Oregon Employment Relations Board Update

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Leading Cases

From the Oregon Employment Relations Board

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1. ***Portland Fire Fighters Association, IAFF Local 43 v. City of Portland,*** Case No. UP-059-13, 26 PECBR 548 (2015), *appeal pending.*

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 RRV. 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 found 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 ORS 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.

2. ***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 Public Employee Collective Bargaining Act (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 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 contact. 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 *status quo* change, which is the historical method for analyzing these cases when a contract has expired, she asserts that the majority chose to bypass that analysis and determine that it could be analyzed as a "flat refusal" because the parties were in the process of negotiating a new contract.

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

[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.

successor negotiations, such as ground rules and tentative agreements. According to Chair Logan, it was not possible to for the parties to add this issue to their successor negotiations at their current place in the process.

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."

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.

3. ***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 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 bargaining unit of 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 ever seeing 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 zoolidarity stickers and in applying its overbroad appearance and uniform policies.

4. ***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 found 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, that 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.

5. ***American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland,*** Case No. UP-046-08, *remand*, 26 PECBR 785, *recons of remand*, 26 PECBR 796 (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 rem'd*, 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 remanded the case "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.

The Board also disavowed both of its prior, inconsistent holdings regarding the mandatory/permissive nature of the subject of charging for information request responses, and "reserved for another day whether, in the context of bargaining, a proposal on information requests (including costs or charges) is mandatory or permissive for bargaining."

Member Weyand recused himself and did not participate in the deliberation and decision of the case on remand.

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 difficulty in producing the information; (3) the kind of information requested; and (4) the parties' history regarding information requests. *Id.* at 5031-32.

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 difficulty 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." *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 costs 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 of 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).

6. *American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, Case No. UP-014-11, 24 PECBR 996 (2012), *rev'd and rem'd*, 265 Or App 288, 336 P3d 519 (2014), *rev'd and rem'd*, 360 Or 809, 388 P3d 1028 (2017).

The Board Decision

In *American Federation of State, County and Municipal Employees, Council 75, Local 2043 v. City of Lebanon*, Case No. UP-14-11, 24 PECBR 996 (2012), *rev'd and rem'd*, 265 Or App 288, 336 P3d 519 (2014), *rev'd and rem'd*, 360 Or 809, 388 P3d 1028 (2017) , the Board held that the City of Lebanon (City) violated ORS 243.672(1)(a) and (b) when a City Councilor advised City employees in a letter to a newspaper "to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors." In doing so, the Board reasoned that a "public employer under PECBA is liable for the actions of its officials" and that, because Campbell "spoke as the City's representative, liability for her remarks [was] ascribed to the City." The Board further observed that Campbell was "a member of a six-person Council in which the City Charter vests all powers. The Council *is* the public employer[,] and Campbell shares that status because she is a member of the Council."

The Court of Appeals Decision

The City appealed the Board's order, and the Court of Appeals reversed. In doing so, the court concluded that Campbell was not the city's "designated representative" within the meaning of PECBA, because the record lacked any evidence that the city had "specifically designated" Campbell to act as its representative. *City of Lebanon*, 265 Or App at 295-96. The court further concluded that, even assuming "agency principles" applied in this context, Campbell could not be a "public employer" under PECBA because she was not acting as an agent when she submitted her letter to the local newspaper.

The Supreme Court Decision

The Supreme Court reversed the decision of the Court of Appeals and remanded the matter to the Board for further proceedings. In doing so, the Supreme Court adopted the "reasonable belief" standard from NLRA case law for determining which individuals constitute a "public employer representative" under PECBA, such that a public employer may be held responsible for the unfair labor practices committed by such individuals. Specifically, when employees of a public employer would reasonably believe that a given individual acted on behalf of the public employer in committing an unfair labor practice, that individual is a "public employer representative" under ORS 243.650(21), and the public employer may be held liable for the conduct of that individual under ORS 243.672(1).

