

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-33-08

(UNFAIR LABOR PRACTICE)

DALLAS POLICE EMPLOYEES)	
ASSOCIATION,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF DALLAS,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on May 20, 2009, after a hearing held on February 10, 2009, in Dallas, Oregon. The record closed on March 12, 2009, with the receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Garrettson, Gallagher, Fenrich & Makler, Portland, Oregon, represented Complainant.

Diana L. Moffat, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent.

On September 19, 2008, the Dallas Police Employees Association (Association) filed this unfair labor practice complaint against the City of Dallas (City). The complaint, as amended, alleges that the City violated ORS 243.672(1)(a), (b), and (e) by eliminating the position of police sergeant in retaliation for the Association's demand

to bargain about a reorganization. The complaint also alleges that the City violated ORS 243.672(1)(a), (b), and (e) when it entered into a pre-employment contract with a bargaining unit member regarding mandatory subjects of bargaining. The City filed a timely answer.

The issues in this case are:

1. Did the City violate ORS 243.672(1)(a), (b), or (e) by threatening to eliminate the position of police sergeant and freeze former sergeants' salaries after the Association demanded to bargain about a reorganization plan?¹

2. Did the City violate ORS 243.672(1)(b) or (e) by entering into a pre-employment contract with Jeff Van Laanen?²

RULINGS

1. On October 9, 2008, the City filed a motion to make the Association's complaint more definite and certain. The ALJ denied the motion in part, but directed the Association to amend its complaint to specify how the City's change in its reorganization plan violated ORS 243.672(1)(b) by dominating or interfering with the formation, existence, or administration of the Association. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 351, *recons* 20 PECBR 388 (2003) (describing the elements of a subsection (1)(b) claim).

¹In its post-hearing brief, the Association contends that the City's manner of announcing the original reorganization at a mandatory all-staff meeting was unlawful direct dealing, a separate violation of ORS 243.672(1)(e). It did not allege this violation in its Amended Complaint. We will consider this allegation as one of the circumstances in assessing the totality of the City's conduct in relation to the Association's bad faith bargaining charge. We consider only those alleged violations raised in a complaint. We do not consider violations alleged for the first time in a post-hearing brief. Alleging these violations at such a late stage does not give the other party notice of the issue in time to present evidence or argument. *See Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 326 (2008) (this Board refused to consider an affirmative defense, raised for the first time in a post-hearing brief, because the opposing party had no opportunity to fully litigate the matter).

²In its Amended Complaint, the Association alleges that the pre-employment agreement violated ORS 243.672(1)(a), but offers no argument in support of this claim in its post-hearing brief. Therefore, we do not consider and will dismiss this claim.

At the hearing, the ALJ ruled that the Amended Complaint failed to allege any actions by the City that constituted actual domination of, interference with, or assistance to the Association. The ALJ told the parties that he would recommend dismissal of the subsection (1)(b) allegation.³ *Id.* The ALJ correctly ruled that the Amended Complaint fails to allege facts sufficient to state a cause of action under subsection (1)(b). We will dismiss this portion of the complaint.

2. The remaining rulings of the ALJ have been reviewed and are correct.

FINDINGS OF FACT

1. The City is a public employer. The Association is a labor organization and the exclusive representative of a bargaining unit of approximately 13 public employees who work in the City police department. The parties entered into a collective bargaining agreement covering the period July 1, 2006 through June 30, 2008.

2. In 2006, the Association requested that the City include police department sergeants in the Association bargaining unit. The City agreed, and the sergeants have been a part of the bargaining unit since that time.

Reorganization

3. On April 15, 2008, the City police bargaining unit consisted of four sergeants, one detective, and seven officers. At least one of the officers was a "senior officer," receiving an additional two percent of base salary per month. Chief Jim Harper, Deputy Chief Tom Simpson, and two lieutenants (including Lieutenant Justin Stevenson) supervised the bargaining unit members.⁴

4. During 2007 and 2008, Sergeant Lee Ingram was the vice president of the Association and a member of the Association bargaining team. Two other sergeants, Jim Rodriguez and John Wallace, were active in the Association in the past.

5. In 2007, the City assigned Sergeant Ingram to conduct an internal affairs investigation of another officer. Ingram expressed concern to City management about

³ The parties did not address the issue substantively in their post-hearing briefs.

