

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-08

(UNFAIR LABOR PRACTICE)

THREE RIVERS EDUCATION)	
ASSOCIATION, SOBC/OEA/NEA,)	
)	
Complainant,)	
)	
v.)	ORDER ON REMAND
)	
THREE RIVERS SCHOOL DISTRICT,)	
)	
Respondent.)	
_____)	

This matter is before the Board on remand from the Court of Appeals. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 294 P3d 547 (2013). The court reversed and remanded the Board’s prior order dismissing the unfair labor practice complaint filed by the Three Rivers Education Association, SOBC/OEA/NEA (Association). 23 PECBR 638 (2010). Because no members of the current Board were involved in that prior order, the parties requested that we allow supplemental briefing and oral argument on remand. We agreed to that request and heard oral argument on June 25, 2013.

In its complaint, the Association alleged that the Three Rivers School District (District) violated ORS 243.672(1)(e) and (1)(f) when it unilaterally decided to change the *status quo* with respect to student contact time/teaching workload.¹ The Board initially held that the District changed that *status quo*, and that the subject of student contact time was a mandatory subject of bargaining. Nevertheless, the Board dismissed the complaint after determining that the District’s adoption of the trimester schedule concerned a *permissive* subject of bargaining. The Board further determined that, “at most,” the decisions regarding the permissive subject (the educational calendar) and the decision regarding the mandatory subject (student contact time) occurred “simultaneously.” 23 PECBR at 660. Reasoning that prior Board cases had “consistently held” that a change in student contact time should be treated as an “impact” of a decision to change the

¹Although “student contact time” and “teaching workload” may be distinct in certain situations, the Association’s arguments before the court and this Board focused almost exclusively on student contact time, and the Association used “teacher workload” synonymously with “student contact time.” Thus, for the remainder of our order, we refer to the contested change as concerning “student contact time.”

educational calendar, even when these changes occurred at the same time, the Board concluded that “the District was not required to bargain about its decision to change the school calendar before it decided to do so.” *Id.* at 661. The Board added, however, that the District was “obligated to bargain about the mandatory impacts of that decision before it implemented the new trimester system.” *Id.* The Board ultimately determined that the District satisfied its statutory obligation to bargain before it implemented the trimester system. *Id.* at 662.

Former Chair Gamson dissented, asserting that the decision to increase student contact time was *separate from* the decision to adopt a trimester schedule. *Id.* at 668 (Gamson dissenting). He further observed that “the majority apparently agree[d] with [him] on this point” because “[i]t expressly finds no ‘inextricable link’ between implementing a trimester system and increasing student contact time for teachers.” *Id.* He concluded:

“Given that my colleagues determined that the increase in student contact time was due to a separate decision by the school board, and was not a necessary result of a trimester schedule, I cannot discern how they could then conclude that the increase was not a decision at all, but merely an impact. I know of no sense, semantic or otherwise, in which a decision is not a decision.” *Id.*

The Association appealed and, as set forth above, the court reversed and remanded the matter to us. In doing so, the court quoted the above passage from the dissent and stated:

“We agree with the dissent: We cannot discern the ERB majority’s reasoning from its opinion. The majority first found that there was no causal relationship between the two decisions. Then it held that, despite that lack of any causal relationship, one decision was an ‘impact’ of the other. Without more explanation, those two items appear incompatible because the concept of ‘impact’ includes causation. That is, if there was no causal connection between the decisions—if they were independent, but simultaneous decisions—then we do not understand how one can be considered an ‘impact’ of the other. Consequently, the order fails our review for substantial reason. * * *

“Thus, the majority’s emphasis on the simultaneity of the two decisions is unavailing in light of its finding that there was no link between them. In all of the cases that the majority cites in support of its holding, there was a causal link between the decision and its ‘impact.’ * * *

“In sum, the majority’s opinion lacks substantial reasoning because it finds no causal connection between the decision to change the school schedule and the decision to increase student-contact time and workload, but then concludes that the latter was an impact of the former. Accordingly, we remand for the board to clearly address whether there was a causal connection between the two decisions and, if so, why the connection was such that it obviated the need for the predecision bargaining that would otherwise be required with regard to student-contact and workload decisions.” 254 Or App at 580-81.