The court added that in applying the "reasonable belief" standard, adjudicators should consider "all factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible." (Quoting *International Association of Machinists, Tool and Die Makers Lodge No. 35 v. Labor Board*, 311 U.S. 72, 80 (1940).). The court further explained:

> "One key factor will be whether the individual acting on behalf of the public entity occupied a high-ranking position within the public entity. As the federal courts have recognized, the potential for interference with employees' labor rights is greatest at the highest levels of authority. Moreover, the greater an individual's general policy-making authority, the more likely that employees would reasonably believe that that individual acted on behalf of the entity. Other relevant factors include whether the individual acted in his or her official capacity when he or she committed the unfair labor practice, whether the individual had the power to hire and fire employees of the public entity, and whether the public entity disavowed the actions of the individual. One or more of those factors may be sufficient to authorize the inference that the individual acted on behalf of the public entity and that the entity is therefore liable for the individual's actions."

Applying that "reasonable belief" standard to this case, the court noted that this Board did not address whether Campbell was a "designated representative" of the City, such that the City could be liable for her conduct. The court directed the Board, on remand, to "determine whether city employees would reasonably believe that Campbell was acting on behalf of the city when she wrote her letter urging city employees to decertify the union." In making that determination, the court instructed, this Board "should consider all relevant factors, including, but not limited to,

whether Campbell occupied a high-ranking position within the city, whether Campbell had general policy-making authority for the city, whether Campbell had authority to hire and fire city employees, whether Campbell acted within her official capacity as a city councilor when she made her statements, and whether the city disavowed Campbell's statements."[2]

Justice Landau, joined by Chief Justice Balmer and Justice Brewer, dissented. According to the dissent, PECBA provides that it is an unfair labor practice for "a public employer or its designated representative" to engage in any of a prohibited list of actions. ORS 243.672(1). Thus, the dissent added, the law provides that an unfair labor practice may be committed on the one hand by a government entity—"a public employer"—and on the other hand by an individual—"its designated representative." The question in this case is whether Campbell is a government entity or a person designated to represent a government entity.

The dissent concluded that Campbell was neither:

> "Certainly, Campbell is not a government entity. She is a single member of the seven-member governing body of the City of Lebanon. But in no reasonable sense of the term can it be said that she is the City of Lebanon, any more than it can be said that a single one of the 90 members of the Oregon Legislative Assembly is the State of Oregon. Moreover, no party claims that she is the city's 'designated representative.' That should be the end of the matter."

7. *Service Employees International Union, Local 503, Oregon Public Employees Union v. Lane Council of Governments,* Case No. UP-048-14, 26 PECBR 853 (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 PECBA. The Board explained that, even under the NLRB framework, those assurances would not be required to be given in this case because the employer did not question the employees about matters involving their protected rights. In this case, there was no other basis for a violation; therefore, 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

[2]After the matter was remanded to the Board, the parties settled their dispute without further proceedings.

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 – The *Johnnie's Poultry* doctrine adopted by the NLRB is premised on an understanding that employer interrogation about protected rights is inherently coercive. Despite the inherent danger of coercion, there are two circumstances under which a private employer nonetheless has the "privilege" to question employees about protected activity, one of which is questioning that is necessary to prepare a defense to a ULP charge. The requirements of the *Johnnie's Poultry* rule safeguard against the inherent coercion of such questioning. Specifically, 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. The NLRB requires those actions, however, 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 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 questioning 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.

8. ***Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon***, Case No. UP-009-15, 26 PECBR 724 (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).

9. ***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.

10. ***Clackamas County Employees' Association v. Clackamas County and Clackamas County Housing Authority,*** Case No. UP-032-15, 26 PECBR 798 (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 initiative 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).

11. ***Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon***, Case No. UP-022-16, 27 PECBR 112 (2017).

Summary:

The Union filed an unfair labor practice complaint alleging that the District violated ORS 243.672(1)(g) by refusing to process or arbitrate two grievances. Regarding the "M.N. Grievance," the District contended that a non-bargaining unit employee lacked standing to file a grievance claiming that the District violated a seniority provision by terminating him instead of returning him to his prior bargaining unit position, and therefore the grievance was not arbitrable. In the "Shuttle Grievance," the Union contended that the District must use bargaining unit employees to operate certain community shuttles, and the District contended that the shuttles were outside the scope of arbitrable labor relations because they were funded only pursuant to certain federal and state grant programs. Applying the "positive assurance test," the Board determined that it must order arbitration of both grievances, and that the District violated (1)(g) by declining to arbitrate them.

