2017 LABOR LAW CONFERENCE

Leading Cases

From the Oregon Employment Relations Board

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Service Employees International Union, Local 503, Oregon Public Employees Union v. Lane Council of Governments, Case No. UP-048-14 (2016)

Summary:

The Union filed an unfair labor practice complaint alleging that the Lane Council of Governments (Council) violated ORS 243.672(1)(a) by not providing employees with certain assurances before interviewing those employees in preparation for a hearing over an unfair labor practice complaint filed by the Union. Specifically, the Union argued that the Board should adopt the standards (described below) required by the NLRB in *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), *enf den,* 344 F2d 617 (8th Cir 1965).

The Board declined to address whether Oregon public employers were required to issue *Johnnie's Poultry* assurances under the PECBA because, even under the NLRB framework, those assurances would not be required to be given in this case. Because there was no other basis for a violation, the Board dismissed the complaint

Facts:

In early 2014, the parties began negotiating a successor collective bargaining agreement. The Union selected AGM, a probationary employee, for inclusion on its bargaining team. In March 2014, the Council terminated AGM because of her poor interpersonal skills in the workplace, which included outbursts with colleagues and customers. The Union filed an unfair labor practice complaint alleging that the Council terminated AGM because of her participation on the bargaining team.

The Council's attorney interviewed employees, including bargaining unit members and managers, in order to prepare for the unfair labor practice hearing. The Council's human resources manager attended the interviews. At the interviews, the attorney advised the employees to be honest and told them the purpose of the questioning. He did not, however, tell them that their participation was voluntary or that they would not be subject to discipline for any answers that they provided. *The attorney did not ask any of the witnesses about AGM's union activities or their own union activities.*

Conclusion:

Under *Johnnie's Poultry,* when an employer questions employees about protected union activities (that is, rights protected under Section 7 of the National Labor Relations Act), the employer is required to (1) communicate to the employee, before the interview begins, the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; and (3) obtain the employee's participation

in the interview on a voluntary basis. Those actions, however, are required only in situations in which the employer "interrogates employees about matters involving their [protected] rights." *Safelite Glass,* 283 NLRB 929, 929 n 4 (1987). In this case, the Council's attorney did not question employees about their union activities or about AGM's union activities. Therefore, the Board dismissed the complaint and left open the question of whether it would adopt the Johnnie's Poultry doctrine under the PECBA.

The Board also concluded that, to the extent the Union was arguing that the Council violated ORS 243.672(1)(a) under the totality of the circumstances test, the Union did not meet its burden to show that the Council interviewed employees "because" of the exercise of any protected right. Similarly, the Union did not prove that the type and circumstances of the Council's question would have the natural and probable effect of interfering with any protected rights.

Concurrence: Member Weyand wrote a concurring opinion. Member Weyand agreed that, on the record in the case, the Union did not meet its burden to prove that the Council violated ORS 243.672(1)(a). Member Weyand, however, also wrote that he would require Oregon public employers to provide *Johnnie's Poultry* assurances in a manner similar to the private sector.

Clackamas County Employees' Association v. Clackamas County and Clackamas County Housing Authority, Case No. UP-032-15 (2016), *appeal pending*.

Summary:

The Union filed an unfair labor practice complaint alleging that the County violated its duty to bargain in good faith under ORS 243.672(1)(e) by presenting a bargaining proposal that included procedures for testing employees for marijuana use. The Union argued that the subject of drug testing for marijuana—so long as that testing included potential off-duty or off-premises marijuana use—had been rendered prohibited for bargaining by the 2014 Control and Regulation of Marijuana Act (Measure 91), which modified Oregon law by decriminalizing the recreational use of marijuana under some circumstances.

The Board concluded that the Union had not established that the County's proposal for marijuana testing involved a prohibited subject of bargaining and, therefore, the Board dismissed the Union's complaint.

Facts:

Beginning in September 2015, the County and the Union engaged in negotiations for successor bargaining agreements for three bargaining units. The previous agreements, and the

County's policies, had provided that newly hired employees were subject to drug testing, including testing for marijuana.

During negotiations, the County presented a proposal that added language to extend the drug testing policy to current employees moving to new positions. The proposal defined a positive drug test result as the detection of a number of substances, including marijuana. The County's proposal made a negative test result a condition of employment, including for employees moving to new positions.

The County told the Union that it sought the changes based in part on generalized concerns about federal grant requirements. The Union stated that the proposed marijuana testing provisions were a prohibited subject of bargaining as a result of the passage of Measure 91.

Conclusion:

The Union did not cite to a specific portion of Measure 91 that prohibited employers from testing employees for marijuana. Instead, it asserted that by decriminalizing the recreational use of marijuana under Oregon law, the legislature effectively made it unlawful for employers to test for such use. The Board rejected this assertion, noting that "it does not necessarily follow that it is unlawful for a public employer to bargain with a labor organization just because a formerly illegal action is now legal under Oregon law."

The Board then analyzed the text of Measure 91 to discern the intent of the voters. The Board observed that Measure 91 is silent about drug testing of applicants and employees. The Board rejected the argument that the decriminalization of the recreational use of marijuana implicitly makes it unlawful for a public employer to test for marijuana use. The Board also observed that Measure 91 expressly states that it may not be construed to amend or affect state or federal law pertaining to employment matters. To accept the Union's argument, the Board added, would omit this directive.

Finally, the Board noted that it has previously found some drug testing proposals to be permissive subjects (such as the decision to test public safety workers) and some to be mandatory subjects (such as the privacy of the test and the results).

Ultimately, the Board concluded that the Union had failed to establish that the subject of the County's proposal was prohibited. The Union conceded that the County's conduct was unlawful only if the drug testing proposal involved a prohibited subject of bargaining. Because the Board concluded that the proposal was not prohibited, it held that the County did not violate ORS 243.672(1)(e).

American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland, Case No. UP-046-08 (on remand, August 4, 2016), reconsideration (September 12, 2016).

Summary:

This Board opinion resulted from the Oregon Court of Appeals reversing and remanding the Board's order dismissing the Union's complaint that the City of Portland engaged in an unfair labor practice by unilaterally deciding to change how it charged the Union for responding to the Union's requests for information. *American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland*, Case No. UP-046-08, 24 PECBR 1008 (2012), *recons*, 25 PECBR 85 (2012), *rev'd and remanded*, *AFSCME Council 75 v. City of Portland*, 276 Or App 174, 366 P3d 787 (2016).

The Board's initial order concluded that the City violated (1)(e) by failing to respond in a timely manner to the Union's request for information relevant to two grievances. The order also, however, dismissed the "unilateral change" charge, concluding that the subject of the change concerned only a permissive subject of bargaining, not a mandatory subject of bargaining. The court of appeals reversed the Board's ruling on the dismissal of the unilateral change charge. The court reversed and remanded "for ERB to reconsider that part of its order addressing whether the City's decision on charges to the Union for the production of information related to pending grievances involved a permissive or mandatory subject of bargaining." 276 Or App at 176.

On remand, the Board concluded that it should not have analyzed the City's responses to the Union by analyzing whether the subject was mandatory or permissive. Instead, the Board decided to follow its longstanding totality of the circumstances framework to resolve a dispute over whether a response to an information request violates (1)(e).

The Board disavowed its earlier analytical framework in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008). There, the Board extracted the issue of the costs of responding to an information request from the general category of providing information and analyzed it as a separate issue under a (1)(e) "unilateral change" framework. In *Lebanon*, the Board concluded that "providing information to a labor organization at little or no charge concerns a mandatory subject for bargaining." *Id.* at 362.

