

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-03

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF OREGON)	
CORRECTIONS EMPLOYEES,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER ON REMAND
STATE OF OREGON,)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

On December 13, 2006, the Oregon Court of Appeals reversed this Board's original decision¹ and remanded the case to us for further proceedings. 209 Or App 761, 149 P3d 319 (2006). After the remand, we permitted the parties to reopen the record to present further testimony and other evidence to address the new standard established by the court.²

On March 26, 2008, Administrative Law Judge (ALJ) Larry L. Witherell conducted a hearing in Salem, Oregon to receive additional evidence. The record closed on May 12, 2008, upon receipt of the parties' post-hearing briefs. On September 19, 2008,

¹The Board's original decision is reported at *Association of Oregon Corrections Employees v State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890 (2005)

²The record now includes additional testimony and exhibits, including the transcript of David Versteeg's testimony taken on March 25, 2008, in a separate case (No. UP-1-08) between these same parties.

ALJ B. Carlton Grew issued a Recommended Order on Remand. On December 3, 2008, this Board heard oral argument on Respondent's objections to the Recommended Order on Remand.

Becky Gallagher, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, 423 Lincoln Street, Eugene, Oregon 97401, represented Complainant.

Kathryn A. Logan, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

The issue on remand is:

Did the collective bargaining agreement between the parties authorize the Department of Corrections (DOC) to unilaterally change employee start-stop times and days off?

RULINGS

The ALJ's rulings have been reviewed and are correct.

FINDINGS OF FACT³

Facts from 2003 Board Order

1. The Association of Oregon Corrections Employees (AOCE) is the exclusive representative of a bargaining unit of correctional officers, sergeants, and corporals employed by DOC at the Oregon State Penitentiary (OSP), a public employer.
2. From March 2000 to July 2002, Paula Allen served as OSP's security manager.

³Findings of Fact 1-23 are from our initial decision in *Association of Oregon Corrections Employees v State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890 (2005). Additional Findings of Fact, numbered 24-35, are primarily based on supplemental evidence submitted by the parties at the March 26, 2008 hearing after remand.

3. Prior to 2000, security staff at OSP bid monthly for their shift schedules. In 2000, as a result of an interest arbitration award, security staff began bidding twice a year.

4. In 2000, Allen and AOCE worked together to revamp the bid package to conform to the twice-a-year schedule. Numerous shift start-stop times and days off were changed. Because the parties were working cooperatively in this process, AOCE did not demand to bargain the changes.

5. Allen and AOCE representatives also worked cooperatively to restructure the recreation yard schedule. During this process, AOCE President Gary Harkins noticed that some of the proposed changes in start-stop times would result in several employees having less than 16 hours between shifts. These changes would have resulted in the institution having to pay a penalty. Allen worked with Harkins to revise the start-stop times to eliminate most of the penalty pay. Again, because the parties were working together cooperatively, AOCE did not demand to bargain the changes.

6. In 2001, the Oregon legislature mandated that DOC develop staffing standards to promote efficiency, reduce overtime, and resolve discrepancies with the sergeants' posts in terms of post relief scheduling.⁴ Both AOCE and DOC management participated in developing the new standards. As a result of the new standards, OSP gained seven new sergeant positions and lost eight officer positions.

7. In response to the new staffing standards, Allen and AOCE worked together to revise the schedule to accommodate the new sergeant positions while Brian Belleque, Assistant Superintendent for Security, concentrated on getting the sergeant positions reclassified.

8. The changes in the sergeant positions and the resulting changes in the schedule were to be effective for the July-August 2002 schedule. Numerous changes were made to the schedule which effected start-stop times and days off. AOCE agreed with these changes. The new schedule was posted for 17 days. Subsequently, DOC was notified that the reclassification of the sergeant positions was not complete. Allen removed the revised schedule and reposted the previous schedule which contained no changes.

⁴A post is a particular job assignment in a particular location

9. From 2000 through 2002, other than the proposed July-August 2002 bid package, there were primarily minor changes to the schedules. However, when DOC proposed to change the Intensive Management Unit (IMU) schedule from an 8-hour to a 12-hour schedule, AOCE demanded to bargain and the parties entered into a memorandum of understanding.

10. In July 2002, Thomas Wright succeeded Allen as OSP's security manager and in September 2002, Gerald Long replaced Belleque as OSP's assistant superintendent of security.

Contract Negotiations

11. AOCE and DOC were parties to a collective bargaining agreement (CBA) effective July 1, 2001 through June 30, 2003.

12. Article 2, Section 2 of the CBA contains an evergreen clause which provides that the CBA will remain in full force and effect during the negotiation process.

13. Article 3—Management Rights provides:

“The Association agrees that the Employer retains all inherent rights of management and hereby recognizes the sole and exclusive right of the State of Oregon, as the Employer, to operate and manage its affairs in accordance with its responsibilities to maintain efficient governmental operations. The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. The retention of these rights does not preclude any employee from filing a grievance, pursuant to Article 44, Grievance and Arbitration Procedure, or seeking a review of the exercise of these rights, when it is alleged such exercise violates provisions of this agreement.”