⁴At the time of hearing, Harper had retired, Simpson had become chief, and Stevenson had become a captain. We will refer to these individuals using the rank they held at the time of the events at issue.

potential conflicts of interest between his duties as Association vice president and his work as an internal affairs investigator. The internal affairs investigation became moot after the City discharged the officer for other reasons, and City officials never responded to Ingram's concern about the potential conflict. Also during 2007, Ingram and other sergeants told City managers that they were not interested in supervisory training and did not want to perform any supervisory or management tasks.

6. Because of Ingram's concern and the other sergeants' lack of interest in management-related tasks, the City revised the sergeants' job description to transfer several functions previously performed by sergeants to lieutenants. Among the functions transferred were: employee evaluations, employee discipline, report approval, and scheduling. The City eventually returned the task of approving reports and also some role in employee evaluations to the sergeants.

7. Chief Harper also concluded that City sergeants had less responsibility than sergeants in other jurisdictions. Chief Harper talked to police department managers and other City officials about the possibility of reorganizing the police department to create lower-level managers.

8. In February 2008, the Association and City began negotiations for a successor to the 2006-2008 collective bargaining agreement. From February through mid-April, the parties primarily discussed issues raised by the Association such as overtime and sergeants' pay. When Association bargaining team members told the City they were pleased with the speed of negotiations, City bargaining team members cautioned that the parties had yet to address issues the City wished to discuss.

9. During late 2007 and early 2008, Chief Harper decided that a "watch commander" system, using one of four separate squads of officers for each shift, would be the best organizational system for the police department.

10. On March 17, 2008, Chief Harper, Deputy Chief Simpson, and Lieutenant Stevenson met with City legal counsel Diana Moffat to discuss reorganization plans. Simpson and Stevenson wanted to eliminate the four sergeant positions and create four watch commander lieutenant positions. Each lieutenant would then supervise one squad. Chief Harper disagreed; he believed that if the City immediately moved to such a system, sergeants would object to it.

11. Harper decided to implement a partial watch commander system, with two lieutenants and two sergeants each supervising one of four squads.

12. On April 1, 2008, City and Association bargaining representatives met and discussed wages. The City adhered to a previous proposal to provide the following for both officers and sergeants: a 0.5 percent pay increase effective July 1, 2008, plus a cost-of-living increase of 3.8 percent; and a 1.5 percent pay increase effective July 1, 2009, plus a cost-of-living increase.

13. On April 15, 2008, Chief Harper spoke at a mandatory staff meeting of all police department employees. Harper presented the reorganization plan.

14. In the reorganization plan the Chief presented, the City proposed to add a captain and two lieutenant positions to the police department while retaining the same number of officers and the four sergeant positions. Two sergeants, however, would be "patrol sergeants" with authority to supervise patrol squads and approve officer reports. The other two sergeants would be "administrative sergeants" who would supervise detectives, review and update standard operating procedures, and oversee accreditation. Harper told employees that the plan would be implemented on June 1, 2008. Harper explained that then-Sergeants Steve Dankenbring and Rob Hatchill would be promoted to the two lieutenant positions. This was the first time Association officials learned of the reorganization plan, although the City had previously discussed the matter with Dankenbring and Hatchill.

15. Later on April 15, 2008, the Association held a previously scheduled membership meeting, which became devoted to discussing the reorganization plan. The meeting was contentious because the employees who were to be promoted supported the plan while others opposed it. Sergeant Ingram believed that the reorganization was a step towards eliminating the sergeants. Other members felt the Association bargaining team had not been forthcoming with bargaining unit members. The Association bargaining unit members ultimately decided to demand that the City bargain issues raised by the reorganization plan.

16. By letter dated May 7, 2008, Association counsel Daryl Garrettson demanded that the City bargain about the reorganization plan. The letter stated, in part:

"Dear Chief Harper:

"It has come to the attention of the Association that the City intends to reorganize the structure of the Police Department by creating a Captains [*sic*] position, adding a Lieutenant's position, and designating two of the Sergeants as administrative Sergeants. This reorganization implicates several mandatory subjects of bargaining, and therefore, must be bargained

prior to implementation. You may consider this letter to constitute a demand to bargain on the part of the Dallas Police Employees Association.

