parties' communications, which occurred by email and at the table over many months, together with the District's own actions, demonstrated that the District understood that PAT objected to the District's sick-leave proposal because it conflicted with ORS 332.507. In response to PAT's objection, the District made its own legal assessment of that objection. And, at the last bargaining session before PAT filed the ULP complaint, the District unequivocally stated to PAT that the District had concluded that substitute teachers were not covered by ORS 332.507 and submitted a proposal that it concedes did not meet the requirements of ORS 332.507 (and was substantially the same as the initial proposal that prompted PAT's objections). "Considering together the statements at the bargaining table, the emails, and the District's actions," the Board "conclude[d] that PAT sufficiently notified the District that the District's sick-leave proposal was unlawful because it did not comply with ORS 332.507."

The Board also found that the remaining conditions for an "unlawful pursuit" ULP were met, because the District had continued "to pursue the objected-to proposal notwithstanding [PAT's] objection." Specifically, at the parties' last bargaining session, the District continued to

pursue the sick-leave proposal that had formed the basis of PAT's objection. The District stated that it was pursuing that sick-leave proposal because it had concluded that its proposal was lawful, based on its legal assertion that ORS 332.507 excluded substitute teachers from its coverage. When PAT pressed the District for further explanation, "the District only reiterated that its proposal reflected its position that ORS 332.507 did not apply to substitute teachers." Under those circumstances, the Board concluded that the District had pursued the objected-to proposal enough to amount to unlawful pursuit of a prohibited subject of bargaining.

Finally, the Board addressed the District's contention that the Board incorrectly determined that the District could not make a lawful proposal based on the Oregon Sick Leave Law, ORS 653.601 et seq. The Board understood the District to be arguing that it intended to make a sick-leave proposal that complied with the Oregon Sick Leave Law, and in so doing, the District was not intending to propose a sick-leave provision that conflicted with ORS 332.507, but rather just one that complied with the Oregon Sick Leave Law. The Board, however, disagreed with the District's argument that it could pursue a proposal that did not satisfy the requirements of ORS 332.507 so long as it satisfied some other statutory provision (here, the Oregon Sick Leave Law).

4. ***Oregon AFSCME Council 75 v. Lane County and Administrative Professional Association of Lane County***, Case No. UC-013-16, 27 PECBR ___ (2017).

Summary:

In this case, the Board determined the representation status of two electricians employed by Lane County. Both employees previously worked in the Maintenance Specialist 3 classification, which required a limited maintenance electrician license, but not a general journeyman license or a general supervising license. Both employees held a general journeyman license. One employee is the sole on-site electrician at the Lane Events Center. The other performs electrical and maintenance work throughout the county's facilities. When they were hired, the employees were placed in AFSCME's bargaining unit because AFSCME represents all employees in the Maintenance Specialist 3 classification.

In 2014, the County decided to perform more electrical work in-house, and wanted to create two positions that required a general journeyman license. It created two new positions with the working title "Lead Electrician" and placed them in the only county classification that required a general journeyman license. That classification, Maintenance Specialist-Lead, is represented by Administrative Professional Association of Lane County. Both employees applied for the new Lead Electrician positions and were selected. AFSCME filed a petition pursuant to OAR 115-025-0005(3) to clarify that the two new positions were in fact in AFSCME's bargaining unit.

The Board concluded that the two petitioned-for employees were performing work historically represented by AFSCME, notwithstanding their new jobs, job titles, and classification. Therefore, the Board granted AFSCME's petition, and clarified AFSCME's unit to include the two disputed positions.

Facts – Since at least the early 1970s, AFSCME has represented Lane County employees. Presently, it represents a general unit, as well as a unit of nurses. (There are also a number of other labor organizations that represent units of Lane County employees, including bargaining units of parole and probation officers, deputy district attorneys, and mechanics and road workers).

Before mid-1987, AFSCME's collective bargaining agreements with the County provided that AFSCME represented employees in the classifications and departments listed in the collective bargaining agreement. Beginning with the 1987 to 1990 agreement, however, the AFSCME collective bargaining agreement provided that it represented "all" employees, except those expressly excluded.

In October 1987, Administrative Professional Association of Lane County (Admin Pro) was certified as the exclusive representative of all employees in the Lane County Department of Public Works employed in administrative, technical and professional staff positions.

Lane County has reorganized a number of times. Over the years, some AFSCME-represented employees were transferred into the Public Works Department. Some Admin Pro-represented employees were transferred out of the Public Works Department. In 2012, Admin Pro obtained an amendment to its certification from the Board to reflect a change from its previous name (which included a reference to public works) to its current name, Administrative Professional Association of Lane County.

