The Good, the Bad, and the Ugly: 11th Annual Review of Recent Oregon Public Sector Labor Cases

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The Oregon Public Employer Labor Relations Association

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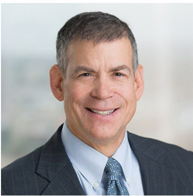

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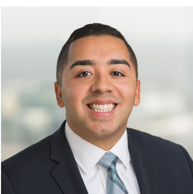

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I. OREGON PERS REFORM UPHELD

1. *James v. State*, 366 Or 732, 471 P3d 93 (2020)

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

2. *Janus v. AFSCME*, Council 31, __ US __, 138 S. Ct. 2448 (2018)

Federal courts have uniformly rejected efforts to force unions to disgorge fair share fees collected before *Janus* was issued or fees collected post-*Janus* under existing membership agreements. See *Casanova v. International Association of Machinists*, 2020 WL 8260314 (7th Cir. 2020), *cert*. *den*. 141 S. Ct. 1283 (January 25, 2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert*. *den*. 141 S.Ct. 1265 (Jan. 25, 2021); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 942 F.3d 352 (7th Cir. 2019), *cert*. *den*. 141 S.Ct. 1265 (Jan. 25, 2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert*. *den*. 141 S.Ct. 1265 (Jan. 25, 2021); *Ogle v. Ohio Civil Service Empl. Ass'n.*, 951 F.3d 794 (6th Cir. 2020), 141 S.Ct. 1265 (Jan. 25, 2021).

II. REPRESENTATION/UNIT CLARIFICATION CASES

3. *IBEW Local 89 v. Oregon Legislative Assembly*, RC-001-21 (4/6/2021)

In an interim order on a representation petition, ERB concluded (1) that the Oregon Legislature was subject to the PECBA, (2) that a bargaining unit of Legislative Assistants hired and supervised separately by each of the 90 members of the legislature was an appropriate bargaining unit, (3) that the legislative assistants were not subject to any of the exclusions from the definition of public employees as supervisory, confidential, or managerial employees (available only to the State of Oregon), and (4) that an election should be held among employees in the proposed bargaining unit.

In concluding that the legislature was subject to the PECBA, ERB focused on the broad scope of the definition of public employer, State of Oregon, and public employees in the PECBA. And, ERB emphasized that in crafting the PECBA, the legislature excluded various persons or parties such as elected officials, persons to serve on boards or commissions, and incarcerated persons but not its own employees. ERB also brushed aside constitutional questions of the legislature delegating oversight of its operations to an executive branch agency, such as ERB.

In terms of the appropriateness of the bargaining unit, ERB focused on the common classification, wage, and benefit scheme that guided the terms and conditions for all legislative assistants. ERB discounted the fact that each elected legislator hires and separately supervises and directs the work of its own aides and that many work in local offices remote from the capitol building.

ERB also considered the alternative of making each legislator's office a separate bargaining unit. But ERB rejected such an alternative as violating its long-standing policy against undue fragmentation. Ironically, ERB discounted and rejected application of that policy when ERB created a unit sought by AFSCME to represent court staff in the Yamhill County Circuit Court, rather than state wide. See *AFSCME Council 75 v. Or. Judicial Dep't-Yamhill Cty.*, RC-003-17, 27 PECBR 240, 255-57 (2018), *rev'd*, 304 Or App 794, *rev den*, 367 Or 75 (2020).

Key takeaway

ERB's policy against undue fragmentation of bargaining unit survives.

4. *Teamsters Local 223 v. Klamath County*, UC-003-20 (1/26/2021)

In a unit clarification case, ERB adopted the ALJ's order after no objections were filed.

The ALJ held that the eight patrol and corrections sergeants employed by the Klamath County Sheriff's Office were supervisors and therefore not public employees covered by the PECBA. As the ALJ found:

> Among other things, all Sergeants assign their subordinates work and then review and correct that work. However, individual Sergeants can also have specific assignments with unique duties and responsibilities and oversee certain programs and groups. Those assignments can change and be rotated over time. Nevertheless, the Sergeants' duties have not changed significantly in the last five years.

