Oregon Public Employment Law: Recent Developments

Miller Nash Webinar

July 22, 2014

Presented by

Michael Porter

Jeffrey P. Chicoine

Miller Nash LLP

www.millernash.com

jeffrey.chicoine@millernash.com

mike.porter@millernash.com

TABLE OF CONTENTS

Page

I. ERB'S NEW PRACTICE WHEN NEITHER PARTY FILES OBJECTIONS TO A RECOMMENDED ORDER 1

1. Int'l Bhd. of Elect. Workers, Local Union No. 659 v. Eugene Water & Elect. Bd., No. UP-008-13, 25 PECBR 901 (Jan. 14, 2014) 1

II. REPRESENTATION & UNIT CLARIFICATION CASES 1

A. Public-Employee Status 1

2. City of Portland v. Portland Police Commanding Officers Ass'n., No. UC-017-13, 25 PECBR 996 (Apr. 28, 2014) 1

B. Expanding the Bargaining Unit 2

3. Tualatin Emps.' Ass'n v. City of Tualatin, No. UC-012-12, 25 PECBR 565 (June 21, 2013) 2

4. Labors Int'l Union of N. Am., Local 483 v. City of Portland, No. UC-011-13, 25 PECBR 953 (Mar. 6, 2014) 3

III. INTERFERENCE, DOMINATION AND DISCRIMINATION 3

A. Discipline Cases—For the Union 3

5. FOPPO v. Lane Cnty., No. UP-52-12, 25 PECBR 612 (June 28, 2013) 3

B. Bargaining-Related Cases—For the Union 3

6. Ass'n of Eng'g Emps. of Or. v. State of Or., Dep't of Admin. Servs., No. UP-043-11, 25 PECBR 525 (June 17, 2013) (Logan dissenting on other issues), on reconsideration, 25 PECBR 764 (Sept. 13, 2013) 3

C. Bargaining-Related Cases—For the Employer 4

7. Tualatin Emps.' Ass'n v. City of Tualatin, No. UP-054-12, 25 PECBR 861 (Dec. 12, 2013) 4

IV. UNILATERAL CHANGE 4

A. For the Union 4

8. Ass'n of Eng'g Emps. of Or. v. State of Or., Dep't of Admin. Servs., No. UP-043-11, 25 PECBR 525 (June 17, 2013) (Logan dissenting), on reconsideration, 25 PECBR 764 (Sept. 13, 2013) 4

9. Or. Sch. Emps. Ass'n v. Parkrose Sch. Dist., No. UP-030-12, 25 PECBR 783 (Oct. 22, 2013), on reconsideration, 25 PECBR 845 (Nov. 25, 2013) (appeal pending 5

10. Laborers' Int'l Union of N. Am., Local 483 v. City of Portland, Bureau of Human Res., No. UP-027-12, 25 PECBR 810 (Nov. 5, 2013), on reconsideration, 25 PECBR 892 (Dec. 31, 2013) 6

TABLE OF CONTENTS
(continued)

Page

11. Three Rivers Educ. Ass'n v. Three Rivers Sch. Dist., No. UP-16-08, 25 PECBR 712 (Aug. 8, 2013), supplemental order, 25 PECBR 828 (Nov. 6, 2013), on remand from 254 Or App 570 (2013), rev'g 23 PECBR 638 (2010) 6

B. For the Employer 7

12. ATU v TriMet, No. UP-53-11, 25 PECBR 795 (Oct. 25, 2013) 7

13. ATU v. TriMet, No. UP-037-12, 25 PECBR 848 (Dec. 2, 2013) 7

14. Independent Ass'n of Linn-Benton Comm. Coll. Classified Emps. v. Linn-Benton Comm. Coll., UP-029-13 (June 19, 2014) 7

V. COLLECTIVE BARGAINING 7

A. For the Union....7

15. FOPPO v. Multnomah Cnty., No. UP-032-12, 25 PECBR 629 (July 3, 2013) 7

16. ATU v. TriMet, No. UP-42/50-12, 25 PECBR 640 (July 19, 2013) 8

17. Int'l Ass'n of Firefighters, Local 890 v. Klamath Cnty. Fire Dist. #1, No. UP-049-12, 25 PECBR 871 (Dec. 20, 2013) 8

B. For the Employer 9

18. Multnomah County Corrections v. Multnomah County, 257 Or App 713, 308 P3d 230 (2013), aff'g Nos. UP-057-10, UP-064-10 (June 29, 2011) (Rossiter and Cowan; Gamson, dissenting) 9

19. Washington County Dispatchers Assn. v. Washington County Consolidated Communications Agency, No. UP-015/027-13 (June 16, 2014) 9

