LABOR UPDATES

NOTABLE OREGON ERB CASES & REGULATIONS

OREGON ERB CASE SUMMARIES

RATIFICATION OBLIGATIONS

***Clackamas County Employees' Association (CCEA) v. Clackamas County*, UP-025-22 (October 5, 2022)**

ERB ruled against the County on a complaint heard on an expedited basis where the County Board refused to consider a two-year contract that had been agreed upon by the bargaining teams in mediation. ERB ordered the County to present the two-year contract agreed to by the bargaining teams for a ratification vote with a statement that bargaining team strongly urges ratification. ERB also directed that the County Board vest its bargaining team with requisite authority to conduct meaningful bargaining.

Specifically, ERB concluded that:

1. The County violated ORS 243.672(1)(e), failure to bargain in good faith, when its bargaining team, at the direction of the Board of Commissioners, failed to seek and affirmatively recommend ratification of the tentative agreements.
2. The County violated ORS 243.672(1)(g) for breach of a written agreement, when its bargaining team, at the direction of the Board of Commissioners, violated the ground rules agreements by failing to present and recommend approval of the tentative agreement for ratification by the Board of Commissioners.
3. The County violated ORS 243.672(1)(e) and(g), the County Board removed and restricted the authority of its bargaining team to engage in meaningful bargaining.
4. The County committed "egregious violations" and ordered the payment of a civil penalty of $1,000. ERB reasoned that the County's actions tended to undermine the very nature of the collective bargaining process.

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KEY TAKEAWAY

ERB continue its aggressive enforcement of commitments made in ground rules and by bargaining teams to recommend ratification of comprehensive tentative agreements.

STRIKES

***City of Portland v. Laborers' International Union of North America, Local 483 (LIUNA),* DR-001-23 (February 2, 2023) Order Dismissing Petition to Declare Strike Unlawful**

ERB rejected the City's challenge to a strike on grounds that the Union's ten-day strike notice was untimely and inadequate. ERB rejected both challenges and dismissed the petition.

The timeliness challenge focused on whether adequate notice was received by the City on January 23, 2023, and whether the Union could strike ten days later on February 2, 2023. The Union sent notice by certified mail, first class mail, and email.

ERB concluded that the City received notice compliant with the statute on Monday, January 23. ERB rejected the City's assertion that sending a certified letter on Friday, expecting a Monday delivery, was not reasonable, noting that the City offered nothing to support that bald assertion.

ERB next concluded that the statute permitted striking on the tenth day after the notice which was February 2, and which is what the Union did (strike on the tenth day). ERB held that the statute is not asking for ten days after notice without a strike, before striking on the 11th day.

As to whether the content of the notice was adequate, ERB found it sufficient for the Union to simply list the subjects in dispute; that is, ERB rejected the City's argument that the notice was not adequate to give notice to the employer, board or public to know how to resolve the dispute." Such detail was not required by statute or rule and, besides, ERB quipped if the City really cared and was concerned it would have promptly contacted the Union to flesh out its concerns—instead of waiting nine days to February 9 with the filing of the petition.

KEY TAKEAWAY

Strike notices will be generously interpreted by ERB when listing subjects of dispute and when finding whether they are timely.

UNION DISRUPTION OF INVESTIGATIONS

***City of Cascade Locks v. IBEW Local 125*, UP-022-22 (November 1, 2022) Dismissal Order**

ERB dismissed the City's claim without a hearing that the Union breached the contract when its representative disrupted an investigatory meeting with a union-represented employee under ORS 243.672(2)(d), alleging a Union breached the term of a CBA.

On the merits, ERB ruled that no provision of the parties' CBA mentions or describes the scope of advocacy or participation by a Union representative in an investigatory meeting. There was no limitation on the right of a Union representative to ask questions in an investigatory meeting, to instruct an employee not to answer a question, or to threaten to end the interview entirely if the questioner persisted with a certain line of questioning.

Alternatively, ERB ruled that the City was required to exhaust contract remedies before filing a breach of contract complaint under (2)(d). The parties' CBA expressly provided

the City could file a grievance and had a dispute mechanism that addressed the process for handling of City-initiated grievances. Consistent with established ERB case law on this exhaustion, ERB dismissed the case.