The standard as set out in ORS 243.650(23)(a), defines a "supervisory employee" as:

> any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Under this 12-factor functional test, if the sergeant is authorized to either take action or effectively recommend action be taken in any of these 12 functions, through the exercise of independent judgment, on behalf of management, then that sergeant is a supervisor.

In this case, the ALJ concluded only that the sergeants "assign" work to officers. The ALJ considered, but rejected, the county's contention that sergeants responsibly direct the work of subordinates, and discipline, suspend, or reward subordinates. As the ALJ noted, "assign" means designating a specific place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties (i.e., tasks) to an employee. However, choosing the order in which the employee will perform discrete tasks within those assignments is not indicative of exercising the authority to "assign."

First, the ALJ noted that the sergeants generally do not assign shifts, vacation, specialty duties, team assignments, or external training to subordinates. But the ALJ noted patrol sergeants do regularly "assign and reassign" patrol deputies to calls, scenes, and different geographical locations within the county. And corrections sergeants regularly assign subordinates to one of the jail's six posts every day, and can also assign specific work and tasks beyond that. Those kinds of assignments go beyond simply choosing the order in which discrete tasks are performed, and are not merely routine or clerical decisions. In short, they demonstrate the use of "independent judgment."

The ALJ found that when assigning work, sergeants considered and prioritized tasks needed to be undertaken each, what was required to undertake the tasks, and the skills, experience, work load, medical needs of each officer under command, and whether the officer had competing responsibilities that day such as work as a field training officer. The ALJ also found that sergeants cold call in additional officers, authorize overtime work, and allow time off if there was adequate coverage.

Key takeaway

Only one of the 12 functions need be satisfied to establish the exercise of supervisory authority. For police units, employers should be cognizant of the need to delegate responsibility and discretion to sergeants when exercising their supervisory authority.

5. *Salem Police Employees Union (SPEU) v. City of Salem*, RC-010-19 (4/15/2021)

In a unit clarification case, ERB adopted the ALJ's recommended order to which no objections were filed.

The ALJ concluded (yet again) that the sergeants were supervisors under the 12-factor analysis set forth in the definition of supervisory employee in ORS 243.650(23)(a). As noted above, the exercise of supervisory authority in any one function is sufficient to find a sergeant to be a supervisory employee. Thus, the ALJ concluded only that sergeants assigned work and exercised independent judgment when making such assignments and declined to consider whether supervisory authority was also exercised under any of the other 12 functions.

In this case, the department's 24 sergeants held several distinct positions. Twelve sergeants served in the patrol operations, two supervised detectives, three worked in support services (one each overseeing the distinct functions of the administrative unit, internal affairs, and personnel hiring and training), and the remaining seven sergeants were assigned to supervise a specialty unit including the officers assigned to such units (traffic control, downtown enforcement, behavioral health, problem-oriented policing, street crimes, school resource officers, and drug enforcement). These distinct positions required detailed evidence through testimony and records showing the work of the sergeants for each of these separate units. In addition to these position assignments, most sergeants held ancillary assignments over special teams or cadres, such as SWAT, K-9, firearms training, or use of force, and would make assignments involving these special teams or cadres.

For example, patrol sergeants would decide which calls would be handled and could and did direct specific officers to respond to specific calls and would also, at the start of each shift, assign officer to specific patrol districts. The sergeant supervising the problem-oriented-policing team identified and prioritized "problems" that required additional attention and decided which and how many team members to assign. The detective-sergeant could and did reassign cases for investigation and decide which cases to prioritize and which not to pursue.

Key takeaway

These are fact-intensive cases. Employers must devote substantial time and resources to these supervisor cases, especially where there a large number of positions in dispute and distinct functions exercised by different persons within the same classification.

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

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

against the possibility of premature disclosure of management collective-bargaining policies, proposals, and strategies.