VI. BREACH OF CONTRACT....9

20. Portland Police Ass'n v. City of Portland, No. UP-25/26/27-11, 25 PECBR 481 (May 3, 2013) 9

21. Serv. Emps. Int'l Union, Local 503 v. State of Or., Dep't of Revenue, No. UP-031-12, 25 PECBR 691 (Aug. 5, 2013) 10

VII. TIMELINESS 10

22. Brookings-Harbor Educ. Ass'n v. Brookings-Harbor Sch. Dist. 17C, No. UP-074-11, 25 PECBR 584 (June 26, 2013) 10

VIII. COMPELLING ARBITRATIONS 10

23. Or. Sch. Emps. Ass'n v. N. Clackamas Sch. Dist., No. UP-017-13, 25 PECBR 983 (Apr. 4, 2013) 10

IX. ENFORCING ARBITRATION AWARDS 10

TABLE OF CONTENTS
(continued)

Page

24. Portland Police Ass'n v. City of Portland, No. UP-023-12, 25 PECBR 94 (Sept. 21, 2012) (appeal pending) 10

25. Brookings-Harbor Educ. Ass'n v. Brookings-Harbor Sch. Dist. 17C, No. UP-074-11, 25 PECBR 584 (June 26, 2013) 11

26. State of Or., Dep't. of Human Servs. v. SEIU, Local 503, No. AR-001-13, 25 PECBR 836 (Nov. 21, 2013) 11

X. INTEREST ARBITRATIONS 12

27. City of Troutdale and Troutdale Police Officers' Ass'n, No. IA-08-12 (Jan. 16, 2013) (Krebs, Arb.) (union) 12

28. Jackson Cnty. Sheriff's Emps.' Ass'n and Jackson Cnty., No. IA-02-12 (Mar. 8, 2013)(Axon, Arb.)(employer) 12

29. City of Albany and Int'l Ass'n of Fire Fighters, Local 845, No. IA-10-10 (May 21, 2013) (Boedecker, Arb.)(union) 12

30. FOPPO and Deschutes Cnty., No. IA-06-13 (Sept. 26, 2013, amended Oct. 2, 2013) (Pesonen, Arb.) (employer) 12

31. FOPPO and Multnomah Cnty., No. IA-05-11 (May 11, 2012) (Whalen, Arb.) (on remand from ERB) (reaffirmed award for employer) 12

I. ERB's NEW PRACTICE WHEN NEITHER PARTY FILES OBJECTIONS TO A RECOMMENDED ORDER

1. *Int'l Bhd. of Elect. Workers, Local Union No. 659 v. Eugene Water & Elect. Bd.*, No. UP-008-13, 25 PECBR 901 (Jan. 14, 2014)

When neither party objects to a recommended order, the Employment Relations Board ("ERB") will now generally adopt the recommended order as its final order without reviewing the rulings or conclusions. The final order will be binding only on the parties and given no precedential effect. ERB reasoned that the parties' failure to file objections did not preserve challenges to a recommended order, and so the parties lose the opportunity to present arguments to ERB. In this case, ERB adopted the ALJ's recommended order, which concluded that the Union's complaint under ORS 243.672(1)(e) be dismissed.

Dissent: Member Weyand dissented, asserting that ERB can and should modify clear legal errors in a recommended order even if objections are not filed.

ERB has since adopted the ALJ's order without review in:

Int'l Bhd. of Elect. Workers, Local Union No. 659 v. Eugene Water & Elect. Bd., No. UP-016-13, 25 PECBR 970 (Mar. 19, 2014)

Prof'l Firefighters of Clackamas Cnty., Local 1159 v. Canby Fire Dist. No. 62, No. UP-011-13, 25 PECBR 972 (Mar. 20, 2014)

Eagle Point Educ. Ass'n/OEA/NEA v. Jackson Cnty. Sch. Dist. #9, No. UP-025-12, 25 PECBR 976 (Mar. 26, 2014)

Clackamas Cnty. Peace Officers Ass'n v. City of West Linn, No. UP-014-13, 26 PECBR 1 (May 9, 2014)

Salem City Attorney's Collective Bargaining Unit v. City of Salem, CC-004-13 (July 1, 2014)

Oregon AFSCME v. State of Oregon, Dept. of Corrections, UP-066-12 (July 18, 2014)

II. REPRESENTATION & UNIT CLARIFICATION CASES

A. Public-Employee Status

2. *City of Portland v. Portland Police Commanding Officers Ass'n.*, No. UC-017-13, 25 PECBR 996 (Apr. 28, 2014)

City filed a management unit clarification petition seeking to have all 44 officers in police commanding officers bargaining unit declared supervisory and removed from the unit. ERB granted the petition as to those commanding officers managing "reporting units." But ERB rejected the petition as regards other commanding officers, concluding that the City had not shown that they direct work of others.

