

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)	
CORRECTIONS EMPLOYEES,)	
)	
Complainant,)	ORDER ON RESPONDENT'S
)	PETITION FOR
v.)	RECONSIDERATION
)	
STATE OF OREGON,)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

On July 23, 2009, this Board issued its Order on Remand. 23 PECBR 222. As the Court of Appeals instructed, this Board considered whether the parties' collective bargaining agreement permitted DOC to change employees' days off and the start-stop times for their shifts. The Board, with one member dissenting, concluded it did not. Consequently, the majority held that DOC violated ORS 243.672(1)(e) when it made those changes without first bargaining with AOCE.

DOC filed a timely petition for reconsideration and AOCE opposed the petition. DOC's petition repeats a number of arguments it raised in the underlying case. We fully addressed those arguments in the underlying Order and reject them without further discussion. We grant reconsideration to address several new arguments.

DOC asserts that the focus of the case is the contractual phrase "to schedule work," and it argues that the majority erred by considering other language in the same contract article. Specifically, we considered the contract phrase "inherent management rights" that appears in a sentence prior to the disputed phrase. We noted that this Board

has used the phrase in numerous cases to mean permissive subjects of bargaining. We concluded that the parties likely intended the phrase to have that meaning and proceeded to consider the phrase as part of the context of the disputed language. DOC asserts we should not have considered this language because it has no bearing on the language in dispute. We disagree. To interpret a disputed contract provision, we must first examine “the text of the disputed provision, *in the context of the document as a whole.*” *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997) (emphasis added). Here, we looked at other contract language to provide context. We did not err in doing so.¹

In a similar vein, DOC argues that the Board should not have considered the “inherent management rights” language as context because the Board did not “have before it an appropriate record and argument by the parties” concerning the meaning of that language. (Petition for Reconsideration at 2) We disagree. We determined the contract language was ambiguous in context. Whether a contract is ambiguous is a question of law. *Yogman*, 325 Or at 361 (quoting *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405, 900 P2d 475 (1995)). The contract was in the record and we properly examined it in its entirety to determine if there was an ambiguity.

To the extent DOC’s argument implies it was denied an opportunity to develop the record and argue these issues, we disagree. DOC should not have been surprised that we considered the disputed language in the context of the entire contract. Since at least 1997 when the Supreme Court decided *Yogman*, the law has required us to interpret disputed contract language in context. In fact, DOC argued throughout these proceedings that the Board should consider other contract articles as context. DOC cannot have it both ways. That is, it cannot ask us to consider other contract articles as context and simultaneously maintain that we cannot consider other provisions in the same article as context. Throughout the lengthy history of this case, DOC had multiple opportunities to present evidence and argument. The Board conducted two evidentiary hearings — one before the initial decision and one after remand — and we provided DOC multiple opportunities to present oral and written argument. If the record was not properly developed, it was because DOC chose not to develop it. We decided the case on the record before us, as we are required to do.

DOC next argues: “While the Board finds that DOC bargained with employees prior to making schedule changes in the past, this finding is not supported by the record. All discussions with employees are not ‘bargaining.’” (Petition for Reconsideration at 4.)

¹Contrary to DOC’s argument, we did not rely on this context to provide a definitive interpretation of the disputed contract provision. Examining the provision in context merely led us to conclude that the disputed language was ambiguous because it had more than one plausible interpretation. We then proceeded to the next step in the *Yogman* analysis and examined extrinsic evidence of the parties’ intent in order to resolve the ambiguity.

This misstates our “finding.” We never said that all prior schedule changes were preceded by bargaining or that all discussions with employees constitute bargaining. What we said is that all prior schedule changes of the type at issue here were *either* bargained *or* agreed upon with AOCE 23 PECBR 222, 239. DOC has provided no evidence of any similar schedule change in the past that did not result from either an agreement or bargaining between the parties. We concluded that “[t]he past practice here provides reliable evidence that the parties did not understand or intend their contract to provide DOC with authority to permanently change employee start-stop times and days off without first bargaining or agreeing with AOCE.” 23 PECBR 222, 239 This conclusion is accurate and is derived from substantial evidence in the record.

DOC also argues that the majority erred by determining “that bargaining must occur prior to posting the bidding list * * *.” (Petition for Reconsideration at 5.) DOC’s concern is unclear. If its argument merely reiterates its general position that DOC has no bargaining obligation before it posts a schedule that changes start-stop times and days off, we reject the argument for the reasons expressed in our prior Orders.² If DOC’s argument concerns the timing—*i.e.*, that we erred by requiring bargaining *before* schedules are posted rather than at some other time—it is contrary to well-established law. DOC announced its decision to change employees’ days off and their start-stop times when it posted the new schedules. We have often stated that “the employer must bargain about the decision before it can lawfully even make the decision” to institute a change in a mandatory subject. *Federation of Oregon Parole and Probation Officers v. Corrections Division Field Services Section, Robert J. Watson, Administrator & Executive Department, State of Oregon*, Case No. C-57-82, 7 PECBR 5649, 5654 (1983); *AFSCME, Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536, 542 (1989); and *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504, 510 (1988). See also *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 126 (2002), *AWOP 192 Or App 672, 89 P3d 688* (2004) (cause of action arises when an employer *decides* to make a change).³ DOC did not fulfill its obligation to bargain before it posted a schedule that changed days off and start-stop times for bargaining unit members.

²There is no dispute that DOC has the right (and perhaps the contractual obligation) to post a list of shifts that employees then bid on. Nor is there a dispute about the manner in which the bidding occurs. The only issue is whether DOC could change start-stop times and days off without first negotiating with AOCE. The posting process is pertinent only because that is where DOC announced its decision to make the changes.

³Requiring the employer to bargain before it makes the decision furthers the purposes and policies of the PECBA. One core policy is that parties must enter bargaining with an open mind and “willingness to resolve * * * disputes relating to employment relations * * *.” ORS 243 656(5). A party that enters negotiations with its decision already made does not demonstrate the requisite willingness to resolve disputes.

ORDER

Reconsideration is allowed. The Board adheres to its July 23 Order as clarified herein.

DATED this 27th day of September 2009.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



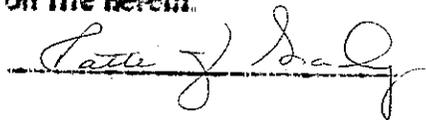
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Cowan, Dissenting:

For the reasons expressed in my dissent to the underlying decision, I would grant DOC's request for reconsideration and would dismiss the complaint

**I certify the foregoing to
be a true and correct copy of
the original Order
on file herein.**





Vickie Cowan, Board Member