14. Article 28—Working Conditions, Section 3, Work Schedule provides:

“Schedules showing each employee’s shift, work days, and hours shall be posted in the appropriate work unit at all times. Except for emergency situations, external contract work, fire crew response or as mutually agreed, the Employer will provide seven (7) days notice of changes in work schedules.”

Section 7, Shift and Time Off Bidding provides, in relevant part:

“A. Regular status employees in the Correctional Officer series may bid for shifts and days off on a schedule posted by the Employer at their institution on the basis of their classification seniority as defined in Article 39. Regular status employees in the Correctional Officer series assigned to positions in Special Housing at OSP (DSU, SMU, and IMU) and * * * may bid within those work units for shifts and days off on a schedule posted by the Employer at the work unit on the basis of their classification seniority as defined in Article 39. The manner of bidding will be consistent with the method spelled out in paragraph E of this Section.

“B. Shift and time off schedule bidding shall apply to all bargaining unit work sections, except Education Services. * * *

“* * * * *

“E. All affected employees, after placing two (2) successful and consecutive bids on the same shift/days off and working on such shift/days off for two (2) consecutive six (6) month periods, may remain on such shift/days off without placing any further bids unless out bid by a senior employee. Such employee will, however, be eligible to place bids on other shifts/days off as the rotation dates occur [5]

“* * * * *

⁵ This section of the CBA is referred to as the incumbency provision. During bargaining for the 2001-2003 CBA, DOC proposed to eliminate the incumbency provision of Article 28(E) but subsequently withdrew the proposal.

“H. Employees will bid for a six (6) to twelve (12) month cycle to commence on or about August and February of each year. The Employer shall post notice of proposed six (6) to twelve (12) month rotation of shift and time off schedules and a seniority roster at the work unit thirty (30) days in advance of the bid * * *”

15. On or about January 22, 2003, the parties began contract negotiations for a successor to the expiring CBA. At the first session, AOCE proposed to amend Article 28 of the CBA to provide for post bidding. The State did not respond to the proposal.⁶

16. Shortly before May 27, 2003, AOCE became aware that DOC intended to post a new schedule at OSP. This schedule changed the rank of various assignments, and changed the start-stop times and days off for a large number of security personnel. The results of these changes eliminated the incumbency provisions of the contract.

17. During bargaining, on May 27, 2003, AOCE Counsel Daryl Garrettson verbally addressed the planned implementation of the new schedule. Garrettson informed DOC that the schedule changes affected mandatory subjects of bargaining and that DOC would be committing an unfair labor practice if it implemented the new schedule without first bargaining. Assistant Superintendent of Security Services Long indicated he was not prepared to discuss the schedule that day. The parties then agreed to address the schedule issues outside of the formal contract negotiation process.⁷

⁶Post bidding is a permissive subject of bargaining over which the State may, but is not required to, bargain. *AOCE v. State of Oregon, DOC*, Case No. UP-91-93, 14 PECBR 832 (1993), *AWOP* 133 Or App 602, 892 P2d 1030, *rev den* 321 Or 268, 895 P2d 1362 (1995).

AOCE made additional proposals to amend Article 28 in June. The new proposals did not involve post bidding.

⁷At hearing, DOC witnesses Jan Weeks and Long testified they did not recall Garrettson making a demand to bargain. Both, however, remember Garrettson discussing the schedule and the agreement that Long would address the schedules with Harkins away from the main table negotiations. Weeks had nothing in her bargaining notes about the request, and Long had no notes from bargaining. Harkins' notes indicate that AOCE made a demand to bargain and that DOC “blew off our DTB [demand to bargain]”

18. By memo dated May 29, 2003, Long informed all security staff that due to the implementation of staffing standards and the additional sergeant positions, it was necessary for all staff to bid, including those staff who held incumbencies.⁸

19. On May 30, 2003, AOCE and DOC met to discuss the schedule. The parties did not reach a consensus. Later that same day, DOC posted the new schedule.

20. The posted schedule is similar to the schedule posted in July-August 2002, but includes additional changes to the shift start/stop times, days off, and assignments. Changes to the start/stop times differ as much as two hours. In addition, the new schedule required all incumbents to bid. This requirement differs significantly from the July-August 2002 schedule.

21. On May 30, AOCE President Harkins posted a memo to all staff regarding the bid schedule changes. The memo provided:

“This is to inform all staff that the AOCE does not agree with or support the wholesale changes to the Bid Schedule. There are over 130 changes to this schedule which equate to 60% of the schedule. Some of these changes should have been negotiated at the Bargaining table but were not. The AOCE will pursue the avenues it has available to us.”

22. On June 27, 2003, AOCE filed this unfair labor practice complaint

23. At the time of the initial hearing in this matter, the parties had not reached agreement on the successor CBA and were scheduled for interest arbitration.

Supplemental Findings of Fact

Collective Bargaining History

24. Prior to 1992, American Federation of State, County and Municipal Employees (AFSCME) represented this bargaining unit. In 1992, AOCE became the new bargaining representative.

