

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-23-06

(UNFAIR LABOR PRACTICE)

NORTHWEST EDUCATION )  
ASSOCIATION/OEA/NEA, )  
 )  
Complainant, )  
 )  
v. )  
 )  
NORTHWEST REGIONAL )  
EDUCATION SERVICE DISTRICT, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter was submitted directly to this Board on October 30, 2007, following a hearing before Administrative Law Judge (ALJ) B. Carlton Grew on October 13, 2006, in Salem, Oregon. The record closed with the submission of post-hearing briefs on December 26, 2006.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Nancy Hungerford and Brian Hungerford, Attorney at Law, The Hungerford Law Firm, 653 S. Center Street, P.O. Box 3010, Oregon City, Oregon 97045, represented Respondent.

\_\_\_\_\_

On May 30, 2006, the Northwest Education Association/OEA/NEA (NWEA) filed an unfair labor practice complaint against the Northwest Regional Education District (District). The complaint, as amended, alleges that the District violated ORS 243.672(1)(e) when it unilaterally adopted a signing bonus policy in

February 2006, subsequently repealed this policy, and unilaterally adopted a hiring incentive pay policy in April 2006.

The following issues are presented: (1) Did the District violate ORS 243.672(1)(e) when it unilaterally adopted a signing bonus policy in February 2006; and (2) did the District violate ORS 243.672(1)(e) when it unilaterally adopted a hiring incentive pay plan in April 2006?

### RULINGS

All rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. NWEA, a labor organization, represents a bargaining unit of all District employees who work in positions for which Teacher Standards and Practices Commission (TSPC) or other professional licensure is required. Speech language pathologists, behavioral specialists, and school psychologists are in the bargaining unit. The District is a public employer.

2. The District and NWEA were parties to a collective bargaining agreement that was in effect from July 1, 2004 through June 30, 2006. The agreement contained a single salary schedule for all bargaining unit members; placement on this salary schedule was based on education and years of work experience. Under the terms of the agreement, the only pay provided to employees in addition to their regular salary was a \$1,000 stipend to any bargaining unit member with a PhD or EdD.

3. During the past several years, the District has had difficulty attracting qualified candidates for positions as speech language pathologist, behavior specialist, and school psychologist. In February 2005, at a regularly scheduled monthly meeting with NWEA President Donna Bauer, District Superintendent Jim Mabbott proposed offering a financial incentive to applicants for positions that were hard to fill. Mabbott asked Bauer if NWEA would allow the District to pay a bonus to applicants who accepted jobs with the District as speech language pathologists and school psychologists. Bauer told Mabbott she would take his proposal to the NWEA Executive Board for its consideration.

4. At its March 8, 2005 meeting, the NWEA Executive Board rejected Mabbott's proposal for hiring bonuses. In a memorandum dated March 9, 2005, Bauer told Mabbott about the decision. The memorandum stated:

“On March 8, 2005 I presented your request for ‘sign on’ bonuses for newly hired speech pathologists and/or school psychologists. Our executive board unanimously rejected such a request. A discussion followed and the following comments were made:

- “● NWEA encourages you to talk with the NWRES D board and encourage our NWRES D board to raise the salary of all employees so that they are competitive with our surrounding school districts. We remind you that our Contract can be reopened by mutual agreement and NWEA agrees that our current salary is currently below the competition.
- “● We encourage you to enter talks with NWEA to set caseload and/or workload limits to encourage retention of speech pathologists and school psychologists.
- “● We encourage you to support talks to work with NWEA in resolving conflicts that arise between school psychologists, speech pathologists and NWEA members whom often feel unsupported by NWRES D supervisors.
- “● We firmly believe that the problem does not lie just with attracting new employees but in retaining employees.
- “● We remind you that just two years ago some of our speech pathologists and school psychologists were cut 5-15 days of pay.

“NWEA agrees with the District that a current shortage for speech pathologists and school psychologists exists at NWRES D and we encourage you to meet with us to problem solve solutions that are fair and equitable.”