KEY TAKEAWAY

ERB is inclined not to find restrictions on the exercise of Union or employee rights unless expressly stated in a CBA. That said, if Union disruption in an investigation process is an ongoing problem, nothing stops an employer from negotiating such limitations. Traditionally, limits on union participation are for the employer to manage and enforce subject to after-the-fact union challenges.

UNION DUES DEDUCTION AGREEMENTS

***Bay Area Hospital (BAH) v. United Food & Commercial Workers, Local 555*, UP-003-21 (November 14, 2022)**

The employer contended that the Union's dues deduction and membership agreement breached the parties' CBA and was thus an unfair labor practice under ORS 243.672(2)(d). The parties' CBA, negotiated after the *Janus* decision, called for employees to be able revoke dues deduction agreements after six months. But the Union's membership agreement permitted revocation only after 12 months. ERB dismissed the complaint, concluding:

- The breach of agreement claim was untimely under the PECBA's 180-day limitation period. The employer had a stack of 12-month membership agreements in its office for years. While just "discovered" by the employer's new human resources director and outside counsel, ERB declined to apply the discovery rule or the continuing violation theory (calling it a novel contention).
- ERB then rejected the merits of the breach of contract claim on the grounds that the claim was speculative and premature, even assuming that the claim was timely. ERB emphasized that the employer did not show that any employee had sought to revoke the authorization after six months, but before the 12-month period had run. The employer never established that any employee had been harmed or denied the right to withdraw from union membership or end dues deduction after six months.
- The employer lacked standing to bring an interference claim against the Union under ORS 243.672(2)(a).
- ERB issued a civil penalty. ERB rejected the employer's initial efforts (later withdrawn) to rely on *Janus* as rendering the Union's dues deduction and membership agreement as unlawful, which it characterized as misleading, unwarranted, and frivolous. Janus involved the rights of non-union employees only, holding that employees could decline union membership and would be obligated to pay fair share fees. *Janus* did not address dues deductions and membership terms for union members, which was what this case was about.

KEY TAKEAWAYS

- Recognize the limited scope of the *Janus* decision. Janus does not regulate dues deduction and membership agreement.

- Do not try to correct erroneous or unfounded claims by repleading. Dismiss and replead a new case. While you may still be stuck with a civil penalty, you won't be forced to carry the full burden of attorney fees.
- ERB may be amenable to arguments that continuing violations theory should not extend the 180-day statutory limitation period.
- Is there a double standard on applying the discovery rule?

NEW RULE NARROWING WHEN 90-DAY EXPEDITED BARGAINING GOVERNS

***Salem Keizer Sch. Dist. v. Salem-Keizer Sch. Dist.*, UP-015-23 (June 22, 2023)**

This decision is ERB's most recent ruling, narrowing when the 90-day expedited bargaining process of ORS 243.698 does not apply. In this case, ERB ruled that the anticipated implementation of the proposed change must be during the term of the then-existing collective bargaining agreement for ORS 243.698 to govern. If not, the interim bargaining gets rolled into the successor bargaining subject to 150-day bargaining and the full panoply of remedies.

In this case, the District proposed to change the method for calculating full time equivalency (FTE), which was a practice not set by the parties' collective bargaining agreement. The District proposed that the new calculation would start July 1, 2023, which happened to be the day after the existing agreement expired. But the parties had yet to start successor bargaining.

Under then existing ERB case law, the District properly thought that the expedited bargaining would run independent of the successor bargaining. ERB's controlling authority was that expedited bargaining is subsumed in successor bargaining (and subject to the 150-day bargaining calendar and dispute resolution process) only if initiated after the successor bargaining has commenced. But ERB viewed this wrinkle of the proposed implementation date as one not covered by its prior rulings.

KEY TAKEAWAY

First, when giving notice of an anticipated change consistent with ORS 243.698, employers should propose to implement any bargainable changes within the term of the existing collective bargaining agreement. Second, the notice of anticipated change should be given to the union more than 90 days before contract expiration.

RESPONDING TO INFORMATION REQUESTS

***Clackamas County Emp. Assn v. Clackamas County*, UP-018-22 (June 29, 2023)**

County held to have violated duty to provide requested information related to underlying data used by County in pay equity analysis. ERB held that the information was relevant to bargaining over wages and the union's expressly stated intent to make a bargaining proposal on wages and pay equity. ERB concluded that the county objection to the relevancy and confidentiality of the information request were unfounded once the union made it clear it was not seeking the actual analysis undertaken by the outside

consultant. While ERB recognized that the County had offered to work with the union to accommodate the union's need for the information, but such accommodation must be justified based on an actual confidentiality interest or privilege that applied. In this case, the county established no such interest.