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

Key takeaway

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

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

ERB adopted the ALJ's order. The ALJ rejected a petition for representation of operations supervisors because they are supervisory employees as defined in ORS 243.650(23)(a). The ALJ concluded that the operations supervisors "assign" employees by deciding when to call in extra board operators and when to send employees home; when to call operators in to work overtime and when to "run lean." The ALJ, however, determined that the supervisors did not meet any of the other 12 factors that indicate supervisory responsibilities.

Key takeaway

Only one of the 12 factors in ORS 243.650(23) need be satisfied to establish a position as "supervisory." The easiest to satisfy and most commonly cited are to "assign" and "responsibly direct work."

8. *Washington County Police Officers Association v. Washington County Sheriff's Office*, Washington County, UC-008-20 (1/25/2021)

In a dismissal order, issued without a hearing, ERB concluded that the union was untimely in its filing of a unit clarification petition to add long-existing civilian positions to the police bargaining unit. The petition was filed while a successor bargaining agreement was in effect and **not** during the "open window" between 60-90 days preceding contract termination when representation or clarification petitions may be filed. Because the positions had existed at the time of the successor agreement was formed, under the "contract bar" rule, the petition was untimely.

Although the union argued that the contract bar rule was undermined by the U.S. Supreme Court decision in *Janus v. AFSCME, Council 31*, __ US __, 138 S Ct 2448, 201 L Ed 2d 924 (2018), ERB rejected that argument with little discussion.

Key takeaway

When a union files a representation or unit clarification petition involving an existing bargaining unit, it should take into account the timeliness of the petition under ERB rules. OAR 115-025-0015.

9. *Oregon AFSCME Local 88 v. Multnomah County*, UC-007-20 (12/2/2020)

ERB ruled that its service of an incomplete AFSCME unit clarification petition on the county did not justify revoking a certification and restarting the process.

AFSCME petitioned for the addition of 81 on-call workers at social distancing shelters and voluntary isolation motels to its general collector unit. The county duly posted the petition. No objections were filed by either the county or any other party. After ERB issued its order, the county realized that the proposed unit included employees with no reasonable expectation of continuing employment. Attachment A, which included the description of those employees, was missing from the notice provided to the county. But Attachment A was available to the county (had it examined what was posted online on the ERB website). Furthermore, ERB provided the county with a list of 81 employees targeted by the filed petition. ERB declined to begin the process anew and permit the county to file objections, but did reissue its order. Apparently, ERB concluded it had no obligation pursuant to its rules to inform employers accurately of the content of unit representation or clarification petitions.

Key takeaway

Employers should scrutinize representation and unit clarification petitions to ensure they are complete and that they fully understand the scope of the petition.

III. SCOPE OF BARGAINING

10. *Oregon Military Department v. IAFF, Local 1660*, UP-048-20 (4/27/2021)

ERB rejected the challenge by the Oregon Military Department to the firefighters' proposal to backfill the funds diverted under SB 1049 as a prohibited subject of bargaining. The Department contended that the backfill proposal would violate the Oregon Pay Equity Act (OPEA) adopted in 2017.

Under SB 1049, the PERS diverts money contributed to the Individual Account Program (IAP) to a deficit reduction account so long as the PERS system is less than 90 percent funded. Specifically, PERS diverts 2.5 percent of the employee share of contributions to IAP for Tier 1 and Tier 2 accounts, and 0.75 percent of the employee share of contributions to the IAP for OPSRP members.

The challenged proposal would require the Department to contribute an additional 2.5 percent to the PERS system under an optional employer funding mechanism for PERS contributions, ORS 238A.340. This particular provision had been utilized only rarely before the enactment of SB 1049.

The Department employs firefighters at air national guard bases in Portland and Klamath Falls in the same classification, but their agreements are bargained separately. If the Portland firefighters' backfill proposal went into effect, Klamath Falls firefighters in the same classification would be paid less for the same work.