Under ORS 243.650(19), a supervisor is not a public employer covered by the Public Employee Collective Bargaining Act (the "PECBA"). A supervisor is defined in ORS 243.650(23) as a person effectively exercising any of 12 delineated responsibilities: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or adjust their grievances.

ERB has held that to qualify as a supervisor, the employee (1) must have the authority to take one of the delineated actions or to effectively recommend such an action, (2) must exercise independent judgment in the exercise of such authority, and (3) must hold the authority in the interest of management.

Other rulings:

- Defined authority to "assign" as referring to act of designating an employee to a place (such as a location, department, or wing), appointing the employee to work a specific time (such as a shift or overtime) or giving significant overall duties or tasks to an employee, but **not** to instruction to perform a discrete task.

- Defined "responsibly to direct" to mean that the supervisor must have employees under him or her and decide what job will be undertaken next or who will do it. The direction must be both responsible and carried out with independent judgment.

- Although such petitions are investigatory in nature and there is no burden of proof imposed, ERB will assume that the employee is not a supervisor "in the absence of detailed, specific evidence establishing that the putative supervisor has the authority listed in the statute." 25 PECBR at 1022.

- Rather than look at job descriptions or ranks, ERB looks at the work performed by individual officers.

- Found authority to hire nonsworn employees in some circumstances makes the commanding officer a supervisor.

B. Expanding the Bargaining Unit

3. *Tualatin Emps.' Ass'n v. City of Tualatin*, No. UC-012-12, 25 PECBR 565 (June 21, 2013)

Union filed a petition under OAR 115-025-0005(3) to "clarify" the bargaining unit by including senior positions that had existed for several years, but not been recognized by the parties as part of the bargaining unit. The recognition clause described the bargaining unit as a broad wall-to-wall unit covering all nonsworn City employees. But the list of "Association Classifications" labeled Exhibit A to the agreement lacked the senior positions. ERB concluded that that list was not sufficient to overcome the sweeping language of the recognition clause and that the historical practice of leaving them out of the unit did not constitute any sort of waiver, declining to find a waiver element in subsection (3) petitions.

ERB allowed the Union to amend the petition twice to restate it under the appropriate section of the unit clarification rule.

4. *Labors Int'l Union of N. Am., Local 483 v. City of Portland*, No. UC-011-13, 25 PECBR 953 (Mar. 6, 2014)

ERB held that it was appropriate to add park rangers, including full-time and those limited to working 1,400 hours per year, to a collector unit composed of other park department employees and employees in other City bureaus. ERB concluded that although park rangers perform security duties and must be DPSST-certified as security officers, they have a community of interest with other park department employees.

ERB found that the limited-hour rangers should be excluded as temporary employees because their employment was neither limited to a "date certain" nor lacking a "reasonable expectation of continued employment." 25 PECBR at 967. Employees meet the latter test if they can reasonably expect being rehired the next year or moving to permanent employment.

ERB also rejected the City's argument that park rangers were not a logically defined group to add to the unit. ERB noted that all workers within the group performed the same job duties and had the same skills. ERB held that excluding two individuals who may occasionally substitute for a limited-hour park ranger did not undercut the cohesiveness of the group proposed.

III. INTERFERENCE, DOMINATION AND DISCRIMINATION

A. Discipline Cases—For the Union

5. *FOPPO v. Lane Cnty.*, No. UP-52-12, 25 PECBR 612 (June 28, 2013)

ERB concluded that the County violated ORS 243.672(l)(a) and (b) when a manager refused to allow a Union officer to serve as a Union representative in an employee meeting because the officer had engaged in protected activity. ERB noted that it was unnecessary to demonstrate that the "employer acted with hostility or anti-union animus." A complainant need only show that "there is a causal nexus between the employer's action and the protected activity." 25 PECBR at 618. The Union officer was told that she could not attend the meeting because she had four pending grievances.

ERB, however, also concluded that the County had not violated ORS 243.672(l)(a) and (b) when the same manager served the same FOPPO representative with a notice of investigation. Service of the notice, although shortly after the filing of grievances, was consistent with County practices.

B. Bargaining-Related Cases—For the Union

6. *Ass'n of Eng'g Emps. of Or. v. State of Or., Dep't of Admin. Servs.*, No. UP-043-11, 25 PECBR 525 (June 17, 2013) (Logan dissenting on other issues), on reconsideration, 25 PECBR 764 (Sept. 13, 2013)

ERB held that the State had made an unlawful unilateral change, following contract expiration, by banning the Association from continuing to use the State's e-mail system as permitted by the parties' collective bargaining agreement.