There have been a number of representation disputes involving the County, AFSCME and Admin Pro. Of particular relevance to this case, in 2009, AFSCME filed a petition pursuant to OAR 115-025-0005(3) to clarify that its bargaining unit included 15 employees at the Lane Events Center. Those employees had previously been employed by a non-County independent entity, and became County employees in 2008, when the County assumed full control of the Lane Events Center. Admin Pro did not intervene or appear. The County objected to the petition. The Board concluded that the express terms of AFSCME's recognition clause included the Lane Event Center employees, and clarified AFSCME's bargaining unit to include the positions.

Admin Pro has never represented employees at the Lane Events Center. It has represented a Lead Electrician position that performs work related to the maintenance and repair of traffic signals and controllers.

AFSCME's 2014-2017 collective bargaining agreement provides, in part, that AFSCME represents "all temporary, probationary, and non-probationary employees in permanent positions exclusive of * * * those employees employed in classifications represented in other bargaining units[.]"

Admin Pro's 2016-2019 collective bargaining agreement provides, in part, that Admin Pro represents "all employees, employed in positions classified as indicated in Schedule B or their successors[.]" The Maintenance Specialist-Lead classification is listed on Schedule B. Next to that classification, it identifies the working title of one position in the classification as Lead Electrician.

In its petition, AFSCME sought to clarify that its bargaining unit includes two new Lead Electrician positions in the Maintenance Specialist-Lead classification. Those positions were

created by the County in 2014, when the County decided that it wanted to perform more electrical work in-house, and wanted two positions that required a general journeyman electrician license. The County assigned the positions to the Maintenance Specialist-Lead classification, which is represented by Admin Pro.

Two AFSCME-represented employees applied for the positions and were selected by the County. Both were AFSCME-represented employees working in the Maintenance Specialist 3 classification. Employees in the Maintenance Specialist 3 classification have always been represented by AFSCME.

One of the petitioned-for employees, Frederic Rosenburg, has been an electrician for almost 30 years. He held a general journeyman electrician license when the County hired him in 2012. As an AFSCME-represented employee, he worked throughout the County's facilities, performing electrical work and general maintenance work.

The other petitioned-for employee, Travis Silke, held both a general journeyman electrician license and a general supervising electrician license when the County hired him in approximately 2010. As an AFSCME-represented employee, he worked as the sole on-site electrician at the Lane Events Center.

After Rosenburg began working in the Lead Electrician position in the Admin Pro bargaining unit, he performed the same work as he previously performed, reported to the same supervisor, and continued to work with only AFSCME-represented employees.

After Silke began working in the Lead Electrician position in the Admin Pro bargaining unit, he performed substantially the same work as he previously performed, reported to the same supervisor, worked almost exclusively with AFSCME-represented employees, and continued to work as the sole on-site electrician at the Lane Events Center.

When Silke's workload has been too heavy, some of the work he previously performed has been subcontracted to private electrical contractors, under his direction. Silke also performed some new duties, including work on capital improvement projects and a facilities assessment. He also sporadically performed some traffic signal-related work—the work historically performed by an Admin Pro-represented electrician—although only for a day or so once every few months.

The County has not replaced Silke or Rosenburg in their Maintenance Specialist 3 positions. The County transmitted Rosenburg and Silke's deducted union dues to Admin Pro, not to AFSCME, because the Lead Electrician position is in the Maintenance Specialist-Lead classification.

Conclusion – The Board started its analysis by explaining the purpose of a petition filed pursuant to OAR 115-025-0005(3). That rule provides:

> "When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time,

except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue."

In a subsection (3) case, the Board does not consider community of interest factors and does not add employees to a bargaining unit. Instead, it decides only whether the petitioned-for positions are already in the unit. The Board will look only to the express terms of a certification description or recognition clause, although it will consider extrinsic evidence to resolve ambiguities.

In subsection (3) cases, the Board has not treated job titles or classifications as dispositive in determining whether positions are already in a bargaining unit. Instead, the Board considers evidence of the work actually performed by the petitioned-for employees. Thus, in circumstances of an employer reorganization or retitling of positions, a labor organization continues to represent historically represented positions so long as there has been no appreciable change in their work. *See, e.g., Oregon AFSCME, Council 75 v. Union County*, Case No. UC-81-87 at 8-9, 10 PECBR 354, 361-62 (1987); *Washington County Dispatchers Association v. Washington County Consolidated Communications Agency*, Case No. UC-69-90 at 11, 13 PECBR 135, 145 (1991); *Laborers International Union of North America, Local 121 v. City of Redmond*, Case No. UC-40-92 at 6, 14 PECBR 162, 167 (1992); *Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UC-61-92 at 10, 14 PECBR 668, 677 (1993).

Applying those principles, the Board concluded that AFSCME continued to represent the two petitioned-for employees because both employees performed essentially the same work that they performed when they were represented by AFSCME. Although their job title and their classification changed as a result of the County's creation of new positions that required a general journeyman electrician license, the petitioned-for employees' job duties had not appreciably changed. Under the Board's case law, they remain in AFSCME's bargaining unit.