5. By letter dated February 10, 2006, OEA UniServ Consultant Dot Russell notified Mabbott that NWEA wished to begin bargaining for a successor agreement in April, and asked Mabbott for a list of dates on which the District bargaining team would be available to meet.

6. District negotiations representative Brian Hungerford responded to Russell in a letter dated February 16, 2006. Hungerford proposed that the parties immediately begin separate negotiations about travel reimbursement, and begin

negotiations for the entire successor collective bargaining agreement in April. Russell agreed with Hungerford's suggestion, and the two representatives scheduled bargaining sessions on the issue of travel reimbursement in March 2006.

7. At the February 21, 2006 meeting of the District Board of Directors, Mabbott gave the first reading of proposed revisions to General Personnel Policies-GB. Mabbott proposed to add the following language to the policy:

"The Superintendent will develop a list of positions that historically have been difficult to hire. The list will be reported to the Board as it changes. Successful applicants in those listed position [*sic*] will receive a signing bonus with the agreement that a contract will be signed. The Board will annually designate the amount of the signing bonus."

Mabbott proposed that the District designate \$1,750 as the annual signing bonus for the 2006-07 school year. He also suggested that applicants for positions as school psychologist, speech language pathologist, behavior specialist, and occupational specialist be eligible for the bonus. The District Board members agreed to waive a second reading of the signing bonus policy, as required by its rules, and voted to adopt the changes to the personnel policy proposed by Mabbott.

8. A copy of the proposed revisions to the General Personnel Policies-GB was sent by e-mail to NWEA President Bauer prior to the February 21 District Board meeting. Bauer was unable to open this e-mail, however, and never received a copy of the revisions proposed to the General Personnel Policies-GB. Mabbott never notified Bauer that the District Board had adopted changes to the policy that created a signing bonus, and never offered to bargain with NWEA about the policy revisions. Bauer found out about the changes in District Board policy on March 17, 2006.

9. On March 27, 2006, NWEA filed a grievance alleging that the revisions made by the District Board in General Personnel Policies-GB violated a number of provisions from the collective bargaining agreement. As part of the remedy requested for the grievance, NWEA asked that the District "[e]liminate the policy regarding a signing bonus until and unless the issue is bargained with NWEA." The District denied NWEA's grievance at the first two levels of the grievance procedure.

10. After NWEA filed its grievance, Mabbott proposed the following additional revisions to General Personnel Policies-GB:

~~“\* \* \* At the discretion of the Superintendent/designee, Successful-selected applicants in those listed position [sic] may be offered a pre-employment economic incentive to encourage them to accept employment with the district will receive a signing bonus with the agreement that a contract will be signed. The Board will annually designate the amount of the signing bonus economic incentive.”~~  
(Emphasis in the original.)

These revisions were scheduled for a second reading at the District Board meeting on April 18, 2007.

11. In a letter dated April 17, 2006, NWEA Attorney Monica Smith wrote Nancy Hungerford, attorney for the District, about the revisions the District proposed to make in General Personnel Policies-GB. The letter stated, in relevant part:

“I’m writing to you in your capacity as the attorney for Northwest Regional ESD about a dispute that is developing between the ESD and the Northwest Education Association. I am hoping that we can avoid extensive litigation if I explain to you the Association’s position on this issue.

“The Association informs me that the ESD is in the process of adopting a policy that provides a ‘bonus’ to applicants or new hires for ‘difficult to hire’ positions, as defined by the Superintendent. \* \* \* I see that a revised version is scheduled for a second reading at the April 18 meeting. The revised version attempts to moot the grievance and avoid a bargaining obligation by changing certain words, so that the ‘signing bonus’ has become a ‘pre-employment economic incentive,’ and the recipients are now ‘selected applicants’ rather than ‘successful applicants.’ \* \* \*

“These revisions do not change the Association’s position on the policy. We believe that it is clearly a form of compensation that must be bargained with the Association before it can be offered to new employees or potential new employees. Because the parties have bargained to completion on the subject of compensation, it cannot be offered at this time without violating the contract.