ERB also found that the e-mail ban violated the "because" prong of ORS 243.672(1)(a). ERB concluded that the ban on Association-related e-mail only, by definition, satisfied the three-part test: performing Association business is a protected activity, the employer implemented the ban against such protected activity, and there is a causal connection. ERB found that the trio of prior cases addressing nonsolicitation rules did not offer the State any support. But ERB failed to acknowledge the State's broad nonsolicitation clause and declined to treat the Association e-mail access rules as an exception to the nonsolicitation clause.

See also discussion for case #8 below.

C. Bargaining-Related Cases—For the Employer

7. *Tualatin Emps.' Ass'n v. City of Tualatin*, No. UP-054-12, 25 PECBR 861 (Dec. 12, 2013)

City did not violate ORS 243.672(1)(a), (b), or (c) by giving all nonrepresented employees a 2.5 percent salary increase, including those employees subject to a pending UC petition.

Because the petition was filed under OAR 115-025-0005(3), there was no election. Consequently, the salary increase cannot be viewed as inducement to employees to vote against Union membership.

The Union also challenged the fact that unrepresented employees received an increase 0.5 percent above those of represented employees as discriminatory. ERB rejected this argument, noting that when the decision to give the increase was made, the Union members had been given the option of a less costly medical plan and higher increase or the existing plan and lower salary increase. Furthermore, because the City had expected the members to vote for the revised plan with the higher increase, there was also no proof of an unlawful purpose.

IV. UNILATERAL CHANGE

A. For the Union

8. *Ass'n of Eng'g Emps. of Or. v. State of Or., Dep't of Admin. Servs.*, No. UP-043-11, 25 PECBR 525 (June 17, 2013) (Logan dissenting), on reconsideration, 25 PECBR 764 (Sept. 13, 2013)

ERB held that the State had made an unlawful unilateral change, following contract expiration, by banning the Union from continuing to use the State's e-mail system as permitted by the parties' collective bargaining agreement. ERB rejected the argument that e-mail use was a permissive subject of bargaining that need not be continued after expiration. Finding that the subject was not enumerated in the PECBA and that it was not previously determined to be a permissive subject, ERB applied the balancing test under ORS 243.650(7)(c). ERB weighed whether Union use of the state e-mail system had a "greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." 25 PECBR at 542.

Although the case was tried on a stipulated record, the ERB majority was dismissive of management's concerns about "controlling the access to and use of its communications systems and

its equipment" as "largely generalized and speculative." *Id.* The majority, on the other hand, gave credit to the stipulations that showed the importance to the union of e-mailed communications and concluded, "The ability of employees to communicate about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and working conditions." *Id.*

ERB reasoned that Union access was mandatory because of "the vital role that e-mail plays in shaping" terms and conditions of employment. 25 PECBR at 543. This is a paradigm shift; prior cases on union rights looked to whether there was a direct effect on the employee. For example, ERB previously held that paid release time is mandatory because it involves paid time off.

Logan dissented, noting that the Union retained the ability to communicate through other means, even if denied e-mail access. She also credited the State's interest in computer equipment and e-mails, specifically citing its access policy and provisions in the parties' expired agreement that recognized the State's right to control e-mail access. She also challenged the majority's equating the use of e-mail systems to bulletin boards.

9. *Or. Sch. Emps. Ass'n v. Parkrose Sch. Dist.*, No. UP-030-12, 25 PECBR 783 (Oct. 22, 2013), on reconsideration, 25 PECBR 845 (Nov. 25, 2013) (appeal pending)

The District violated ORS 243.672(1)(e) by unilaterally imposing unpaid furlough days for classified employees. The District claimed that the agreement did not set the number of days worked, and that "variability" was the status quo. The agreement contained a chart listing workdays and holidays by classification with the notation that this was not a guarantee of any given number of days or hours.

- ERB rejected the District's contention that "variability" of the work year was the status quo.

- ERB further reasoned that the parties' bargaining history belied the District's interpretation of the agreement. Specifically, ERB concluded that the parties had agreed that furlough days were a separate issue to be bargained at a future date. (During negotiations for a successor agreement, the District refused to bargain over furlough days, and the Union stated on the record that it would address the subject later. A successor agreement was ratified in March 2012. In April 2012, the District announced that it would implement furlough days, refusing the Union's demand to bargain.)

- ERB held that to pursue a contract-waiver defense, the District was required to assert that defense in its answer. See OAR 115-035-0035(1). Because the District did not do so, ERB did not consider the "contractual waiver" defense.

As a remedy, ERB granted a "make-whole" remedy, and on reconsideration distinguished the case from those in which it ordered further bargaining noting that the other cases involved unilateral addition of workload or other issues concerning which the monetary value of the make-whole remedy was difficult to determine.