The county also failed to bargain over extracontractual payments made to a departing employee which it contended were mandated by the final paycheck law, ORS 652.150, and the Pay Equity Act. But the County had made no attempt to inform the union of its perspective or rationale or to bargain as much as possible before the payments came due. Thus, ERB concluded that the county had violated its duty to bargain in good faith.

KEY TAKEAWAY

If objecting to an information request, and specifically asserting confidentiality, the objections need to have a legitimate basis. And the employer should recognize that the union may modify the request, in which case the employer may need to respond by dropping the objection.

EMPLOYER INTERFERENCE WITH UNION MEMBERSHIP

***Bay Area Hospital (BAH) v. United Food & Commercial Workers, Local 555 (UFCW)*, UP-045-20, UP-004-21 (July 10, 2023)**

Direct dealing

ERB held that the Hospital engaged in directly dealing violating ORS 243.672(1)(a) and (b) by conveying a new proposal directly to employees by letters dated September 4, and October 18, 2020. Employer proposed to use the money budgeted for certification pay to pay for a contribution surcharge imposed by a multi-employer trust fund under a rehabilitation plan in its.

The Hospital sent the two letters after the union refused to bargain over changes to wages and benefits mid-contract to address the surcharge. ERB concluded the letters informing employees of the dispute was intended for employees to put pressure on their union. ERB recognized that one proposal had already been submitted to the union. But in what may be a nuanced-reading of the employer proposal, ERB found that the proposed trade-off had not yet been submitted to the union.

ERB also said the letters could be read as blaming the union for the Trust's financial problems by refusing to bargain and calling the Trust the UFCW Pension Trust, without explaining that there were management representatives serving as Trustees. ERB concluded that the Hospital was wrongly portraying itself as protector of employees' interests and not the union. Without explanation, ERB concluded that this supported an inference of direct dealing.

Interference

ERB concluded that the Hospital cancelled a planned disbursement of certification pay to Union members in response to members' protected activities, violating ORS 243. 672(1)(a)?

ERB rejected the Hospital's position that there was never a final agreement for the certification pay because the parties were still negotiating over how such pay would be allocated, and so when it pulled the plan nothing had changed. ERB found that pulling the plan was acting on an earlier threat that the Hospital that it would pull the plan if there was not agreement on reducing wages and benefits.

Detering union support

ERB held that the Hospital violated the "neutrality" provision of ORS 243. 672(1)(i) and ORS 243. 670(2) by using public funds to issue communications that were designed to undermine employees' support for the Union and to give employees legal advice about how to get out of the Union.

First ERB concluded that the Hospital's September 4, and October 18, 2020, communications to its employees (discussed above) were calculated to undermine employees' support for the Union. Therefore, by using its resources to draft and distribute those letters, the Hospital used public funds to influence the decision of its employees regarding whether to support the Union.

ERB then addressed legal guidance about decertification obtained in response to specific questions from the Hospital's professional staff. ERB concluded that seeking legal advice and forwarding that advice to professional staff violated ORS 243.670(2) and did not fall within any exception of the neutrality law. Without elaborating ERB said, "we disagree that our determination regarding the Hospital's conduct would reasonably preclude public employers from responding to employees' questions in a manner that was not intended to facilitate their efforts to get out of a union." Op. at 25.

KEY TAKEAWAY

Communications about bargaining positions are allowed, but employers should carefully track what was proposed to the union. And ERB will *aggressively* infer anti-union motive or intent in communications with union members.

ERB may read interference or intimidation in what otherwise be a lawful and legitimate bargaining position as when the Hospital pulled it is certification plan to pay for the 401(k) surcharge. Employers need to be careful as to how they justify changes in bargaining proposals so they cannot be viewed as retaliatory and motivated by anti-union animus.

ERB is aggressively enforcing the neutrality provision of ORS 243.670 against employers. When dealing with staff inquiries about decertification be wary of offering even "ministerial support" as permitted in the private sector.