“\* \* \* \* \*

“My specific request is that the ESD withdraw from consideration policy GB-General Personnel Policies, and that it raise the issue as part of the successor negotiations, if it chooses to do so. If the ESD chooses to continue with the policy revision/adoption process, we will pursue both the grievance and an unfair labor practice.”

12. At its April 18, 2006 meeting, the District Board of Directors approved the additional revisions Mabbott proposed to Board Personnel Policies-GB. The District never notified NWEA about the changes or offered to bargain about them.

13. On April 24, 2006, the District and NWEA began negotiations for a successor collective bargaining agreement by mutually exchanging proposals. The District’s proposal included no language referring to a signing bonus or hiring incentive pay.

14. On May 15, 2006, Russell demanded arbitration in the grievance concerning General Personnel Policies-GB. Russell subsequently withdrew her demand, however.

15. During the spring of 2006, the District advertised on-line openings for speech language pathologists and psychologists. Hiring incentives were not mentioned in any of the information provided to prospective applicants, however. The District also participated in a job fair in Portland, Oregon at which it solicited applicants for open positions. The District posted a sign at its booth at the job fair that stated: “Ask us about our hiring incentive.”

16. Applicants for speech language pathologist and school psychologist positions with the District submitted their applications and supporting materials on-line. The District then interviewed qualified individuals, selected the applicants it wished to hire, and offered these individuals positions by phone. Each applicant who accepted a job then went to the District office to sign a form to memorialize acceptance of the job offer and confirm work schedule, salary, and benefits.

Applicants for positions as school psychologists and speech language pathologists first learned about the hiring incentive after they accepted positions with the District. When they came to the District office to memorialize their acceptance, District Chief Personnel Officer Darcy Rourke told them that they would receive a

\$1,750 payment as a hiring incentive. Rourke also gave them a letter from Superintendent Mabbott that stated:

“Dear NWRES D position applicant:

“Thank you for considering a position with our agency as a speech pathologist, school psychologist, physical therapist or behavioral specialist.

“The NWRES D Board of Directors has authorized me as the Superintendent to offer you a monetary incentive designed to further encourage your consideration of our offer of employment in one of the above mentioned positions. By accepting this incentive of \$1,750, you have no obligation to accept our offer of employment although we sincerely hope that you do so. We are merely asking that you look at everything the NWRES D has to offer you as a possible future employee.

“It is important for you to know that, since you are not an NRES D employee, the attached check is not a payroll check and State/Federal taxes have not been deducted. You will receive a Form 1099 at the end of the calendar year and you will be responsible for paying any taxes owed as a result of this monetary incentive.

“Once again, thank you for considering NWRES D as a potential employer and we hope that you choose to join our team.”

Individuals received the hiring incentive pay on the same day that they signed the agreement confirming their acceptance of positions with the District as speech language pathologists and school psychologists.

17. For the 2006-07 school year, 12 individuals accepted positions with the District as speech language pathologists and school psychologists; each of these individuals received a hiring incentive of \$1,750. No applicants for speech language pathologist and school psychologist positions who did not accept jobs with the District received the hiring incentive.

One of the individuals who accepted a position with the District as a speech language pathologist resigned on September 12, 2006, shortly after the start of the school year. She offered to return the hiring incentive pay she had received, but Rourke told her that she need not do so.

### 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) when it adopted the February 21, 2006 revisions to its personnel policy that provided a signing bonus to successful applicants for specified positions with the District.

On February 21, 2006, the District Board of Directors adopted a policy that allowed the Superintendent to make special payments to individuals who agreed to work in positions designated as difficult to fill. The District Board also designated school psychologist and speech language positions as difficult to fill and established a \$1,750 signing bonus for each applicant who agreed to work for the District in one of these jobs. NWEA alleges that the District's unilateral implementation of this policy constituted a violation of the duty to bargain in good faith under ORS 243.672(1)(e).