Facts:

The City has had a policy called the "Public Records Fee Schedule" since 2001. Under the 2007-2008 version of the policy, the standard fee for obtaining copies of documents was 25 cents per copy, which covered the cost of staff time.

Before 2004, the City charged the Union five cents per copy (if it charged at all). By 2004, the City had begun charging the Union 25 cents per copy. Until 2008, the City charged the Union nothing for small quantities of documents and nothing for easy to provide collections of documents. Between 2004 and 2008, the City never charged the Union more than $172 per request.

In June 2008, the City suspended an employee. The Union requested documents related to discipline given to other employees for similar conduct. A month after the request, the City provided the Union with an estimate of $200 to produce documents. The City notified the Union that it had questions about the information request two months and then three months after the request was made.

In July 2008, related to another employee who was disciplined, the Union submitted another series of information requests. The City waited approximately a month and a half before asking for clarification of the requests. The City provided some information, and sent a bill for $41.25, noting that the City's fee schedule—the Public Records Fee Schedule—was on the City's website. This was the first time the City had referred to the Public Records Fee Schedule in connection with a PECBA information request. The City later compiled more documents, and sent the Union an invoice for $622.08.

Conclusion:

To determine whether the City's response violated (1)(e), the Board applied the factors in *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5031 (1982). In that case, the Board explained that the "extent to which a party must supply the information requested and the length of time the party may take to do so are dependent upon the totality of circumstances present in the case[.]" *Id.*, 6 PECBR at 5031.

In *Colton*, the Board explained that it will consider the following factors to analyze whether a party has violated (1)(e) or (2)(b): (1) the reason given for the request; (2) the ease or difficult in producing the information; (3) the kind of information requested; and (4) the parties' history regarding information requests. *Id.* at 5031-21.

On remand in the *AFSCME* case, the Board applied the four factors as follows. The Board explained that the reason for the request related to a pending grievance, and as set forth in the

Board's original order in *AFSCME*, the City's response was so untimely as to establish a (1)(e) violation.

The Board next analyzed the second and third factors together—the ease or difficult in responding and the kind of information requested. The Board relied on the following principles, which were developed under the National Labor Relations Act:

• "The cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data." *Tower Books*, 273 NLRB 671, 671 (1984).

• The objecting party bears the burden of establishing an unduly burdensome financial impact so as to put the requesting party on notice of a need to bargain about the allocation of costs associated with compiling the information. *Id.*; *Martin Marietta Energy Systems*, 316 NLRB 868, 868 (1995).

• To avoid an inference that the cost of compiling the information would be negligible, an objecting party must justify its assertion of a burdensome financial impact if the requesting party maintains that the cost of compliance would be "*de minimis.*" *Tower Books*, 273 NLRB at 671.

• An unconditional demand that the requesting party pay all costs is inconsistent with the obligation to bargain in good faith.*Martin Marietta Energy Systems*, 316 NLRB at 868.

• If the parties dispute whether the costs to comply with the information request are unduly burdensome, "the parties must bargain in good faith as to who shall bear such costs."8 *Tower Books*, 273 NLRB at 671 (quoting *Food Employer Council*, 197 NLRB 651, 651 (1972)).

Applying these factors, the Board concluded that the City did not comply with its obligation to bargain in good faith. For example, with regard to one request, when AFSCME objected to the amount of the payment required by the City as a prerequisite to producing the information, the City did not commence bargaining with AFSCME. Instead, the City failed to respond at all. With regard to the request related to the second grievance, however, the City did attempt to engage in discussions with AFSCME about the cots after AFSCME objected to the City's initial demand that AFSCME pay the costs. These efforts, the Board observed, were "more in line with good-faith bargaining," although the Board also found that the City's delayed response and failure to provide a reasonable estimate of the staff costs to respond to the information request were sufficient to establish that the City violated (1)(e).

The Board concluded that the fourth factor—the parties' history regarding information requests—did not weigh one way or the other in its conclusion. The evidence in the case did not indicate either that AFSCME had a history making unreasonable requests, or that the City showed a pattern of unreasonable delays.

Thus, the Board adhered to its prior conclusion that the totality of the City's response to AFSCME's information requests did not satisfy the City's obligations under ORS 243.672(1)(e).

Eric Sofich v. Salem Professional Firefighters Local 314 and Salem Fire Department/City of Salem, Case No. FR-003-14 (2016).

Summary:

A City employee alleged that the Union violated its duty of fair representation under ORS 243.672(2)(a) when it decided not to pursue the member's grievance to arbitration. The employee also filed a complaint against the City, alleging that the City violated the collective bargaining agreement by terminating him without just cause.

The Board concluded that the complainant did not establish that the Union's actions were arbitrary, discriminatory or made in bad faith, and dismissed the complaint against the Union. Because the complaint against the Union was dismissed, the Board also dismissed the case against the City.

Facts:

The complainant was a firefighter terminated by the City after he left early from his shift without permission and without relief. The complainant believed he had been given permission by a union-represented captain to leave early without a relief employee to cover his absence. The captain denied that he gave the complainant permission to leave.

During the employer's investigation into the complainant's conduct, the Union provided a lawyer to assist complainant. The lawyer attended the pre-disciplinary (due process or *Loudermill*) meeting with the complainant. The lawyer did not raise all the issues that the complainant wanted him to raise. The complainant also presented a written statement to management, although the lawyer and complainant had previously agreed that the complainant would present it only if the lawyer indicated that he should do so. In the meantime, the complainant submitted a tort claim notice to the City. The complainant threatened to sue the City for an alleged ongoing pattern of unfair, retaliatory and disparate treatment due to complainant's physical disabilities, work related injuries, use of FMLA leave and requests for accommodations. The complainant sent a copy of the tort claim notice to the Union president.

The City thereafter terminated the complainant for an unauthorized absence without permission or relief. The Union's grievance committee voted to pursue a grievance on behalf of complainant. The complainant was dissatisfied with the lawyer that the Union had provided at the pre-disciplinary meeting. The Union provided the complainant with new counsel.

At the Step 2 grievance meeting, the Union vice president perceived that the complainant made more specific statements about the captain's alleged permission than the complainant had made on earlier occasions. The Union vice president thought that this change weakened the grievance, and he reconvened the Union grievance committee.

The Union decided to ask a neutral third-party attorney to review the grievance. In the meantime, the complainant's private attorney submitted a supplemental tort claim notice to the City, this time naming as a person who allegedly retaliated against the complainant the captain who allegedly gave complainant permission to leave his shift early.

The neutral attorney submitted a report to the Union (the "Aitchison Report"), in which he found merit in the complainant's grievance. The Union officials decided not to reconvene the grievance committee. The Union's executive board voted to pursue the grievance. Several Union members thereafter expressed frustration at the Union's decision to pursue the grievance.

The executive board then decided it should reconsider its decision to advance the complainant's grievance to arbitration. A general membership meeting was scheduled to discuss the grievance. The Union received legal advice from its attorney indicating that the complainant had the right to pursue the grievance individually, and the Union would not be bound by the arbitrator's decision.

At the membership meeting, 20 members voted against the Union taking the grievance to arbitration, five voted in favor of proceeding, and six abstained. The executive board voted to discontinue support for the grievance.

Throughout these events, there were multiple email conversations among and between Union officers expressing concern about the grievance and its effect on the Union's reputation. Some of the emails included negative comments about the complainant.