The issue on remand is:

Did the District violate ORS 243.672(1)(e) by deciding to unilaterally change the *status quo* regarding a mandatory subject of bargaining?²

FINDINGS OF FACT

Neither party disputes the Findings of Fact from the Board's prior order, and we continue to adopt those findings as part of our Order on Remand, as supplemented herein.³ We summarize the undisputed facts most pertinent to our resolution of the issue on remand.

In September 2007, the Oregon Department of Education (ODE) notified the District that it was increasing student graduation requirements from 22 credits to 24 credits, with additional requirements in math, science, and vocational preparation. ODE required the District to implement this credit change for freshman by the fall of 2008. As a result, the District's Leadership Team (Team), which recommends to the school board how to best serve the needs of the students and the District, was concerned that students who failed only one class would not graduate. The 2007-2008 Team consisted of the superintendent, the human resources director and labor-relations spokesperson (Debbie Bruckner), the fiscal services director, and the director of curriculum and business services.

In the spring and summer of 2007, the Team had collected and reviewed data regarding the District's declining enrollment, budget issues, student state assessment scores, class failure rates, and graduation rates. The Team looked at options for addressing the budget shortfall at the high schools, including eliminating teaching positions. The Team was also concerned about high class failure rates. A significant number of high school students obtained a Graduate Equivalent Development (GED) certificate, rather than graduating from a District high school.

After being informed by ODE of the new graduation requirements, the Team and other high school administrators explored options on how best to serve the needs of the students, despite a \$1.2 million budget shortfall. They discussed scheduling options, such as a six-period schedule and a trimester schedule. The group was familiar with a six-period schedule because Grants Pass School District used such a schedule. The Team had never before considered a trimester schedule.

²The Association's complaint also alleged that the District violated ORS 243.672(1)(f) by failing to send the Association notice of anticipated changes that imposed a duty to bargain under ORS 243.698. In our prior order, we dismissed that claim, as well as the subsection (1)(e) claim. As noted, the Association appealed that decision to the court of appeals. However, the Association only assigned as error our determination regarding the subsection (1)(e) claim, and the Association's submissions to the court did not reference the subsection (1)(f) claim. Likewise, on remand, the Association has not referenced the subsection (1)(f) claim. Consequently, we conclude that the Association only appealed that portion of our order concerning the subsection (1)(e) claim or that the Association has abandoned that claim; therefore, we will not address any subsection (1)(f) claim.

³A full accounting of those facts is set forth in the Board's prior order. *See* 23 PECBR at 639-58.

In early October, the high school principals and Dan Huber-Kantola⁴ visited several Oregon school districts that utilized trimester schedules. These trimester schedules consisted of five daily periods, including a preparation period. After the site visits, the administrators concluded that the trimester schedule offered possibilities that the Team should explore with the school board.

By memorandum dated October 18, 2007, the Team told the school board that it recommended that the District adopt a common preparation period at the high schools and a trimester schedule that increased student contact time. The Team projected that such a change could reduce between eight to 13 high school teaching positions, with a savings of approximately \$570,000 to \$890,000. The Team explained that a common prep period allowed a school to teach the same number of students with fewer staff because the teachers taught every period instead of one-seventh of them being away from students on a prep period. The Team looked at implementing the common preparation period in the current schedule, but did not see it as a good option because it would reduce the number of elective classes a student could take. With the new state requirement of 24 credits to graduate, there would be no “wobble room” if a student failed a class—something that often occurred with freshman and sophomore students. The Team felt the trimester schedule would best meet the needs of high school students, but was willing to look at other options that also met those needs.

The Team developed a PowerPoint presentation, which included information regarding the District’s enrollment decline, financial situation, assessment scores, failure and graduation rates, the Team’s recommendation for a common prep period, an overview of the four schedules the Team had considered, and the Team’s recommendation for the trimester schedule, which also included an increase in student contact time. On October 29, 2007, Human Resources Director Breckner reviewed the PowerPoint presentation with Association President Chuck Robertson. The Team presented the PowerPoint at a joint meeting of District site councils on October 30 and at a school board work session on November 5.