⁸At the initial hearing, Long admitted that this was a violation of the contract.

1993-1995 Agreement

25. In 1994, an interest arbitration award settled the first collective bargaining agreement between DOC and AOCE for this unit. The agreement covered the period 1993 through June 30, 1995.

Article 28⁹ of that agreement included provisions regarding work day, work week, and consecutive days off, rest and meal breaks, and an extensive process for shift and time off bidding. No provision in this or any subsequent contract expressly addressed whether DOC had the right to change days off or the start-stop time for shifts.¹⁰

The interest arbitrator also selected a management rights clause, Article 3, which provides:

“The Association agrees that the Employer retains all inherent rights of management and hereby recognizes the sole and exclusive right of the State of Oregon, as the Employer, to operate and manage its affairs in accordance with its responsibilities to maintain efficient governmental operations. The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. The retention of these rights does not preclude any employee from filing a grievance, pursuant to Article 46, Grievance and Arbitration

⁹The Working Conditions article is identified as “Article 25” in the Arbitrator’s decision and “Article 28” in the final printed version of the collective bargaining agreement.

¹⁰Article 28, Section 3 of the 1993-1995 agreement permitted DOC to give seven days notice to change a specific employee’s work schedule. The advance notice was unnecessary in case of emergency or mutual agreement. The 2001-2003 agreement (the one in effect at the time of the changes at issue here) retained this provision but expanded the circumstances when the advance notice was unnecessary. DOC does not argue that this provision permits the changes at issue here. By its terms, the provision applies only to changes after the employees have bid on their schedule. It does not apply to permanent changes to a schedule before bidding occurs, as happened here.

Procedure,^[11] or seeking a review of the exercise of these rights, when it is alleged such exercise violates provisions of this agreement.”

The parties carried this provision forward without change in successor agreements, including the 2001-2003 contract, which is the one at issue here.

1995-1997 Agreement

26. The next collective bargaining agreement between the parties covered the period 1995 through 1997. During negotiations both parties proposed changes to Article 28.

27. The parties reached agreement on their 1995-1997 contract in mediation. The agreement did not delete any language from Article 28. The final agreement, however, added language regarding employees who were involuntarily transferred. These transferred employees would retain their shift and days off, if feasible, but if not, DOC would make “reasonable attempts to maintain the employee’s shift and days off or close proximity of shift and days.” There were no pertinent discussions, proposals, or changes to the management rights clause.

1999-2001 Agreement¹²

28. During negotiations for the 1999–2001 agreement, both parties proposed changes in Article 28. AOCE proposed to add a section on “Shift Schedule Changes” to state:

“No employee shall have to work an assignment where their hours of work are changed with regards to the starting and stopping times more than three (3) hours in a week. In other words, an employee who is scheduled to start work at 4:00 p.m. shall not be required in a week to start work any earlier than 1:00 p.m. or later than 8:00 [sic] p.m. An employee who is scheduled for an assignment with more than a three (3) hour change shall receive a ten (10) percent shift scheduling premium pay. In addition, an employee will receive no more than one schedule change per week.”

¹¹Former Article 46 is Article 44 in the 2001-2003 agreement.

¹²Neither party contends that the collective bargaining agreement covering the period 1997 through 1999 is relevant to the issues currently before the Board, so we do not discuss it.

29. DOC proposed to halve the number of times bidding and shift rotation occurred so that shift and time off bidding for some portion of the bargaining unit did not occur every month.

30. On January 4, 2000, the contract bargaining was resolved through interest arbitration when the arbitrator selected DOC's last best offer. The arbitrator recommended that the parties continue discussions about shift bidding:

“The Arbitrator recommends the parties continue discussions on the changes that flow from adoption of the Employer's last offer, particularly in relation to shift bidding inasmuch as the Employer proposed a major revision of the bidding process. The Arbitrator believes that good faith consultation can result in an implementation plan that will preserve to employees some of the benefits of the old system.”

No discussions that are relevant here took place pursuant to this suggestion. There were no pertinent discussions, proposals, or changes to the management rights clause.

2001-2003 Agreement

31. The next collective bargaining agreement covered the period July 1, 2001 through June 30, 2003. This agreement was in effect on May 30, 2003, when DOC posted the schedule changes that are the subject of this dispute.

32. During negotiations over this agreement, DOC proposed to delete then Section 7.C from the agreement, relating to the times for bidding shifts and time off schedules, and add language to other sections reflecting that deletion. Those proposals became part of the final agreement. There were no pertinent discussions, proposals, or changes to the management rights clause.¹³

¹³The parties offered evidence regarding their negotiations for the 2003-2005 collective bargaining agreement. This agreement was not yet in effect on May 30, 2003, when DOC posted the work schedules at issue here. Neither party argues that this agreement affects the analysis, outcome, or remedy, and we do not view the agreement as relevant to the question of whether the 2001-2003 agreement permitted DOC to make the schedule changes.