Under subsection (1)(e), an employer is obligated to bargain to completion with a labor organization before changing the *status quo* in regard to a mandatory subject of bargaining that is not included in the parties' contract. When, as in this case, a collective bargaining agreement is in effect, an employer can only make a unilateral change in a mandatory condition of employment if it first notifies the exclusive representative of the proposed change and completes the bargaining process mandated by ORS 243.698. When a union alleges that the employer made an unlawful unilateral change, we begin our analysis by determining: (1) whether the employer changed the *status quo* and (2) whether the change concerned a subject that is mandatory for negotiations. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007).

Here, the parties do not dispute the fact that the District's February 21, 2006 decision to implement a signing bonus constituted a change in the status quo. Prior to the District Board's February decision, the District did not offer a signing bonus. Under the collective bargaining agreement, the only pay any bargaining unit member received in addition to their regular salary was a \$1,000 stipend paid to any employee with a PhD or EdD. The signing bonus thus constituted a new contractual monetary benefit for certain individuals.

The parties do not agree, however, as to whether a hiring bonus concerns a subject which is mandatory for negotiations. The District asserts that money designated as a hiring bonus was intended to be paid to individuals who were not members of the bargaining unit at the time they received it. The District correctly points out that under the Public Employee Collective Bargaining Act (PECBA), it is obligated to negotiate only about the terms and conditions of employment for bargaining unit members. *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 722 (1996), *AWOP* 147 Or App 729, 939 P2d 172, 173 (1997). According to the District, it had no duty to bargain about a signing bonus because it was monetary benefit for non-bargaining unit members. We disagree with the District's premise that the bonus went only to non-bargaining unit members.

The record demonstrates that under the February 21 policy adopted by the District Board, an applicant was to receive the signing bonus only after the applicant was offered a job by the District and agreed to take it. Under Oregon law, a contract is formed when parties make a bargain in which they demonstrate mutual assent to an exchange and consideration. Ordinarily, mutual assent is shown when an offer made by one party is followed by the other party's acceptance. *Ken Hood Construction v. Pacific Coast Construction*, 201 Or App 568, 578, 120 P3d 6 (2005), *adh'd to as modified on recons*, 203 Or App 768, 126 P3d 1254 (2006) (citing *Restatement (Second) of Contracts* §§ 17(1) and 22(1) (1981)). The contract is formed even if the parties intend to subsequently adopt a written memorial of their agreement. *Ken Hood Construction*, 201 Or App at 579. The consideration involved in the formation of a contract may be a bargained-for exchange of promises between the parties. *Restatement* at § 71.

Here, the District's February 21 policy provided bonuses only to an applicant who was offered a job by the District and promised to accept it. Under Oregon law, this offer and acceptance formed an enforceable contract for employment with the District. Thus, the signing bonuses were to be paid to applicants when the parties formed employment relationships that placed the employees in the bargaining unit. Under this policy, the individuals were employees of the District and thus members of the bargaining unit at the time they received the bonus payments. Consequently, the policy concerns a subject which is *per se* mandatory for negotiations—a direct monetary benefit to bargaining unit members. ORS 243.650(7)(a); and *Washington County Police Officer Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274, 286 (2003).

Even if we were to accept the District's argument—that the hiring bonus was agreed to before the individuals became employees of the District—our conclusion remains unchanged. In *Washington County Police Officers Association*, 20 PECBR 274, we considered a situation analogous to the one presented here. In *Washington County Police*

*Officers Association*, the employer required, as a condition of hire, that new employees sign an agreement in which they promised to reimburse the county for the cost of mandatory training if they quit their jobs within three years. We determined that “[r]egardless of when it is paid, or whether designated as a monetary penalty, damages, or reduction in pay, it involves rights and obligations that concern direct or indirect monetary benefits arising out of the employment relationship.” 20 PECBR at 287; ORS 243.650(7)(a). We were unpersuaded by the employer’s argument that the individuals required to repay their training costs had already quit and were technically non-employees. We noted that the reimbursement requirement affected employees’ monetary benefits, since it impacted their ability to retain compensation they had received. *Washington County Police Officers Association*, 20 PECBR at 288 (quoting *New Jersey Transit Authority v. Local 304*, 314 NJ 129, 714 A2d 329, 158 LRRM 3064 (1968)).