“The first question raised by the reorganization is whether or not the Lieutenants would be in the bargaining unit. It is my understanding that given the structure of this reorganization it is intended that Lieutenants would respond to calls, and otherwise perform routine police work. If that is accurate, then either the Lieutenants belong inside the bargaining unit, or the City must negotiate the transfer of bargaining work outside of the bargaining unit. The transfer of work is a mandatory subject of bargaining.

“Secondly, it is unclear whether or not the Lieutenants would take their vacation ahead of bargaining unit members, or whether they would bid with the bargaining unit. In either event this impacts a mandatory subject of bargaining the taking of vacation, and again must be bargained prior to implementation.

“Thirdly, it’s my understanding that the administrative Sergeants are intended to be assigned to permanent day shift, with the other two Sergeants being assigned to night shift. Since the Sergeants [sic] positions are inside the bargaining unit, this directly impacts the shift bidding of members of the bargaining unit. Hours of work again are a mandatory subject of bargaining.

“Finally, in looking at the reorganization chart, it appears that at least one day shift would consist of a Lieutenant, Sergeant, and one Police Officer. This creates a serious safety concern for the sole remaining Officer. Again safety is a mandatory subject of bargaining.

“Since the Collective Bargaining Agreement is open for negotiations, these issues can be dealt with at the bargaining table, or they can be dealt with separately. The Association is willing to have separate negotiations to deal with these issues if that is the pleasure of the City. Otherwise, these issues will need to be dealt with at the Collective Bargaining Table.”

17. After he received Garrettson’s letter, Harper met with Deputy Chief Simpson, Lieutenant Stevenson, and City legal counsel Moffat to discuss the problems raised in the demand to bargain and review the logistics of the proposed reorganization.

18. By letter dated May 23, 2008, Moffat responded for the City to the Association's demand to bargain. The letter included a revised reorganization proposal. The new reorganization plan created four lieutenant positions and eliminated the four sergeant positions. The letter stated, in part:

"In anticipation of our upcoming negotiations, I would like to provide you with a preview of the Department's revised plan for reorganization. I believe that this new plan will eliminate some of the issues outlined in your letter of May 7th.

"First, here is a summary of the Chief's expected reorganization plan:

"After extensive consideration and review of options, the best avenue appears to be moving to a Watch Commander system. These Police Lieutenants will be members of the management team, outside of the collective bargaining unit, and assigned to supervise each of the four squads of patrol officers. (Refer to attached position description: Police Lieutenant / June 2008)

"The management team met, conferred and ultimately selected two personnel who are highly qualified to serve in this capacity. My initial plan was to start a slow, evolutionary process with two watch commanders and as sergeants retire or otherwise leave the department, then phase in the remaining two lieutenants. I announced this plan at our most recent department meeting.

"On May 9th, I received a letter from the DPEA's attorney, citing a few reasons the Association now wishes to formalize the negotiations process. The majority of the concerns addressed were related to the work and shift assignments of the sergeants, as well as the perception of being 'top-heavy'. While my intent was to make this an evolutionary process with minimal impact on the existing sergeants, I can acknowledge the concerns highlighted in the letter. My endeavors to give special consideration to individuals, has inadvertently resulted in a negative impact on the department in general.

"The most logical solution is to re-evaluate the manner in which I implement the Watch Commander system. I propose to move ahead with four lieutenants on July 1, 2008. Based on input from

department members, the two additional lieutenants will be selected using an internal competitive process. Once the lieutenants are selected and appointed, the need for Police Sergeants will no longer exist.

“In fairness to the current sergeants, I propose that any of them who do not choose to compete for lieutenant or are not successful in their efforts, will be immediately designated as Senior Officers, irrespective of the time qualification requirements listed in the current CBA (requires two years on a specialized task). This is a one-time ‘grandfathered’ exception based on the re-organization needs. This will compensate for the loss of 2% (on-call pay). The management team will work with the personnel and the Association to identify duties which fit the Senior Officer criteria and are suitable. If they decide this is not a good option for them, they may elect not to take advantage of this benefit.

“Since we will no longer have personnel designated as Police Sergeant, I’m recommending any of the current sergeants who are moved to Senior Officer continue to be paid at their current salary, however freeze their salary at the rate established in the 2006-2008 CBA, until their pay is commensurate to the top of the Police Officer range.”

