CHANGE ORDERS NEEDED?

2020 Oregon Public Sector Update

OREGON PERS REFORM UPHELD

***James v. State*, 366 Or. 732, 471 P.3d 93 (2020)**

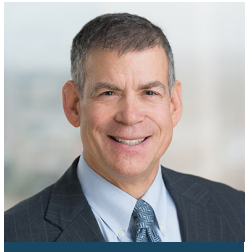
The Oregon Supreme Court rejected a challenge to revisions to the Oregon Public Employees Retirement System (PERS) enacted by the 2019 Oregon Legislature in SB 1049. The petition challenged the redirection of a portion of PERS contributions to a debt-reduction fund and the salary-cap provision. Because these changes were prospective only, the court held that the bill did not impair employment contracts with public employees covered by PERS under common law and constitutional theories.

REPRESENTATION/UNIT CLARIFICATION CASES

***Oregon AFSCME Council 75 v. State of Oregon, Oregon Judicial Department -Yamhill County*, 304 Or. App. 794, 469 P.3d 812 (2020), *rev denied*, 367 Or. 75 (2020)**

The court of appeals overturned an order by the Employment Relations Board (ERB) certifying the American Federation of State, County and Municipal Employees (AFSCME) as the exclusive representative of a bargaining unit of 27 nonsupervisory employees working in the Yamhill County Circuit Court. ERB had concluded that the "interests" of these 27 employees were sufficiently separate and distinct from interests of the other state court employees to constitute an appropriate bargaining unit for representation.

The court examined in great depth the operations of the unified state court system and lack of autonomy of individual county courts. The court concluded that ERB's order certifying a county-level bargaining unit was not supported by substantial evidence or substantial reason. The evidence did not support a conclusion that the Yamhill County Circuit Court employees had a shared, distinct community of interest that was significantly stronger than, and distinct from, interests shared with court employees statewide. The court exercised its discretion under ORS 183.482(8)(c) to set aside the order and not remand the matter to ERB.



WRITTEN BY:
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KEY TAKEAWAY: To challenge efforts to organize a fragment, focus on the common interests with the larger group.

***Or. AFSCME Council 75, Local 189 v. City of Portland-Hous. Bureau*, UC-007-19 (May 18, 2020)**

ERB ruled that Analysts I and II in the Portland Housing Bureau (PHB), consisting of three employees, should not be added into an existing citywide bargaining unit of approximately 850 employees. In so ruling, ERB applied the factors set forth in ORS 243.682(1)(a) of "community of interest, [including the] wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." And ERB noted that it considers other nonstatutory factors such as its preference for larger, wall-to-wall units and undue fragmentation.

The majority concluded that the petitioned-for analysts had a community of interest with bargaining unit employees. But with regard to bargaining history, ERB found that (1) analysts employed in the city had never been represented, and (2) the housing bureau analysts were not part of a bargaining unit representing other PHB staff that was merged into the larger citywide AFSCME-represented unit. Further, ERB found that there was no impediment to organizing analysts on a citywide basis and noted its preference for larger units and avoidance of undue fragmentation. ERB concluded that the petitioned-for employees did not constitute a logical group of employees, especially in light of history of labor relations.

Interestingly, ERB distinguished its ruling in *Yamhill County*, RC-003-17 at 15-16, 27 PECBR 240, 254-55 (2018) (rev'd as discussed above) (ERB majority concluded that the larger-unit preference was entitled to less weight in circumstances where employees had repeatedly rejected the preferred wall-to-wall unit).

Member Sung dissented, rejecting the concept that three analysts failed to constitute a logical group and also citing the longtime preference for the largest possible unit.

***Or. AFSCME Council 75, Local 88 v. Multnomah Cty.*, UC-004-19 (Aug. 28, 2020)**

ERB granted AFSCME's petition to add two Administrative Analysts, reporting to department managers, to its bargaining unit. Although the county objected on the grounds they were confidential employees, it withdrew the objection for one of the employees. As for the remaining employee, ERB concluded that the disputed position did not meet the well-established standard of the types of positions that may be excluded as confidential: (1) whether the allegedly confidential employee provides assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining, (2) whether the assistance relates to collective-bargaining negotiations and administration of a collective-bargaining agreement, and (3) whether it is reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective-bargaining policies, proposals, and strategies.

