

The Oregon Employment Relations Board

2019 Oregon Labor Law Conference

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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”
- Composition?
- Jurisdiction?
- Duties?



Structure and Composition of ERB

- Three Board Members, appointed by the Governor with the approval of the State Senate
 - Representatives of labor, management, and the public
- Administrative Law Judges who hear unfair labor practice complaints and representational issues
- The State Conciliator and additional Mediators
- Staff

Mediation and Conciliation Services

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

Jurisdiction of ERB

- Oregon public sector
 - Public Employee Collective Bargaining Act
 - State Personnel Relations Law
- Some Oregon private sector not within the jurisdiction of the National Labor Relations Board

Primary Duties of ERB

- To determine appropriate bargaining units and conduct card-checks or 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?

- The Public Employee Collective Bargaining Act (PECBA) defines certain conduct as an unfair labor practice.
- Public Employer ULPs
 - ORS 243.672(1)
- Labor organization ULPs
 - ORS 243.672(2)

ORS 243.672 (1)(a): The “in” and “because of” prohibitions.

- ORS 243.672(1)(a) prohibits a public employer from taking actions that “interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed under the PECBA.”
- What is protected activity?
 - Striking, strike planning, union organizing, displaying union insignia, filing a grievance, etc.

ORS 243.672 (1)(b): Employer domination of, interference with, or assistance to the union

- It is an unfair labor practice for an employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.”
- To violate subsection (1)(b), an employer’s action must amount to actual domination, interference, or assistance.
- “A complaining union must prove that the employer’s actions impeded or impaired the labor organization in performing its duties as exclusive representative.”

ORS 243.672 (1)(c): Encouraging or discouraging union membership

- It is an unfair labor practice for a public employer or its designated representative to “[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.”
- ERB examines the reasons for the employer’s conduct. A violation will be found “only if the employer acted with a discriminatory motive, intending to undermine employees’ exercise of [rights protected by the Public Employee Collective Bargaining Act].”

ORS 243.672 (1)(d) – (i)

- It is also a ULP for a public employer to:
 - (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.
 - (e) Refuse to bargain collectively in good faith with the exclusive representative.
 - (f) Refuse or fail to comply with any provision of the PECBA.
 - (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, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
 - (h) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
 - (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).

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, they can file “objections” with the Board.
- Board issues a Final Order that can be appealed to appellate courts.

Mediation of ULPs

- The parties may participate in voluntary mediation with the State Conciliation Service.
- If both parties agree to participate in mediation, the ALJ will notify the State Conciliator, who will assign a mediator and schedule the matter for mediation.
- During 2013-2015, 82% of ULP cases mediated with the State Conciliation Service settled.
- Benefits of settlement:
 - The parties negotiate their own resolution tailored to the needs of all involved: employer, union, employees, and the public;
 - The parties avoid the cost of hearing, post-hearing objections, and possible appeal to the Oregon Court of Appeals;
 - The parties avoid further uncertainty, workplace disruption, and inconvenience to witnesses and participants.

Representation Petitions

- Petitions for Representation
 - New units typically certified by card check verifying majority support
 - Unless at least 30% of employees petition for election in lieu of card check
- Petition to add Unrepresented Employees to an Existing Bargaining Unit
- Other Petitions for Unit Change/Clarification
 - E.g., disputes over supervisory status, or to move employees from one unit to another
- Decertification Petitions

Takeaways from Recent Board Decisions

- *Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department – Yamhill County*, Case No. RC-003-17 (May 4, 2018) (appeal pending)
- Employees at one circuit courthouse petitioned for representation.
- OJD’s position: court employees at a single courthouse are not an “appropriate unit.” The only appropriate bargaining unit is a statewide unit (27 locations).
- Unit determination factors include: community of interest, wages, hours and other working conditions, history of collective bargaining, desires of the employees, and administrative preference for larger units.
- Majority concluded appropriate unit: Several past attempts to organize statewide were unsuccessful; majority agreed record established sufficiently distinct community of interest to justify separate unit under the circumstances presented.

Takeaways from Recent Board Decisions

- *Teamsters Local 206 v. City of Eugene*, Case No. RC-009-17 (Dec. 21, 2018)
- “Temporary” part-time employees at one community center (out of 6) petitioned for representation.
- City’s position: unit must include seasonal employees and be City-wide.
- Board did not agree with City’s position, but found unit was inappropriate.
- Primary factor: petitioned-for employees shared a strong community of interest and other working conditions with temporary part-time employees at other community centers.

Takeaways from Recent Board Decisions

- *ATU, Division 757 v. TriMet*, Case No. UP-003-16 (July 18, 2018)
- ATU's complaint alleged various actions violated multiple sections of ORS 243.672(1); all but one claim dismissed.
- Majority concluded: TriMet made an unlawful unilateral change when it stopped scheduling new hires to attend ATU orientation on paid time.
- Key unanimous holding: permitting employees to attend union orientations on paid time is lawful. Specifically, that practice does not violate ORS 243.672(1)(b) or ORS 243.670(2)(a).
- Majority also held that the subject of paid union orientations is mandatory for bargaining.
- Dissent would have held that the subject is permissive.

Takeaways from Recent Board Decisions

- *SEIU Local 503, OPEU v. University of Oregon*, Case Nos. UP-009-17 and UP-014-17 (Dec. 4, 2018)
- Both cases involved SEIU claim that UofO violated duty to respond to information request (part of duty to bargain).
- In information request cases, ERB looks at “totality of the circumstances.”
- In both cases, University withheld certain information, asserting privacy/confidentiality concerns.
- UP-009-17: University’s response did not violate (1)(e).
- UP-014-17: University’s response violated (1)(e).

Takeaways from Recent Board Decisions

- In UP-009-17, employee was reprimanded for several alleged incidents, including one involving student. Supervisor witnessed the student incident; student gave no statement and declined to be involved. UofO promptly provided all requested info except student info. SEIU did not interview supervisor or any other witnesses; student only tangentially involved; and there was no evidence that SEIU needed student's testimony to resolve any factual dispute. No ULP, because SEIU did not prove that it had an immediate need for the student info, and University's conduct was reasonable under the circumstances.
- In UP-014-17, employees raised potentially grievable concerns to steward, who relayed concerns to HR rep. In response, HR rep interviewed employees and wrote report. Steward requested copy of report. UofO provided heavily redacted report, claiming its rule re: faculty record confidentiality prohibited disclosure. ERB held that UofO's response violated (1)(e) because UofO's reliance on its rule was mistaken under the circumstances; UofO's redactions were overbroad; and SEIU was entitled to the factual info in the report (e.g., employees' statements).

Resources

- ERB Website
 - <http://www.oregon.gov/erb/pages/index.aspx>
- ERB's PECBA Unfair Labor Practice Q&A:
 - https://www.oregon.gov/erb/Documents/Q-A_ULPGuide.pdf
- 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/>
- PECBA Digest
 - ERB's library in Salem is open to the public, and it includes the PECBA Digest and other labor law resources.
- ERB Orders are public records; request form is available here:
 - <https://www.oregon.gov/erb/Pages/PublicRecord.aspx>