The Department argued that this difference would violate the strict liability pay equity requirements of the OPEA. But ERB concluded that this difference fell within one of the bona fide factors listed in the OEPA; specifically, "workplace locations." ORS 653.220(2)(a)(D). And ERB brushed aside the Department's argument that such a factor should not considered because it was not specifically identified as the reason for the difference.

Key takeaway

Expect ERB and arbitrators to be skeptical and look with disfavor at employer challenges to union bargaining positions based on the OEPA.

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

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

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

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

Key takeaway

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

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

12. *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757 (ATU)*, UP-035/036-20 (2/26/2021)—part 1

This 100-page decision involved cross-complaints between the parties. TriMet's complaint addressed the scope of bargaining challenging various ATU proposals as permissive. ERB examined specific proposals that the union had included in its final offer and purportedly intended to take to interest arbitration.

ERB rejected TriMet's position that several proposals involved "assignment," which is a permissive subject of bargaining as defined by statute. These rulings included proposals that "performance of work done" would be set by seniority or trading of days-off was limited to individuals having "similar sign-up responsibilities." ERB concluded that these proposals were not assignment because the issue was **not** the delegation of tasks or duties within a particular classification.

ERB also held that proposals that give a preference for internal candidates were not minimum qualifications (a permissive subject of bargaining), but were related to the mandatory subject of job security. ERB's ruling on several of these proposals that involved assignment and minimum qualification turned on union testimony that conceded (for the first time at the hearing) that notwithstanding the terms TriMet was free to set minimum qualifications for the work. ERB disregarded prior case law that had determined that internal preferences constituted minimum qualifications.

ERB did conclude that proposals that directed which employees could install tire chains or what work an assistant supervisor could perform addressed permissive subjects of bargaining. But ERB ruled that assignment of warranty work was mandatory for bargaining as a job security matter because it mandated training of employees who would learn how to perform such work when the warranty expired.

Key takeaway

ERB disfavors challenges to proposals as permissive subjects for bargaining and reads prior rulings narrowly. But the process may prompt unions to self-interpret their own proposals narrowly in a way that helps the employer in the future.

IV. DIRECT DEALING & SURFACE BARGAINING

13. *Tri-County Metropolitan Transportation District of Oregon (TriMet) v. Amalgamated Transit Union, Division 757 (ATU)*, UP-035/036-20 (2/26/2021)—part 2

Direct dealing claim

On ATU's counterclaim, ERB concluded that TriMet had engaged in unlawful direct dealing (a per se violation) in two separate sets of interactions, over a vigorous dissent from Member Umscheid. ERB started its analysis emphasizing that direct dealing is not limited to bargaining. ERB cited prior cases where an employer was found to have engaged in direct dealing by providing a new proposal directly to employees, before presenting it to the union.

In this case, ERB faulted TriMet for direct dealing in two situations by purportedly soliciting "employee sentiment" over working conditions, which is the necessary precondition for direct dealing under private sector case law.

First, TriMet engaged a bargaining unit member—a chief station agent—to help revise extra board practices and draft revised contract language. TriMet relied on him because he was the only person available who understood how the extra board rules worked (more than 50 of them are listed in the CBA). TriMet then invited the chief station agent to the table to explain its proposals on two occasions and ran subsequent counter-proposals by him during negotiations. ERB concluded such actions taken together and without full disclosure to the union was wrong because it pitted ATU against its own member.

The dissent noted that ATU first became aware of TriMet's work with the chief station agent in October 2019 and never objected to TriMet communicating with him until filing its complaint in November 2020. Further, the dissent cited a prior case, *AFSCME v. Hood River County*, UP-92-94, at 16, 16 PECBR 433, 448 (1996), *aff'd without op*, 146 Or App 777 (1997), in which ERB found no direct dealing arising from contacts between the employer and union members that involved no attempt at substantive negotiations and to which the union never objected. The dissent emphasized that the union had accepted the chief station agent's role as a fact and subject expert.