All three factors must be satisfied. And because the department manager to whom the assistant provides support did not determine management policies in the area of collective bargaining, the first factor was not met, and there was no need to consider the other two. ERB noted that such policies were formulated by the labor relations managers and that having the department manager sitting on the bargaining team was not sufficient.

KEY TAKEAWAY: Sitting at the bargaining table is not sufficient to prove that one formulates, determines, and effectuates polices in the area of bargaining.

ALJ orders adopted when no objections were filed:

***Salem City Attorney's Collective Bargaining Unit v. City of Salem*, UC-008-19 (Feb. 13, 2020)**

In a case that ERB declined to give precedential effect, the ALJ held that the deputy city attorney (DCA), hired into a newly created position in a preexisting classification, was a supervisory employee and therefore not appropriately included in a unit of assistant city attorneys. There was another deputy city attorney with supervisory authority who had made effective decisions regarding hiring assistant city attorneys into the city's prosecutorial staff and assigning and directing their work. The new DCA was given supervisory authority over the nonlawyer litigation staff, which included making effective recommendations on hiring, discipline, and discharge, and in assigning and responsibly directing work of subordinates.

The ALJ rejected the union's argument that recognizing this position as supervisory created an inappropriate supervisor-to-staff ratio, noting ERB's long-standing refusal to consider the necessity of supervisory positions and that the city had not created an additional level of supervision by putting staff under the DCA. Also, the ALJ rejected the union's argument that giving supervisory authority to the DCA position was a sham to remove her from the bargaining unit, noting that ERB lacks authority to strip supervisory authority from an employee in a unit composition case.

KEY TAKEAWAY: Hiring authority can be shown by focusing on nonprofessional staff.

***Prof'l & Technical Emps., Local 17 v. City of Portland*, UC-013-19 (Mar. 23, 2020)**

Maintenance supervisors for the City of Portland were supervisory employees because they assigned, directed, and disciplined subordinates. In this case, the supervisors had effectively recommended discipline, issued low-level discipline of oral and written reprimands, and conducted their own prediscipline investigations, deciding whether to discipline or opt for a course other than discipline.

The supervisors could also assign subordinates to overtime and premium-pay work and were held accountable for the work of their staff.

***Amal. Transit Union, Div. 757 v. Salem Area Mass Transit Dist.*, RC-012-19 (Aug. 28, 2020)**

The ALJ rejected a petition for representation of operations supervisors because they are supervisory employees as defined in ORS 243.650(23)(a). The ALJ concluded that the operations supervisors "assign" employees by deciding when to call in extra board operators and when to send employees home, call operators in to work overtime, or to "run lean." The ALJ, however, determined that the supervisors did not meet any of the other twelve factors that indicate supervisory responsibilities.

KEY TAKEAWAY: Only one of the twelve factors in ORS 243.650(23) need be satisfied to establish a position as supervisory. The easiest to satisfy and most commonly cited are to assign and responsibly direct work.

SCOPE OF BARGAINING

***Jackson Cty. v. SEIU Local 503, OPEU*, UP-002-20 (Mar. 31, 2020)**

On stipulated facts, in an expedited decision, ERB dismissed an unfair labor practice complaint against the union for including an option for insurance coverage under the Public Employee Bargaining Board (PEBB) in its final offer.

The employer asserted that the union had unlawfully conditioned bargaining by including a permissive subject in its final offer. ERB concluded that the subject of the union proposal was choice of carrier, which was a permissive subject for bargaining. But ERB nevertheless dismissed the complaint because the employer had not objected to that proposal as permissive before the filing of the final offer.