The complainant's attorney told the Union's attorney that the complainant wished to pursue the grievance individually. The Union's attorney notified the City. The City asserted that the complainant did not have the right under the collective bargaining agreement to proceed to arbitration independently. By letter, the Union informed the general membership that the Union would not be supporting the grievance, and that the complainant and the City disagreed about whether the complainant could proceed individually. The Union's letter to its membership explained, "At this point, that is for those two parties to discuss."

Conclusion:

The Board concluded that the employee in this case failed to prove that the Union violated its duty of fair representation. In cases involving a union's decision not to pursue a grievance, the

Board gives substantial deference to the union's decision. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 88 (1999).

To prevail on a duty of fair representation claim, the employee must prove that the union's decision not to pursue a grievance was arbitrary, discriminatory, or made in bad faith. A decision is arbitrary if it lacks a rational basis. *Howard v. Western Oregon State College Federation of Teachers Local 2278, OFT and Western Oregon State College*, Case Nos. UP-80/93-90. 13 PECBR 328, 354 (1991). A decision is discriminatory if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objections. *Id.* A decision is in bad faith if the union intentionally acts against a member's interest for an improper reason. *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73, 80 (1992).

To decide whether a union violated these standards, the Board focuses on the union's conduct and decision making process, not on the merits of the grievance. *Chan v. Clackamas Community College; Leach and Stubblefield; Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 563, 575 (2006). Under these standards, a labor organization may decide not to pursue a grievance, even if it would likely win in arbitration, as long as the labor organization acts reasonably.

The Board concluded that the Union's reversal of its initial decision to advance complainant's grievance to arbitration was not arbitrary, discriminatory, or made in bad faith. The Union changed its decision because credibility concerns about complainant grew over time, and because a membership vote indicated that the members did not want the Union to continue the grievance. These reasons were sufficient to support the Union's position that it acted for legitimate reasons.

The Board acknowledged that there was evidence of a few negative comments by some Union officers about the complainant and other members who were assisting him. The Board concluded, however, that the evidence of those comments was insufficient to meet the complainant's burden of proof in light of the Union's proof of its reasons for its decision. Those reasons included: (1) member input that the grievance should be discontinued; (2) ongoing concerns about complainant's credibility; (3) the Union being placed in the position of supporting one member over another; (4) concerns about the potential damage to the Union's reputation if it expended resources to protect an employee who had left work without permission; and (5) Union counsel's legal advice that the complainant could proceed independently with his grievance, without the outcome binding the Union. In light of the evidence supporting these reasons, the Board rejected the complainant's argument that the negative comments by Union officers about

him were evidence of pretext (that is, that the Union's stated reasons for its decision were not genuine).

The complainant also alleged that the Union failed to properly investigate his grievance, thus violating its duty of fair representation. The Board concluded that the Union conducted a reasonable, good faith investigation, including reviewing the City's extensive investigatory materials. The Board also noted that the Union provided the complainant with extensive assistance, including providing him with an attorney and then allowing him to choose another attorney when he became dissatisfied with the initial attorney.

The Board also concluded that the Union did not violate its duty to complainant with respect to two decisions that the complainant alleged violated the Union's bylaws. First, the complainant alleged that the Union did not provide the grievance committee with the Aitchison Report, which found merit in the grievance. The Board rejected the argument that this decision caused any harm to complainant because, at the time of this decision, the Union was moving the grievance forward.

Second, the Board also found no merit in the complainant's argument that the Union violated its duty to him when it did not make a recommendation to the members as to how to vote, which was required by the Union bylaws. The Board concluded that this failure was, at most, a minor technical violation of bylaws, and not sufficient to establish arbitrary, bad faith, or discriminatory conduct. The Board also found that the record did not establish that the Union's failure to make this recommendation prejudiced the complainant, which is a necessary element of a claim for breach of the duty of fair representation.

Finally, the Board found no merit in the complainant's argument that the Union failed to honor its commitment to ensure that he could take the grievance to arbitration on his own. The Board concluded that the Union took reasonable steps so that the complainant could proceed to arbitration on his own behalf. The complainant, however, instead believed he could not independently take the grievance to arbitration, although the Union itself believed that the complainant had the right to do so under both the collective bargaining agreement and the Union bylaws. Under these circumstances, the Board concluded that the Union did not violate its duty of fair representation.

Summary:

The Union filed an unfair labor practice complaint alleging that the City violated ORS 243.672(1)(e) by failing to bargain before unilaterally: (1) making several operational changes due to a budget reduction, (2) promoting a lower-ranked candidate on a ranked eligibility list over a higher-ranked candidate, and (3) developing an unranked eligibility list to promote candidates to Battalion Chief positions. The Union also alleged that the City violated ORS 243.672(1)(g) and ORS 243.672(1)(h) by violating or refusing to sign a Memorandum of Understanding (MOU) regarding the use of Rapid Response Vehicles (RRVs).

The Board concluded that the City violated ORS 243.672(1)(e) by promoting a lower-ranked candidate and using an unranked eligibility list to promote candidates to Battalion Chief in 2013. The Board dismissed the remaining claims.

Changes Resulting from Budget Deficit

Facts – In December 2012, when the City began its budget process for the next fiscal year, it estimated that it would have a $25 million deficit. All City departments were asked to make corresponding reductions in their budgets. The Fire Bureau, with input from the Union President, created a proposed budget that reflected a 10 percent reduction (approximately $9.25 million). The proposed cost-saving measures included closing seven stations, transferring the Safety Officer and Chief Inspector assignments out of the bargaining unit, eliminating two Training Academy Specialist positions, discontinuing the Dive Team, eliminating the Hazmat Coordinator position, reducing overtime, closing the Safety Learning Center (thereby eliminating an Inspector position), and eliminating 3.8 FTE support positions.

On April 30, 2013, the mayor released his proposed budget to the public. The mayor's proposed budget reflected a smaller budget deficit but still would have resulted in the loss of numerous jobs, all held by Union-represented personnel. Around this time, the City, the Fire Bureau, and the Union were aware of the federal Staffing for Adequate Fire and Emergency Response (SAFER) grant that could provide the Fire Bureau with additional funds and potentially avoid the loss of programs and jobs.

In May, the Union president met with a representative of the mayor's office on three occasions to discuss the budget, the pending operational reductions, and the SAFER grant. The Chief was at one of these meetings. After these meetings with the Union's president, the City agreed to move off of its original position and cede to the Union's primary objective-namely, that no bargaining unit positions would be lost, in exchange for certain "innovations." Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station's truck and engine being replaced with a quint; (2) two additional RRVs would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant, with the understanding that

receiving the grant would prevent 26 bargaining unit members from being laid off. The terms of this agreement were not reduced to writing.

Later, the Union asserted that it had not agreed to the above-mentioned changes and filed this unfair labor practice complaint over the same issues.

Conclusion – The Board majority concluded that the City exhausted its duty to bargain over the "innovation" changes regarding consolidating companies by replacing trucks with quints and permanently implementing RRVs. Specifically, the majority found that the City met multiple times with the Union's president over these changes, and that the Union's president ultimately agreed not to contest the changes as part of the package agreement that saved 26 bargaining unit jobs. In reaching this conclusion, the majority determined that the meetings between the City and Union president were "collective bargaining." Member Weyand disagreed with this conclusion.

