INSTRUCTIONS: File the original and three copies of the complaint and all attachments and the $300 filing fee with the Board at:

528 Cottage St NE, Suite 400
Salem, Oregon 97301-3807
Phone 503-378-3807

STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

UNFAIR LABOR PRACTICE COMPLAINT
Public Employment

For Board Use Only

Case No. UP-011-16

Date Filed 3/25/16

COMPLAINANT Name, address, phone number, and e-mail address	COMPLAINANT'S REPRESENTATIVE Name, address, phone number, and e-mail address, if applicable
Oregon School Employees Association c/o Haley Rosenthal Tedesco Law Group 3021 NE Broadway Portland, OR 97212 866-697-6015 x 706 haley@miketlaw.com	Haley Rosenthal Tedesco Law Group 3021 NE Broadway Portland, OR 97212 866-697-6015 x 706 haley@miketlaw.com
RESPONDENT Name, address, phone number, and e-mail address	**RESPONDENT'S REPRESENTATIVE** Name, address, phone number, and e-mail address, if applicable
Gary Tempel Superintendent Scio School District 38875 NW 1st Ave. Scio, OR 97374 503-394-3261	Gary Tempel Superintendent Scio School District 38875 NW 1st Ave. Scio, OR 97374 503-394-3261

Complainant alleges that Respondent has committed an unfair labor practice under ORS 243.672(1)(e) and ORS 243.672(1)(f) of the Public Employee Collective Bargaining Act. The following is a clear and concise statement of the facts involved in each alleged violation, followed by a specific reference to the section and subsection of the law allegedly violated.

1.

Complainant Oregon School Employees Association ("OSEA" or the "Association") is a labor organization as defined in ORS 243.650(13). The Association is the exclusive representative of certain classified employees of the Scio School District.

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2.

Respondent Scio School District (the "District") is a public employer as defined in ORS 243.650(20).

3.

The Association and the District are parties to a collective bargaining agreement ratified on September 29, 2015 and effective through June 30, 2020 (the "Agreement").

4.

In the fall of 2014, OSEA Field Representative Jill Simmons heard that District principals were sending one-on-one instructional aides assigned to a special education student ("instructional aides") home without pay when their assigned student did not attend school on the particular day. Ms. Simmons called District Superintendent Gary Tempel to discuss what she had heard, at which time Mr. Tempel informed her that instructional aides were being given the option to either remain at work or, voluntarily, to take unpaid leave if their assigned student was not in attendance.

5.

On September 29, 2015, the Association learned the Scio Middle School principal verbally announced to OSEA members that the District intended to send instructional aides home without pay on days when the instructional aide's student was not in attendance.

6.

On September 30, 2015, OSEA Field Representative Cydnie Meyer emailed Mr. Tempel asking about the District's intent to cut hours. Mr. Tempel replied, in part, that it was "the long-standing past practice of the District to send home one on one aides if the

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student the aide is assigned to does not show." Ms. Meyer responded on September 30, 2015 requesting information supporting the District's contention that the parties' had such a past practice. On October 1, 2015, Mr. Tempel responded to Ms. Meyer via email stating, "I believe the best source of information regarding the parties' past practice are the instructional aides themselves and would suggest that you talk to them before we proceed further with this matter." The email string is attached hereto as Exhibit 1 and incorporated herein.

7.

On October 1, 2015, Ms. Meyer spoke with Mr. Tempel via phone to discuss when the District would provide the requested documentation. Mr. Tempel said he would need until the following Monday morning to gather information from the school principals regarding the past practice. He also stated Ms. Meyer should already have the needed information by speaking to the instructional aides.

8.

The District did not provide written notice to the Association of its intent to implement the reduction in days. Nevertheless, the Association sent the District a letter on October 5, 2015 in which the Association demanded to bargain over the District's decision to implement the reduction of work days and any mandatory impacts of that decision. The letter is attached hereto as Exhibit 2 and incorporated herein.

9.

On October 7, 2015, the District responded to the Association's demand letter by stating, in part, that the District had not made a unilateral change because it had the management right to establish hours of employment. The District stated that, without

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establishing precedent, it would discuss the issue with the Association. The District did not agree to bargain with the Association, nor did it agree that it had an obligation to bargain with the Association. The letter is attached hereto as Exhibit 3 and incorporated herein.

10.

The parties met on October 27, 2015 to discuss the issue. At that meeting, the District asserted it had the discretion to send instructional aides home without pay and did not agree it had an obligation to bargain with OSEA.

11.

On October 27, 2015, OSEA offered a proposal that when an instructional aide's student is absent, the instructional aide have the option to either remain at work and perform alternative duties as assigned, or to be relieved from duties for the day by electing to use paid or unpaid leave. The proposal is attached hereto as Exhibit 4 and incorporated herein.

12.