The employer also asserted that the union had continued to reference PEBB in an amended final offer after the city had objected to the PEBB option. But here, ERB found that the union proposal was not permissive, although it still referenced PEBB. In the amended final offer, the union proposed that the city continue the practice of providing for a specified contribution amount and that the union could select the carrier. And in this context, the union simply referenced PEBB as one carrier that the union could select. ERB noted that the city had not objected to the union proposal to continue the practice of the union's selecting the carrier as permissive, which was at the heart of the union proposal. Because PEBB was simply identified as a carrier option, this reference in the amended final offer was not seen as making the proposal permissive.

***Amal. Transit Union, Div. 757 v. Tri-Cty. Metro. Transp. Dist. of Or.*, UP-019-18 (Dec. 31, 2019) and supplemental order on remedy (Apr. 30, 2020), appeal pending**

ERB ruled that TriMet violated a contract term when it hired 15 bus mechanics from the outside, effectively requiring TriMet to fill bus mechanic positions only through its in-house apprentice program during the term of the collective bargaining agreement.

In light of the contract ruling, ERB declined to rule on an alternative claim that TriMet unilaterally changed a past practice of filling bus mechanic positions only through the apprentice program. TriMet had defended that shift because its hiring preference was a question of minimal qualifications and therefore permissive for bargaining.

TriMet had many openings for bus mechanics, arising from retirements and adding of new positions. In 2018, TriMet hired 20 bus mechanics from the outside to fill open positions. Previously, TriMet had filled bus mechanic positions solely through its apprentice program. But during the late 2010s, this proved insufficient to meet TriMet's hiring needs, even though TriMet had doubled the size of the apprentice program.

To justify its outside hiring, TriMet invoked a long-standing but rarely used contract clause that permitted outside hiring for new positions. ERB, however, ruled that this clause was inapplicable, and then construed a newer contract clause that permitted the outside hiring of up to five mechanics each year as creating a cap on outside hires.

ATU did not request termination of the outside hires, but in a supplemental ruling, after the parties failed to agree on a remedy, ERB granted super-seniority to apprentices ahead of the outside hires.

***Amal. Transit Union, Div. 757 v. Tri-Cty. Metro. Transp. Dist. of Or.*, UP-001/003-20 (Apr. 21, 2020), order on recons. (June 24, 2020), appeal pending**

ERB dismissed the complaint in both these consolidated cases, which were heard on an expedited basis while the parties were bargaining for a successor agreement. In UP 001-20, TriMet complained that ATU had conditioned bargaining on maintaining in-house apprentice programs, notwithstanding that the programs implicated permissive subjects of bargaining. Specifically, the apprentice programs addressed the permissive subjects of minimal qualifications for hiring, assignment, and staffing. They also required TriMet to bargain over these permissive subjects in administering the apprentice program through a joint apprentice and training committee that was subject to oversight by the Bureau of Labor and Industries (BOLI). ERB, however, concluded that ATU was not conditioning bargaining, notwithstanding ATU's repeated statements that the apprentice program was mandatory for bargaining and that ATU insisted on having the apprentice program in any negotiated agreement. Thus, ERB dismissed TriMet's complaint, forcing the parties to wait until after final offers to have this question decided.

In UP-003-20, ATU complained about TriMet's hiring outside mechanics into journey-worker bus mechanic positions. ERB concluded that the contract term that TriMet violated in UP-019-18 when it hired from the outside was no longer in effect after the contract expired. ERB further concluded that the requirement of graduating from the apprentice program was a minimal qualification, which was a permissive subject of bargaining, and as such need not be followed after the contract expired. ERB did, however, emphasize the need to bargain impacts before implementing a change in a permissive subject, even during the hiatus period between contracts.

On reconsideration, ERB ruled that the ATU proposals to maintain BOLI-administered apprentice programs addressed permissive subject of bargaining. ERB recognized that by administering the apprentice programs, BOLI was involved in setting minimal qualifications, making assignments, and determining staffing levels, among other traditionally permissive subjects of bargaining.

KEY TAKEAWAY: A proposal that diverts a decision on or discussion about permissive subjects is itself a permissive subject of bargaining.