The Board unanimously went on to state that, even if it accepted the Union's argument that an agreement had not been reached, it would still dismiss the claim because the Union waived its right to dispute those changes through its inaction when given notice of the City's desire to make the changes. There was no dispute that the Union had actual notice of the changes. The Union was actively involved in multiple meetings where the specific potential changes were discussed throughout May and the following months. The City sought the Union's input and the Union discussed its concerns over the possible changes with City representatives, its own members, and representatives of the media on several occasions. The Union never filed a demand to bargain at any point.

Because the Union had notice of the proposed changes, the Board held that the Union's failure to demand bargaining constituted a waiver of the right to bargain. The Board found that, in this situation, the notice given by the City did not amount to a *fait accompli*, such that the Union's failure to file a demand to bargain could be excused. In so finding, the Board noted that, even in the absence of a demand to bargain, the City on numerous dates actively solicited and considered the Union's input on how best to respond to the budget shortfall, and modified its original position significantly in response to the Union's concerns.

The Board reached the same conclusion (*i.e.*, waiver) regarding the other unilateral changes arising out of the budget reduction: (1) moving Safety Chief and Chief Investigator assignments to management; (2) eliminating the Training Academy Specialist positions; (3) eliminating one Inspector position; (4) eliminating the Hazardous Materials Coordinator position; (5) eliminating the Dive Team; and (6) eliminating three Investigator positions, including standby and overtime wages.

Special Concurrence – Member Weyand joined in the opinion with one exception – he disagreed with the majority's conclusion that the Union and the City had reached an agreement on the City's budget related changes. First, Member Weyand disagreed with the majority's conclusion that the meetings between the Union president and representatives from the City constituted

collective bargaining, noting that all three individuals involved in those meetings testified that they had not been collectively bargaining, and that two of the three people involved in those meetings testified that they had no authority to enter into an agreement during those meetings.

Second, Member Weyand found insufficient evidence to support the majority's conclusion that an agreement had been reached. Rather, Member Weyand would have found that at most, the Union and the City agreed generally to work together to pursue a budget solution that met both parties' needs.

RRV MOU

Facts – In early 2012, the City informed the Union that it wanted to explore the use of two-person RRVs (instead of traditional fire trucks or "ladders") through a pilot program. The Union and the City began negotiations over the details of the pilot program and generally reached agreement on terms for such a program. The City proceeded with the pilot program, which included switching the employees in the program to a 40-hour work schedule rather than the traditional 24/48 compression schedule. In September 2012, shortly after the City began the new work schedule, the City moved the employees back to the 24/48 schedule because the employees strongly preferred the schedule. The parties continued to exchange proposals on the MOU after this date.

The Union filed the complaint on December 26, 2013, alleging that the City violated subsection (1)(g) by failing to comply with the terms of the RRV MOU. It attached an unsigned draft of the MOU to its complaint. Neither party could produce a fully executed version of the MOU. However, drafts of the MOU produced at the hearing contained a provision establishing that the pilot program ended June 30, 2013, unless the City notified the Union that it wished to continue the program. The City asserted that there was not a valid signed agreement. In response, the Union demanded that the City sign a version of the RRV MOU that the Union president had signed. The City refused, and the Union amended its complaint to include an ORS 243.672(1)(h) claim.

Conclusion – The Union alleged two alternate violations with respect to the MOU on the RRV program – one under 243.672(1)(g) and another under ORS 243.672(1)(h). First, the Union argued that the City violated ORS 243.672(1)(g) when it failed to follow the terms of parties' 2012 MOU that defined the working conditions of bargaining unit employees assigned to a pilot RRV program. In the alternative, the Union argued that the City violated ORS 243.672(1)(h) when it refused to sign the expired agreement in 2014. For its part, the City asserted that the agreement was never signed by both parties. The Board did not reach that issue, as the MOU terminated with the funding of that program in June 2013. Thus, the Union's allegation was based on the City's conduct *after the agreement expired*. As a result, the Board found that a decision on the issue would have no "practical effect on or concerning the rights of the parties," and dismissed the (1)(g) claim as moot.

City Promotions

Facts – Before the events leading up to this case, the City used a standardized promotions process. Candidates seeking promotions to Captain and Battalion Chief (BC) positions completed an "assessment center," where high-ranked personnel from external jurisdictions administered exercises to challenge candidates in handling situations similar to what they would encounter in the position. The assessment center evaluators scored the candidates' performance. Candidates who passed the assessment center then completed an oral panel interview. The panelists scored the candidates, and the City then ranked candidates on an eligibility list based on their combined assessment center and oral panel interview scores. The City published the eligibility lists, which typically remained valid for two years.

On October 27, 2011, the City issued a ranked list for promotion to the Fire Inspector position. In 2013, although there was not a vacancy at the time, the Fire Chief promoted the fourth ranked candidate on that list, passing over a candidate that was higher ranked on the existing list. The decision was based on the Chief's subjective determination that the lower ranked employee was the more highly qualified candidate for promotion.

In 2013, the City began using unranked (or equally ranked) lists in recruitments for Battalion Chief vacancies. The City claimed that this change was made as a result of changes to its HR policies and Charter.

Conclusion – The Union asserted that the City violated subsection (1)(e) by unilaterally changing its practices with regards to the promotions in two separate ways: (1) by promoting a lower ranked candidate to a Fire Inspector, and (2) by using an unranked list for Battalion Chief promotions. The Board first concluded that the subject at issue was promotions and not minimum qualifications, as it concerned "a raise in position or rank" rather than the knowledge, skills, and abilities necessary to perform the work. Here, the candidate that was passed over possessed the minimum qualifications for the position; otherwise, the candidate would not have been allowed to test or be placed on the eligibility list. Promotions are a mandatory subject of bargaining.

The Board then examined whether the *status quo* was changed, concluding that the relevant past practice consisted of promoting the highest-ranking candidate on the eligibility list, so long as that individual "passed" the chief's (or prehire) interview. The Board rejected the argument that the *status quo* was "variability." Because the City did not promote the highest-ranked individual remaining on the eligible list that had passed the chief's interview, the City had unilaterally changed a mandatory subject of bargaining in violation of ORS 243.672(1)(e).

The Board also concluded that the City unilaterally changed that established practice for employees promoting to the Battalion Chief rank by discarding the ranked list system in favor of using an unranked (or equally ranked) list for the promotion process. Thus, the City also violated ORS 243.672(1)(e) with those promotions.

As a remedy, the Board ordered the City to promote the higher-ranked (and passed over) candidate to the Fire Inspector position and make her whole for not being promoted in October 2013, including back pay and benefits (plus interest). With respect to the Battalion Chief position, the Board ordered the parties are to promptly confer to determine if any employee was affected by the unilateral change. If so, the parties were directed to bargain in good faith for a period of 60 days to determine an appropriate remedy regarding any affected employee. If the parties were unable to reach an agreement after 60 days of good-faith bargaining, the Board directed them to each submit a final offer, at which point the Board would select one of the offers or craft its own remedy.

District Council of Trade Unions, et al v. City of Portland, Case No. UP-023-14, 26 PECBR 525 (2015).

Summary:

DCTU alleged that the City violated ORS 243.672(1)(e) when it refused to bargain over the impact of installing GPS location reporting devices on City vehicles and violated ORS 243.672(1)(g) by failing to comply with the terms of the parties' ground rules for successor contract negotiations. The Board, in response to the City's affirmative defenses, first concluded that DCTU had standing to file the complaint, and that the complaint was timely. The Board majority then concluded that the City violated ORS 243.672(1)(e) when it refused to bargain over the mandatory impact of the City's utilization of GPS location reporting devices. The remaining claim was dismissed.