Second, ERB concluded that TriMet engaged in direct dealing when responding to inquiries from apprentices concerned about losing seniority that were made to a maintenance supervisor regarding returning to a service worker position. Under the parties' agreement, employees who left an apprentice program could demote out of the apprentice program without loss of seniority within six months or by mutual agreement of ATU and TriMet. The supervisor raised these concerns with the agency's labor relations staff and was told to find out who was interested in returning. The supervisor asked each of six apprentices and reported back to the labor relations staffer who then called the union president. The dissent found TriMet's actions consistent with the parties' agreement and that more was required before direct dealing should be found.

Interestingly, neither prior ERB case law nor private sector case law was cited finding direct dealing based on similar fact patterns. Rather, ERB inferred that what TriMet was doing was trying to solicit employee sentiment before acting.

Key takeaway

ERB's broad reading of direct dealing seems to open door to challenging union interaction with and solicitation of support from governing board members and/or presiding executives although such claims will likely face some sort of first amendment challenge.

Surface bargaining claim

ERB, however, rejected ATU's complaint that TriMet engaged in "surface bargaining" under "the totality of the circumstances" test. ERB analyzed TriMet's conduct under the standard six factors: (1) whether dilatory tactics were used; (2) the contents of the proposals; (3) the behavior of the party's negotiator; (4) the nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations.

While ERB concluded TriMet did not violate ORS 243.672(1)(e), ERB made some conclusions that would have been troubling to TriMet had the parties proceeded to interest arbitration on the disputed proposal, which TriMet dropped after the hearing.

Specifically, TriMet sought to exclude work on electric bus propulsion systems. ERB found TriMet's proposal premature and ATU unable to respond because of a lack of knowledge and experience with such matters. But ERB disregarded testimony that there was already electric propulsion systems on trains and hybrid buses and that TriMet planned to start acquiring electric busses within the first year of the contract.

Key takeaway

The best defense is often a counterclaim even if it fails.

V. UNILATERAL CHANGE CASES

14. *Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or App 395, 461 P3d 1001 (2020), *on remand* UP-059-13 (Sept. 24, 2020) (Sung dissenting)

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

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

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

Key takeaway

Waiver by action is possible through oral agreement.

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

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

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

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

Key takeaway

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

VI. BREACH OF CONTRACT / JUST CAUSE

16. *AFSCME Council 75, Local 2503, Hood River County (Public Works)*, UP-005-20 (2/11/2021), *appeal pending*

Procedural issue: ERB refused to accept late-filed objections to the proposed order notwithstanding counsel's inability to file the objections through ERB's electronic CMS-filing system on the due date despite numerous attempts to do so. In addition to filing by the CMS system, ERB permits filing by mail, email, fax or in-person delivery. Counsel for the employer could not file through the CMS system because she was not the registered counsel for filing in the case in which another attorney had handled the hearing. Counsel had not contacted ERB about the difficulty she was having over her filing before the expiration of the filling deadline. ERB declined to find that there was good cause for the late filing.

Therefore, ERB adopted the ALJ's order.

The ALJ ruled that the county's termination of a public works employee was without just cause and in violation of the parties' collective bargaining agreement.

Several procedural issues were addressed in the ALJ ruling. The first one addressed the county's failure to timely file witness and exhibit lists with the ALJ that were served on the union. The union argued that the county should not be permitted to offer any evidence, but the ALJ decided to permit the county to present evidence consistent with the late-filed lists because of lack of prejudice to the union and that the disputed evidence did not change the outcome. The ALJ did note that the county had failed to show good cause for its failure to file the objections.

The county offered two additional exhibits after the hearing closed, but without filing a motion to reopen the record. The union agreed to one of the late filed exhibits, but objected to the other. ERB ruled there was no showing of good cause and no context or foundation for the objected-to exhibit. Thus, it was not admitted.