10. *Laborers' Int'l Union of N. Am., Local 483 v. City of Portland, Bureau of Human Res.*, No. UP-027-12, 25 PECBR 810 (Nov. 5, 2013), on reconsideration, 25 PECBR 892 (Dec. 31, 2013)

ERB held that the City had violated ORS 243.672(1)(e) by unilaterally changing the maximum annual hours of Seasonal Maintenance Workers ("SMWs"). The change was made in revisions to the City's Human Resources Administrative Rules ("HRARs") and was one of several revisions made at the time. On October 4, 2011, notice of revisions was sent to all City employees, elected officials, and Union leaders (including the Union's designated representative for receiving correspondence), which announced the notice and comment period for proposed revisions to the HRARs. The Union claimed not to have seen or received the e-mail and in any event the e-mail did not expressly call out the change to hours worked.

Applying the discovery rule, ERB applied the "knew or should have known" test and concluded that it was not reasonable for the Union (a) to have seen the change, and (b) to understand that the change in rules applied to the SMWs. The parties had just concluded bargaining and had had some discussions about revising the total number of hours for SMWs, but the City dropped its proposal before concluding a contract, not wanting to agree to the *quid pro quo* offered by the Union.

Recall that the court of appeals determined that notwithstanding plain language of the PECBA, the discovery rule applies to its statute of limitations. *See Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 189, 260 P3d 619 (2011).

On reconsideration, ERB applied the "clear and unmistakable waiver" standard borrowed from the private sector per the directives of the supreme court in *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 295 P3d 38 (2013).

11. *Three Rivers Educ. Ass'n v. Three Rivers Sch. Dist.*, No. UP-16-08, 25 PECBR 712 (Aug. 8, 2013), *supplemental order*, 25 PECBR 828 (Nov. 6, 2013), on remand from 254 Or App 570 (2013), rev'g 23 PECBR 638 (2010)

In the initial order, ERB held that the employer had no obligation to bargain a change in the school calendar (a PECBA-defined permissive subject) and had properly bargained its impact on teacher workload (a mandatory subject) before implementation. The court of appeals overturned the ERB decision for lack of "substantial reason" based on confusing language that suggested that the decisions on school calendar and workload were independent decisions made at the same time that were not inextricably intertwined.

On remand, rather than offer a better rationale, ERB (with entirely different members) held that the District had violated ORS 243.672(1)(e) because it had made separate, contemporaneous decisions to change the school calendar and to increase student contact time and had not bargained the decisions to change the workload.

B. For the Employer

12. *ATU v TriMet*, No. UP-53-11, 25 PECBR 795 (Oct. 25, 2013)

ATU challenged TriMet's request for a medical release before permitting an employee to return to work as a unilateral change in the status quo and as a breach of a written agreement under ORS 243.672(1)(e) and (g). ERB dismissed the complaint, finding that ATU had not established that TriMet's practice either contradicted the agreement or was contrary to established practice. ERB credited testimony of TriMet's manager as to the frequent referral of employees to medical examination for a release before returning to work despite protests from Union leadership that it was not aware of such referrals. ERB noted that the Union could have asked but did not ask for such records in prehearing discovery.

13. *ATU v. TriMet*, No. UP-037-12, 25 PECBR 848 (Dec. 2, 2013)

ERB declined to find that TriMet had changed the status quo for rail supervisors when requiring them to demand to see proof of fares from passengers, issue citations, and meet a daily quota of contacts as change to the status quo. TriMet claimed that whatever change occurred had taken place in 2008 and that this directive was not a change in the status quo. ERB, citing various records, concluded that TriMet was merely reminding employees of their existing job duties. In addition, ERB concluded that ATU had failed to establish that TriMet imposed a quota.

14. *Independent Ass'n of Linn-Benton Comm. Coll. Classified Emps. v. Linn-Benton Comm. Coll.*, UP-029-13 (June 19, 2014)

ERB examined the PECBA obligation to continue step increases after the expiration of a bargaining agreement under ORS 243.712(2)(d). ERB held that provision did not apply where the expired agreement provided for specified across-the-board pay increases on specific dates.