Shuttle Grievance

Facts – The parties' collective bargaining agreement (CBA) contained a provision that required the District to use bargaining unit employees to operate "lines of the District." Pursuant to certain federal and state transportation funding grant programs, the District had been receiving grant funds and distributing them to third-parties through a competitive grant-funding process. Among the projects funded through this grant process were three community shuttles that were operated by a third-party non-profit organization, and designed to meet commuters' need for transportation services in areas or at times not served by the District's conventional, fixed-route bus and train service (e.g., for reverse commuters). The Union filed a grievance claiming that the District was violating the CBA's "lines of the District" provision by failing to use bargaining unit members to operate those community shuttles. The District declined to process or arbitrate the Shuttle Grievance, noting that the District distributed only grant funds to the shuttles (not District general funds), and that the shuttles did not use District-owned equipment. The District essentially argued that, because it had only a grantor-grantee relationship to these third-party shuttles, the shuttles could not be lines of the District and were outside the scope of labor relations.

The Union contended that the CBA's grievance and arbitration clause was broad in scope and covered grievances to enforce the "lines of the District" provision (noting that the parties had arbitrated such grievances in the past). The express terms of the arbitration clause covered "all grievances related to any alleged violation of any provision" of the CBA. The CBA expressly excluded three types of grievances from arbitration, but the District did not contend that any of those express exclusions applied to the lines of the district provision or the Shuttle Grievance. The Union further contended that the District's arguments went to the merits of the grievance, not its arbitrability.

Conclusion – The Board reviewed the reasons why PECBA policy strongly favors arbitration and discussed the legal standard that the Board applies to determine whether to order arbitration of a particular grievance, which is referred to as the "positive assurance test." The Board explained, "The positive assurance test creates a 'presumption of arbitrability' that can be

overcome only by an express exclusion of the grievance from arbitration or by other most forceful evidence of a purpose to exclude the claim from arbitration." (Citing *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-59-86 at 10, 9 PECBR 9367, 9376 (1987).) The Board also reiterated that in applying this test, the Board interprets only the scope of the arbitration clause, and it does not consider the merits of the underlying grievance. If the arbitration clause is "susceptible to an interpretation that covers the underlying grievance[,] . . . or if there is any ambiguity," then the Board "must order arbitration."

Applying this test, the Board concluded that the arbitration clause unambiguously covered grievances concerning the CBA's "lines of the District" provision. The arbitration clause plainly covered any and all disputes arising under the CBA, and the only express exclusions were not applicable. The Board also engaged in a limited review of the District's evidence regarding the nature of the shuttle funding (while declining to review proffered evidence relevant only to the grievance merits, i.e., interpretation of the lines of the District provision) to determine whether it was the "most forceful evidence of a purpose to exclude" the Union's grievance from arbitration. In concluding that the District's evidence did not meet that standard, the Board noted that the shuttles were "not so completely different from the District's own operations and so unrelated to the work performed by bargaining unit members that [the Board could] conclusively find, on this record, that they [we]re outside the realm of labor relations contemplated by PECBA." Additionally, although the District asserted that it was "merely a conduit" for federal grant funds, the Board found that the District "did not establish through 'the most forceful evidence' that its role [wa]s, in fact, so limited." As a result, the District's evidence was insufficient to overcome the presumption of arbitrability. Finally, the Board addressed the District's argument that the grant-funding programs at issue precluded an arbitrator from awarding a viable remedy, explaining that such a contention, even if true, was not a basis for refusing to arbitrate, citing *Service Employees International Union, Local 503, Oregon Public Employees Union v. City of Hermisto*n, Case No. UP-57-01 at 10, 19 PECBR 860, 869 (2002).

M.N. Grievance

Facts – The "M.N. Grievance" related to the termination of a non-bargaining unit employee. The employee had been a member of the bargaining unit, and at the time that he was promoted to a non-bargaining unit position, the CBA provided that promoted employees retained their seniority, without any time limit. However, between the time of M.N.'s promotion and termination, the parties amended the seniority provision of the CBA to impose a five-year limit on the seniority retention. At the time that the District terminated M.N. (for performance reasons that did not rise to the level of misconduct), he had been working in a non-bargaining unit position for over five years. When M.N. asked to be returned to a bargaining unit position, the District refused, and M.N. filed a grievance. After the initial filing, the Union pursued the grievance on M.N.'s behalf. The District refused to process the grievance, contending that M.N. lacked standing to file a grievance under the CBA's grievance and arbitration provisions, both because M.N. had been terminated at the time he filed the grievance, and because he was no longer a bargaining unit employee at the time he was terminated.

