

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-2-04

(DECLARATORY RULING)

IN THE MATTER OF THE JOINT PETITION)	
FOR DECLARATORY RULING FILED BY)	
MEDFORD SCHOOL DISTRICT 549C AND)	DECLARATORY RULING
OREGON SCHOOL EMPLOYEES)	
ASSOCIATION CHAPTER 15)	
_____)	

The Board held oral argument on June 23, 2004, in Salem, Oregon.

David W. Turner, Staff Counsel, Oregon School Boards Association, 1201 Court Street N.E., P.O. Box 1068, Salem, Oregon 97308, represented the District.

Michael J. Tedesco, Attorney at Law, 15050 S.W. 150th Court, Beaverton, Oregon 97007, represented the Association.

Petitioners Medford School District 549C (District) and Oregon School Employees Association Chapter 15 (Association) jointly filed this request for a declaratory ruling on April 26, 2004. The petition seeks a ruling on whether the salary and fringe benefits reopener provision of the collective bargaining agreement is governed by the 90-day provisions of ORS 243.698 or the 150-day provisions of ORS 243.712. We conclude that, in the circumstances presented, the parties' bargaining is governed by the 150-day provisions of ORS 243.712.

STATEMENT OF FACTS BEING ADJUDICATED

1. The District is a public employer. The Association is the exclusive representative of a group of classified employees employed by the District.

2. The District and Association are parties to a collective bargaining agreement (Agreement) effective July 1, 1999, through June 30, 2006.¹

3. The parties have agreed to reopen salary and fringe benefit portions of the Agreement pursuant to Article I, Section 1.2.

4. Article I, Section 1.2, of the Agreement reads, as follows:

“1.2 CONTRACT DURATION AND REOPENING OF NEGOTIATIONS

“This contract shall be effective July 1, 1999 and shall remain in full force and effect to and including June 30, 2004. This contract may be extended by mutual agreement of both parties at any time prior to June 30, 2004. The term of the contract shall be extended for two years. The agreement will now expire on June 30, 2006.

“Upon expiration of this contract and until a new contract is negotiated, the salaries and fringe benefits identified in this Agreement or its supplements shall not be reduced.

“If, as a result of bargaining described in the paragraph above, salary or benefits are reduced, the District agrees to reopen for negotiations those items that had been reduced if it receives significantly more revenue than anticipated.

“In the event of a budget deficit from the prior year, legislative action or initiative affecting any portion of this agreement, the salary and related economic items

¹The petition states that the Agreement was effective July 1, 1999, through June 30, 2004, and a document was attached bearing those dates. The parties acknowledge that the Agreement has been extended and will now expire on June 30, 2006. The revised Agreement, which was attached to the District's brief in support of oral argument, contains changes in the pertinent contract language. At oral argument, the parties stipulated on the record that the current language, rather than the language of the 1999-2004 Agreement, is pertinent here.

agreed to herein shall not be reduced without negotiations between the Association and the District. A budget deficit shall be defined as the inability of the District to finance staffing and programs through the general fund operating budget at the previous year's level. The District or Association shall give notice of its need to renegotiate the contract during the term of the contract."

STATUTES BEING APPLIED TO THE FACTS

ORS 243.712, which sets out the process applicable to most collective bargaining, was amended in 1995. It establishes a 150-day period for bargaining "the terms of an agreement." It sets the time frames within which parties may declare impasse, submit final offers, and (in the case of strike-permitted units) impose a final offer or engage in a strike. ORS 243.698, which establishes an expedited 90-day bargaining period for certain negotiations, provides, in relevant part:

"(1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.

"(2) The employer shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain.

"(3) Within 14 calendar days after the employer's notification of anticipated changes specified in subsection (2) of this section is sent, the exclusive representative may file a demand to bargain. If a demand to bargain is not filed within 14 days of the notice, the exclusive representative waives its right to bargain over the change or the impact of the change identified in the notice.

“(4) The expedited bargaining process shall cease 90 calendar days after the written notice described in subsection (2) of this section is sent, and the employer may implement the proposed changes without further obligations to bargain.
* * * ”

No analogous provision existed before the 1995 enactment of ORS 243.698.

QUESTIONS PRESENTED BY THE JOINT PETITIONERS

1. When there is a salary and fringe benefit contract reopener, and the reopener language is silent as to bargaining timelines, is the reopener bargaining governed by ORS 243.698 or ORS 243.712?

2. Does it make a difference if successor contract negotiations have commenced as defined in *Cascade Bargaining Council v. Jefferson County School District*, Case No. UP-12-00, 19 PECBR 12 (2001)?

ANSWER REQUESTED BY THE DISTRICT

ORS 243.698 applies. This statute was enacted in 1995 for this very purpose.

ANSWER REQUESTED BY THE ASSOCIATION

ORS 243.712 applies when contract language is silent. If the parties intended the expedited process of ORS 243.698 to apply, they would have bargained language with that specification.