Standing

Facts – DCTU is a coalition of labor unions that represent different groups of City employees. DCTU was created no later than the enactment of the PECBA to allow the City and several of its unions to negotiate a single collective bargaining agreement rather than multiple individual contracts. This arrangement has continued for decades, with many successor agreements having been reached.

The DCTU elects a President, who in turn appoints a negotiating committee that includes at least one representative from each affected Local Union. The contracts negotiated by the DCTU are ratified by a majority vote of the employees affected. DCTU is the labor organization identified in several areas of those contracts, including the signature page, the cover page and the preamble. In the past, DCTU has filed cases with the Board, and the City has filed at least one case against the DCTU.

Conclusion – Under ORS 243.672(3), an "injured party" may file an unfair labor practice complaint with this Board. A party is "injured" if it has "suffered or will suffer a substantial injury as a consequence of the alleged unfair labor practice." Whether a party may suffer an injury as a result of an alleged unfair labor practice depends on the type of unfair labor practice alleged. Under

ORS 243.672(1)(e), it is an unfair labor practice for a public employer to refuse to bargain in good faith with the "exclusive representative" of its employees. Thus, an exclusive representative would be an injured party with standing to bring a (1)(e) claim alleging a refusal to bargain.

The City claimed that DCTU was not the exclusive representative of its employees under the PECBA, and therefore, could not file a complaint under subsection (1)(e). The Board disagreed. ORS 243.650(8) defines an "exclusive representative" as "the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." Under this statute, a party may become an exclusive representative either through certification by the Board *or* voluntary recognition by an employer. Here, the Board found that the City has long recognized DCTU as the collective bargaining agent for all of the employees represented by the coalition unions. For more than 35 years, the City voluntarily engaged in this mutually agreed-on bargaining relationship. As a result, DCTU was the exclusive representative of the City employees for the purposes of collective bargaining, and had standing to bring the (1)(e) claim. The Board also found that DCTU had standing to bring the claim alleging a breach of the ground rules under ORS 243.672(1)(g), as DCTU was a party to the ground rules and would clearly be injured if the City violated its agreement with DCTU.

GPS Tracking

Facts – Since 2008 or 2009, the City's Water Bureau had been using GPS devices to track certain City vehicles. The City continued to slowly expand its use of GPS devices across some of its other bureaus. Sometime in 2012 or 2013, the City decided that it wished to contract with a single GPS equipment provider to expand its use of GPS devices in City vehicles in a more consistent manner. The City issued a request for proposals for these services, and on January 1, 2014, signed a price agreement with their chosen manufacturer.

On January 3, 2014, the City sent an email to the representatives from each of the DCTU constituent unions stating that it intended to install GPS devices on City vehicles to better manage and track its fleet. The City also stated that installation of GPS devices on vehicles was a permissive subject of bargaining. At this time, the parties were still in negotiations for a successor contract. On January 22, 2014, DCTU demanded to bargain over the mandatory *impacts* of the installation of the GPS devices on the City's vehicles. This demand to bargain was made while the parties were in successor negotiations and in response to a notification from the City that it was planning to expand the use of GPS devices in City vehicles operated by DCTU members. The City refused to bargain over the GPS devices, and the Union filed an unfair labor practice complaint.

Conclusion – As an initial matter, the majority found that the Union had alleged both a unilateral change claim and a "flat refusal" claim under ORS 243.672(1)(e), both of which constitute *per se* violations. The majority first analyzed the case as a "flat refusal" by the City to bargain over the impact of installing GPS devices on City vehicles during the course of successor negotiations.

Because there was no dispute that the Union had demanded to bargain over the impact on January 22, 2014, and that the City had refused to do so, the only issue remaining was whether the installation of GPS devices had any impact on mandatory subjects of bargaining.[1] The majority concluded that, at a minimum, the installation of the GPS devices impacted the mandatory subject of discipline. The City had provided multiple examples of situations where GPS devices had been utilized in employee investigations and disciplinary actions. Disciplinary standards and procedures are mandatory subjects of bargaining.

The majority also concluded that the installation of GPS devices affects the mandatory subject of safety (under ORS 243.650(7)(g), safety is mandatory subject for bargaining if it has a "direct and substantial effect on the on-the-job safety of public employees."). The City itself cited employee safety as a core justification for its decision to utilize GPS technology, both in its brief before the Board and in the bid process for the GPS devices. Thus, the Board found that installing GPS devices had a sufficient effect on safety to render the impacts mandatory for bargaining.

Dissent – Chair Logan dissented to this conclusion of law, objecting to the analysis used by the majority in deciding the ORS 243.672(1)(e) charge. Rather than analyze the case as a "flat refusal" because the parties were in the process of negotiating a new contract, which is what the majority chose to do, she asserts that the case should be analyzed as a *status quo* change, which is the historical method for analyzing these cases when a contract has expired.

According to the majority, "once the parties began successor negotiations, DCTU was entitled to demand to bargain over any mandatory subject of bargaining." Chair Logan disagreed with the breadth of that statement. There are limitations on *when* a demand can be made during successor negotiations, such as ground rules and tentative agreements. According to Chair Logan, it was not possible for the parties to add this issue to their successor negotiations at their current place in the process, which was mediation and tentative agreement.

Chair Logan then proceeded to analyze the matter, determining that a status quo change had not occurred, so there was no statutory violation.

Ground Rules

Facts – On November 13, 2012, DCTU sent a letter to the City initiating bargaining for a successor agreement. The City subsequently agreed to a first bargaining session on February 5, 2013. On February 19, 2013, the City and DCTU entered into a ground rules agreement that provided, in relevant part, that "the last date to exchange new issues/articles shall be March 26, 2013. Exceptions may be agreed upon by the Chief Negotiators or designees in writing."

[1]The Union only demanded to bargain over the mandatory impacts of installing GPS devices, and did not demand to bargain over the decision. Accordingly, the Board did not address whether the decision to install GPS devices on the City's vehicles was mandatory for bargaining.

Conclusion – The Board concluded that the City did not violate the ground rules as alleged by DCTU, as the language at issue stated that "the last date to exchange new issues/articles shall be March 26, 2013." As discussed above, the Board concluded that the City refused to bargain over issues related to GPS location devices, and that [t]his refusal to bargain over the issue is the opposite of bringing forward a new issue." The Board could not find that the City had "exchanged" a new issue or article in bargaining when it refused to consider the same issue that DCTU sought to negotiate over. Accordingly, the City did not violate ORS 243.672(1)(g), and the Board dismissed this portion of the complaint.

Laborers' International Union of North America, Local 483 v. Metro, Case No. UP-030-14, 26 PECBR 665 (2016).

Summary:

Metro violated ORS 243.672(1)(a) when – pursuant to its dress and uniform policy – it forbade Union-represented employees from wearing Union stickers in the workplace. Because it would not add to the remedy, the Board did not consider whether the same conduct also violated ORS 243.672(1)(b).

Facts:

Metro, which operates the Oregon Zoo, has a bargaining unit of employees represented by Union. The Union and Metro were in the process of negotiating a successor contract for the Zoo employees in 2014. The Union organized an event during the workday that involved distributing two-and-one-half inch stickers to Zoo patrons and employees that featured an image of a raised animal paw and the word "Zoolidarity!" Zoo management learned of the pending sticker day, and decided not to allow employees to wear the stickers. The Zoo maintained dress and uniform policies that required employees to wear uniforms consisting of certain types of clothing and a Zoo name badge. These policies also contained a broad prohibition on modifications or alterations to the uniforms. However, the Zoo had in the past allowed employees to wear other stickers of similar size, and allowed employees to wear Christmas sweaters in lieu of uniform shirts during its annual Zoolights event.

