EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-32/35-06

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL #1431, Complainant, v. CITY OF MEDFORD, Respondent, Case No. UP-32-06;	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
CITY OF MEDFORD Complainant, v. INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 1431, Respondent, Case No. UP-35-06.	)	

This Board heard oral argument on August 1, 2007 on objections filed by Complainant International Association of Firefighters Local 1431 to the Proposed Order issued by

Administrative Law Judge (ALJ) Vickie Cowan on June 8, 2007, following a hearing on November 14, 2006, in Medford, Oregon. The hearing record closed on January 8, 2007, upon receipt of the parties' post-hearing briefs.

Michael J. Tedesco, Attorney at Law, 1729 N.E. 65th Avenue, Hillsboro, Oregon 97124, represented the Association.

Jeffrey P. Chicoine, Attorney at Law, Newcomb, Sabin, Schwartz & Landsverk, US Bank, Suite 4040, 111 S.W. Fifth, Portland, Oregon 97204, represented the City.

On July 12, 2006, the International Association of Firefighters Local 1431 (Association) filed unfair labor practice complaint number UP-32-06 alleging that the City of Medford (City) violated ORS 243.672(1)(e) by expanding a work-hour proposal beyond the parties' tentative agreement and pursuing interest arbitration. The City filed a timely answer.

On August 4, 2006, the City filed unfair labor practice complaint number UP-35-06 alleging that the Association violated ORS 243.672(2)(b) and (d) by refusing to bargain or proceed to interest arbitration. The Association filed a timely answer.

The cases were consolidated for hearing.

The issues presented are:

1. Did the City bargain in bad faith about its 40-hour-work-week proposal in violation of ORS 243.672(1)(e)?

2. Did the Association unlawfully refuse to bargain over the City's 40-hour-work-week proposal and unlawfully refuse to proceed to interest arbitration in violation of ORS 243.672(2)(b) and (d)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of Fire Department personnel employed by the City, a public employer. Bargaining unit members provide emergency response, fire prevention, and public education services.

2. The City maintains five fire stations. Each fire station has an engine company which is staffed by a minimum of three firefighters at all times. The work of the engine companies is supplemented by two-person rapid response units (RRUs).

3. For at least 17 years, firefighters, engineers, and captains have worked a schedule in which they are assigned 24 hours on duty, 24 hours off duty, 24 hours on duty, 24 hours off duty, 24 hours on duty, 24 hours off duty, and four days off. This schedule is referred to as a 56-hour work week because over a four-year period, employees work an average of 56 hours per week.

4. The Association and the City were parties to a collective bargaining agreement effective July 1, 2001 to July 1, 2005.

5. In April 2005, the parties began negotiations for a new successor collective bargaining agreement.

6. On April 7, 2005, the parties agreed to ground rules which provided, in pertinent part:

> "1. The parties conducted their initial meeting on 4/7/05, and agreed that the 150-day bargaining period begins 4/20/05 with the mutual exchange of proposals for the successor contract, notwithstanding that discussions preliminary to negotiations commenced earlier in a timely fashion pursuant to the existing contract.
>
> "2. All proposed modifications to the existing contract are to be presented in writing.
>
> "* * * * *

"4. No new proposals would be made by either side after the third bargaining meeting. New proposals are those which do not naturally flow from existing proposals or that raise substantially new content/subject matter."

7. On April 20, 2005, the City made the following proposal:

"This is provided for information only at this time.

"The City is considering operating a Day Time Engine Company; unfortunately no specifics are available to reduce to writing for negotiations at this time. The City reserves the right to make proposals on this subject during negotiations.

8. At an April 25, 2005 bargaining session, the City withdrew its proposal concerning the "Day Time Engine Company." The City proposed to delete existing contract language which required the City to maintain "[c]urrent hours of work" unless a change was mutually agreed upon, and replace it with the following provision:

"* * * <u>At the City's discretion, operational personnel assigned to a 56-hour week may be transferred to a 40-hour week for the purpose of staffing operational units. The format of the 40-hour week shall also be at the City's discretion.</u>" (Emphasis in original.)

9. On May 31, 2005, the Association rejected the City's 40-hour-work-week proposal. The Association asked for additional information regarding the City's proposal.