Conclusion – Again applying the positive assurance test, the Board concluded that the M.N. grievance must be arbitrated. The scope of the arbitration clause was clearly broad enough to cover the subject of the M.N. grievance (alleged violation of the seniority provision), and no express

exemption applied. Regarding the standing issue, the Board noted that the arbitration clause was susceptible to an interpretation that permitted any employee (not just currently employed, bargaining unit employees) to file grievances, and that also permitted the Union to cure any standing issue by pursuing the grievance itself. In so holding, the Board clarified that prior cases that declined to order arbitration after applying the "arguably arbitrable" standard instead of the positive assurance test were no longer good law.

12. ***Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)***, Case No. UP-024-17, __ PECBR __ (2017).

Summary:

The Association's unfair labor practice complaint alleged that the District violated its duty to bargain in good faith under ORS 243.672(1)(e) by pursuing a prohibited subject of bargaining when it continued to propose, over PAT's objection, a paid-sick-leave proposal for the substitute-teacher bargaining unit that conflicted with the paid-sick-leave mandates of ORS 332.507. The District maintained that ORS 332.507 did not apply to substitute teachers, and therefore its proposal (and its conduct in pursuing the proposal) was lawful. The Board concluded that ORS 332.507 did not, as the District contended, exclude substitute teachers from its coverage, and that the District's proposal involved a prohibited subject of bargaining because it was directly contrary to that statute.

Additionally, the District asserted in its post-hearing brief that it was withdrawing the at-issue proposal, and that that action required dismissal of the case as moot. The Board clarified that the judicial doctrine of mootness applies only to courts, not administrative agencies. The Board then determined that dismissal, under the circumstances presented, was not "necessary and proper" under PECBA.

Mootness:

Facts – The Board granted PAT's request for expedited processing of the case, and the full Board conducted the evidentiary hearing. The Board authorized the parties to submit post-hearing briefs. The District, in its post-hearing brief, asserted that it was withdrawing its sick-leave proposal and argued that the case was therefore moot. The Board permitted PAT to respond to the mootness issue, and PAT contended that the matter was not moot.

Conclusion – The Board first noted that "mootness" is a term of art that applies only to the courts, and that the standards for when a *court* might dismiss a case as moot did not apply to administrative agencies, citing *Wallace v. State ex rel PERS,* 249 Or App 214, 220-21, 275 P3d 997, *rev den*, 352 Or 342 (2012), and *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 556-57, 180 P3d 87 (2008).

The Board then considered whether PECBA authorizes the Board to dismiss matters as "moot." PECBA does not expressly reference "mootness," although it authorizes the Board to dismiss a complaint if no issue of fact or law warrants a hearing. ORS 243.676(1)(b). Likewise, ORS 243.766(3) directs the Board to "[c]onduct proceedings on complaints of unfair labor practices by employers, employees and labor organizations and take such actions with respect

thereto as it deems necessary and proper." Although the Board recognized the possibility "that a concept of 'mootness' fits within these statutory directives, and that [the Board is] authorized to dismiss a complaint on grounds akin to mootness," the Board declined to "decide all the contours that would shape that statutory authority" in this case. The Board decided only that it was *not* necessary and proper to dismiss PAT's complaint as requested by the District, for two reasons.

First, under ORS 243.676(2), if the Board finds that a respondent "has engaged in or is engaging in any unfair labor practice charged in the complaint," the Board is required to state its findings of fact, issue a cease and desist order, and take affirmative action to effectuate the purposes of PECBA. Because the statutory language ("has engaged in") contemplates that an unfair labor practice has occurred and potentially ceased, "the mere fact" that the District had withdrawn the disputed proposal did not automatically warrant dismissal. Second, the Board noted that the timing and manner of the District's withdrawal of the proposal did not establish that it would be necessary and proper to dismiss. Specifically, the District had declined to withdraw its proposal at the table, despite PAT's protests for over eight months. Further, the District withdrew its proposal only in its post-hearing brief after the evidentiary record closed, "rather than at the bargaining table where the scope of the withdrawal and the District's position regarding the applicability of ORS 332.507 to substitute teachers could more readily and meaningfully be assessed."

Prohibited subject of bargaining:

Facts – In 2016, after the Oregon legislature enacted the Oregon Sick Leave Law (commonly referred to as "SB 454"), the parties engaged in interim bargaining over implementation of that statute to a bargaining unit comprised of substitute teachers, and they agreed to a memorandum of understanding. In the course of preparing for the subsequent successor contract bargaining, PAT's representative became aware of a much older statute, ORS 332.507, that requires public school districts to provide certain paid sick leave to "each school employee," and further provides that "school employee" includes "all employees of a public school district."