“ * * * **

“I do recognize that there will still be some mandatory subjects to bargain under this new reorganization plan. However, I do believe that it will dramatically decrease the topics to be bargained. The Department, in my opinion, does not need to bargain over the creation of a new level of supervisors, nor over the removal of the Sgts’ classification.

“As to the first concern that you raise in your letter, I have provided the job description for your review. If you feel there is still an issue of taking bargaining unit work away, we can certainly discuss that. It is my understanding that these new positions will be primarily supervisors with some additional police duties. However, the majority of their time will be spent in a supervisory capacity.

“We will also be willing to address your second raised issue of vacation bidding. However, given the new reorganization plan I am not convinced that it would remain a mandatory subject any longer. The Chief, however, has told me that he wishes to be fair in vacation selection as he recognizes what an important benefit vacation selection can be.

“Given our new reorganization plan, I do not believe that your third issue (hours of work/shift bidding) is any longer relevant. Management will now assign the hours for the new Lts.

“Your final concern, raised in your letter, has to do with safety concerns. I will await a further explanation of this at bargaining.

“To best prepare to make good use of our upcoming meeting, I am hopeful that you can discuss the above, or even share this email and attachments, with your bargaining team and members.” (Italics in the original)

19. The parties negotiated the impact of the City’s second reorganization proposal to completion. The former sergeants, now designated as senior officers, were compensated and made whole for the change in their rank. The City would not bargain over the change in rank. Sergeants Ingram, Wallace, and Rodriguez did not apply for the two new lieutenant positions.

20. On September 30, 2008, Chief Harper retired. Deputy Chief Simpson became the chief. At some point during 2008, Stevenson became a captain.

21. The City policy manual includes policies governing the filling of City jobs. It states, in part:

“C. Promotion/Transfer to an Existing Vacancy

“It is the City Policy to encourage promotion from within the City organization. When a vacancy occurs, first opportunity will be given to City employees presently in classes requiring less responsibility, provided they are qualified to perform the duties of the vacant position. Notification of the vacancy shall be given to the City Manager who will furnish the department information on City employees in lesser classes located in other departments. When an employee is transferred, the department manager of the department filling the vacancy shall notify the City Manager of who is being transferred, from what department, the new position and the

recommended salary of the employee in the new position.”
(Emphasis omitted.)

Pre-employment Agreement

22. On April 14, 2008, the City offered a police officer position to Jeffrey Van Laanen. The terms of the offer were that: (1) Van Laanen would initially be paid \$4,422 per month, the top step of the 2006-2008 collective bargaining agreement officer salary scale; (2) he would be promoted to sergeant on July 1, 2008; and (3) he would receive a four percent salary increase when appointed to sergeant. The letter stated, in part:

“Ordinarily (*pursuant to DPEA Article 34.3*) new employees are eligible for a step increase 12 months after initial hiring. Since you are scheduled to be promoted/appointed to Police Sergeant on July 1, 2008, you will receive a 4% pay increase effective the date of appointment. The 4% is calculated based on the new July 1st officer salary increase. Additionally, (*pursuant to City of Dallas Personnel Rules section VI*) you will be eligible for a merit increase after successful completion of the 6 months probationary period as a Police Sergeant and thereafter on the annual anniversary of the promotion date at one-year intervals until you reach the top of the salary range.

“Finally, and for your information, a Collective Bargaining Agreement exists between the City of Dallas and the Dallas Police Employee’s Association.” (Emphasis in original.)

23. The 2006-2008 collective bargaining agreement did not provide for a four percent pay increase upon promotion to sergeant. Van Laanen’s promised raise would result in a salary which did not match any other salary step in the collective bargaining agreement.

24. The Association knew that the City had a practice of entering pre-employment agreements with new employees. The Association was not aware of any prior instance in which the City promised a promotion in a pre-employment agreement. Promotion within the bargaining unit only became possible when sergeants were added to the bargaining unit in 2006.

25. The Association first learned of the Van Laanen pre-employment agreement in May 2008, and first received a copy of the agreement in June 2008.

26. As of April 14, in collective bargaining, the City had offered the Association a 4.3 percent salary increase; 3.8 percent of this amount was a cost of living increase and 0.5 percent was an increase in base salaries.