10. In response to the Association's request, the City prepared a "Concept Paper" regarding the 40-hour work week and presented it to the Association on August 8, 2005. The "Concept Paper" stated, in relevant part:

"**<u>Concept</u>**

"• Place units in service during peak times to improve delivery of service by supplementing current staffing and reducing response times in the city.

"• Demonstrate the effectiveness of this unit, move through the phases to eventually add a sixth company in its own fire station.
"• The department is most interested in having qualified personnel who want to work the 4-10's.

"**Three phases**

"• Phase 1: Operate one day time crew to supplement the five 24 hour units. This unit could be either a two or three person unit.

"• Phase 2: Operate two day time crews to supplement the five 24 hour units. These units could be either two or three person units.

"• Phase 3: Build Fire Station 1 and hire additional staff to have one three person company on the 56 hour schedule.

"• Phase 4: Return to Phase 1 to begin process for Fire Station #7.

"**Phase 1**
"Make the current day-time unit a 3 person engine as much as possible. Reassign two personnel to a 40 hour week (4/10's 0800-1800 each day)
"Transfer the fourth FF from 03 to this unit from 0800-1800
"Maintain five – three person engines working the 24 hour schedule

"**Proposals**

"12.3 Operational assignments to the 40 hour (4-10's) schedule

"• All Firefighters hired after July 1, 2005 are subject to transfers between the 40 and 56 hour schedule.

"• Promotions to Captain and Engineer after July 1, 2005 are subject to transfers between the 40 and 56 hour schedule.
"• Assignments are made for one calendar year.
"• The department will first consider requests for the assignment; selection will be at the discretion of the Fire Chief." (Emphasis in original.)

11. In December 2005, the Association declared impasse. On January 23, 2006, the parties participated in a one-day mediation session. The parties were unable to reach agreement and scheduled interest arbitration for April 25, 2006.

12. The parties met on March 14, 2006, in an effort to reach agreement on a new contract before arbitration. The City submitted a revised proposal on the 40-hour work week which provided, in pertinent part:

> "12.3 Upon execution of this agreement, at the City's discretion, a 40-hour shift schedule for operational personnel may also be used, subject to the following conditions:
>
> "(a) Employees hired after July 1, 2006 may be assigned to a 40-hour week for the purpose of staffing operational units.
>
> "(b) Employees hired prior to July 1, 2006 may volunteer for assignment to a 40-hour work week schedule, said assignment to be for a one-year period.
>
> "(c) The 40-hour work week schedule, if implemented, is designated as a separate shift.
>
> "(d) Employees assigned thereto would be provided at least 90 days notice of assignment to the shift." (Emphasis in original.)

13. At the end of the March 14 session, the parties reached tentative agreement on all issues. The tentative agreement specified that current work hours would

remain in effect unless a change was mutually agreed upon. In regard to the City's 40-hour-work-week proposal, the parties agreed to the following language:

> "The parties agree to meet and engage in interim bargain [*sic*] over the 40-hour workweek proposal from management. The parties that [*sic*] agree that the PECBA [Public Employee Collective Bargaining Act] interim bargaining rules apply to such bargaining and that the 90-day period under ORS 243.968 commences on March 15, 2006."

The parties also agreed to schedule an interest arbitration on July 16, 2006, in case they were unable to reach agreement on the issue of a 40-hour work week.

14. Both the City and the Association ratified the tentative agreement they had reached.

15. On March 15, 2006, the City gave the Association a 40-hour-work-week proposal, which provided, in relevant part:

> "12.3 <u>At the City's discretion, operational personnel hired after July 1, 2006 may be assigned to a 40-hour week for the purpose of staffing operational units. Employees hired prior to July 1, 2006 could volunteer for a 40-hour work week schedule for a one-year period. The 40-hour work week schedule would be designated as a separate shift, and employees assigned thereto would be provided at least 90 days notice of assignments to the shift.</u>" (Emphasis in original.)

16. The parties held their first formal interim bargaining session on March 22, 2006. At this meeting, the fire chief explained that he wanted to start with a 40-hours-per-week operational unit which would work Monday through Thursday, the days when the demand for emergency response services was greatest. He hoped to form an additional 24-hour/7-day-a-week company within the next two to three years. The fire chief indicated that achievement of this goal would depend upon budget restrictions and the support of the City Council.

17. The parties met again on April 12, 2006. The City presented a 40-hour-work-week proposal to the Association which provided, in relevant part:

"12.3 At the City's discretion, a 40-hour shift schedule for operational personnel may also be used, subject to the following conditions:

"(a) An employee hired after July 1, 2006 may be assigned to a 40-hour week for the purpose of staffing operational units.