At the start of bargaining, PAT explained to the District that it believed that ORS 332.507 set the floor for substitute teachers' sick leave, and that any sick leave proposal would have to comply with that statute's mandates. When the parties first exchanged written contract proposals, the District submitted a paid-sick-leave proposal that it designed to comply with the Oregon Sick Leave Law, but not ORS 332.507. When PAT objected, the District explained that it would need to consult with its counsel to determine whether it agreed that ORS 332.507 applies to substitute teachers. (The parties did not disagree regarding the application of ORS 332.507 to other teachers in the District, who are represented by PAT in a separate bargaining unit.) The parties agreed that PAT's counsel would provide the District with PAT's legal opinion on the issue, and PAT's counsel did so through the District's counsel.

In the following months, PAT continued to follow up with the District regarding application of ORS 332.507 to the substitute teachers, but the District indicated only that it was still assessing its legal position. After approximately eight months, the District submitted another sick-leave proposal that was essentially the same as its original proposal. When PAT asked the District for an explanation, the District stated only that its position was that ORS 332.507 did not apply to substitutes, and it declined to provide any further explanation.

Conclusion – To determine whether the District's proposal was "contrary to" ORS 332.507 and therefore a prohibited subject of bargaining, the Board interpreted the statute applying the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as subsequently modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Specifically, the Board reviewed the text and context of the statute and found that, "by its terms, ORS 332.507 applies to 'all employees of a public school district,'" which includes substitute teachers. The District did not dispute that substitute teachers are District employees or that the District is a public school district, but nevertheless argued that the "substitute teachers are not the type of employees included in the statute." After considering the District's arguments, the Board found that nothing in the statute's context or legislative history was sufficient to overcome the statutory text's express inclusion of "all employees," which is the best indicia of legislative intent. Because the District admitted that its proposal would be insufficient to comply with ORS 332.507 if the statute were applicable to substitute teachers, the Board concluded that the proposal was contrary to the statute and therefore a prohibited subject of bargaining.

The District also argued that its conduct was lawful because it is not required to bargain a contractual term that incorporates ORS 332.507 into the parties' CBA. The Board agreed that while "sick leave is a mandatory subject of bargaining that must be bargained upon request, PECBA does not require a party to enshrine other statutory obligations as specific contract articles in a collective bargaining agreement." The Board explained, however, that "should a party choose to pursue a proposal (or counterproposal) concerning certain terms and conditions of employment, that proposal cannot conflict with a statute." Thus, the issue was "not whether the District must agree to incorporate statutory requirements into a collective bargaining agreement, but whether the District may insist on a sick-leave proposal that conflicts with a statute. It may not."

Finally, the Board addressed the District's argument that ORS 332.507 lacked clarity regarding how to apply its mandates to substitute teachers, and that bargaining would be more complex as a result. The Board explained that any such difficulties did not allow the District to pursue a proposal that conflicts with ORS 332.507. Moreover, the Board noted that "the parties have already demonstrated their ability to satisfactorily bargain mutually agreeable terms that apply ORS 332.507 to other District employees who are not traditional, full-time employees," and that "pushing complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions in circumstances that initially looked daunting or even hopeless."

Summary of Significant Changes to the Employment Relations Board's Administrative Rules*

Effective Date for Amended Rules: February 1, 2017

*This chart does not contain a complete summary of the changes—it only summarizes the most significant changes made by the Board. Parties should review the revised rules carefully before proceeding with any matters before the Board. The updated rules are available on the Board's website: http://www.oregon.gov/ERB/Pages/index.aspx.