At a November 19, 2007 school board meeting, the board voted to adopt the process recommended by the Team; that process involved changing three District high schools to a trimester schedule, with a common prep period and increased student contact time.

On November 26, 2007, Breckner hand-delivered a letter to Robertson and Oregon Education Association (OEA) UniServe Representative Jane Bilodeau, which notified the Association of the changes made by the District (as approved by the board), including: (1) moving from a 7-period semester schedule to a 5-period trimester schedule; (2) moving to a common prep period; and (3) increasing a teacher’s average student contact time from 312 minutes a day, 6 periods a day, to 340 minutes a day, 5 periods a day.

On December 12, 2007, Bilodeau e-mailed Breckner and Superintendent Fritts, informing the District that the Association considered certain aspects of the District’s changes to be mandatory for bargaining. The Association demanded to bargain over those mandatory subjects,

⁴As set forth in the Board’s prior order, Huber-Kantola worked for the District as the special education director until he became the director of fiscal services, and then replaced Jerry Fritts in February 2008 as the superintendent-clerk.

but also questioned whether legitimate bargaining could occur because the board had already made its decision.

Thereafter, Breckner provided the Association with bargaining dates and informed the Association that the District believed that its decision involved only a permissive subject, and that, therefore, the District had no obligation to engage in predecision bargaining.

The parties subsequently engaged in impact bargaining regarding the District's November 2007 changes. The Association filed a complaint alleging, among other things, that the District violated ORS 243.672(1)(e) by unilaterally deciding to increase student contact time, without first bargaining over that decision.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District violated ORS 243.672(1)(e) by refusing to bargain its decision to increase student contact time.

DISCUSSION

We quote the Board's prior order as to the applicable law, which neither party disputes:

“When, as here, a labor organization alleges that an employer made a unilateral change in the *status quo*, we apply the analysis as set out in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). First, we must identify the *status quo* and then determine whether the employer changed it. If the employer changed the *status quo*, we then determine whether the change concerns a mandatory subject for bargaining. If so, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. An employer must bargain about its decision to change a mandatory subject for bargaining *before* making the decision.”⁵ 23 PECBR at 658-59.

The Board's prior order treated the dispute as one involving whether the District was required to engage in predecision bargaining regarding the increase in student contact time. However, at oral argument before the Court of Appeals, as well as at oral argument before this Board on remand, the District did not dispute that it was required to engage in predecision bargaining with respect to student contact time. Rather, the District contended that it had engaged in such predecision bargaining because it did not make any “student-contact-time” decision in November 2007, but only in April 2008, *after* bargaining with the Association.

⁵If the employer did not complete its bargaining obligation, we would then consider any affirmative defenses raised by the employer (*e.g.*, waiver, emergency, or failure to exhaust contract remedies). Here, however, no affirmative defenses have been raised.

Thus, although the Board's prior order suggests otherwise, the parties generally agree on the appropriate legal framework governing this dispute. Specifically, the Association agrees that if the District made only a decision in November 2007 concerning the permissive subject of the trimester schedule, the District was not obligated to bargain that decision under the Public Employee Collective Bargaining Act (PECBA). For its part, the District agrees that if it made *separate* decisions in November 2007, one concerning the trimester schedule and a second concerning the mandatory subject of student contact time, it was required to bargain about the latter before deciding on any changes.⁶ Thus, as clarified at oral argument before the court and on remand before this Board, the dispositive issue is quite narrow and relatively straightforward—specifically, we must determine, as a factual matter, whether the District made a decision in November 2007 to increase student contact time. If so, the District violated subsection (1)(e) because no bargaining took place on that subject before such a decision was made. If not, the District did not violate subsection (1)(e) because it only made a decision concerning the permissive subject of the educational calendar.

In the Board's prior order, all three former members agreed that the District made *two* "prebargaining" decisions in November 2007, one concerning the permissive subject of the trimester schedule and one concerning the mandatory subject of student contact time. *See* 23 PECBR at 660-61 (majority opinion), 668 (dissenting opinion); *see also* 254 Or App at 576-77. That fact was also apparently accepted by the Court of Appeals, which characterized the facts as "undisputed," and noted on multiple occasions (including its remand instructions) that the District made "two decisions" in November 2007. *See* 254 Or App at 571, 577, 578, and 580.