"(b) An employee hired prior to July 1, 2006 may volunteer for assignment to a 40-hour work week schedule which assignment would normally be for a period of not less than six months nor more than one year.

"(c) Use of a 40-hour work week schedule, if implemented, is designated as a separate shift for purposes of vacation selection or any other shift-related benefit.

"(d) Employees assigned thereto would be provided at least 90 days notice of assignment to the shift." (Emphasis in original.)

18. During discussion of the City proposal at the April 12 meeting, the fire chief explained to the Association that although he wanted eventually to add an extra engine company to the Fire Department, he might have to begin with a "manpower pool." Based on this remark, Association negotiators concluded that the City now wanted to create a group of bargaining unit members who could be assigned any duties Fire Department managers wished, including non-operational administrative tasks. The Association spokesperson told the City that the Association believed the City had changed their proposal, and the Association needed to reevaluate it.

19. On June 23, 2006, the parties met for a third and final interim bargaining session. The Association spokesperson told the fire chief that he believed the City had changed its proposal because the City now wanted the right to assign 40-hours-per-week employees to tasks other than those related to emergency response operations. The fire chief responded by referring Association negotiators to his original proposal that specified that the 40-hours-per-week workers would be used to staff operational units. The fire chief explained that the intent of his proposal was to put 40-hours-per-week employees to work in the field and not in an office. When the

Association spokesperson continued to question the City's intentions, the fire chief reiterated that he wanted people working in the field. The parties discussed additional concerns that the Association had about the City's proposal, and the City agreed it would revise its proposal to address some of these issues.

20. Although additional dates were set for further negotiations, the Association refused to meet with the City. The Association also refused to proceed to the scheduled interest arbitration. Instead, the Association decided to file this unfair labor practice complaint.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The City did not bargain in bad faith in violation of ORS 243.672(1)(e) in negotiations about its 40-hour-work-week proposal.

The Association alleges that the City bargained in bad faith about its proposal concerning the 40-hour work week in violation of ORS 243.672(1)(e). Under the terms of the parties' tentative agreement, the City and the Association were obligated to bargain over the City's 40-hour-work-week proposal in accordance with the provisions of ORS 243.698. Under this statutory provision, when an employer is "obligated to bargain over employment relations during the term of a collective bargaining agreement," the parties will engage in 90 days of bargaining. ORS 243.698(1). If negotiations involve a strike-prohibited bargaining unit and no agreement is reached after 90 days of bargaining, either party may initiate interest arbitration proceedings. ORS 243.698(4); *State of Oregon, Department of Justice v. Criminal Investigators' Association,* Case No. UP-14-00, 18 PECBR 630 (2000). According to the Association, the City violated its obligation to bargain in good faith by changing its 40-hour-work-week proposal at May and June negotiation sessions and by forcing the Association to proceed to interest arbitration. We begin our analysis by considering the extent and nature of an employer's duty to bargain in good faith.

An employer violates subsection (1)(e) when: (1) its conduct is so inimical to the negotiations process that it constitutes a *per se* violation of its good faith bargaining duty or (2) the totality of its conduct during negotiations indicates an unwillingness to reach an agreement. *Portland Police Association v. City of Portland,* Case No. UP-64-01, 20 PECBR 295, 310 (2003), quoting *Public Works Association Local 626 v. Lane County,* Case No. UP-1-98, 17 PECBR 879, 885 (1998). *Per se* violations of

subsection (1)(e) include employer actions such as unilaterally implementing a change in a mandatory subject of bargaining, or submitting a new proposal in mediation or as part of a final offer. *City of Portland,* 20 PECBR at 310, quoting *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 464-66, *reconsid* 12 PECBR 646 (1990).

In applying the totality of conduct standard, we analyze the following factors to decide if an employer's conduct indicates an unwillingness to reach agreement and constitutes unlawful surface bargaining: (1) dilatory tactics; (2) contents of the proposals; (3) behavior of the party's negotiator; (4) nature and number of concessions made; (5) failure to explain a bargaining position; and (6) the course of negotiations. *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 393 (2006).

The Association does not allege that the City's actions during the 90-day bargaining period were a *per se* violation of subsection (1)(e). Accordingly, we will consider the totality of the City's conduct in bargaining about the 40-hour-work-week proposal to determine whether it violated subsection (1)(e).