V. COLLECTIVE BARGAINING

A. For the Union

15. *FOPPO v. Multnomah Cnty.*, No. UP-032-12, 25 PECBR 629 (July 3, 2013)

The Union challenged the County's last best offer ("LBO") after the interest arbitrator ruled for the County. ERB held, for the first time, that making a regressive proposal between the final offer and the LBO was a per se violation of the duty to bargain in good faith. ERB noted that there was no corresponding concession on another subject otherwise made and specifically noted: "We do not decide whether a regressive proposal on a mandatory subject of bargaining would *per se* violate the duty to bargain in good faith if it was accompanied by a significant concession on another issue." 25 PECBR at 637 n.5. ERB noted, however, that it would review that question in light of the well-established understanding that the policies of the PECBA are served by actions that move the parties toward an agreement and that narrow, rather than expand, the scope of the parties' dispute. *Id.*

ERB rejected the argument that the Union had waived the challenge to the interest arbitration by filing a grievance under the newly awarded contract and waiting until the arbitration hearing to challenge two of the three changes made in the LBO. ERB reasoned that the County still had opportunity to cure the defect before the record closed.

The remedy was to modify the County LBO and remand the dispute to Arbitrator Whalen to resolve based on the modified County LBO.

16. *ATU v. TriMet*, No. UP-42/50-12, 25 PECBR 640 (July 19, 2013)

ERB held that TriMet had changed its health insurance proposal at interest arbitration and held that such a change constituted a per se violation of its good-faith bargaining obligation. Specifically, ERB ruled that TriMet had effectively amended its LBO on health insurance by explaining in the hearing that its proposal was retroactive and adding terms that would permit TriMet to recoup money from its members for health insurance premiums already paid. ERB disregarded evidence: (1) that the LBO package had a retroactive effective date (December 1, 2009), (2) that the health insurance proposal had no other effective date, and (3) that other proposals specified that they were effective upon ratification when intended not to be retroactive. ERB focused on that fact that TriMet had never bargained with the Union as to how it would recoup overpayments if made retroactive. ERB remedied this violation by ordering TriMet not to make the health insurance plan retroactive and recoup overpayments.

ERB rejected Union challenges to various other TriMet proposals presented at the interest arbitration.

ERB held that TriMet had changed the status quo by discontinuing payments to Union-administered funds after the interest arbitration award was issued and ordered continued payments.

TriMet's proposal to stop paying Union stewards to attend grievance meetings was done to save money and not in retaliation for the ATU's filing so many grievances. Thus, there was no violation of either the "because" or "in" prong of ORS 243.672(1)(a).

Dissent: Member Weyand questioned whether an employer could have a retroactive cutback in wages or benefits. It is worth reviewing if you are anticipating such an approach.

17. *Int'l Ass'n of Firefighters, Local 890 v. Klamath Cnty. Fire Dist. #1*, No. UP-049-12, 25 PECBR 871 (Dec. 20, 2013)

ERB held that the District committed a unilateral change when, following impasse in interim bargaining, it implemented a change to practices related to breaks and travel expenses for overnight medical transports. ERB ruled that the employer must go to interest arbitration before implementing a change in a strike-prohibited unit that the Union demanded to bargain.

Surprisingly, this was the first time that ERB had encountered this issue since the 1995 amendments to the PECBA in SB 750.

Unfortunately for employers, ERB wholly disregarded the plain language of ORS 243.698(4) that: "The expedited bargaining process shall cease 90 calendar days after the written notice described in

subsection (2) of this section is sent, and the employer may implement the proposed changes without further obligations to bargain. * * * Neither party may seek binding arbitration during the 90-day period." One of two ways to read this: (1) interest arbitration is never required for bargaining during the term of the contract, or (2) interest arbitration is required only if asked for in a timely manner.

ERB rejected and frankly demeaned the District's position, suggesting that it created a "race" between implementation and the right to demand arbitration. On May 8, 2014, the District notified the Union that it intended to implement its proposals. On June 13, the Union filed a petition to initiate interest arbitration.

B. For the Employer

18. *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 308 P3d 230 (2013), *aff'g* Nos. UP-057-10, UP-064-10 (June 29, 2011) (Rossiter and Cowan; Gamson, dissenting)

The court of appeals affirmed ERB's holding that a Union proposal to require training for 40 hours is a permissive subject of bargaining. The court, like ERB, rejected the Union argument that the training proposal involved a safety issue under ORS 243.650(7)(f) and thus did not address a mandatory subject of bargaining. The court agreed with ERB that "it must be apparent from the face of a proposal itself—that is, 'directly' and without reference to extrinsic evidence—that the proposal involves a 'safety issue.'" The court did, however, reject ERB's use of the term "unambiguous" when ruling that the proposal must "unambiguously address" a matter related to workplace safety. The court elaborated that the subject of a proposal is a "'safety issue' for purposes of ORS 243.650(7)(f) if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of strike-prohibited employees." 257 Or App at 716.

19. *Washington County Dispatchers Assn. v. Washington County Consolidated Communications Agency*, No. UP-015/027-13 (June 16, 2014)

ERB over dissent of Member Weyand adhered to private sector precedent that a recording of a bargaining session is a permissive subject of bargaining (as are other ground rules) and that a party (in this case, the employer) may refuse to continue bargaining should the other party insist on recording the session.

