

Understanding the Employment Relations Board

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Overview of the Oregon Employment Relations Board

- What is the Employment Relations Board?
 - fondly referred to as “ERB” (pronounced like herb) or “the EE-ARE-BEE”
- What statutes govern?
- Jurisdiction?
- Mission?
- Duties?
- Composition?



Primary Duties of ERB

- To determine appropriate bargaining units and conduct elections regarding collective bargaining for employees;
- To resolve disputes over union representation and collective bargaining negotiations, including providing mediation and conciliation services;
- To issue declaratory rulings and orders in contested cases, including:
 - Unfair labor practice cases;
 - Claims by union members against unions (duty of fair representation claims);
 - Appeals from state personnel actions.

What types of conduct constitute a ULP?

- Public Employer ULPs
 - ORS 243.672(1)
- Labor organization ULPs
 - ORS 243.672(2)

ORS 243.672 (1): Employer ULPs

An employer may not:

- interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed under the PECBA.
- dominate, interfere with or assist in the formation, existence or administration of any employee organization.
- discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.
- 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.
- refuse to bargain collectively in good faith with the exclusive representative.
- refuse or fail to comply with any provision of the PECBA.
- violate the provisions of any written contract with respect to employment relations.
- refuse to reduce to writing and sign a collectively-bargained agreement.
- use public funds to oppose or support a union organizing campaign, or to take certain actions against employees who participate in hearings under this section. (See ORS 243.670.)

ORS 243.672(2) Labor Organization ULPs

- **A labor organization may not:**
 - interfere with, restrain, or coerce any employees in the exercise of any statutory right.
 - refuse to collectively bargain in good faith.
 - refuse or fail to comply with any PECBA provision.
 - violate the provision of any written contract with respect to employment relations.
 - refuse to reduce to writing and sign a collectively-bargained agreement.
 - engage in unconventional strike activity.
 - picket at the residence or business premises of any member of the governing body of a public employer.

Processing of ULPs

- Complaint filed with the Board.
- ALJ investigates the complaint to determine if there should be a hearing.
- The ALJ sets a hearing date, conducts a hearing, and issues a Recommended Order.
- If any party disagrees with the Recommended Order, objections to that order can be filed with the Board.
- Board issues a Final Order that can be appealed to appellate courts.

Representation Petitions

- Petitions for Representation
 - (Card Check or Election)
- Petition to add Unrepresented Employees to an Existing Bargaining Unit
 - (Card Check or Election)
- Other Petitions for Unit Change/Clarification
- Decertification Petitions

Procedures in Representation Cases

- Petition with Showing of Interest
- Posting of Notice of Petition
- Ability to Waive Hearing and Agree to Consent Election
- Any Objections or Motions to Intervene
 - If so, Hearing and Recommended Order
- Election and Tally of Ballots
- Any Objections to Conduct of Election or Conduct Affecting Results of Election
- Certification of Election Results

Mediation and Conciliation Services

- Mediation of Collective Bargaining Disputes
- Grievance and ULP Mediation
- Interest-based Bargaining Training and Facilitation
- Arbitrator List

Takeaways from Recent Board Decisions

- AFSCME, Council 75, Local 2043 v. City of Lebanon
 - Under PECBA, ORS 243.672(1), a public employer or its “designated representative” can commit a ULP.
 - When is an individual, such as an elected official, acting as a designated representative of a public employer?
 - Supreme Court’s new test, based on NLRB case law:
 - Would employees “reasonably believe” that the individual acted on behalf of the public employer?
 - Factors to consider include:
 - Individual’s rank, policy-making authority, power to hire/fire
 - Whether the individual was acting in their official capacity
 - Whether the public entity disavowed the individual’s actions

Takeaways from Recent Board Decisions

- ATU, Division 757 v. TriMet (appeal pending)
- ORS 243.672(1)(g) and (2)(b): ULP to violate a written agreement, including an arbitration clause
- If a party claims that a particular grievance is not arbitrable, ERB applies the “positive assurance test”
- ERB will order arbitration unless it can say with positive assurance that the grievance is not covered by the arbitration clause
- Only two ways to overcome the presumption in favor of arbitration
 - Express exclusion
 - “Most forceful evidence of a purpose to exclude the grievance from arbitration”
- ERB must not consider the merits of the grievance itself

Takeaways from Recent Board Decisions

- PAT v. Multnomah County School District No. 1 (PPS)
- Unlawful to pursue a prohibited subject of bargaining
- Prohibited = in conflict with law
- Not a ULP just to make a proposal, even if it involves a prohibited subject of bargaining
- For ULP, need:
 1. Notice of the objection to the proposal and reasons why
 2. Pursuit of the proposal *after* the objection

Takeaways from Recent Board Decisions

- AFSCME v. Lane County and Administrative Professionals Association
 - OAR 115-025-0005(3) petition
 - The Board determines whether the disputed positions are *already* in a unit pursuant to the certification or recognition clause
 - Where there has been an employer reorganization or retitling of positions, the Board will look at the work the employees actually perform (not merely job titles or classifications)
 - Here, the employees performed substantially the same work after being selected for two new positions, which the employer placed in another union's bargaining unit due to the level of license required
 - Petition granted

Takeaways from Recent Board Decisions

- SR v. AFSCME Local 328

- Duty of Fair Representation: A union has a duty to fairly represent members of the bargaining unit—that means it may not act arbitrarily, discriminatorily, or in bad faith.
- Arbitrary Action=No rational basis
- Discriminatory Action=Intentional, severe, and unrelated to legitimate union objectives
- Bad Faith=Acting intentionally against a member's interest for an improper reason
- Most Common DFR Claim: How the union handles a grievance
 - The Board considers how the union handled the grievance, not the merits of the grievance.
 - Same principles apply to grievance settlements

Resources

- ERB Website
 - <http://www.oregon.gov/erb/pages/index.aspx>
- Oregon State Bar Treatise: *Labor and Employment Law: Public Sector*
- University of Oregon's Labor Education and Research Center's Monograph Series
 - <http://lerc.uoregon.edu/research/monograph-series/>
- Public Employee Collective Bargaining Reporter