27. On July 25, 2008, representatives of the parties signed a successor collective bargaining agreement, covering the period July 1, 2008 through June 30, 2010.

28. In September 2008, Chief Harper retired.⁵

CONCLUSIONS OF LAW

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

2. The City violated ORS 243.672(1)(a) by proposing a second police department reorganization plan that froze sergeants' salaries after the Association demanded to bargain about the City's first reorganization plan.

The City decided to reorganize its police department. Police Chief Harper, in consultation with other City managers, devised the initial plan. It created new supervisory positions and changed sergeants' job descriptions. Harper presented the plan at an April 15, 2008, police department staff meeting. The Association then demanded to bargain about the plan.

After the Association demanded to bargain, the City devised a second reorganization plan. In this second plan, the City eliminated the position of sergeant and created four new lieutenant positions. Any sergeant who did not apply or was not selected for one of the newly-created lieutenant positions would be designated a "senior officer." In regard to these "senior officers," the City's counsel explained:

"I'm recommending any of the current sergeants who are moved to Senior Officer continue to be paid at their current salary, however freeze their salary at the rate established in the 2006-2008 CBA [collective bargaining agreement], until their pay is commensurate to the top of the Police Officer range." (Italics in original.)

⁵Harper did not testify at the hearing.

The City implemented this second reorganization plan on July 1, 2008.⁶

The Association contends that the City's threat to freeze sergeants' salaries at 2006-2008 contract rates violates ORS 243.672(1)(a), which makes it an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." The statute creates two violations. An employer violates the statute if it: (1) takes action "because of" employees' exercise of PECBA-(Public Employee Collective Bargaining Act) protected rights or (2) takes action that interferes with employees "'in the exercise' of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739 (2004).

An employer that threatens bargaining unit members with adverse action for engaging in protected activity may violate the "in the exercise" prong of subsection (1)(a). *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-2-08, 23 PECBR 108, 127 (2009). To determine whether an employer violated the "in the exercise" portion of subsection (1)(a), we examine the effects of the employer's actions. The motive for the employer's conduct is irrelevant, and a complainant need not prove any actual interference with employees' protected activity. Instead, we examine the natural and probable effect of the employer's actions. If the employer's conduct, when viewed objectively, would tend to deter employees from exercising their PECBA rights, the employer's actions violate subsection (1)(a). *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623-624, 16 P3d 1189 (2000); *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-063-05, 22 PECBR 168, 186 (2007), *AWOP*, 229 Or App 96, ___ P3d ___ (2009). However, the potential effect of the employer's action or the employees' subjective impressions are not sufficient to establish a violation. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 348, *recons*, 20 PECBR 388 (2003), *citing Spray Education Association and Walt Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201 (1989). In examining a threat under the "in the exercise" prong of subsection (1)(a), it is not necessary that the employer follow through on the threat. The relevant inquiry is whether the threat would naturally deter employees from exercising their protected rights.

Here, there is no dispute that bargaining unit members engaged in protected activity when they met on April 15, 2008, discussed the first reorganization plan, and

⁶ Before the City implemented this second reorganization plan, the parties bargained to completion about all mandatory aspects of the plan. Sergeants were made whole and compensated for their change in rank. Thus, the City never carried out its threat to freeze sergeants' salaries.

voted to demand bargaining about the plan. After the Association notified the City that it wished to bargain about the reorganization, the City devised a second reorganization plan. In this second plan, the City eliminated the position of police sergeant and threatened to freeze former sergeants' salaries at 2006-2008 contract levels. Based on these specific facts, we conclude that the natural and probable effect of these statements is to discourage bargaining unit members from engaging in PECBA-protected activities. Given the parties' history regarding the sergeants, bargaining unit members could reasonably fear that exercising their PECBA-guaranteed right to demand bargaining would result in a salary freeze or other undesirable action. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 789 (1998) (an employer violated the "in the exercise" prong of subsection (1)(a) when it discharged an employee after the employee grieved a disciplinary action; the natural and probable effect of the employer's action is to chill employees in exercising their PECBA-guaranteed right to grieve). Accordingly, we hold that the City's threat to freeze former sergeants' salaries violated the "in the exercise" prong of subsection (1)(a). We will order a remedy to address this violation of the law.