KEY TAKEAWAY: A contractual obligation to hire from the outside is permissive and is not binding after the contract expires.

UNILATERAL CHANGE CASES

***Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or. App. 395, 461 P.3d 1001 (2020), on remand UP-059-13 (Sept. 24, 2020) (Sung dissenting)**

The union claimed that the city had made unlawful unilateral changes to operations and to the promotion process in the fire bureau. ERB rejected the union's claim relating to operational changes because the parties had "bargained" over and agreed upon such changes in informal discussions during the budget process between the union president and the mayor's office. ERB, however, agreed that the city had unlawfully changed the promotion process. Both parties appealed.

The court of appeals affirmed ERB's conclusion on the promotion process. But the court held that budget discussions leading to the operational changes did not constitute collective bargaining, and thus there was no enforceable agreement. The court therefore remanded the case to ERB on the operational changes. And it noted that the city had not pled waiver by inaction, on which ERB seemed to rely.

On remand, ERB adhered to its prior conclusion on different grounds. Although there was no written agreement, ERB concluded that the union's "actions" in the form of a verbal agreement were sufficient to constitute a clear and unmistakable waiver. Interestingly, ERB distinguished this waiver by action defense from a defense based on a written agreement. Under PECBA, an agreement must be in writing to be enforceable under ORS 243.672(1)(g) or (2)(d).

KEY TAKEAWAY: Waiver by action is possible through oral agreement.

***Or. Tech American Ass'n of Univ. Professors (Oregon Tech AAUP) v. Or. Inst. of Tech.* (Oregon Tech), UP-023-20 (Oct. 28, 2020)**

ERB concluded that Oregon Tech engaged in unilateral changes to faculty employment relations by (1) posting revised "workload guidelines" as a draft, even though it had not implemented the guidelines for the fall term, and (2) eliminating funding under its "Stipend and Release Model," which provided release time to faculty from teaching obligations or funding for special administrative assignments for faculty.

Although engaged in bargaining for a first contract with the faculty union, Oregon Tech had not engaged in any discussions with the union about either topic before posting or making these changes. ERB rejected the argument that the workload guidelines issue was moot because Oregon Tech announced that it would not take any steps to implement them and pulled down its posting of the guidelines.

ERB rejected Oregon Tech's argument that there was no status quo because the amount of funds allocated under the Stipend and Release Model and the use of funds varied by department and for a given department varied from year to year. The department chair of each of 15 departments independently determined how to use the funds and changed it each year.

KEY TAKEAWAY: An established practice or status quo need not be a uniform practice across departments or years, at least during the negotiation of a first contract.

UNION-INITIATED INTERIM BARGAINING

***Multnomah Cty. Corr. Deputy Ass'n v. Multnomah Cty.*, UP-003-19 (Oct. 11, 2019) (initial order) and (Mar. 20, 2020) (order on recons.), appeal pending**

In its original October 2019 order, ERB dismissed the complaint, contending that the county, during the term of a collective bargaining agreement, had (a) made a unilateral change by implementing a new timekeeping and payroll system, and (b) refused to bargain, or engaged in surface bargaining, over increased staff assaults on the union's demand to bargain. ERB ruled as follows:

- The adoption of the new payroll system by itself did not concern a change in a mandatory subject of bargaining.
- The union did not initially demand to bargain over the change.
- There was no showing that any problems or impacts from the changeover had more than a minimal impact on a mandatory subject, including workload.
- The county did not flatly refuse to bargain over the safety concerns and expressed willingness to meet, and did meet, to discuss union concerns. The union offered a memorandum of understanding, the county made some counterproposals, and the union declined to respond or counterpropose.
- An employer is obligated to engage in midterm bargaining (that is, bargaining during the term of a contract) upon a union demand over a matter of employment relations not covered by a contract provision, as well as over an anticipated employer-initiated unilateral change under ORS 243.698.

The union asked for, but was denied, rehearing on the first claim.