At the end of the meeting on October 27, 2015, the District requested a caucus and returned with a proposed Memorandum of Agreement. The District proposed the following: in circumstances when the instructional aide's assigned student provides advance notice of absence, the District would notify the instructional aide not to report to work and would not be paid for the day(s); in circumstances when the student did not provide advanced notice, the instructional aide would be allowed to take the place of a classified substitute employee, if any were employed that day, or could choose to be paid for two hours of work, but would not be paid for the remaining work hours; and, if no

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classified substitute employees were working on the day of a non-advanced notice absence, the instructional aide would receive two hours of pay and sent home without pay for the remainder of the day. The proposal is attached hereto as Exhibit 5 and incorporated herein.

13.

The parties were scheduled to meet on November 5, 2015. On November 4, 2015, Mr. Tempel cancelled the meeting.

14.

The parties met again on November 23, 2015, Ms. Meyer renewed her request for information verbally to the District at that meeting. Specifically, she asked for the number of days students assigned one-on-one instructional aides were absent in the last two to three years and for the number of days instructional aides were sent home as a result of their assigned student's absence in the last two to three years

15.

At the bargaining session on November 24, 2015, the District stated it was facing a budget shortfall in the 2016-2017 school year. The District knew of the budget shortfall during successor bargaining for the 2015-2020 Agreement, but did not raise the issue with the Association.

16.

During bargaining for the 2015-2020 Agreement, the District proposed increases to starting wages and salary increases for each year of the five-year Agreement.

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17.

At the meeting on November 23, 2105, OSEA asked if there was possibility for movement from the District's position. Mr. Tempel responded, "No."

18.

At the meeting on November 23, 2015, the Association asked if the District agreed to bargain with the Association since it had previously agreed only to discuss the issue. The District agreed for the first time it was bargaining with the Association. The Association asked if it was the District's intent to run out the clock on bargaining and implement its proposal, to which the District's Attorney Kelly Noor nodded in agreement.

19.

The parties met again on December 1, 2015. The Association proposed that instructional aides may be sent home without pay when their assigned student is absent, limited to one day per year. The proposal is attached hereto as Exhibit 6 and incorporated herein. The District did not make any proposals at the December 1, 2015 bargaining session.

20.

The parties met again on December 14, 2015. The District proposed the establishment of a "volunteer pool" of instructional aides, listed in order of seniority. The District proposed that when an instructional aide has advance notice that their student will be absent, the instructional aide may call employees listed in the "volunteer pool" and request to work in place of another instructional aide, who could use accrued personal leave for the day. The District's proposal for student absences without advance notice was

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the same as its prior proposal. The District's proposal is attached hereto as Exhibit 7 and incorporated herein.

21.

On December 14, 2015, the Association provided the District with an updated proposal. The proposal is attached hereto as Exhibit 8 and incorporated herein.

22.

The parties met for bargaining on January 6, 2016. The Association proposed that instructional aides could be sent home without pay as a result of an advance-noticed student absence two days per school year, an increase in days from the Association's previous proposal. The proposal is attached hereto as Exhibit 9 and incorporated herein.

23.

On January 7, 2016, the District implemented its previous proposal. The implemented process is attached hereto as Exhibit 10 and incorporated herein.

24.

The District's implemented proposal is nearly identical to its first proposal on October 27, 2015.

25.

The District did not provide any information responsive to OSEA's request for information until January 7, 2016. By email on January 7, 2016, Mr. Tempel provided some information responsive to OSEA's request. The email and attachments are attached hereto as Exhibit 11. To date, the District has not provided information establishing the number of days instructional aides have been sent home over the last two to three years as a result of their assigned student's absence.

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Count 1

26.

The Association re-alleges paragraphs 1-25.

27.

Under ORS 243.672(1)(e), the District had a duty to bargain in good faith with the Association over the decision to reduce work days by requiring instructional aides to take an unpaid day when the instructional aide's student was not in attendance and the impacts of that decision.

28.

The District altered the status quo by unilaterally implementing the decision to require instructional aides to take a day without pay when the instructional aide's assigned student was not in attendance. The status quo can be defined by the parties' past practice. *Three Rivers Ed. Ass'n v. Three Rivers Sch. Dist.*, ERB Case No. UP-16-08, p. 22 (March 29, 2010). Under the parties' practice, instructional aides have not been forced to take an unpaid day when the instructional aide's student was not in attendance.

29.

The District's decision to require instructional aides to take a day without pay when the instructional aide's assigned student was not in attendance was a decision to reduce instructional aides' wages and monetary benefits, which are mandatory bargaining subjects under ORS 243.650(7)(a). The District was obligated to bargain over its decision to reduce monetary benefits for instructional aides before implementing its decision. *See Three Rivers Ed. Ass'n, supra*, at p. 22. Even if the District's decision to implement the requirement that instructional aides take a day without pay when the instructional aide's

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assigned student was not in attendance, the impacts of that decision concern employees' wages and monetary benefits, which are mandatory bargaining subjects under ORS 243.650(7)(a). The District was obligated to bargain over the mandatory impacts of its decision to reduce monetary benefits for instructional aides before implementing that decision. *See Three Rivers Ed. Ass'n, supra,* at p. 22.