New Rule Number	Subject	Summary of Key Differences
Division 1—Procedural Rules		
115-001-0000	List of Parties to Receive Notice of Rulemaking	The modified rule streamlined and updated the system the Board uses for maintaining its list of parties that receive notification of potential rulemaking. Previously, the Board maintained a rule that included specific organizations. Under the new rule the Board would have the flexibility to add and remove parties from this list at their request without having to modify the rule. The new rule also contemplates the use of email in communicating with list members where appropriate.
115-001-0005	Application of the Attorney General's Model Rules of Procedure	Previously, the Board had adopted the provisions of the Attorney General's Model Rules of Procedure where the Board's rules were silent. The new rule modified this to state that the AG's Model Rules are only adopted where specifically identified in the rules.
Division 10—General/Policy and Definitions		
115-010-0010	Definitions of Certain Terms	The primary change was to create a central location for the definition of important terms which were previously located throughout the Board's rules in Divisions 10, 40, and 45. However, some definitions were added or modified, including the following two changes: • Added a definition of "business day" in 0010(6): excludes any holiday as defined by ORS 187.010 and ORS 189.020, and any day the Board is closed; and • Modified the definition of "showing of interest" in 0010(21) to expand the time in which a showing of interest can be used from 90 days to 180 days (consistent with the statutory timeline created by the legislature for the card check process). This new definition also notes that there are different requirements for a showing of interest to support a petition for an election in response to a card check petition, and refers to the alternate definition of "showing of interest" in OAR 115-025-0075 for that purpose.
115-010-0015 and 0030	Organization of the Board and Enforcement of Board Orders	Former OAR 115-010-0015 and 0030 were deleted as redundant as they largely restated statutory provisions.
115-010-0032	Public Records Requests	Modified the Board's public records procedure by designating Business Operations Administrator as the custodian of public records for the agency and cleaned up old language on the process for requesting public records.

115-010-0033	Filing of Documents	The new rule will now allow parties to file documents by email for the first time and to do so free of charge. The email address to be used will be developed by the Board and made publicly available soon. Documents may still be filed by fax, mail, or personal delivery. This new rule also incorporated the general provisions of former OAR 115-010-0115, which allowed documents to be filed by fax. Accordingly, the Board deleted the old rule. This rule also clarified that, unless stated otherwise in the rules, all documents filed with the Board must be served on other parties or their representative, and the party must provide the Board with proof of service.
115-010-0040	Time, Place and Notice of Hearings	This rule largely consolidated existing rules into one place, but also made the following changes: • Clarified that a hearing may be held more than 20 days after the notice of hearing is issued if the parties and the Board Agent agree; • Established what parties must include in a request to postpone a hearing, including a statement of the reasons for the hearing and whether other parties object to the postponement; and • Acknowledged that the promptness of the request is a factor the Board Agent will consider when determining whether to grant a request to postpone a hearing.
115-010-0055	Subpoenas	This rule was modified to clarify that parties represented by attorneys should issue their own subpoenas under the process set forth in ORS 183.440, rather than having the Board issue subpoenas on their behalf. The rule contains an exception for situations where a party can establish that it is necessary for the Board to issue subpoenas. The Board will issue subpoenas for parties not represented by an attorney, or may issue subpoenas on its own motion.
115-010-0077	Briefs	The Board struck outdated language that suggested that filing briefs was unusual. The rule also eliminated the (rarely ever followed) requirement that briefs be filed within 14 days of the conclusion of the hearing. Instead, the modified rule allows the Board Agent to set a brief filing date. Before an extension is granted, the party seeking the extension must confer with the any other parties on the request. Opposed extensions will only be granted for good cause. Additionally, the Board now only requires a party to file one copy of a brief (previously three were required).
115-010-0090(2)	Objections and Cross-Objections to a Recommended Order	Parties still have 14 days from the service of a recommended order to file objections. However, the rule was modified to allow a party that has not yet filed objections to file cross-objections within the 7 days after the service of another party's objections.
115-010-0090(4) and (5)	Board Treatment of Cases Where No Parties Object to an ALJ's Recommended Order	The Board, in a contested case, had previously decided that recommended orders by ALJs would become final orders in the event that no party filed objections. The Board treated these cases as non-precedential (except for between the specific parties to that case). This modified rule incorporates this practice into the Board's rules, but makes those orders precedential, unless the Board determines that all or part of the recommended order's conclusions should not be treated as precedential.
115-010-0095	Memoranda in Aid or Lieu of Oral Argument	Memoranda in aid of oral argument may not be longer than 25 pages without Board approval. Memoranda *in lieu of* oral argument may not be longer than 30 pages without Board approval.
115-010-0100	Petitions for Reconsideration or Rehearing	The Board clarified the process for requesting reconsideration or rehearing of Board orders, setting forth the time to file the petitions, detailing the necessary contents of each type of petition, and setting forth the general grounds for granting or denying such requests. The Board also incorporated its practice of generally granting requests for reconsideration (and oral argument) in cases where no recommended order was issued before the Board's final order.
115-010-0103	Amicus Curiae	This new rule specifically allows for the filing of amicus briefs, establishing timelines (21 days after objections are filed to a recommended order or within 14 days after the appellate judgment where a case is remanded to the Board by the courts) and setting forth the page limits for the briefs. In addition, the rule recognizes the Board's ability to request amicus briefs on its own motion.