In *Washington County Police Officers Association*, the employer made a potential monetary *penalty* a condition of employment for newly-hired employees. Here, the District’s February 21 hiring bonus policy made a salary *increase* a condition of employment for newly-hired workers. The distinction between an increase and a penalty does not matter. Both directly affect the amount of compensation employees receive and retain. We conclude, for the same reasons we did in *Washington County Police Officers Association*, that the District’s February 21 hiring bonus policy affects monetary benefits that arose out of the employment relationship, a subject that is *per se* mandatory for negotiations. ORS 243.650(7)(a). Accordingly, the District made a unilateral change in violation of ORS 243.672(1)(e) when it failed to complete the statutory bargaining process before it adopted the February 21 revisions to its personnel policies.<sup>1</sup>

3. The District violated ORS 243.672(1)(e) when it adopted the April 18, 2006 revisions to its personnel policy which provided a hiring incentive to applicants for designated positions with the District.

---

<sup>1</sup>The District asserts, as an affirmative defense, that NWEA waived its right to bargain about the February 21 changes to District personnel policies when it failed to make a timely demand to bargain. The District notes that NWEA never demanded to bargain about the policies until it filed a grievance on March 17. When an employer wishes to make unilateral changes in a mandatory subject of bargaining during the life of a collective bargaining agreement, the PECBA requires that it notify “the exclusive representative in writing of anticipated changes that impose a duty to bargain.” ORS 243.698(2). The union then has 14 calendar days to demand to bargain. ORS 243.698(3). An employer that fails to provide the appropriate notification denies the labor organization its statutory opportunity to demand bargaining before the change is made. Here, the District did not give NWEA written notice at least 14 days before the District Board adopted the policy at issue. Under these circumstances, NWEA was not required to make a bargaining demand before filing this unfair labor practice complaint alleging a violation of subsection (1)(e). *Washington County Police Officers Association*, 20 PECBR at 285 n. 11.

On April 18, 2006, the District Board of Directors voted to revise its hiring bonus policy. These policy revisions allowed the Superintendent to provide a “pre-employment economic incentive” to selected applicants for certain positions that were designated as hard to fill. The “pre-employment economic incentive” was intended to encourage applicants to work for the District. The Superintendent designated the positions of school psychologist, and speech and language pathologist as hard to fill for the 2006-07 school year, and the District paid a \$1,750 pre-employment incentive to each of 12 applicants who accepted one of these jobs.

According to the District, these pre-employment incentives differed from the signing bonus in several significant respects. The payments were made to encourage individuals to work for the District, and were not considered salary. Applicants had no obligation to repay the hiring incentive to the District even if they rejected the District’s offer of employment<sup>2</sup> or quit their jobs. Based on these circumstances, the District contends that the hiring incentive payments went to individuals who were not bargaining unit members at the time they received them. The District argues that because the hiring incentive policy affected only non-employees, it did not concern a mandatory subject for negotiations. Accordingly, the District contends that adoption of the April 18 personnel policy revisions did not violate its duty to bargain under subsection (1)(e). We disagree.