Past Practice Regarding Schedule Changes¹⁴

33. In practice, DOC representatives met with AOCE representatives to discuss proposed new schedules. The parties mutually agreed to any significant changes before they were implemented. The lone exception involved a change to the work hours and days for the Intensive Management Unit. AOCE demanded to bargain that change and the parties reached agreement.

34. The posted bid sheet for the February 2003 rotation contained at least eight schedule changes from the posted bid sheet for the February 2000 rotation, including the elimination of one shift.

Grievance Arbitration History

35. On October 31, 2007, Arbitrator Ronald L. Miller issued an award in a contract dispute between DOC and AFSCME. The contract at issue did not cover employees in the AOCE bargaining unit. The award concerned, in part, the extent of DOC's rights under a management rights clause that was functionally equivalent to the clause at issue in this case. Both the AOCE and AFSCME management rights clauses were successors to the clause originally negotiated by AFSCME. The specific issue in the arbitration was whether DOC could unilaterally make a temporary change to the work schedules of two AFSCME correctional officers so they could attend a week-long in-service training. Arbitrator Miller ruled that under the management rights clause, DOC had the right to make the schedule changes. Arbitrator Miller's analysis relied, in part, on DOC's bargaining history with AFSCME. He found it "instructive," for example, that AFSCME and DOC agreed to remove language from their contract that restricted DOC's right to temporarily reassign employees if it gives them seven days advance notice. That language remains in DOC's contract with AOCE. The arbitrator also relied on a contract provision in the AFSCME agreement titled "Shift Change Penalty." The AOCE contract does not contain such a provision.

¹⁴See also Findings of Fact 4-9.

CONCLUSIONS OF LAW¹⁵

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The collective bargaining agreement between the parties did not authorize DOC to make unilateral changes in employee start-stop times and days off, and DOC's changes violated ORS 243.672(1)(e).

In regard to the issue on remand, AOCE's complaint alleges that DOC violated ORS 243.672(1)(e)¹⁶ when it changed employee start-stop times and days off without first bargaining to completion. DOC asserts it did not act unlawfully because the parties' contract in force at the time of the change expressly permitted DOC to act as it did. In our initial Order, we rejected this defense. We held that AOCE did not waive its right to bargain the subject by express contract language. In doing so, we followed existing Board precedent which required the employer to prove its defense by "clear and unmistakable" language in the contract.¹⁷ This standard furthers the primary purposes of the PECBA by ensuring that employees are afforded their statutory right to bargain

¹⁵These Conclusions address only the issue on remand from the Court of Appeals, *i.e.*, whether the parties' collective bargaining agreement permitted DOC to unilaterally impose changes in employee work schedules. Our initial Order, reported at 20 PECBR 890, also addressed the unilateral change doctrine and rejected DOC's two affirmative defenses, waiver by inaction and untimeliness of the complaint. Further, we dismissed AOCE's allegations that DOC unlawfully changed the rank an employee must hold in order to bid on certain assignments, and that the changes violated the incumbency provision of the parties' agreement. We adopt those conclusions and incorporate them by reference rather than setting them out again in this Order. Consequently, if DOC prevails here on its contract defense, we will dismiss the complaint; if DOC fails to establish the defense, we will reconfirm that DOC violated ORS 243.672(1)(e) and will proceed to consider the appropriate remedy.

¹⁶ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." As we described in our initial Order, this obligation generally prohibits a public employer from unilaterally altering conditions of employment that are mandatory for bargaining. 20 PECBR at 896

¹⁷The "clear and unmistakable" standard is derived not only from this Board's own cases, but is also consistent with cases from the National Labor Relations Board and the Ninth Circuit Court of Appeals *Provena Hospitals*, 350 NLRB No. 64 (2007) (when an employer in a unilateral change case asserts that the contract authorizes it to act unilaterally, the employer must prove its defense by clear and unmistakable contract language); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F3d 1072 (9th Cir 2008) (same).

unless it is unmistakably clear that they have either exercised those rights or waived them. We concluded that DOC failed to meet this high burden of proof. 20 PECBR at 899-900.

The Court of Appeals disagreed with our analysis. It held that we should have interpreted the contract to determine whether it permitted DOC to act as it did. It remanded the case so that we could interpret the contract. The Court determined that in light of its holding, it did not need to reach the waiver issues.

The Court explained:

“DOC acknowledges that ORS 243.650(7) provides that ‘hours’ of work is a matter concerning ‘employment relations’ subject to bargaining. DOC asserts that the current bargaining agreement reflects and memorializes the parties’ bargaining on that matter and permits unilateral decision-making by DOC. We agree with DOC that, if the CBA [collective bargaining agreement] authorizes an employer to act unilaterally with respect to certain conditions of employment, then changing those conditions is not a change in the status quo, and a failure to bargain before changing them cannot be an unfair labor practice. *See Marion Cty. Law Enforcement Assn. v. Marion Cty.*, 130 Or App 569, 883 P2d 222 (1994), *rev den*, 320 Or 567 (1995) (CBA unambiguously authorized the employer to unilaterally change employees’ work schedule); *Enlow Medical Center v NLRB*, 433 F3d 834 (DC Cir 2005) (refusal to bargain over changes allowed by the collective bargaining agreement not a basis for an unfair labor practice claim over refusal to bargain). If the CBA, which is the memorialization of the parties’ bargaining, authorizes DOC to change employee work schedules, then a unilateral change in the work schedules is not a change in the status quo regarding a mandatory subject of bargaining and does not constitute an unfair labor practice.