On the second claim involving the union-initiated safety bargaining, the union asked ERB on reconsideration to decide whether the 90-day or 150-day bargaining would control the union-initiated bargaining over safety. And the county asked ERB to reconsider its ruling that the county was obligated to engage in midterm bargaining over safety upon the union's demand. ERB noted that the union demand was prompted by new information in a "Staff Assault Report."

Dismissal of the complaint was affirmed by all members. The majority ruled that the county did have a midterm bargaining obligation and that the 150-day negotiation period applied, relying on the private-sector case of NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952), and pre-1995 ERB decisions adopting Jacobs Mfg.

In a concurring opinion, Member Umscheid considered the 1995 changes in the PECBA that created, among other things, the midterm bargaining process of ORS 243.698 and 243.702 and changes to the definition of "collective bargaining" in ORS 243.650(4). Member Umscheid argued that there was no provision made for a union to demand midterm bargaining and disagreed with the majority that the union's demand created a midterm obligation. As Member Umscheid further noted, the majority's ruling required analysis of several issues that the parties had not briefed.

KEY TAKEAWAY: Union can demand to bargain new concerns arising during the contract term.

INTERFERENCE/DISCRIMINATION

***United Academics of Or. State Univ. v. Or. State Univ.*, UP-021-18 (May 4, 2020), appeal pending**

ERB held that the university violated ORS 243.670 when publishing Frequently Asked Questions (FAQs) during an organizing drive for a faculty unit. This was only the second decision applying ORS 243.670, which passed in 2013 and barred public employers from attempting to influence employees' decisions whether or not to join unions.

The university had collected and answered questions, submitted both informally and anonymously in written form through a web portal. The university then published the FAQs on a webpage accessible only to university faculty and staff, in an accordion fashion. This required employees to affirmatively seek out the portal to the FAQ webpage, enter through the portal, and click on individual questions to see the answers.

The university utilized the accordion model so that clicking on a question would be akin to the employee's virtually asking the question. But ERB did not address this approach.

ERB then flyspecked the university's posted questions (in some instances going beyond union arguments) and faulted the university for, among other things:

- Implying that all questions were exclusively submitted through the portal and specifically asked by an employee (notably, the initial set of questions to which the union did not object were gleaned from questions generally asked of administrators).
- Editing questions by not publishing them verbatim and thus changing their tone.
- Providing information about how to withdraw an authorization card in response to a specific question.
- Posting three questions that were prompted by a newspaper article.
- Soliciting questions from employees.
- Concluding that questions and answers were not neutral.
- Providing answers that were not strictly factual but also communicated an opinion.
- Declining to apply the statutory provision that permitted an employer to give an opinion when asked.

Then, applying a totality-of-conduct analysis, ERB concluded that the university had violated the neutrality obligation of ORS 243.670.

One positive outcome, however, is that ERB's decision clearly established that the attempt-to-influence test requires volitional conduct by the employer to influence membership decisions.

KEY TAKEAWAY: ERB will read the neutrality obligation of ORS 243.670 very broadly.

***Baldwin v. Lane Cmty. Coll. & Lane Cmty. Coll. Emps. Fed'n* (LCCEF), UP-008-19 (Aug. 28, 2020)**

ERB rejected Baldwin's argument that the college could not investigate complaints against him arising out of e mails sent to bargaining unit members on the union listserv. ERB concluded that the college had the right to investigate the alleged misconduct, notwithstanding that it occurred in the context of union e mails. ERB noted that it had recognized that an employer could investigate other misconduct, such as picket line violence. Such conduct is not protected, and the college's decision to investigate the allegations did not restrain, coerce, or interfere with the bargaining unit.

However, the college violated the "in the exercise" prong of ORS 243.672(1)(a) and (1)(b) by effectively directing Baldwin to cease sending challenging e mails to bargaining unit members during the pendency of the investigation. That direction, ERB found, was overly broad and vague and would have the probable effect of silencing Baldwin (and did indeed silence him).

ERB also found that the union did not interfere with Baldwin's exercise of PECBA rights and violate ORS 243.672(2)(a) by filing a complaint against Baldwin for his e mails.