The Association also alleges that the City's actions violated the "because of" prong of subsection (1)(a). We have already found a violation of the "in the exercise" portion of the statute. It would add nothing to our remedy to decide whether the City's proposal for a second reorganization plan also violated the "because of" prong of subsection (1)(a). Consequently, we will not address these Association allegations. *Oregon AFSCME Council 75 v. Umatilla County*, 23 PECBR at 125.

3. The City's proposals to reorganize the Department did not violate ORS 243.672(1)(e).

ORS 243.672(1)(e), provides that it is an unfair labor practice for a public employer to refuse to bargain in good faith with the employees' exclusive representative over mandatory subjects of bargaining. The Association alleges that the City engaged in bad-faith bargaining in negotiations about the City's plan to reorganize the police department.

An employer bargains in bad faith if: (1) its conduct is so inimical to the bargaining process that it constitutes a *per se* violation of its good faith bargaining obligation; or (2) the totality of its conduct during negotiations demonstrates an unwillingness to reach agreement. *International Association of Firefighters Local #1431 v. City of Medford*, Case No. UP-32/35-06, 22 PECBR 198, 206 (2007); *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 387 (2006), quoting *Portland Police Association v. City of Portland*, Case No. UP-64-01, 20 PECBR 295,

310 (2003). The Association does not allege a *per se* violation.⁷ Consequently, we look at the totality of the City's conduct to determine if it bargained in bad faith.

We consider the following factors to determine if the totality of an employer's conduct demonstrates an unwillingness to reach agreement and 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.” *International Association of Firefighters Local #1431 v. City of Medford*, 22 PECBR at 207.

As proof of its bad faith bargaining charge, the Association points to the City's announcement of the initial reorganization plan at a mandatory staff meeting, and not at a bargaining session. The Association also asserts that the City's response to the demand to bargain devising a second reorganization plan that eliminated the sergeants' positions and froze former sergeants' salaries also indicates bad faith bargaining.

The City's announcement of its second reorganization plan⁸ was arguably a single instance of regressive bargaining — the City proposed to freeze sergeants' salaries at 2006-2008 contract rates, a position apparently harsher than the one it took in negotiations for a successor collective bargaining agreement. This Board does not conclude that this one instance of regressive bargaining is by itself substantial proof that the City engaged in unlawful surface bargaining, however. Instead, we examine the totality of the City's conduct to determine whether the City bargained in good faith. There is no evidence that the City engaged in dilatory tactics, or that City's negotiators behaved inappropriately⁹ (except, arguably, by presenting the City's first reorganization

⁷Examples of conduct “so inimical to the bargaining process” that it is a *per se* violation of the duty to bargain in good faith include: “(1) an employer's unilateral implementation of a change in a mandatory subject of bargaining; (2) submitting a new proposal at the mediation stage; and (3) submitting a new proposal in a final offer.” *Coos County*, 21 PECBR at 387, quoting *City of Portland*, 20 PECBR at 310.

⁸The Association does not contend that the second reorganization itself, and its elimination of the sergeants' positions, were mandatory subjects of bargaining.

⁹The Association cites only one instance of arguably inappropriate conduct by City negotiators—Chief Harper's announcement of the first reorganization plan at an April 15, 2008,

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plan and salary structure at the employee meeting). Nor is there any evidence that the City refused to make concessions or failed to explain its bargaining positions. The overall course of negotiations was unremarkable. The parties bargained to completion about all mandatory issues arising from the reorganization plan; the agreement reached by the parties made the former sergeants whole and compensated them for their loss of rank. The parties also reached agreement on a successor contract. The fact that the City entered into these agreements creates “a difficult hurdle” that the Association must overcome to prove that the City engaged in surface bargaining. *Lincoln County Employees Association v. Lincoln County and Daniel Globe, District Attorney*, Case No. UP-42-97, 17 PECBR 683, 707 (1998). The totality of the City’s conduct demonstrates that it fulfilled its good faith bargaining duty under subsection (1)(e). We will dismiss this claim.