Division 25—Public Employee Representation		
115-025-0000 through 0009	Petitions for Representation	These rules were modified for clarity and to clean up the language used in the old rules.
115-025-0010	Contents of Petitions	The Board deleted the detailed description of the contents necessary for the various types of representation petitions. Instead, parties will be required to use the forms provided by the Board, which will include all of the necessary information to process a petition. The modified rule also requires that, in cases where a showing of interest is required and authorization cards are submitted, the cards be submitted in alphabetical order.
115-025-0045	Notice and Conduct of Hearings and Post-Hearing Procedures	The Board deleted the more detailed provisions of the former rule, noting that the procedures in OAR 115-010-0040 through 0110 apply to representation cases unless the context requires otherwise.
115-025-0050	Appropriate Bargaining Unit	The Board deleted much of the content of the former rule as it merely restated statutory provisions. This change was not intended to be substantive.
115-025-0060(4)(b)	Elections Procedure-Type of Ballot	The rule was changed to reflect the fact that most elections are conducted by mail-ballot, rather than by elections at the workplace. Under the modified rule, all elections will be conducted by mail unless the mail-ballot election would not fulfill the purposes and policies of the PECBA (as set forth in ORS 243.656).
115-025-0065	Certification or Unit Clarification Without Election	The Board made a few changes to the rules on "card check" cases, including: • Changing the reference from "authorization cards" to "authorization documents"; • Requiring authorization cards to be used if the proposed bargaining unit involves more than 100 employees.
Division 30—Deauthorization of Fair Share Agreement		
115-030-0000	Deauthorization of Fair Share Agreement	Similar to the representation petition rules, this rule was modified to replace the specific contents required in a deauthorization petition with a reference to a Board-provided form.
Division 35—Unfair Labor Practices in Public Employment		
115-035-0000	Filing an Unfair Labor Practice Complaints	Similar to the representation and deauthorization petition rules, this rule was modified to replace the specific contents required in a ULP complaint with a reference to a Board-provided form. **The Board now only requires parties to file one copy of the complaint.** Previously an original and three copies was required.
115-035-0010(2)	Amendment of Complaint at Request of Complainant	This rule was modified to state that an amended complaint may be filed any time before the service of the complaint, but after service, a complaint may only be amended if good cause is shown.
115-035-0040 through 0050	Notice and Conduct of Hearings, Post-Hearing Procedures	The Board moved these provisions to OAR 115-010-0040 through 0110, unless the context requires otherwise. As a result, the majority of OAR 115-035-0040 was deleted, as was the entirety of OAR 115-035-0042, 0045 and 0050.
115-035-0055	Representation Costs	The Board revamped the process for a prevailing party in an unfair labor practice case to receive representation cost awards. Unless a civil penalty is awarded, the Board will award the prevailing party the following amounts: • $250 for a case dismissed without a hearing (and the Board concludes that the respondent has not engaged in an unfair labor practice); • $1,000 for a case presented solely on stipulated facts;