“Although ERB held, in the context of its waiver analysis, that the CBA ‘does not expressly give DOC the right to unilaterally change the start/stop times and days of employees,’ and that there was no ‘clear and unmistakable’ waiver of the right to bargain under the CBA, ERB did not construe the CBA for the purpose of determining whether it provides for unilateral schedule changes by DOC. Whether the CBA authorizes DOC to make unilateral changes in employee work schedules is a question for ERB to address in the first instance. As we said in *Marion Cty Law Enforcement Assn.*, the meaning of the CBA is determined under general

rules of contract construction. 130 Or App at 575. ERB must determine whether, under the terms of the CBA, DOC was authorized to make the changes in the work schedule that it did. If the CBA is ambiguous, then ERB is required to resolve the ambiguity by examining extrinsic evidence of the contracting parties' intent, if such evidence is available. *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 103 P2d 1138 (2004). In light of our holding that on remand ERB must interpret the provisions of the CBA to determine whether it authorized DOC to change work schedule start/stop times and days off unilaterally, we do not address DOC's contention that ERB erred in concluding that AOCE did not waive its right to bargain on those conditions of employment." *Association of Oregon Corrections Employees*, 209 Or App at 769-70.

Following the remand of this case, but prior to the hearing and briefing after remand, this Board in a different case addressed the legal issues raised by the Court of Appeals decision. In *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008), this Board stated:

"The Court of Appeals reversed and remanded the matter to us for further consideration. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 209 Or App 761, 149 P3d 319 (2006). It observed that we applied a 'clear and unmistakable' waiver standard and therefore did not construe the provisions of the parties' labor agreement. The court held that this Board was required to interpret the contract to determine if it authorized the employer to make unilateral schedule changes. 209 Or App at 770. It instructed us to use general rules of contract construction in making this determination. If the contract is ambiguous, we must 'resolve the ambiguity by examining extrinsic evidence of the contracting parties' intent, if such evidence is available.' *Id.*

"Thus, this Board's cases prior to the court's decision in *AOCE* seemed to assume that all contract defenses to unilateral change allegations presented the same question and required the same method of analysis. Although we struggled with that analysis and occasionally changed it, we tried to apply it uniformly to all contract defenses. The upshot of the recent Court of Appeals decisions, as we read them, is that there are actually two separate defenses, each with a separate analysis. The first defense asserts that the contract language permits the employer to take the specific action it did. In such cases, we must interpret the contract language to determine whether the contract does in fact authorize the

action. The second defense does not assert that the contract expressly allows the action, but rather that the contract in some fashion waives the union's right to bargain over the matter. In such cases, we will continue to apply the 'clear and unmistakable' standard as articulated in *Bandon School District.*" *Lebanon Community School District*, 22 PECBR at 365-66 (footnote omitted).

Under these cases, our task here is to interpret the parties' contract to determine if it permitted DOC's actions. In doing so, our goal is to determine the intent of the contracting parties. ORS 42.240; *Oregon AFSCME Council 75, Local 3336 v. State of Oregon, Department of Environmental Quality*, Case No. UP-47-06, 22 PECBR 18, 29 (2007). To determine the parties' intent, we follow a three-part analysis which we described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005):

"We first examine the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we proceed to the second step which is to examine extrinsic evidence of the contracting parties' intent. Finally, if the provision remains ambiguous after applying the second step, we resort to the use of appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)."

DOC does not point to any contract language which expressly states that DOC has the authority to alter the employees' start-stop times or days off. Instead, DOC relies on the more general language of the contract's management rights clause. According to DOC, the clause gives it authority over all aspects of scheduling work unless a specific contract provision limits that authority. Article 28 of the parties' agreement contains specific limits on DOC's right to schedule work. AOCE does not assert that any of Article 28's provisions prohibit DOC's actions. Nor does DOC assert that any of Article 28's provisions permit it to act as it did. Thus, the only issue before us is the proper interpretation of the parties' management rights clause.

To interpret the management rights clause, we apply the three-step analytical framework described above. We begin by examining its language:

"The Association agrees that the Employer retains all inherent rights of management and hereby recognizes the sole and exclusive right of the State of Oregon, as the Employer, to operate and manage its affairs in accordance with its responsibilities to maintain efficient governmental

operations. The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. The retention of these rights does not preclude any employee from filing a grievance, pursuant to Article [44], Grievance and Arbitration Procedure, or seeking a review of the exercise of these rights, when it is alleged such exercise violates provisions of this agreement.”