Thus, to agree with the District that it only made *one* prebargaining decision in November 2007 (concerning *just* the permissive subject of the educational calendar), we would need to make a factual determination contrary to that set forth in the Board's prior order (by both the majority and the dissent), and that was understood by the court to be undisputed. We decline to do so. To begin, we are not inclined to revisit and reverse a factual finding made in a prior order that the District did not cross-assign as error with the court (*see* ORAP 5.57), and that was at least implicitly accepted by the court. In other words, we conclude that the District did not properly preserve a challenge to the Board's previous finding that the District made *two* decisions in November 2007, one concerning the permissive subject of the school calendar, and the second to the mandatory subject of student contact time.⁷ Consequently, we adhere to the Board's prior

⁶There is no dispute that the subject of the educational calendar is permissive for bargaining, and that the subject of student contact time is mandatory for bargaining. *See Three Rivers Ed. Assn.*, 254 Or App at 575.

⁷The significance in the District not cross-assigning as error the prior finding regarding the two decisions should not be underestimated. By not doing so, the court engaged in a substantial analysis of whether the District was required to engage in "impact bargaining" or "decision bargaining" regarding the mandatory subject of student contact time. That analysis (as well as the analysis in the Board's prior order) was predicated on a determination that the District made two prebargaining decisions in November 2007. If the District had cross-assigned as error the finding that it made two decisions in November 2007, the court could have addressed that finding at that time.

factual determination (which was unanimous) that the District decided in November 2007 to change both the educational calendar and student contact time.

In any event, even if we were to entertain the District's challenge to that prior factual finding, this Board would still conclude that the District made two prebargaining decisions in November 2007. On November 19, 2007, the school board adopted the process recommended by the Team; that recommended process included *both* changing to a trimester system and increasing student contact time. Consistent with that action, on November 26, 2007, Breckner, the District's HR Director and spokesperson in labor-relations matters, hand-delivered a letter to the Association stating that the District had: (1) approved a change from a 7-period semester schedule to a 5-period trimester schedule; (2) approved a change to move to a common prep period; and (3) approved a change in student contact time. With respect to the latter, Breckner's letter was unequivocal, stating that, although the average District teacher currently taught 312 minutes a day, 6 periods a day, under the change approved by the board, "a high school teacher *will teach approximately 340 minutes, 5 periods a day.*" (Emphasis added.)

Based on the foregoing, even if the District preserved the issue, we would nevertheless continue to adhere to the Board's prior determination that the District made two decisions in November 2007 to: (1) change to a trimester schedule (a permissive subject of bargaining); and (2) increase student contact time from 312 minutes per day to 340 minutes per day (a mandatory subject of bargaining).

In arguing for a different result, the District contends that it cannot be bound by Breckner's letter because only a formal resolution by the District's board could constitute a District "decision." We disagree.

Breckner was the District's HR director and labor-relations spokesperson. She was also the authority that informed the Association of the District's decision. Moreover, when the Association demanded to bargain and indicated that the District's prebargaining decision regarding mandatory subjects already violated the PECBA, Breckner was the District representative who informed the Association of the District's position regarding that assertion. Breckner also provided the Association with bargaining dates and asked the Association to come prepared to identify the mandatory impacts of the decision to change to a trimester system and to present its proposals. Breckner further accepted, on behalf of the District, the Association's demand to bargain, and she informed the Association of the District's willingness to engage in "impact" bargaining.⁸ Additionally, Breckner acted as the District's primary bargaining representative in the subsequent "impact" negotiations.

⁸The record does not show that the District's board formally voted on a resolution regarding that position.