On the merits, the ALJ applied ERB's "no reasonable employer" standard as adopted in *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981). Under that standard, ERB reviewed the termination in light of factors that should be considered by the fictive reasonable employer, and determined first, whether the employee's conduct warrants discipline and second, if some discipline is appropriate, what discipline is objectively reasonable. Under this standard, ERB considers the following factors: (1) disciplinary action is taken in good faith, for cause, and for nondiscriminatory reasons; (2) rules enforced are reasonable, and employees are given fair notice that violations of the rules may lead to discipline; (3) disciplinary action is taken in a timely manner; (4) an employee is warned of proposed discipline and given an opportunity to refute the charges; and (5) a fair investigation is made before discipline is administered.

In addition, a reasonable employer generally imposes sanctions proportionate to the offense, considers the employee's length of service and record in determining sanctions, and applies principles of progressive discipline unless the offense is gross. It also bases any disciplinary action on "substantial evidence."

But the county acted in this case on the basis of the employee being arrested, incarcerated, and charged with the crime of theft of campground fees. The charge was dismissed by the court, and the dismissal order is on appeal. While the county sheriff's office did undertake an investigation, its investigation was not entered into evidence. And neither the public works department nor the county administration undertook an investigation of its own.

The county has since appealed and moved to stay the back pay order pending appeal, which amounts to approximately $218,000. The county notes that it will suffer irreparable harm if compelled to pay the back wages because it will not be able to recoup the payout. As in other cases dealing with back pay while an appeal is pending, ERB dismissed such contentions as speculative and concluded that the employer failed to establish irreparable harm.

Key takeaway

ERB's procedural rules and timelines on filing objections, just like filing answers, **must** be followed. Likewise, pay attention to the prehearing obligations in serving or filing of exhibits, exhibit lists, and witness lists.

Do not rely the fact of arrest, indictment, or prosecution in a criminal matter to justify a termination.

VII. INTERFERENCE/DISCRIMINATION

17. *Clackamas County Empl Ass'n v. Clackamas County*, 30 Or App 146 (July 8, 2020), *rev'g and remanding* UP-010-18, 27 PECBR 719 (01 15-19), *order on reconsideration*, 27 PECBR 753 (03-14-19)

ERB, by unanimous order, dismissed the Association's challenge to a reprimand to Morales, a county employee who served as the Association's designated representative. The Association contended that the reprimand interfered with, restrained, or coerced an employee because of, or in the exercise of, protected rights under ORS 243.672(1)(a). Because the county reprimanded Morales for the disrespectful and denigrating references about a manager (Dooley) in an email that did not involve his activity as a union representative, ERB concluded there was no violation of section (1)(a).

The court, however, concluded that ERB had failed to provide "substantial reason" as to why the discipline was not a violation of the "in the exercise" prong of ORS 243.672(1)(a), because ERB only examined the text of the email and not the surrounding circumstances:

> As should be clear, that question is not one that can be answered solely by reference to the text of the email. Rather, the standard requires an assessment of the circumstances in which it was sent, including the following: (1) Morales was, as he had been doing for weeks, engaging in advocacy that involved repeated challenges to Dooley's role in the investigations in which he was serving as a union representative; (2) those communications were heated and contentious; (3) a few weeks before Morales sent this email, he sent several other emails harshly criticizing Dooley's actions in the investigation and suggesting that those actions impaired the Association's ability to effectively represent its membership; and (4) at the time he sent this email, he was waiting for what he believed was an inordinately long time for the result of a disciplinary investigation involving Dooley.
>
> Because ERB's resolution of the 'in' claim failed to apply the appropriate legal test and, thus, failed to connect the facts to its legal conclusion under that test, it lacked substantial reason. Accordingly, we remand for the agency to correct the deficiency. 308 Or App at 154.

This case may be the first one that faults ERB for failing to find an "in the exercise" violation of ORS 243.672(1)(a).

Key takeaway

Generally, union representatives are immune from employer discipline for misconduct during union-management interchanges other than for threats or acts of physical violence or acts of racial, ethnic, or sexual discrimination or harassment (typically, slurs). The court of appeals wants ERB to explain why comments not part of union-management dialogue but made by a union representative should not also be protected.