DOC emphasizes the language in the second sentence that “[t]he employer retains all rights to direct the work of its employees * * * except as modified or circumscribed by the terms of this Agreement.” Neither party asserts that any contract language modifies or circumscribes DOC’s actions in regard to employee start-stop times or days off. A plausible reading of “all rights to direct the work of its employees” is that it permits DOC to change start-stop times and days off.

We cannot, however, read the language in isolation. We must instead read it in the context of the contract as a whole. *Yogman v. Parrott*, 325 Or at 361. When we do so, we conclude there are other plausible interpretations of the management rights clause.

The first sentence in the clause refers to “inherent rights of management.” Although this phrase is not defined in the contract, it is commonly used in labor law. This Board has repeatedly used the phrase to refer to subjects that are permissive for bargaining. *Oregon AFSCME, Council 75 v. Polk County*, Case No. UP-38-88, 11 PECBR 114, 121 (1988) (a subject is permissive if it has a greater impact on an “inherent management right” than on an employee concern); *OPEU, Local 503 v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 78-79 (1987) (same); *IAFF, Local 314 v. City of Salem*, Case No. C-61-83, 7 PECBR 5819, 5825 (1983), *aff’d* 68 Or App 793, 684 P2d 605, *rev den* 298 Or 150 (1984) (same); *Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85, 9 PECBR 8794, 8806 (1986) (an employer’s determination of how to use its equipment is “an inherent management right” over which it need not bargain); *East County Bargaining Council v. Centennial School District No. 28JT*, Case No. C-185-82, 6 PECBR 5556, 5568 (1982) (a school district’s assignment of substitute teachers of its choosing affects its “inherent management rights” and is thus permissive). *See* ORS 243.650(7)(c) (a subject

is permissive for bargaining if it has a greater impact on “management’s prerogative” than on employee concerns). We conclude that the phrase “inherent rights of management” is a term of art in labor-management relations, and the parties used the phrase as it is commonly understood in the labor-management community. Use of the phrase indicates that the parties intended the management rights clause to apply only to permissive subjects for bargaining. If so, the clause would not apply to work hours issues such as employee start-stop times and days off because they concern mandatory subjects for bargaining. ORS 243.650(7)(a); *IAFF, Local 890 v. Klamath County Fire District #1*, Case No. UP-16-00, 19 PECBR 533, 547 (2001).

We also note that the clause twice uses the word “retains.” The first sentence provides that DOC “retains all inherent rights of management.” The second sentence provides that DOC “retains all rights to direct the work of its employees.” We interpret the words of a contract to have their common and ordinary meaning. “Retain” means “to hold or continue to hold in possession or use; continue to have, use, recognize, or accept; maintain in one’s keeping.” *Webster’s Third New Int’l Dictionary* 1938 (unabridged ed. 1971). Under this definition, a party cannot “retain” something it never had in the first place. Thus, one plausible reading of the management rights clause (although perhaps not the only plausible reading) is that it authorizes DOC to keep those rights it had prior to negotiating the clause. Prior to negotiating the clause, DOC did not have the right to unilaterally change employee work hours, a mandatory subject for bargaining. The clause did not bestow that right.

The threshold to show an ambiguity in a contract is not high. *Milne v. Milne Construction Co.*, 207 Or App 382, 388, 142 P3d 475, *rev den* 342 Or 253 (2006). A contract is ambiguous if it can reasonably be given more than one plausible interpretation. *Portland Fire Fighters’ Association v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den* 334 Or 491 (2002). The management rights clause here can plausibly be read to give DOC authority to act in any way not expressly prohibited in the contract. Under this reading, the parties’ contract authorizes DOC to change the employees’ start-stop times and days off. It can also plausibly be read to authorize DOC to make changes only in permissive subjects of bargaining if not prohibited by the contract. Under this reading, the contract does not authorize DOC to make unilateral changes in mandatory subjects of bargaining such as employee start-stop times and days off. We conclude that the language of the management rights clause is ambiguous.¹⁸

¹⁸It is unclear whether DOC also relies on language in the management rights clause that authorizes it “to schedule work.” If it does, this language is also ambiguous. It could refer to setting employee work schedules; but it could also refer to scheduling services for the public, or scheduling the time of day a particular work task is to be accomplished rather than the hours a particular employee works.

When contract language is ambiguous, we turn to the second step of the *Yogman* analysis and consider extrinsic evidence of the parties' intent. The parties' past practice is the "most reliable aid" in construing ambiguous contract language. *Oregon School Employees Association v. Lincoln County School District*, Case No. UP-10-92, 14 PECBR 503, 508 (1993); *LIUNA, Local 483 v. City of Portland*, Case No. UP-12-06, 22 PECBR 12, 16 (2007) (same). See also *Goodman v. Continental Casualty Co.*, 141 Or App 379, 389, 918 P2d 438 (1996) (the parties' conduct in performing a contract can be persuasive evidence of the contract's meaning); *Tarlow v Arntson*, 264 Or 294, 300, 505 P2d 338 (1973) (how the parties conduct themselves under a contract is evidence of their intent).