CONCLUSIONS AND REASONING

Prior to 1995, one process applied in all circumstances in which the parties had an obligation to bargain. The 1995 statutory amendments established two separate bargaining processes. The first, ORS 243.698, is an expedited process that applies to certain negotiations during the term of an agreement. The second, ORS 243.712, applies to all other bargaining. The issue presented here is which process governs these parties' reopener negotiations.

This Board implemented the 1995 amendments by adopting administrative rules. OAR 115-40-000. The pertinent provisions of those rules state, as follows:

“Mediation

“115-40-000 (1) Negotiations concerning a new or reopened collective bargaining agreement.

“* * * * *

“(b) The 150-calendar-day period of negotiations begins:

“(A) When an exclusive representative is recognized or certified; or,

“(B) Where the parties are negotiating over the terms of a successor agreement or pursuant to a contractual reopener provision, when the parties meet for the first bargaining session and each party has received the other party’s initial proposal.

“* * * * *

“(2) Mid-contract negotiations.

“(a) At any time during a 90-day period of expedited negotiations concerning a proposed change in employment relations not covered by a collective bargaining agreement or concerning the renegotiation of contract terms pursuant to ORS 243.702, the parties may jointly request mediation.

* * *

“(b) Mediation of a labor dispute subject to expedited negotiations shall not continue past the 90-day period. The 90-day period of expedited negotiations begins:

“(A) When the employer notifies the exclusive representative in writing of anticipated changes that impose a duty to bargain; or

“(B) When a party requests in writing renegotiation of contract terms pursuant to ORS 243.702.”

The plain language of OAR 115-40-000 answers the questions presented here. The 150-day bargaining period applies when parties are “negotiating over the terms of a successor agreement *or pursuant to a contractual reopener provision* * * * .” OAR 115-40-000(1)(b)(B) (emphasis added). By contrast, the 90-day bargaining period applies when the parties are negotiating “concerning a proposed change in employment relations *not covered by a collective bargaining agreement,*” or the parties are renegotiating an invalid contractual provision pursuant to ORS 243.702. OAR 115-40-000(2)(a) (emphasis added). Article I, Section 1.2, is a “contractual reopener provision” on salary and benefits, subjects that *are* “covered by” the Agreement. Bargaining pursuant to that reopener provision is therefore governed by ORS 243.712 and is subject to the 150-day

bargaining period and subsequent dispute resolution processes in that statutory provision.

The District nonetheless urges us to either (1) declare OAR 115-40-000 invalid to the extent it applies ORS 243.712 to reopeners, or (2) limit the rule to scheduled reopeners rather than optional or conditional reopeners such as the one here. We decline both invitations. Beginning with the District's second argument, we find no statutory or practical support for the narrow and tortured definition of reopener the District suggests. The rule applies to all reopeners, including the one at issue here.

Regarding the District's first argument, we conclude the rule is valid. The language of this rule is grounded in both the statutory language and the context in which that language was enacted—*i.e.*, a substantial body of case law that determines when an employer is "obligated to bargain over employment relations during the term of a collective bargaining agreement."

Mid-contract negotiations are not new to the Public Employee Collective Bargaining Act (PECBA). In 1996, law professor Henry H. Drummonds aptly summarized this Board's case law on mid-contract bargaining obligations as they existed prior to the 1995 statutory amendments:

"* * * Mid-contract bargaining obligations can arise under the PECBA in several situations: for example, when some term of a contract cannot be performed or is declared invalid; or when the contract remains silent on a 'condition of employment' and the employer proposes or makes a unilateral change in working conditions." LERC Monograph, Issue No. 14, *After SB 750: Implications of the 1995 Reform of Oregon's Public Employee Collective Bargaining Act*, University of Oregon, 47-48 (1996) (footnotes omitted).

In a footnote at the end of the paragraph quoted above, Professor Drummonds discussed the situation addressed by ORS 243.698, in which the contract is silent on the condition of employment:

"Mid-contract disputes in this latter situation arise most often when an employer attempts to make a 'unilateral change' in a 'condition of employment' on some subject not covered by the collective bargaining agreement, and the union has not waived its right to bargain by contract or

inaction. AFSCME, Local 2752 v. Wasco County, 4 PECBR 2397, 2400 (1979), *aff'd* 46 Or. App. 859, 613 P.2d 1067 (1980); Eugene Educ. Ass'n. v. Eugene Sch. Dist., 2 PECBR 1101 (1977). The 'unilateral change' law under the PECBA generally follows private-sector NLRB precedents. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962); May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945). *See generally*, Nancy J. Hungerford & Henry H. Drummonds, *The Continuing Duty to Bargain*, 2 LERC MONOGRAPH SER. 1 (1983) (updated 1986 by Paul B. Gamson)." *Id.* at fn. 192.