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

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

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

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

Key takeaway

During investigations, employers should carefully consider admonishments restricting communications.

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

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

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

Key takeaway

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

VIII. UNION INTERFERENCE

20. *Portland Public Schools (PPS) United Association, Plumbers and Pipefitters Local 290*, UP-002-19 (3/24/2021)

ERB adopted the recommended order of the ALJ to which neither party objected. Interestingly, ERB included a footnote in its order stating that this order should not be construed as "as precluding a union from

investigating an allegation that one union member is discriminating against another" or "from disciplining a member for violating an anti-discrimination provision of a union constitution (whether by making false statements or engaging in other unprotected activity)," if ORS 243.672(2)(a) is not violated.

The ALJ concluded that the union violated ORS 243.672(2)(a), under which a union may not interfere with, restrain, or coerce, an employee in the exercise of protected rights, in the union's discipline of two employees.

Two employees provided a written statement to the school district during an investigation about an incident of unsafe driving in a high school parking lot by another employee. The employee was given a one-day suspension (later reduced in arbitration). The disciplined employee filed a formal complaint against the coworkers for providing statements, alleging that the statements were false. A union trial panel found against both employees and issued fines. Both employees stated that they did not want any further involvement in the disciplinary proceedings and said they would not be providing statements in the future. The ALJ applied a three-part test that ERB had adapted from the private sector for reviewing whether a union's enforcement of its rules interfered with members' protected rights. The test considers whether such enforcement (1) reflects a legitimate union interest, (2) does not impair a public policy under the labor laws, and (3) is reasonably enforced against union members who are free to leave the union and escape the rule. The Union's actions in this case failed on all three counts for, among things, it imposed disincentives on employees to report concerns regarding safety and unsafe employee conduct and resigning in lieu of contravening union interests was not a practical alternative.

The ALJ declined to find that ORS 243.672(2)(b) or (d) was violated in its discipline of a third employee, a supervisor who was a union member but not part of the bargaining unit.

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. It is the mirror provision to ORS 243.672(1)(e), which sets bargaining obligations on the employer.

The district relied on private sector cases making it unlawful for a union to threaten sanctions against a union supervisor when engaged in collective bargaining or the adjustment of grievances. ERB declined to construe either the disciplinary process or adjustment of grievances as part of collective bargaining. Most notable was a provision found in section 8(b)(1)(B) of the National Labor Relations Act, which is lacking in the PECBA. The ALJ also found no showing of a harm on the supervisor or that it affected the supervisor's work for the district.

Under ORS 243.682(2)(d), it is an unfair labor practice to violate the provisions of any written contract with respect to employment relations, where previously the parties have agreed to accept arbitration awards as final and binding upon them. It is the mirror provision to ORS 243.672(1)(g). The ALJ also rejected the district's contention that the union was compelled by contract term to refer any complaint against a supervisor to the district's internal complaint procedures. But the ALJ ruled that the complaint procedure did not cover the particular complaint.

Key takeaway

Unions can be limited in the use of internal discipline to restrict its members from participating in disciplinary actions. But ERB is not likely to find such interference to constitute a violation of the duty to bargain in good faith or that an employer's internal system trumps union discipline processes.

IX. REVIEW OF ARBITRATION AWARDS

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

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

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

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

Key takeaway

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

X. INTEREST ARBITRATION AWARD

22. *Hood River County and Hood River County Law Enforcement Association* (8/28/2020) (Blair, Arb.)

Arbitrator David Blair awarded the Association's last best offer. The case turned on problems in recruitment and retention of sheriff's deputies and the relative underpayment of deputies (by nearly 10 percent at the top step) relative to comparable counties. While there was some dispute over which counties were the proper comparators, the relative underpayment was evidence in both the employer and Association lists of comparable counties.

Key takeaway

Consistent with past reviews, dramatic discrepancies in wages paid by comparable jurisdictions usually trumps other factors.