The Association does not assert that the City engaged in dilatory tactics, that the City spokesperson behaved discourteously, or that the City refused to explain its proposals. The Association allegations concern the contents of the City proposals and the course of negotiations. The Association contends that the City abruptly and unfairly changed its proposal at May and June negotiation sessions, and that the changes in its proposal were contrary to the ground rules to which the parties agreed. The Association argues that prior to the May and June negotiation sessions, it believed that the City had proposed a 40-hour work week in order to staff an engine company or RRU. According to the Association, the City radically changed its proposal when the City fire chief mentioned creation of a "manpower pool" of 40-hours-per-week employees at a May negotiation meeting. The Association asserts that this change violated the parties' negotiation ground rules, which required that no new proposals could be submitted after the parties' third bargaining session. In addition, the Association argues that the City had no sincere desire to reach a negotiated agreement about its 40-hour-work-week proposal and hurried through the bargaining process in order to proceed to interest arbitration.

We first consider the Association's contention regarding the contents of the City's proposals. In determining the meaning and intent of the City proposals, we will apply basic principles of contract interpretation. The objective manifestations of the City's intent control, rather than the City's subjective intentions or unspoken

assumptions. *OSEA v. Athena-Weston School District,* Case No. UP-2-97, 17 PECBR 586, 590 (1998). We find virtually no support in the record for the Association's assertion that the City changed the meaning or intent of its 40-hour-work-week proposal. Throughout negotiations, the City consistently proposed the same language regarding the assignment of 40-hours-per-week employees: they were to be assigned to operational units of the Fire Department. When Association negotiators told the City they were worried about the type of work that the 40-hours-per-week workers could be required to perform, the fire chief repeatedly assured them that he wanted firefighters working in the field and not in an office. Under certain circumstances, changes made by a party in a bargaining proposal might constitute bad faith bargaining in violation of subsection (1)(e), particularly if proposals were changed in a regressive manner. These circumstances are not present in this case. The Association failed to prove that the City made *any* substantive changes in its proposal regarding the assignment of 40-hours-per-week workers.[1]

We now turn to the Association's contention that the City demonstrated no serious intent to reach agreement on the 40-hour work week and sought only to move through the process as quickly as possible in order to proceed to the interest arbitration scheduled for July 16, 2006. Again, we find little evidence in the record to support this assertion. After reaching tentative agreement on a contract in March 2006, the City and the Association met regularly to bargain about the City's proposal for a 40-hour work week. The City explained its proposals, listened to the Association's concerns, and proposed to address these concerns in its counterproposals. The City had no opportunity to offer these counterproposals, however, because the Association stopped negotiating. Based on our analysis of the City's conduct during negotiations, we conclude that the City demonstrated a sincere desire to reach agreement on the issue of the 40-hour work week and did not engage in bad faith bargaining.

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[1]In support of its contention that the City unlawfully made a new proposal, the Association cites *City of Madras v. Madras Police Employees Association,* Case No. UP-63-02, 20 PECBR 258 (2003), and *Lincoln County Employees Association v. Lincoln County,* Case No. UP-42-97, 17 PECBR 683 (1998). Our conclusions in these cases are not applicable to the facts here, however. In both *City of Madras* and *Lincoln County Employees Association,* we found that the parties violated their statutory obligation to bargain in good faith when they submitted new proposals to interest arbitration that they had not bargained about or submitted to the PECBA dispute resolution process. The dispute in this case concerns the type of bargaining in which the parties were obligated to engage during the 90-day period *prior* to interest arbitration under the provisions of ORS 243.698.

The City did not bargain in bad faith in violation of subsection (1)(e) during negotiations over the 40-hour-work-week proposal. We will dismiss the Association's complaint.

3. The Association did not refuse to bargain over the City's 40-hour-work-week proposal in violation of ORS 243.672(2)(b).

In its unfair labor practice complaint, the City alleges that the Association bargained in bad faith in violation of ORS 243.672(2)(b) by refusing to discuss its 40-hour-work-week proposals during the bargaining sessions held between March 15, 2006 and June 23, 2006.