VI. BREACH OF CONTRACT

20. *Portland Police Ass'n v. City of Portland*, No. UP-25/26/27-11, 25 PECBR 481 (May 3, 2013)

The Union blew the timeline on moving grievances to arbitration. The arbitrator dismissed the grievance as untimely. The Union brought a claim for breach of contract to resolve a contract dispute, which ERB permits when the parties' contract lacks an arbitration agreement. ERB dismissed the Union's complaints that the City's suspensions of the three grievants violated ORS 243.672(1)(g). ERB concluded that because an arbitrator ruled that the same three grievances were not procedurally arbitrable, the Union could not then bring those grievances in a (1)(g) claim.

21. *Serv. Emps. Int'l Union, Local 503 v. State of Or., Dep't of Revenue*, No. UP-031-12, 25 PECBR 691 (Aug. 5, 2013)

ERB enforced a settlement agreement as it would a collective bargaining agreement, following the rules for contract interpretation adopted by the Oregon courts. The agreement settled a dispute over payment terms for tax auditors. On three issues, ERB found the terms unambiguous and applied the letter of the agreement even if it appeared to result in exaggerated payments—following a rather formulaic approach. (The settlement agreement did contain an integration clause.)

On a fourth issue, it found that nothing in the agreement barred the State from requiring weekend stays when that was the least-cost alternative to traveling back and forth from the audit site.

VII. TIMELINESS

22. *Brookings-Harbor Educ. Ass'n v. Brookings-Harbor Sch. Dist. 17C*, No. UP-074-11, 25 PECBR 584 (June 26, 2013)

ERB found untimely the Union's claim that the District's reclassification of certain classes prevented a laid-off teacher from being assigned to teach them. ERB concluded that even if the Union lacked actual knowledge of the reclassification within the 180-day limitation period, it was "in possession of the critical facts to the cause of action" within that time frame and thus knew or should have known of the change. 25 PECBR at 604.

VIII. COMPELLING ARBITRATIONS

23. *Or. Sch. Emps. Ass'n v. N. Clackamas Sch. Dist.*, No. UP-017-13, 25 PECBR 983 (Apr. 4, 2013)

ERB held that the employer had improperly refused to proceed to grievance arbitration, in violation of ORS 243.672(1)(g). By letter dated March 22, 2013, the Union asserted that it was arbitrating a grievance over a termination that occurred on November 4, 2011. The District responded that the grievance was so untimely that it was both procedurally and substantively nonarbitrable, since the District had not heard from the Union on this issue since November 10, 2011. Applying the "positive assurance" test, ERB sent the issue of timeliness and arbitrability to the arbitrator to decide. ERB, citing prior case law, said that the positive-assurance test can be applied only by an "express exclusion of the claim from arbitration." 25 PECBR at 990. ERB seems to imply that timeliness will never be subject to the positive-assurance test.

IX. ENFORCING ARBITRATION AWARDS

24. *Portland Police Ass'n v. City of Portland*, No. UP-023-12, 25 PECBR 94 (Sept. 21, 2012) (appeal pending)

ERB enforced an arbitration award issued by Arbitrator Jane Wilkinson, who reinstated Officer Ronald Frashour, even though he shot an unarmed Aaron Campbell in the back when he was turning away from officers. The arbitrator ultimately concluded that the officer had acted consistent with his training and with constitutional standards for deadly force. The City challenged the award under the PECBA public-policy exception of ORS 243.706(1).

In its review, ERB applied its standard for reviewing arbitration awards under its three-part test:

> "(1) we determine whether the arbitrator found that the grievant engaged in the misconduct for which discipline was imposed; (2) if so, we then determine if the arbitrator reinstated or otherwise relieved the grievant of responsibility for the misconduct; and (3) if so, we determine if there is a clearly defined public policy, as expressed in statutes or judicial decisions, that applies to the award and makes it unenforceable." 25 PECBR at 111.

Two key factors:

The arbitrator did not find that the grievant had engaged in any misconduct. In any event, ERB has not looked to the particular findings but to the arbitrator's ultimate conclusions. There are cases in which an arbitrator may find misconduct but then impose a lesser penalty or find misconduct but conclude that it was not sufficient to find just cause.

Second, ERB understands the Oregon Supreme Court to require a public policy to specifically bar employment under the circumstances found by the arbitrator, a circumstance that would generally arise only under an accreditation statute. This approach is substantially narrower than was intended by, and would seem to ignore legislative comments made by, the chief sponsor of the exception, Sen. Neil Bryant.