The past practice here is clear, consistent over time, and known to both parties. See *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-994 (2005) (describing elements necessary to establish a past practice). For a number of years, DOC representatives met with AOCE representatives to discuss any proposal that would significantly change employees' schedules. Many of these proposed changes involved start-stop times and days off. The parties mutually agreed to all significant changes before they were implemented. The lone exception involved a change to the work hours and days off for the Intensive Management Unit. AOCE demanded to bargain that change and the parties reached agreement. DOC failed to identify any instance where it implemented a change of this type over AOCE's objections or without AOCE's agreement.¹⁹ The way the parties conducted themselves under the contract indicates what they intended and understood the contract to mean. The 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.

We also consider the legal landscape at the time the parties entered their agreements. Negotiations for these agreements were covered by the PECBA and cases interpreting it. The parties would naturally consider their contract language within the legal framework that existed at the time they negotiated it. The management rights

¹⁹In 2002, in response to legislative actions, the parties agreed to a number of schedule changes. Before these changes were implemented, the parties learned that the legislation had not yet been implemented. As a result, they could not make the changes and abandoned them. They returned to the prior schedule, without changes and without objection from AOCE.

clause came into the parties' agreement in 1994.²⁰ The parties did not discuss or change the clause in any of their subsequent agreements. Before and during the life of these agreements, this Board reviewed a number of management rights clauses. We consistently refused to give a management rights clause the type of broad interpretation that DOC suggests here. *E.g.*, *FOPPO v. Washington County*, Case No. UP-70-99, 19 PECBR 411, 428 (2001); *IAFF, Local 1817 v. Jackson County Fire District, No. 3*, Case No. UC-64-90, 12 PECBR 656, 662 n 4 (1990); *Oregon AFSCME, Council 75 v. Polk County*, Case No. UP-38-88, 11 PECBR 114, 121-122 (1988); *IAFF, Local 2854 v. Tualatin Fire Protection District*, Case No. C-13-82, 6 PECBR 5224, 5237-5238, 5240 n 3 (1982); *OSEA v. Sherman Union High School District #1*, Case No. C-218-80, 6 PECBR 4715, 4725 n 13 (1981). Given the narrow interpretation of management rights clauses in our case law in effect when the parties agreed to their clause, the parties would not likely have understood or intended their clause to have the broad scope DOC now asserts.

The bargaining history of a contract is another type of extrinsic evidence we consider in attempting to resolve ambiguities. What the parties said and did at the bargaining table provides evidence of their intent and understanding. DOC argues that the bargaining history here demonstrates that the parties intended to give DOC the right to change employee schedules at will, subject only to other contractual limitations. DOC does not present any history relevant to the management rights clause. The only discussions or proposals DOC identifies that directly involved start-stop times or days off occurred in bargaining for the 1999-2001 contract. During those negotiations, AOCE proposed language to require premium pay if DOC changed an employee's assignment in a way that altered the employee's start-stop times by more than three hours, and it limited such changes to one time per week. This language did not end up in the contract, and DOC argues that AOCE is now trying to obtain in litigation what it could not obtain in negotiations. We disagree.

The specific proposal at issue²¹ addressed work hours of an individual employee whose assignment was changed. Here, no assignment change accompanied DOC's change in start-stop times, and it applied to the entire bargaining unit rather than to specific

²⁰Although the management rights clause entered the contract through interest arbitration, we do not interpret a contract formed in this way any differently than one agreed upon at the bargaining table. *See Benton County Deputy Sheriff's Association v. Benton County Sheriff's Department*, Case No. UP-36-02, 20 PECBR 551 (2004), *AWOP 198 Or App 533, 109 P3d 803, rev den, 338 Or 583, 114 P3d 505* (2005). In any event, the parties agreed to include this provision in their subsequent contracts

²¹See Finding of Fact 28 for the full text of the proposal.

individuals. Further, AOCE's proposal did not address changes in days off. Even if AOCE had successfully obtained this language in bargaining, it would not apply to the situation at issue here. Thus, it is not accurate to say that AOCE is attempting to get protections it could not achieve at the bargaining table. This history does not support DOC's interpretation of the management rights clause.

DOC also argues that a 2007 arbitration decision provides persuasive authority that the management rights clause permits DOC to change employee schedules at will. We disagree. The arbitration decision DOC relies on has little or no application here because it involved DOC's contract with AFSCME, not its contract with AOCE. Although the management rights language is similar in both contracts, they have different bargaining histories and many other different provisions. For example, in reaching his decision, the arbitrator relied in part on the fact that AFSCME and DOC agreed to delete the seven-day notice requirement from Article 28 of their contract. That provision remains part of the AOCE-DOC agreement. The arbitrator also relied on a provision in the AFSCME contract that provided premium pay in some circumstances to employees whose shifts were changed. The AOCE contract does not contain such a provision. In addition, the issue before the arbitrator was different from the issue currently before us. The dispute in the AFSCME arbitration arose when DOC temporarily changed the schedules for two officers so they could attend a training. The changes occurred after the officers had bid on their schedules. Here, by contrast, the changes were imposed before the bidding process began, and they applied on a permanent basis across the bargaining unit. In these circumstances, we do not find the arbitration award persuasive authority for DOC's position.