The City provided little factual argument or factual support for its contention that the Association bargained in bad faith. We do not find that the Association's conduct during negotiations was a *per se* violation of subsection (2)(b). We next evaluate the Association's actions under the totality of circumstances test we use to determine bad faith surface bargaining. The only Association conduct that might indicate unlawful surface bargaining is the Association's unwavering rejection of the City's 40-hour-work-week proposal.

In regard to an *employer's* duty to bargain in good faith, we have never found that an employer engaged in bad faith bargaining solely because the employer refused to make concessions during negotiations. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and Oregon State Police Officers' Association v. State of Oregon, Department of State Police,* Case Nos. UP-25/35-04, 21 PECBR 139, 151 (2005), *aff'd* 213 Or App 648, 164 P3d 291 (2007); *School Employees Local Union 140, SEIU v. School District No. 1, Multnomah County,* Case No. UP-44-02, 20 PECBR 420, 433 (2003); and ORS 243.650(4).

Consistent with the statute and our holding in *Association of Oregon Corrections Employees* and *School District No. 1, Multnomah County,* we do not conclude that the Association's failure to make concessions during bargaining with the City over the 40-hour-work-week proposal constituted unlawful surface bargaining in violation of ORS 243.672(2)(d).

4. The Association refused to proceed to interest arbitration in violation of ORS 243.672(2)(d).

The City alleges that the Association violated ORS 243.672(2)(d) which makes it an unfair labor practice for a union to "[v]iolate the provisions of any written

contract with respect to employment relations * * * ." As discussed above, the Association and the City agreed, in writing, that they would bargain about the City's 40-hour-work-week proposal during the life of the collective bargaining agreement, and also agreed that these negotiations would be conducted in accordance with ORS 243.698. Under the provisions of this statute, either party may request interest arbitration if negotiations involve a strike-prohibited bargaining unit and no agreement is reached after 90 days of good faith bargaining.

Here, the parties bargained in good faith over the City's 40-hour-work-week proposal for more than 90 calendar days—from March 15, 2006 through June 23, 2006. Under the terms of the parties' agreement, either party had the right to initiate interest arbitration proceedings. By refusing to comply with the City's request to proceed to interest arbitration, the Association violated the terms of the agreement it made with the City.

Remedy

We have concluded that the Association violated ORS 243.672(2)(d) by refusing to proceed to interest arbitration. Under ORS 243.676(2), we must order the Association to cease and desist from its unlawful actions and to proceed to interest arbitration. However, both parties have expressed a desire to continue negotiations. In these circumstances, we believe that additional negotiations would benefit the parties and further the purposes and policies of the PECBA. Accordingly, we will order the parties to schedule an interest arbitration on a date no sooner than 30 days from the date on which this Order is issued, and, unless the parties agree otherwise, no later than 60 days from the date on which this order is issued. This will allow the parties additional time to bargain in good faith about the City's 40-hour-work-week proposal.

The City has also requested that we order the Association to post a notice of its wrongdoing. Under the criteria we use to determine if it is appropriate to order a party to post a notice, we conclude that such a remedy is not warranted. *See Blue Mountain Faculty Association v. Blue Mountain Community College,* Case No. UP-22-05, 21 PECBR 673, 782 (2007). In addition, posting of such a notice might adversely affect the parties' negotiations.

ORDER

1. The Association shall cease and desist from refusing to proceed to interest arbitration. The parties will schedule an interest arbitration on a date no sooner than 30 days from the date on which this Order is issued and, unless the parties mutually agree otherwise, no later than 60 days from the date on which this Order is issued.

2. All other allegations in the complaints are dismissed.

DATED this 4TH day of December 2007.

Paul B. Gamson, Chair

*Vickie Cowan, Board Member

Susan Rossiter, Board Member

*Board Member Cowan is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.

CERTIFICATE OF MAILING

I hereby certify that on December 4, 2007, I mailed a true copy of the Rulings, Findings of Fact, Conclusions of Law and Order, dated December 4, 2007, in Case Numbers UP-32/35-06, by depositing same in the United States mail and/or state mail to the following parties of record:

Michael J. Tedesco
Attorney at Law
1729 NE 65th Avenue
Hillsboro OR 97124

Jeffrey P. Chicoine
Attorney at Law
Newcomb, Sabin, Schwartz & Landsverk
US Bank Suite 4040
111 SW Fifth
Portland OR 97204

Signed

Employment Relations Board
Old Garfield School Building
528 Cottage Street N.E., Suite 400
Salem, Oregon 97301-3807