We see little, if any, practical difference between the District’s February 21 signing bonus and the April 18 hiring incentive. Both had the same purpose of attracting applicants to positions that were hard to fill. Both used the same method of fulfilling this purpose by giving extra money to applicants who accepted jobs. Both the signing bonus and the hiring incentive were to go to individuals only after they promised to accept the District’s offer of employment.<sup>3</sup> Thus, at the time they received the money, the applicants under both policies had already formed enforceable employment contracts with the District by accepting job offers for bargaining unit positions. The net effect of both the signing bonus and the hiring incentive was the same: certain bargaining unit members received extra-contractual salary increases. Accordingly, the hiring incentive policy, like the signing bonus policy, directly affected the employees’ monetary benefits,

---

<sup>2</sup>It is disingenuous of the District to argue that applicants did not need to repay the incentive if they rejected the District’s job offer. On this record, it is clear that the District did not mention the incentive pay until *after* the recipient had already accepted the offer.

<sup>3</sup>As a practical matter, it appears that the District’s April 18 hiring incentive policy was either an unnecessary or ineffectual method of inducing applicants to accept employment with the District. The only applicants who received the incentive pay were those who had already agreed to work for the District.

a subject which is *per se* mandatory for negotiations. The District violated ORS 243.672(1)(e) when it adopted the hiring incentive policy on April 18, 2006 without first completing bargaining with NWEA.

### Remedy

Because the District has already rescinded and revised its February 21, 2006 signing bonus policy, it is unnecessary to order that the District take any action in regard to this policy. In accordance with ORS 243.672(2)(b), however, we will order the District to cease and desist from adopting the April 18, 2006 revisions to its personnel policy that created a hiring incentive. If the District wishes to adopt and implement such a policy, it must first complete the appropriate bargaining process under the PECBA.

NWEA requests an order requiring the District to post a notice of its wrongdoing. After considering the criteria we use to determine if it is appropriate to order a party to post a notice, we conclude that a notice is not warranted. *See Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007).

We also deny NWEA's request for a civil penalty. We may award a civil penalty when a party commits an unfair labor practice "repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious." ORS 243.676(4)(a). We find no evidence in the record that the District's actions were repetitive or taken with the knowledge that they constituted an unfair labor practice. Nor do we find that the District acted egregiously. The District's rescission of its February 21 signing bonus and adoption of the April 18 hiring incentive policy appear to be a sincere attempt to create a lawful method of encouraging applicants to work for the District.

Finally, NWEA asks that we order the District to reimburse its filing fees. ORS 243.672(3) allows this Board to order such reimbursement to a prevailing party in an unfair labor practice proceeding when we find that an answer was frivolous or filed in bad faith. A pleading is considered frivolous only if every argument asserted is one that a reasonable lawyer would know is not well-grounded in fact, warranted by existing law, or by a reasonable argument for extending the law. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 104 (2007) (appeal pending). We do not find that the District's answer was either frivolous or filed in bad faith. All

arguments asserted by the County had a basis in the facts and existing law, or were supported by a reasonable argument for extending the law. We will deny NWEA's request for reimbursement of its filing fees <sup>4</sup>

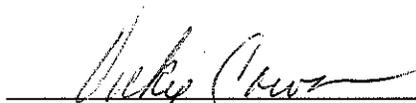
ORDER

The District shall cease and desist from adopting its April 18, 2006 revisions to its personnel policy that created a hiring incentive and shall immediately rescind the policy.

DATED this 30<sup>th</sup> day of January 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>4</sup>When an employer commits an unfair labor practice, this Board may order affirmative relief intended to make the injured party whole when necessary to effectuate the purposes and policies of the PECBA. ORS 243.672(2)(c). Here, NWEA has not requested an affirmative remedy, and it would be inappropriate to order such a remedy. The District injured Complainant NWEA by depriving the union of the opportunity to bargain over a change in a mandatory subject of bargaining. A make-whole remedy for the violation of the PECBA would logically require us to order bargaining unit members repay the economic incentives they received as a result of the District's unlawful actions. We decline to order such a remedy. The purposes and policies of the PECBA would not be furthered by a remedy that strengthens a union's position at the expense of its members. *See Association of Professors: Southern Oregon State College v. Oregon State Board of Higher Education*, Case No. UP-27-88, 11 PECBR 491, 515 (1989) (employees need not return a pay increase the employer unlawfully implemented).