		• $3,000 for a case that involves one day of hearing (does not need to be a full day); • $5,000 for a case that involves more than one day of hearing (hearings do not need to last a full day to be included); or • $500 in cases where a non-prevailing party relied on their personal financial resources to litigate the matter (for example, DFR cases), *unless* the Board determines that a lesser award is appropriate. **In these situations, no petition for representation costs needs to be filed. The Board will issue an order awarding costs after the time to file an appeal runs or, if an appeal is filed, until after the Board receives the appellate judgment.** In cases where a civil penalty is awarded, the Board will issue an award of full costs in excess of $5,000 *only if* the prevailing party files a petition for costs. That petition must include a statement of the amount of costs requested and the basis for the amount requested. The Board no longer requires the prevailing party to submit an affidavit setting forth this information. If no petition is filed, the Board will issue a representation costs award on the scale set forth above. An opposing party may file written objections to the amount of costs requested within 21 days from the date of service of the representation cost petition. If the basis for the objections is excessive hourly rates or time spent on a case, the objecting party must submit a statement identifying the hourly rate its representative charges or the amount of time the objecting party spent on the case.
115-035-0057	Attorney Fees for Appeals	Parties must still file a petition for attorney fees within 21 days of the appellate judgment. The petition must include a statement of the amount of the costs requested, along with a description of the actual amount of the fees incurred by the petitioner or, where no fees were charged, the bases for the amount of costs requested. Parties no longer need to file an affidavit with the petition. The Board will not award more than $5,000 in attorney fees unless a civil penalty is awarded. A party may file objections to the petition for attorney fees within 14 days of the date the petition is served. Note-this is different than the timeline to file objections to a petition for representation costs (21 days). If the basis for the objections is excessive hourly rates or time spent on a case, the objecting party must submit a statement identifying the hourly rate its representative charges or the amount of time the objecting party spent on the case.
115-035-0060	Expedited Procedure for Unfair Labor Practice Cases	The Board consolidated the three previous rules on expedited unfair labor practice cases (OAR 115-035-0060, 0065, and 0068) into one single rule that sets forth the procedures for expedited cases as well as the factors the Board will consider in deciding whether to expedite a case. The new rule also makes it clear that the Board has the discretion to expedite all or part of any complaint, even if not specifically requested by the parties. The rule also sets forth what information must be submitted by a party requesting that a case be expedited, including an affidavit setting forth the reasons the complaint should be expedited, the estimated length of any needed hearing, a statement of the complexity of the issues, a description of the harm that would result if the case is not expedited, and a statement of any legal authority in support of the complainant's position. If the expedited complaint involves issues arising out of the bargaining procedures in ORS 243.712 or 243.722, the affidavit must also describe what stage of the bargaining process the alleged unfair labor practice occurred in. If the complaint involves a question regarding the scope of bargaining (*e.g.*, whether a proposal involves a mandatory, permissive or prohibited subject for bargaining) under ORS 243.672(1)(e) or (2)(b), the affidavit must also include the precise language of the last bargaining proposal on the subjects in dispute, the date of the proposal, and the date of any alleged refusal to bargain.

Division 40—Dispute Resolution in Public Employment		
115-040-0000(1)(e)	Cost Summary in Final Offers	Requires that parties use a cost summary form approved by the Board when submitting their final offers after the declaration of impasse. Parties may submit additional information with the approved form.
115-040-0010	Factfinding	The Board eliminated nearly all of its rule on Factfinding, instead referring parties to the procedures set forth under ORS 243.722.
115-040-0033	Arbitrator Subpoenas	The Board deleted the provisions on arbitrator issued subpoenas, as those provisions were redundant in light of ORS 243.706.
115-040-0015	Interest Arbitration	This rule has been streamlined, eliminating provisions that largely restated statutes. The rule was also clarified to specifically reference interest arbitration proceedings under ORS 243.698, 243.736, and 243.738.
Division 45—State Personnel Relations Law Appeals		
115-045-0000	Definitions for State Personnel Relations Law Cases	These definitions were moved to OAR 115-010-0010.
115-045-0021 and 0023	Management Service Appeals	The Board deleted OAR 115-045-0023, consolidating the rules on management service appeals into one place and streamlining the remaining provisions.
115-045-0025	Hearings for SPRL Cases	The Board clarified the procedure for setting SPRL hearings and processing requests for postponements. The most significant changes were the deletion of the requirement that the Board serve notices of hearing on parties by registered or certified mail, and the acknowledgment that a hearing date may be set more than 30 days from the filing of the appeal if the parties agree.
115-045-0030 (Deleting 0035 and 0040)	Notice and Conduct of SPRL Hearings and Post-Hearing Procedures	The Board moved the procedures for SPRL cases to OAR 115-010-0040 through 0110, and deleted the old provisions in 115-045-0030, 0035, and 0040.
Deletion of Divisions 75, 80, 85 and 86		
115-075-0000 through 0005 115-080-0000 through 0015 115-085-0000 through 0010 115-086-0000 through 0020	Private Sector Mediation Dispute Resolution for Nurses in Private Health Care Facilities Arbitration Procedures for Reduction or Recall of Teachers Under ORS 342.934(7) List of Hearings Officers for Fair Dismissal Hearings	These divisions were deleted because they were redundant or referenced repealed statutes.