The Union distributed the stickers to Zoo patrons and to employees. A Zoo manager directed multiple employees to remove the stickers, and informed Union representatives that the stickers were not allowed under the uniform and dress policies. The Union filed an unfair labor practice shortly thereafter.

Conclusion:

The Board began its discussion by noting that it is settled law that the PECBA protects the right of employees to wear union insignia in the workplace, and that a public employer may not

interfere with that right unless it can establish that "special circumstances" exist. Special circumstances may include situations where the wearing of union insignia jeopardizes public safety, damages employer equipment, interferes with the employer's ability to maintain discipline, interferes with an established public image, or uses controversial language that "is susceptible to derisive and profane construction and is disruptive of harmonious employee-employer relationships." Any prohibition or limitations on wearing union insignia must be narrowly tailored.

Metro asserted two general types of special circumstances: those that affect the safety of the public, and those that result from Zoo employees' contact with members of the public. On the safety concerns, Metro claimed that allowing stickers to be placed on the Zoo uniforms would make it difficult for members of the public to identify Zoo employees, which would in turn create safety risks to patrons. Metro witnesses testified that they were concerned that any resulting confusion could be particularly dangerous in "Code Pink" situations where children lose their parent or guardian. Children could be put at risk as they are directed to seek out Zoo employees if they get lost or separated from their group.

The Board found that there was insufficient evidence to support this safety concern, noting that the only evidence in the record was speculation of Metro witnesses about the possible safety impacts. More was needed to satisfy the employer's burden of proof regarding the existence of a special circumstance. The Board also noted that Zoo employees were allowed to wear other buttons and stickers on their uniforms, and that employees were permitted to wear Christmas sweaters, rather than a Zoo uniform, during Zoolights. Metro did not explain how wearing the Zoolidarity stickers constituted a public safety threat, whereas wearing other buttons and stickers and Christmas sweaters did not.

The Board then reviewed Metro's concerns about its public image. In doing so, the Board agreed that an employer's "public image" is a legitimate factor to be considered under its special-circumstances analysis, but again, more than a simple statement asserting that an employer wishes to protect its public image is needed to justify a decision to ban union insignia. Further, the fact that employees interact with members of the public or clients of the employer is not enough to justify such a ban.

As with the safety concerns, Metro offered testimony about concerns that its managers had about the potential effect of the stickers on the Zoo's public image. However, Metro did not offer additional evidence that corroborated these concerns. Moreover, the Zoo received no complaints about the stickers from patrons or employees, even though three thousand stickers were handed out to Zoo patrons throughout the day. The Board did not find that the stickers contained profane or clearly offensive language that would justify banning them, as the term Zoolidarity is a play on the words zoo and solidarity, a word customarily associated with the labor movement. Further, the image of the raised paw is not outrageous or inherently offensive so that it would harm the Zoo's public image. Finally, the Board noted that the decision to ban the stickers was made before Metro ever saw the stickers, undermining any special circumstances arguments.

The Board concluded that Metro did not provide sufficient evidence that any special circumstances existed that justified its decision to prevent employees from wearing the stickers. Therefore, it concluded that Metro violated ORS 243.672(1)(a) by prohibiting employees from wearing the stickers and in applying its overbroad appearance and uniform policies.

4. ***Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon***, Case No. UP-009-15, 26 PECBR __ (2016), *appeal pending*.

Summary:

The Union alleged that the University violated ORS 243.672(1)(e) by refusing to produce the names and content of student reports regarding two Union-represented employees, which the University had used in the disciplinary process of those employees. The University justified its refusal to provide those reports on the ground that they were protected from disclosure by the Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). The University also asserted that the Union's claims were moot because: (1) the parties had settled the underlying grievances; and (2) the University had now provided the Union with all responsive documents.

The Board concluded that the claims were not moot. As to the substance of the claims, the Board held that the University's response to the information request violated (1)(e). In doing so, the Board did not reach the issue of whether the student reports were "educational records" under FERPA. Rather, even assuming that the reports were protected under FERPA, the Board concluded that the University failed to pursue a good-faith accommodation to reconcile the conflict between FERPA and the PECBA.

Facts:

Grievance 1. The University issued employee CB a written reprimand, which relied in part on information reported by a student. The Union requested the name and contact information of the student witness who had reported the information. The University refused to provide the information, asserting that such a disclosure was barred by FERPA. Approximately four months later, the University wrote a letter to the Family Policy Compliance Office (FPCO) of the Department of Education, requesting assistance with the information request. The grievance was subsequently settled, and the University withdrew its request for FPCO assistance.

Grievance 2. The University terminated employee RG after receiving a report from a student. The Union requested information that included all documents, incident reports, and witness names used in making the termination decision. The University refused to provide all of the requested information. Later, the University provided some redacted faculty interviews and a redacted Title IX report. The University did not provide any notes of interviews conducted with the reporting student. Approximately four months after the initial information request, the University sought FPCO assistance. About six months after the FPCO letter, FPCO responded that the documents at issue were protected from disclosure by FERPA.

Conclusion:

The Board rejected the University's mootness defense, citing prior case law that a "refusal to provide required information under the PECBA is not rendered moot by the disposition of a related grievance under the parties' collective bargaining agreement, or by ultimately providing the information."

Turning to the University's response to the information request, the Board began with the well-settled requirement that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes promptly providing an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." Here, there was no dispute that the requested information satisfied this minimal threshold.

Putting aside whether the requested documents were protected from disclosure by FERPA's "education records" provision, the Board explained that the University was not excused from its duty to bargain when faced with possibly conflicting obligations under the PECBA and another law/confidentiality interest. Rather, when faced with such a conflict, the withholding party (here, the University) must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict.

Applying that framework, the Board concluded that the University had not satisfied its obligation to pursue a good-faith accommodation regarding the requested information. Specifically, with respect to both grievances/information requests, the University's first response was a flat refusal to provide the information on the ground that disclosure was precluded by FERPA. That response did not extend an accommodation to the Union or ask the Union to meet to try to work out an accommodation that would meet the Union's PECBA right to the information, as well as the University's concerns under FERPA. As set forth above, good-faith bargaining in these circumstances requires that the University pursue such an accommodation.

Moreover, after the University secured a letter from FPCO that FERPA precluded the disclosure of some of the information (which could arguably justify the claimed conflict between FERPA and the PECBA, as well as a legitimate and substantial confidentiality interest), the University still did not pursue a good-faith accommodation regarding the requested information. The Board added that, in addition to the myriad proposals or compromises that the University could have suggested beyond FERPA, FERPA itself allows disclosure of otherwise protected information, with student consent. The University acknowledged that it did not seek the consent of any of the at-issue students.

Because the University did not establish that it pursued a good-faith accommodation regarding the requested information, the Board held that the University violated (1)(e).

5. ***State of Oregon, Department of Administrative Services, Department of Human Services, and Oregon Health Authority v. Service Employees International Union Local 503, Oregon Public Employees Union,*** Case No. UP-004-16, 26 PECBR 678 (2016).