5. ***S.R. v. AFSCME Local 328***, Case No. FR-001-17, 27 PECBR ___ (2017)

Summary:

In this case, the Board dismissed a duty of fair representation complaint filed against AFSCME Local 328 because the complaint did not allege facts that, if proven, would demonstrate that AFSCME violated its duty, and because the Complainant had, in a separation agreement, waived her right to assert claims against AFSCME.

Facts – To decide whether the case presented an issue of fact or law that warrants a hearing, the Board assumed that the Complainant's factual allegations were true. Complainant's complaint and submissions during the investigatory process indicated that Complainant was a health care worker employed by Oregon Health Sciences University (OHSU). OHSU notified Complainant that her employment was terminated after it had issued her a pre-discharge letter, alleging a serious basis for discharge. Complainant told AFSCME that she wanted to pursue a grievance disputing her termination.

AFSCME declined to pursue a grievance, and instead engaged in settlement negotiations with OHSU. AFSCME communicated OHSU's final offer to Complainant. Three days later, Complainant told AFSCME that she would "take" the offer and wanted to "move on." Approximately one week later, Complainant contacted AFSCME and asked to sign the separation agreement, again stating that she was "ready to move on."

OHSU, AFSCME, and Complainant signed a "Separation Agreement and General Release" (Separation Agreement). OHSU agreed to provide Complainant with 16 weeks of severance pay and other benefits, including extended health coverage in exchange for Complainant's voluntary resignation. The Separation Agreement also included a general release, in which Complainant agreed to release both OHSU and AFSCME from any and all liability relating to Complainant's employment.

Some months later, Complainant determined that the AFSCME-OHSU collective bargaining agreement provides for certain severance benefits when an employee is "involuntarily terminated due to program closure, position elimination or reorganization," if the employee also meets other requirements.

Complainant believed that the collective bargaining agreement provision regarding severance benefits applied to her. She then filed this duty of fair representation complaint, asserting that the Separation Agreement provided less benefits than the benefits described in the collective bargaining agreement.

Conclusion –The Board dismissed the complaint on two grounds: (1) failure to state a cause of action, and (2) contractual waiver.

ORS 243.672(2)(a) requires the exclusive representative of a group of employees to represent all employees in the bargaining unit fairly. In order to be entitled to a hearing on her claim alleging a violation of subsection (2)(a), Complainant was required to allege facts that, if proven, would establish that AFSCME acted arbitrarily, discriminatorily, or in bad faith.

The Board affords a labor organization's actions and decisions as the exclusive representative broad discretion, and will find a violation of ORS 243.672(2)(a) only where a labor organization's actions are arbitrary, discriminatory, or taken in bad faith. *Chan v. Leach and Stubblefield, Clackamas County Community College; and McKeever and Brown Clackamas Community College Association of Classified Employees, OEA/NEA,* Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006). A union's action is arbitrary if it lacks a rational basis. Its conduct is discriminatory if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate objectives. Its conduct is in bad faith if it intentionally acts against a member's interest and does so for an improper reason. *Id.*

Here, Complainant alleged that AFSCME negotiated inadequate separation benefits because the Separation Agreement did not provide the level of pay and benefits described in the collective bargaining agreement. The collective bargaining agreement, however, described benefits for different circumstances (program closure, reorganization, or position elimination) that did not apply to Complainant.

Complainant also claimed that AFSCME violated the duty of fair representation by negotiating a settlement agreement rather than pursing a grievance on her behalf. Generally, however, it is lawful for a union to try to settle a potential grievance instead of pursuing it. Complainant did not allege any facts that would tend to show that AFSCME violated its duty by acting without a rational basis or with improper or discriminatory motives.

For both these theories, the allegations, even if proven, would not demonstrate that AFSCME violated its duty of fair representation.

Similarly, none of the facts alleged by Complainant would, if proven, support her theory that AFSCME acted discriminatorily, in bad faith, or arbitrarily by unfairly pressuring her into entering the Separation Agreement. The facts alleged indicate that Complainant repeatedly expressed her desire to accept OHSU's settlement offer. The fact that Complainant felt that she faced a difficult choice when she decided whether or not to resign does not mean that AFSCME's conduct was unlawful.

The Board also dismissed the complaint because the Separation Agreement included a waiver of Complainant's right to pursue any claims against AFSCME arising from her employment. Because Complainant did not allege any facts indicating that AFSCME's actions were discriminatory, in bad faith, or arbitrary, the Board concluded that there was no basis to disregard the waiver in the Separation Agreement.

Finally, the Board also noted that it could dismiss the complaint as untimely because it was filed more than 180 days after Complainant knew or should have known that an unfair labor practice had occurred. *See* ORS 243.672(3); *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011) (statute of limitations for unfair labor practice complaint includes a discovery rule). Complainant knew or reasonably should have known that AFSCME had declined to file a grievance or had pressured her into signing the Separation Agreement by the date she signed the agreement (March 3, 2017). To be timely, Complainant would have needed to file her claim by August 30, 2017, but did not do so until September 1, 2017.