25. *Brookings-Harbor Educ. Ass'n v. Brookings-Harbor Sch. Dist. 17C*, No. UP-074-11, 25 PECBR 584 (June 26, 2013)

ERB enforced an arbitration agreement reinstating a laid-off teacher. ERB rejected the employer's argument that the arbitrator had exceeded her authority and violated public policy by failing to apply the teacher layoff statute, ORS 342.934(7), to a grievance challenging a layoff. ERB concluded that the arbitrator had not "actually violated that statute" in her award or that any portion of the award was inconsistent with the statute. 25 PECBR at 602 (emphasis omitted). ERB also found nothing improper in the arbitrator's providing a clarification under her retained jurisdiction.

26. *State of Or., Dep't of Human Servs. v. SEIU, Local 503*, No. AR-001-13, 25 PECBR 836 (Nov. 21, 2013)

DHS challenged the enforceability of an arbitration award (by Arbitrator Kathryn Whalen) reinstating a DHS employee for failure to report child abuse under the PECBA's public-policy exception in ORS 243.706(1). The employee was a family resource worker responsible for certifying foster parents and without prior disciplinary history. The abuse was by her son of her grandchild, and she ultimately reported it, but after some delay.

ERB applied its three-part test, concluding that the arbitrator found that the employee had failed to report abuse and that she had been relieved of responsibility for that offense. The arbitrator reduced the termination to a 60-day suspension.

Although statutes obligated the employee to report child abuse, none dealt with employment or reinstatement. ERB declined to overturn the award because no specific statute or court case says that a DHS employee who fails to report child abuse is barred from employment.

X. INTEREST ARBITRATIONS

27. *City of Troutdale and Troutdale Police Officers' Ass'n*, No. IA-08-12 (Jan. 16, 2013) (Krebs, Arb.) (union)

The sole issue was health insurance. The parties had agreed to a three-year agreement, with the employer picking up the employees' PERS contribution.

The arbitrator rejected the City's proposed change in health plans that would save the City money, opting to maintain the current plan, noting that the City was low relative to **comparables** in overall compensation.

28. *Jackson Cnty. Sheriff's Emps.' Ass'n and Jackson Cnty.*, No. IA-02-12 (Mar. 8, 2013)(Axon, Arb.)(employer)

The Union proposed substantially higher wage and medical insurance contributions. The County proposed a hard cap on medical costs, with employees picking up all increases in excess of the cap. The arbitrator looked to criteria of other factors in rendering his ruling for the employer, seemingly because of **internal equity** issues.

29. *City of Albany and Int'l Ass'n of Fire Fighters, Local 845*, No. IA-10-10 (May 21, 2013) (Boedecker, Arb.)(union)

The parties' three-year contract left open the wage increase for the third year (July 1, 2012, to June 30, 2013), which was to be negotiated. With no agreement on the third-year increase, the dispute went to interest arbitration.

The employer proposed a wage freeze; the Union proposed a 2 percent increase. The arbitrator rejected the employer's ability-to-pay argument. The City characterized the argument as a "relative inability to pay," which the arbitrator said was really just an unwillingness to pay. The arbitrator focused on **comparables** and a comparison to increases in the **cost of living**.

30. *FOPPO and Deschutes Cnty.*, No. IA-06-13 (Sept. 26, 2013, amended Oct. 2, 2013) (Pesonen, Arb.) (employer)

The arbitrator rejected the Union's "little bit more" approach. The employer LBO revised the cost-sharing arrangement for insurance premiums, replacing a set amount for employer and employee with a sliding scale based on employee earnings. All other County unions had agreed with this approach. FOPPO wanted a *quid pro quo* of a half-hour paid lunch that was not provided to any other unit when adopting this change. The paid lunch had an annual cost of approximately $60,000. Without expressly stating so, the decision relied on **internal equity**.

31. *FOPPO and Multnomah Cnty.*, No. IA-05-11 (May 11, 2012) (Whalen, Arb.) (on remand from ERB) (reaffirmed award for employer)

ERB concluded that the County had made a regressive move between final offer and LBO, reversed, and remanded in the interest arbitration award back to Arbitrator Whalen. Whalen rejected the Union's argument that the interest and welfare of the public demanded award of the union LBO

because the County had committed an unfair labor practice. Rather, she stated that she understood that her role was to apply the statutory criteria, which in her view continued to support the employer LBO.

In the original award: The differences in the parties' proposals for a three-year contract were that the County proposed a third-year wage adjustment of a COLA from 1 to 4 percent, and the Union proposed a third-year reopener, an ORPAT incentive, and a workers' compensation supplement. In the original award, the arbitrator considered the Union's additional proposals, most significantly a workers' compensation supplement without limit that had several complicating factors. Calling the case close, the arbitrator found for the County in light of the workers' compensation proposal.