Summary:

The State filed a complaint alleging that SEIU violated ORS 243.672(2)(b) by refusing to bargain over who pays the administrative expenses to develop and implement dues deduction for

a bargaining unit of adult foster care providers. After holding an expedited hearing under OAR 115-035-0060, the Board dismissed the complaint, concluding that the subject of who pays the costs of implementing and administering a dues deduction process is not a mandatory subject of bargaining.

Facts:

Under ORS 443.733, the State is the public employer of record for these adult foster care providers, who are represented by SEIU. After bargaining for a successor contract, the parties were able to reach an agreement on most issues, but not on language concerning dues deduction. The parties agreed to proceed through the statutory process for interest arbitration to resolve that issue. The State's final offer included a proposal that SEIU would "pay reasonable costs associated with dues deduction administration and/or systems changes to accommodate dues deduction." SEIU asserted that the subject of the proposal was permissive or prohibited for bargaining and demanded that it be withdrawn. The State disagreed with that assertion, but SEIU refused to continue bargaining over that proposal. The parties later agreed that the State would file an unfair labor practice complaint so that the Board could resolve the mandatory/permissive issue before the parties proceeded to interest arbitration.

Conclusion:

The Board concluded that the subject of the State's proposal was not mandatory for bargaining. The Board began with the definition of "employment relations," which is synonymous with mandatory subjects of bargaining: "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." The Board disagreed with the State's assertion that the subject of its proposal was: (1) direct or indirect monetary benefits; or (2) "other conditions of employment."

Addressing the "monetary benefits" assertion, the Board reasoned that the represented employees neither receive nor are deprived of a monetary benefit under the State's cost-shifting proposal. "Rather, it is the State that gains a direct benefit by not paying those expenses."

Turning to the "other conditions of employment," the Board explained that the represented employees are not affected by whether SEIU or the State pays the administrative costs because it is the entity that pays (SEIU or the State) that is affected. Although the adult foster care providers may see a debit in the money paid to them for their services (an issue separate from the subject in this case), this is because of the dues being deducted, not because either the State or SEIU pays the administrative costs for implementing such system. "In other words, the subject of the State's proposal does not impose a "condition of employment" on the adult foster care providers."

Finally, the Board explained that, unlike other permissive subjects of bargaining that an employer may just implement, the State could not do so here—*i.e.*, implement a dues-deduction system and bill the costs to SEIU. The Board observed that the State's proposal has nothing to do with imposing any working conditions on its employees, but rather is an attempt by the State to shift its administrative costs to SEIU. Those costs are part of the State's, or any employer's,

business operations, not part of employee working conditions. Therefore, SEIU was not obligated to bargain the subject of that proposal.

In addition to dismissing the complaint, the Board ordered that the State delete the at-issue language from its last best offer proposal.

Recent Court Decisions

6. ***Portland Police Association v. City of Portland,*** Case No. UP-23-12, 25 PECBR 94 (2012), *aff'd,* 275 Or App 700 (2015).

Summary:

The Court of Appeals affirmed the Board's 2012 decision that held that the City violated ORS 243.672(1)(g) by refusing to comply with an arbitration award ordering the reinstatement of a police officer who had been dismissed after allegedly violating City policy.

Facts:

The City of Portland dismissed a police officer after a fatal officer-involved shooting. The Union grieved the termination under the just cause provisions of the CBA between the parties. The dispute was submitted to an arbitrator, who found that the City did not meet its burden of proof in establishing that the officer violated the City's use-of-force policies. The arbitrator ordered the City to reinstate the officer with back pay. The City refused to implement the arbitration award, even though the CBA provided that the decision of the arbitrator was final and binding. The Union filed an unfair labor practice complaint with the Board, alleging that the City had violated ORS 243.672(1)(g) by refusing to comply with the arbitrator's award.

In response, the City argued that the arbitrator's award was not enforceable under ORS 243.706(1), which states that:

> "As a condition of enforceability, any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting * * * unjustified and egregious use of physical or deadly force * * * related to work."

To determine whether an arbitration award is enforceable under ORS 243.706(1), the Board engages in a three-part analysis. First, it determines whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed. Second, if the arbitrator finds that the grievant engaged in the misconduct, the Board then determines if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct. If so, the Board

then determines if there is a clearly defined public policy, as expressed in statutes or judicial decisions, which makes the award unenforceable.

Applying its three-part test, the Board concluded that, because the arbitrator found that the officer was not guilty of the misconduct for which discipline was imposed, the analysis was complete at the first step, and the award was enforceable. However, the Board noted that, if it were to reach the third analytical step, it still would require the City to implement the award, because "an award reinstating an employee who did not engage in misconduct" does not "violate[] the public policy requirements as clearly defined in statutes or judicial decisions." The Board explained that Oregon appellate court decisions interpreting ORS 243.706(1) have held that the public policy analysis must be directed at the award, not the underlying conduct at issue, and that the Board does not conduct a right/wrong analysis of the arbitrator's decision.

Consequently, the Board held that the City violated ORS 243.672(1)(g) when it refused to comply with the arbitration award. It ordered the City to reinstate the officer with full back pay, plus interest. The City filed a petition for review with the Oregon Court of Appeals.

Conclusion:

The court affirmed the Board's decision. In doing so, it rejected the City's arguments that the Board's three-part analysis is inconsistent with the legislature's intent in enacting ORS 243.706(1). The court specifically approved the Board's analysis as being consistent with the statute and the terms of the statute and prior decisions of the appellate courts, reasoning that:

> "the public-policy exception to the enforceability of an arbitration award set out in ORS 243.706(1) does not apply to circumstances where, as here, the arbitrator rejects the employer's conclusion that the employee had engaged in misconduct. In other words, unless there is misconduct, the award cannot "order[] the reinstatement of a public employee or otherwise relieve the public employee of responsibility *for misconduct*" (emphasis added), which is what triggers the enforceability condition that requires compliance with public-policy requirements."

The court also rejected the City's arguments that, in enacting the public-policy exception, the legislature intended to require arbitrators to give deference to public employers' disciplinary decisions in use-of-force cases. The court looked at the plain language of the statute, the legislative history, and prior court decisions and found little-to-no support for this proposition. In its opinion, the court noted that the City's arguments did "not directly confront the text of ORS 243.706(1), nor does it seriously address [previously issued] appellate decisions."

Finally, the court stated that, even if it agreed with the City that the Board should have reviewed whether the arbitrator's decision itself violated public policy, the City could not meet the final portion of the three-part analysis because it had not identified any clearly defined public policy that was violated by the award.

The City had argued that ORS 181.789(2) establishes a clearly defined public policy requiring deference to the police chief's decision on whether an officer's conduct comports with the bureau's use-of-force policies. ORS 181.789(2) provides that "[a] law enforcement agency shall adopt a policy dealing with the use of deadly physical force by its police officers. At a minimum, the policy must include guidelines for the use of deadly physical force." The court rejected the assertion that this statute established a clear public policy requiring deference to the City's disciplinary decisions in use-of-force cases; it merely required the City to create such a policy. The court refused to "superimpose (notwithstanding the clear words of the statute) an additional expression of public policy" onto the statute.

International Longshore and Warehouse Union, Locals 8 & 40 v. Port of Portland, Case No. UP-19-14, 26 PECBR 156, *recons*, 26 PECBR 163 (2014), *aff'd,* 279 Or App 146, *rev den*, ___ Or ___ (2016).

Summary:

The Oregon Court of Appeals affirmed the Board's dismissal of the Union's unfair labor practice complaint.