KEY TAKEAWAY: During investigations, employers should carefully consider admonishments restricting communications.

***Schallerer v. City of Portland*, UP-021-19 (Aug. 28, 2020), adopting ALJ order**

Schallerer alleged that the City violated ORS 243.672(1)(a) by scoring him lower when applying for a promotion because of his advocacy for himself and others. The ALJ concluded that (1) Schallerer was engaged in protected activity when he pursued a pay differential for high work and created and distributed a related Excel template, and (2) he did not establish that the City was motivated by that activity.

ERB found that Schallerer's work was protected, although pursued individually through a non-contract review process because, among other factors, the union's support of and involvement in Schallerer's efforts, Schallerer was pursuing a bargained-for right, and his peers understood that he was taking a lead on this particular dispute.

KEY TAKEAWAY: Individual acts sometimes constitute the exercise of PECBA-protected rights.

***Springfield Police Ass'n v. City of Springfield-Springfield Police Dep't*, UP-001-19 (Dec. 12, 2019) and (Feb. 24, 2020) (order granting full representation costs)**

ERB adopted, with no precedential value, the ALJ's recommended order finding that police lieutenants had violated ORS 243.672(1)(a), but not (1)(c), by confronting a police officer and by making accusations and threats involving protected activity. Following an arbitration hearing, the police association accused a police lieutenant of offering perjured testimony at the hearing. While on paid administrative leave, the accused lieutenant was published in a newspaper article as threatening retaliation against the association officers. Another lieutenant had two angry confrontations with an association member. The city and police department made no effort to disavow the statement of the lieutenants. The ALJ found the lieutenants' actions attributable to the city under AFSCME, Council 75, Local 2043 v. City of Lebanon, UP-14-11, at 7-8, 24 PECBR 996, 1002-03 (2012), rev'd and remanded on other grounds, 360 Or. 809, 388 P.3d 1028 (2017).

With little analysis, the ALJ also found the actions flagrant and imposed a civil penalty of $1,000. In awarding fees, ERB granted full representation costs because of the civil penalty award.

KEY TAKEAWAY: A civil penalty will justify an award of actual attorney fees.

***Or. AFSCME Council 75, Local 3997 v. Deschutes Cty. Pub. Libr. Dist.*, UP-005-18 (Jan. 31, 2020)**

ERB dismissed the complaint, concluding that the employer had just cause to terminate the complainant and did not violate ORS 243.672(1)(g) when she refused to return to work at a different library branch after an injury.

The union argued that the district's decision to transfer the employee was improper, so she could not be terminated for refusing to report to her new assignment at the Bend library. The employee returned to work from an off-duty injury with severe lifting restrictions that the employer determined could not be accommodated in the Sisters location where she had been formerly assigned, due to the much smaller staff there. The union and the dissent disagreed with the employer's assessment that the employee's work restrictions prevented her from doing her job in Sisters and that an adequate interactive process had been held.

Interestingly, the majority noted that Member Sung in her dissent asserted several issues not pursued by the union.

REVIEW OF ARBITRATION AWARDS

***Multnomah Cty. Chapter of the FOPPO v. Multnomah Cty.*, UP-012-19 (Aug. 6, 2020)**

The union challenged the county's refusal to reinstate a terminated county probation officer following an arbitration award overturning the termination.

The arbitrator found that the employee had been untruthful during an investigation when denying that he had engaged in a nonconsensual sex act off duty and held that it warranted a penalty. But the arbitrator concluded that termination as the penalty was unreasonable.

ERB rejected the county's position that reinstatement was contrary to public policy under ORS 243.706(1). ERB found no statute or judicial decision that makes reinstatement under such circumstances contrary to public policy. ERB rejected the County's argument that the public policy against sex harassment under Title VII and state discrimination laws were relevant because the employee was not terminated for harassment or discrimination.

KEY TAKEAWAY: Under the public policy exception, ERB looks for a public policy (1) that bars reinstatement, (2) for the precise misconduct on which the employee is terminated.