Consequently, we find with little difficulty that Breckner was authorized to speak on behalf of the District regarding the decision that the board had made.⁹

In any event, we do not find Breckner's November 2007 letter informing the Association of the District's decisions regarding the trimester schedule and the increased student contact time to be inconsistent with the board's vote to approve the Team's recommendations regarding those matters. Specifically, Breckner's letter setting forth the District's decision was consistent with the board's vote to adopt the Team's recommendations, as both the letter and the board's vote reflected that the District had decided to both change to a trimester system and to increase student contact time. Under such circumstances, we disagree with the District's contention that Breckner's letter was insufficient to demonstrate that the District made a decision in November 2007 to change student contact time.

As set forth above, the District concedes that if we find that it made a decision in November 2007 to change student contact time, then it violated subsection (1)(e) because it did not bargain with the Association before making that decision. Therefore, because we have made such a finding, we conclude that the District violated ORS 243.672(1)(e).¹⁰

We turn to the remedy. Because the District violated ORS 243.672(1)(e) by deciding to change student contact time without first bargaining with the Association, we will order the District to cease and desist from engaging in that conduct. ORS 243.676(2)(b).

Normally, in a case involving an unlawful unilateral change such as this one, we also order restoration of the *status quo*. However, given the significant passage of time since the District's unlawful unilateral change (and the nature of the change), the Association requests that we instead direct the parties to bargain in good faith over the appropriate remedy. We agree with the Association that such a remedy is appropriate here and will so order. The parties will have 60 days from the date of this order in which to bargain in good faith for a remedy. If the parties have not

⁹Additionally, even if Breckner had acted on her own, such action would likely be imputed to the District. Under ORS 243.672(1), an unfair labor practice is committed by "a public employer or its designated representative." Although there is no statutory definition of "designated representative," for purposes of ORS 243.650 to 243.782, a "public employer representative" includes "any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues." ORS 243.650(21); *see also Service Employees Int'l Union Local 503 v. DAS*, 202 Or App 469, 476, 123 P.3d 300 (2005). As set forth above, there can be little dispute that Breckner was designated to act in the District's interests for purposes of collective bargaining and related issues and would qualify as a "designated representative" of the District within the meaning of the PECBA.

¹⁰Because we have not adhered to the Board's prior analysis and the issues on remand have been treated more narrowly, the court's remand instruction (to provide a substantially-reasoned order regarding that analysis) does not appear to be applicable. In any event, as we have explained, we conclude that the District made two separate decision in November 2007—(1) a change in student contact time, and (2) a change to the educational calendar—and that the decision to change student contact time was not caused by the decision to change the educational calendar.

reached an agreement on a remedy at the end of the 60-day period, each party is to submit to the Board the last proposal that was submitted to the other party, and we will determine a remedy that effectuates the policies of the PECBA.¹¹ See ORS 243.676(2)(c).

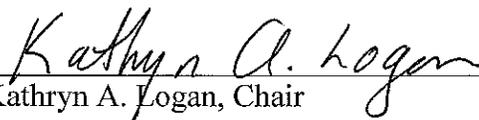
The Association also requests that we order the District to post a notice of its subsection (1)(e) violation. We order employers to post a notice of violations if we determine that the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983). Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). The Association has not identified which, if any, of these factors necessitate the requested posting remedy, and after applying these factors to the present case, we do not conclude that a posting is warranted.

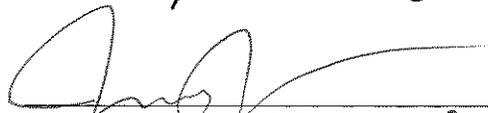
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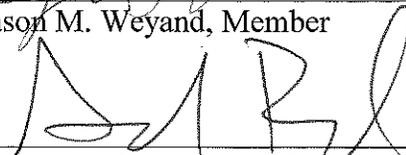
1. The District violated ORS 243.672(1)(e) when it decided to change student contact time without first bargaining with the Association. The District will cease and desist from engaging in such conduct.

2. The District and Association shall bargain in good faith over the appropriate remedy. The parties have 60 days from the date of this order to bargain over a remedy. If the parties have not reached an agreement on a remedy at the end of the 60-day period, each party is to submit to the Board the last proposal that was submitted to the other party.

DATED this 8 day of August, 2013.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

¹¹Our potential remedy may involve selecting the Association's proposed remedy, the District's proposed remedy, or a remedy of our own.