In its complaint, the Union alleged that the Port of Portland violated ORS 243.672(1)(e) when it refused to negotiate a successor agreement to a 1984 agreement between the Port and the Union. The Union also alleged that the Port violated ORS 243.672(1)(g) when it refused to arbitrate the dispute with the Union.

The Board dismissed the complaint based on lack of jurisdiction. The Board found that the Port, although itself a public employer, did not employ members of the Union. The Board found that the workers, rather than being employed by the Port, were employed by the Port's private contractor. The Union appealed to the court, which affirmed the Board's order dismissing the complaint.

Facts:

This dispute arises from operations at Terminal 6 of the Port of Portland. Between 1974 and 1993, the Port employed longshore workers represented by the Union at Terminal 6. The Port and the Union executed their last collective bargaining agreement in 1984. That agreement provided that it would extend "in yearly increments … unless either party notifies the other, in writing … of its desire to modify the agreement."

In 1993, the Port transferred management of the stevedoring operations of Terminal 6 to a private contractor. In 1994, the Port sent the Union a letter terminating the agreement, but several months later rescinded that notice, but only, it stated, to "promote its relationship with ILWU." In

that second letter, the Port noted that it is not an employer of longshore labor. The Port wrote that, "as a result, the [1984 agreement has] no effect."

In 2010, the Port entered an agreement to lease Terminal 6 to a private contractor, ICTSI Oregon, Inc. ("ICTSI"), for 25 years. ICTSI employs ILWU members for the operation of Terminal 6. That ICTSI employment relationship with ILWU members is subject to a separate collective bargaining agreement negotiated between ILWU and the Pacific Maritime Association, a multiemployer bargaining agency. The Port is not a member of the Pacific Maritime Association.

The Port reserved for itself the repair and maintenance of six "Hammerhead" cranes at Terminal 6. The Port solicited bids from contractors for the repair and maintenance of the Hammerhead cranes. ICTSI was the successful bidder. The Port and ICTSI entered into a separate contract to perform the repair and maintenance work. Also, the Port hired a separate contractor for maintenance and repair on one of the cranes. That contractor also did not employ ILWU members.

After the 2012 maintenance work, the Union submitted a series of grievances to the Port, alleging that the use of non-ILWU labor violated the 1984 collective bargaining agreement. The Port refused to address or arbitrate the grievances. The Union also sent the Port notice of its intention to negotiate and modify the terms of the 1984 agreement. The Port declined to negotiate with the Union on the basis that the Port did not employ the Union's members.

The Union then filed an unfair labor practice complaint with the Board. The Union did not allege that its members were employed by the Port. The ALJ to whom the complaint was assigned issued an order to show cause why the case should proceed to a hearing. In response, the Union did not assert that its members were employed by the Port. The Union argued, instead, that the ALJ was mistaken that PECBA required that the Union's members be Port employees for ERB to have jurisdiction.

The ALJ emailed both parties a short set of questions. Among them, the ALJ asked, "Are there members of ILWU Locals 8 and 40 [who] are employed by the Port of Portland and work at the Port of Portland, Terminal 6?" The Union responded, "Not currently in a direct sense. The Port does direct the work through ICTSI and has directed work through another contractor."

The Board dismissed the complaint based on lack of jurisdiction. The Union appealed.

Conclusion:

The court of appeals affirmed the Board's dismissal of the complaint. The court wrote, "ERB found that it was uncontested the petitioner's members were employees of ICTSI, and not the Port. That finding was supported by substantial evidence in the record and substantial reason."

ILWU, 279 Or App at 154. The court reasoned that although the Union asserted to the ALJ that the Port assigned, directed, and controlled the maintenance work on the cranes, the Union never "argued that the Port's assignment, direction, or control of that work *amounted to* the Port's employment of petitioner's members—let alone that it amounted to employment under the right to control test, some other legal theory, or any of the definitions petitioner now urges upon this court." *ILWU*, 279 Or App at 155 (emphasis in original).

Thus, the court held, "Without more, and in light of petitioner's concession that is members were actually employees of ICTSI, ERB did not err in concluding that petitioner failed to create an issue of fact or law that its members were employees of the Port." *ILWU*, 279 Or App at 156.

International Longshore and Warehouse Union, Local 8 v. Port of Portland, Case No. UP-37-14, 26 PECBR 350 (2015), *recons*, 26 PECBR 395, *rev'd,* 279 Or App 157, *rev den*, ___ Or ___ (2016).

Summary:

The Oregon Court of Appeals reversed and remanded the Board's dismissal of the Union's unfair labor practice complaint.

This case, like the Board's order in *International Longshore and Warehouse Union, Locals 8 & 40 v. Port of Portland,* Case No. UP-19-14, 26 PECBR 156, *recons*, 26 PECBR 163 (2014), *aff'd,* 279 Or App 146 (2016), discussed above, arose from the parties' dispute with regard to longshore work at Terminal 6 at the Port of Portland. In this case, the Union alleged that the Port violated ORS 243.672(1)(e) when it issued a request for proposals seeking proposals from contractors to perform maintenance and repair work on the cranes at Terminals 2 and 6 and declined to bargain the decision and the impact of the decision with the Union. The Union also alleged that the Port violated ORS 243.672(1)(g), alleging a contractual violation.

The Board dismissed the complaint based on lack of jurisdiction. The Union appealed to the Oregon Court of Appeals, which reversed the Board's decision and remanded the case to the Board.

Facts:

The Port contracted with ICTSI to provide day-to-day mechanical crane maintenance at terminals owned by the Port. The contract expired in February 2015. Under that contract, ICTSI employed ILWU Local 8 members to perform the work.

Because of the expiration of the contract in February 2015, in October 2014, the Port issued a request for proposals seeking proposals from potential subcontractors. Unlike the Port's previous

RFPs, this RFP did not include a provision requiring that a potential contractor employ Local 8 members to perform the work under the contract.

The Union demanded to bargain the Port's decision to issue the RFP, as well as the impact of the decision. The Port declined. The Union filed the unfair labor practice complaint as a result. The Board dismissed the complaint, relying on the legal doctrine of law of the case to support its dismissal. The Board explained that, under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review." *ILWU*, 26 PECBR at 352 n. 3 (quoting *Kennedy v. Wheeler*, 356 Or 518, 524 (2014)). The Board explained that although the law of the case doctrine typically applies to rulings within the same case, the issue in the two cases related to the Port of Portland (Case No. UP-19-14 and this case)—whether the Port employed members of ILWU Local 8—were the same and thus the application of the doctrine was apt.

Conclusion:

The Oregon Court of Appeals reversed the Board's decision and remanded the case to the Board for further proceedings. The court noted that, on appeal, the Union did not challenge the Board's legal conclusion that its jurisdiction under PECBA is limited to public employers and its employees or their representatives. The court concluded, however, that the Board's application of the law of the case doctrine was error. The court reasoned that the Board's reliance on the law of the case doctrine left the court without a key factual finding—whether there was an employment relationship between the Port and Union members—to review for substantial evidence. Thus, the court concluded that the Board's "ultimate conclusion that there is no disputed issue of law or fact that would warrant a hearing does not comport with substantial reason because it fails to articulate facts that lead to the conclusion drawn." *ILWU*, 279 Or App at 165.

The court remanded the case to the Board with the instruction that "ERB should reevaluate whether its investigation of the second complaint revealed a disputed issue of fact or law that would warrant a hearing." *Id.*