Extrinsic evidence establishes that the parties did not intend the management rights clause to permit DOC to change employee work hours at will. We conclude that DOC violated ORS 243.672(1)(e) when it unilaterally changed the start-stop times and days off of bargaining unit employees.

Remedy

In the original Order, this Board wrote:

"REMEDY

"In a typical unilateral change case, we order the offending party to rescind the change and restore the status quo until bargaining is complete. To do so here might cause unnecessary disruption. As noted, the bid process occurs every six months. There have thus been several rounds of

bidding since this violation occurred. Bargaining unit members have arranged their lives to conform with the new schedule, and to order an immediate change would unfairly penalize them. We are also aware of the potential difficulties an abrupt change could create for DOC. We will delay any change until the next scheduled round of bidding. At that time, AOCE, as the innocent party, can choose to either maintain the current schedule for days off and start-stop times, or else return to the schedule on those issues as it existed prior to the unlawful change. AOCE will notify DOC of its choice at least 30 days prior to the posting so that DOC can begin any necessary preparations. Of course, the parties are free to implement any other schedule that they mutually agree upon." 20 PECBR at 902.

We adhere to that remedy here.

ORDER

1. DOC shall cease and desist from refusing to bargain before it permanently changes employee days off and the start-stop times for their shifts; and
2. Unless the parties mutually agree otherwise, at least 30 days prior to the next scheduled round of bidding, AOCE shall notify DOC whether the days off and the shift start-stop times up for bid shall be those currently in existence, or else those in existence prior to the May 30, 2003 posting

DATED this 23 day of July 2009.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Cowan Dissenting:

I disagree with the majority's conclusion that the applicable contract language does not authorize DOC to unilaterally change bargaining unit members' start-stop times and days off.

The majority correctly describes the standards for interpreting language in a collective bargaining agreement. Our goal is to determine the parties' intent, and we do so by examining the provisions at issue in the context of the entire agreement. If the language is ambiguous, we then look to extrinsic evidence of the parties' intent. If the language remains ambiguous after these analytical steps, we then utilize generally accepted maxims of contract construction. *Lincoln County School District*, 21 PECBR at 29 (2005). However, I reach a far different result from the majority when I apply this analysis.

Article 3, Management Rights of the parties' collective bargaining agreement specifies that the employer retains all "inherent rights of management" as well as all rights to direct employees' work, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause and to schedule work. These rights are only modified or circumscribed by the terms of the collective bargaining agreement. Despite the fact that Article 3 appears to give DOC authority over scheduling, including employee start-stop times and days off, the majority holds that it does not. I disagree. Unlike the majority, I conclude the contract permits DOC to take the actions it did.

The language of Article 3 is not ambiguous. To the contrary, it gives DOC *all* rights to direct employee work, including scheduling. The only limitations on scheduling employee work are found in Article 28, which specifies that the employer must give employees seven days notice of schedule changes, except under certain circumstances that are not relevant here.

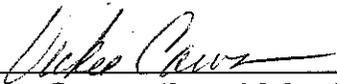
The majority focuses on the fact that nothing in Article 3 "specifically allows" DOC to change start-stop times or days off. I find this interpretation excessively restrictive. The fact that the contract language is general does not mean it is unclear. Our goal in contract interpretation is to interpret the agreement in such a way as to give all provisions effect. ORS 174.010. The majority's interpretation fails to do so.

Assuming, *arguendo*, that the management rights clause in Article 3 is ambiguous, extrinsic evidence of the parties' intent—their negotiation history and past practice—does not support the majority's interpretation. In bargaining, AOCE twice made

proposals that would have restricted DOC's right to change employee's work schedules. In negotiations for the 1999-2001 contract, AOCE proposed language that would have limited DOC's ability to make assignments that changed an employee's start-stop times. If AOCE believed that DOC had no right to unilaterally change employee start-stop times or days off, it would not have made this proposal. DOC rejected the proposal, and the interest arbitrator adopted DOC's position. In bargaining for the 2003-2005 contract, DOC proposed deleting language from Article 28, Section 7, concerning the times for bidding shifts and days off. DOC's proposals became part of the final agreement. Thus, the parties' recent bargaining history demonstrates that AOCE failed in its attempt to limit or maintain limits on DOC's authority to schedule employees' work.

The majority also concludes that the parties had a clear, consistent, and known past practice of mutually agreeing to schedule changes. This is an inaccurate characterization of the parties' conduct. The record shows that historically, DOC notified AOCE of upcoming schedule changes and allowed AOCE to comment and make suggestions. The record is devoid of any evidence, however, that the parties ever negotiated over schedule changes or that DOC or AOCE believed they were obligated to bargain over schedule changes.

For the foregoing reasons, I respectfully dissent.



Vickie Cowan, Board Member