ORS 243.698 did not change the standards for determining when an employer is "obligated to bargain"; it merely provided an expedited vehicle for completing mid-term negotiations when that obligation exists. *Benton County Deputy Sheriff's Association v. Benton County Sheriff's Department*, Case No. UP-36-02, 20 PECBR 551, 561 (2004). Our administrative rules are consistent with the purpose and intent of the statutory provisions resulting from the 1995 amendments.²

This Board's case law leads to the same answers to the questions posed. We have previously discussed at length the history, purpose, and impact of the 1995 amendments. *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699 (1996), involved a proposal to subcontract transportation services, which was proffered within a month after the parties began negotiations for a successor collective bargaining agreement. There, the question was which bargaining process applied. We described the "special circumstances" in which ORS 243.698 applies. The bargaining must be:

"* * * (1) during the term of a contract; (2) when the employer notifies the union of 'anticipated changes'; (3) giving rise to an obligation to bargain – *i.e.*, changes concerning a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement." *Id.* at 703 (footnotes omitted).

²Courts will uphold an agency's construction and interpretation of its own rules if the interpretation is plausible and not inconsistent with the rule, the context of the rule, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994); *Stroeder v. OMAP*, 178 Or App 374, 380, 37 P3d 1012 (2001).

We explained that the expedited bargaining process in ORS 243.698 “does not by its terms supersede the regular bargaining process unless the special circumstances giving rise to its application are in place.” *Id.* at 705.

The questions posed here fit easily within our statutory analysis in *Sandy Union High*. Expedited bargaining under ORS 243.698 is an exception to the regular bargaining process, and is limited to the situation the legislature sought to address—*i.e.*, where the employer wishes to make a mid-term change in a condition of employment that is not already covered by the existing contract. A reopener is not such a situation. The subjects of negotiation—here, salary and fringe benefits—are covered by the existing contract. The parties are negotiating over possible changes on those subjects.³ For this reason, the 150-day process of ORS 243.712 applies to negotiations pursuant to a reopener provision in a collective bargaining agreement.

The second question posed by the petition is whether our answer would be different if the parties had already commenced successor bargaining when the time arose to bargain the reopener issues. This question would be significant only if we concluded that reopener bargaining in general is governed by the expedited process. The question apparently arises from our holding in *Sandy Union High* that the expedited process does not apply once successor bargaining has commenced. Here, however, that question does not arise because we conclude the reopener bargaining is governed by the 150-day process in ORS 243.712. That process would still apply if the parties had begun successor contract negotiations at the time of the reopener.⁴

³The duty to bargain over salary and fringe benefits under this reopener results from an agreement by the parties to bargain over subjects that are *already covered by the contract*. Further, *either party* may notify the other of “its need to renegotiate the contract during the term of the agreement.” This contractual provision does not fit within the scheme of ORS 243.698, which obligates only *the employer* to notify the union in writing when *the employer* is “obligated to bargain” over “anticipated changes” in employment relations while the contract is in effect.

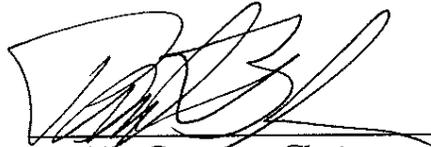
⁴We decline to join our concurring colleague in extending the expedited process of ORS 243.698 to changes proposed during bargaining for a successor contract. In *Sandy Union High*, we considered, and unanimously rejected, the same argument. We noted the potential to undermine the bargaining process if an employer could isolate one issue for expedited treatment while simultaneously bargaining for a successor contract. 16 PECBR at 705. That potential has not diminished in the intervening years. Our analysis of the text and context of ORS 243.698 has similarly retained its vitality. That statutory provision is a limited one, intended to apply to a specific situation, *i.e.*, “where the employer’s duty to bargain *only arises* because of its desire to make a mid-term change.” 16 PECBR at 705 (emphasis in original). When successor bargaining
(continued...)

RULINGS

1. In response to the first question, we rule that bargaining under a reopener clause is governed by ORS 243.712.

2. In response to the second question, we rule that the answer to the first question does not change depending on whether successor contract negotiations have begun at the time of the reopener.

DATED this 14th day of July 2004.



Paul B. Gamson, Chair

* Rita E. Thomas

Rita E. Thomas, Board Member

Luella E. Nelson

Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas Concurring:

I concur with this Order but write separately to discuss when expedited bargaining under ORS 243.698 applies.

⁴(...continued)

has already begun, the employer's duty to bargain does not "only arise" because of its proposed mid-term change. It arises instead under ORS 243.672(1)(e) and 243.712-243.756. That duty applies both to subjects addressed in the predecessor contract and to new subjects raised in bargaining. The expedited process of ORS 243.698 does not apply.

Our decision in *Sandy Union High* was driven by the balance struck by the legislature when it drafted ORS 243.698. The partial retrenchment from that balance urged by our colleague would exceed the limited scope of ORS 243.698.

In *Sandy Union High*, we concluded that once bargaining has begun for a successor agreement, mid-contract bargaining should be subsumed into the 150-day successor bargaining process. I disagree.

ORS 243.698 provides that matters subject to mid-contract negotiations, which are subjects not already covered by the agreement, and which arise “during the term of the agreement,” shall be bargained under the 90-day process. This language is clear and unambiguous. There is no statutory language under ORS 243.712 that modifies the rights and obligations provided under ORS 243.698.