30.

The District failed to bargain in good faith with the Association, a per se violation of ORS 243.672(1)(e), when the District altered the status quo and unilaterally implemented the requirement that instructional aides take a day without pay when the instructional aide's assigned student was not in attendance.

Count 2

31.

The Association re-alleges paragraphs 1-30.

32.

Under ORS 243.698, the District has an obligation to bargain in good faith with the Association during the term of a collective bargaining agreement. The term of expedited bargaining is 90 days after the date the exclusive representative is notified in writing of anticipated changes that impose a duty to bargain.

33.

The District did not provide written notice, as required by ORS 243.698(2).

34.

The District did not agree to bargain with the Association upon the Associations demand to bargain, only to meet and discuss. The District provided a written proposal to

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the Association on October 27, 2015. The District did not agree to bargain with the Association until November 23, 2015. The District implemented its proposal on January 7, 2016—only 73 days after its first proposal and only 47 days after it first agreed to bargain with the Association.

35.

By failing to bargain in good faith with the Association in accordance with the requirements of ORS 243.698, the Association failed to comply with the provisions of ORS 243.650 through ORS 243.782, in violation of ORS 243.672(1)(f).

Count 3

36.

The Association re-alleges paragraphs 1-35.

37.

The District has bargained in bad faith, in violation of ORS 243.672(1)(e), by engaging in surface bargaining. Specifically, and without limitation, the District has:

a. Engaged in dilatory tactics: The District did not notify the Association of a change to a subject mandatory for bargaining. The District did not agree to bargain with the Association upon demand, but only to meet and discuss. The District cancelled the meeting scheduled for November 5, 2015. The District failed to provide information in a timely manner to allow for meaningful bargaining.

b. Refused to make concessions: The District's final and implemented proposal is nearly identical to its initial proposal. The District did not make concessions over the course of bargaining.

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c. Proposed unduly harsh and predictably unacceptable proposals: The District's proposal for a reduction in work days and, accordingly, wages for instructional aides is harsh and predictably unacceptable.

d. Shown an unwillingness to negotiate toward agreement: the course of negotiations shows that the District has not taken any meaningful steps toward reaching an agreement. During the course of negotiations, the District made only three proposals. The three proposals the District made are nearly identical. Additionally, members of the District's bargaining team stated they were not open for movement from their original position and stated their intent to run out the clock on bargaining.

e. Generally engaged in behavior evidencing bad faith: The District waited to raise budgetary concerns until immediately after the parties ratified a successor agreement, which included pay raises for all classified employees each year of its five-year term. Made a change to a mandatory subject by its announced intent to reduce work days of one-classification of classified employees, immediately after the parties ratified a five-year successor bargaining agreement.

The above constitutes examples in support of this Complaint and in no way limits the arguments that OSEA intends to raise during the course of any Board proceedings.

38.

Based on the totality of the circumstances, the District bargained in bad faith in violation of ORS 243.672(1)(e)

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Count 4

39.

The Association re-alleges paragraphs 1-38.

40.

The duty to bargain in good faith requires the parties to provide each other with requested information that is of "probable or potential relevance to a grievance or other contract administration issue," *Deschutes County 911 Employees Ass'n v. Deschutes County 911 Service Dist.*, ERB Case No. UP-032-04, at p. 13, 21 PECBR 416, 428 (May 15, 2006) (internal quotation omitted.) Because the information request by the Association was of probable or potential relevance to bargaining, the District had an obligation to provide the requested information in a timely manner.

41.

By failing to timely provide information responsive to an information request, the District failed to bargain in good faith with the Association, in violation of ORS 243.672(1)(e).

42.

The District maintains email addresses for all Association members, and routinely uses its email system to communicate with Association members about job-related matters. Communication through the e-mail system about the results of this proceeding would be more effective than any other type of communication.

WHEREFORE, the Association requests that the Board order the District to:

A. Cease and desist its unlawful actions;

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B. Return to the pre-implementation status quo and bargain in good faith with the Association;

C. Post notices of its unlawful actions. This requirement for posting should include email notification to all Association members through the District's email system;

D Make whole any Association member who has lost monetary or nonmonetary benefits as a result of the District's unlawful conduct;

E. Pay the Association's reasonable representation costs pursuant to OAR 115-035-0055;

F. Pay the Association's filing fee pursuant to OAR 115-035-0075(3); and

G. Order any additional relief that the Board deems just and equitable.

I certify that the statements in this complaint are true to the best of my knowledge and information.

By: */s/ Haley Rosenthal*
Signature of Complainant or Complainant's Representative

Haley Rosenthal
Attorney for Complainant

March 25, 2016
Date

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