4. The City violated ORS 243.672(1)(e) when it entered into a pre-employment contract with Jeff Van Laanen.

Under subsection (1)(e), an employer must bargain to completion with a labor organization before changing the *status quo* regarding a mandatory subject of bargaining that is not included in the parties’ contract. When, as here, a collective bargaining agreement is in effect, an employer can only make a change in a mandatory condition of employment not covered by the agreement if it first notifies the exclusive representative of the proposed change and completes the bargaining process set out in ORS 243.698. In deciding whether an employer made an unlawful unilateral change, we begin by identifying the *status quo* and then determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerned a subject that is mandatory for negotiations. *Lebanon Education Association/ OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). The

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staff meeting and not a bargaining session. An employer engages in unlawful direct dealing, a *per se* violation of subsection (1)(e), if it negotiates directly with bargaining unit members and does not first present its proposals to the union. *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 769 (2007), citing *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160, 8195 (1985).

Even if we assume *arguendo* that the City’s conduct constituted unlawful direct dealing, that would not be sufficient to prove unlawful surface bargaining. In *Lane Unified Bargaining Council* we found that the employer engaged in unlawful direct dealing. We nevertheless held that direct dealing alone is insufficient to establish surface bargaining. 8 PECBR at 8202. We apply that principle here. Absent other indicia of bad faith, direct dealing does not establish surface bargaining.

status quo may be established by an expired collective bargaining agreement, past practice, work rule, or policy.

Consistent with this analytical framework, we first determine the *status quo* in regard to City promotional increases, and then determine if the City changed the *status quo* in its dealings with Van Laanen. The Association contends that the City's agreement to promote Van Laanen and give him a four percent raise on July 1, 2008, was unprecedented. According to the Association, the City had never before given a four percent promotional raise to a bargaining unit member. The City argues, however, that the promised four percent pay increase was the *status quo* for such a promotion. Although no such raise was included in the expired collective bargaining agreement, the City asserts that it had a longstanding practice of awarding such salary increases. We disagree.

A past practice is established by a course of conduct

“characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. Acceptability means that both parties know about the conduct and consider it an acceptable method for dealing with a particular situation. Mutuality means the practice arose from a joint understanding by the employer and the labor organization.” *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, 285 (2008), citing *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005).

The party claiming that a past practice exists bears the burden of proving its existence. *Multnomah County*, 22 PECBR at 285, citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06, 22 PECBR 159, 165 (2007). Here, the record is devoid of evidence that the City ever awarded a four percent increase to a bargaining unit member whom it promoted to the position of sergeant. Thus, the City did not prove a past practice of awarding bargaining unit members a four percent promotional increase. Accordingly, the City changed the *status quo* when it promised Van Laanen a four percent increase upon his promotion to sergeant.

We move to the next step in our analysis and determine whether the City's agreement with Van Laanen concerned a subject that is mandatory for negotiations. A pre-employment agreement that makes a salary increase a condition of employment for a newly-hired worker concerns monetary benefits, a subject that is *per se* mandatory for negotiations. ORS 243.650(7)(a); *Northwest Education Association/OEA/NEA v. Northwest Regional Education Service District*, Case No. UP-23-06, 22 PECBR, 247, 256 (2008) (an

employer violated subsection (1)(e) when it unilaterally implemented a policy to provide a “signing bonus” to prospective employees who agreed to accept certain positions with the employer). Promotions, and the requirements for promotions, are permissive subjects for bargaining and the City was not obligated to negotiate about these matters. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 869-70 (1993), *AWOP*, 133 Or App 602, 892 P2d 1030, *rev den*, 321 Or 268, 895 P2d 1362 (1995). The City was, however, required to bargain over the pay increases for the promotions.

The City unilaterally changed the *status quo* in violation of subsection (1)(e) when it agreed to give Van Laanen a four percent salary increase after his promotion to the position of sergeant. We will order the City to cease and desist from entering into such agreements.¹⁰

5. The City violated ORS 243.672(1)(b) when it entered into a pre-employment contract with Jeff Van Laanen about his wages after his future promotion to sergeant.

Subsection (1)(b) makes it an unfair labor practice for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” The Association alleges that the City’s pre-employment agreement with Van Laanen violates ORS 243.672(1)(b). In order to demonstrate a violation of subsection (1)(b), a union must show that an employer’s actions actually, directly, and adversely affected the labor organization’s right to represent its members. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 397 (2008).

Under certain circumstances, an employer violates subsection (1)(b) if it bypasses the union and deals directly with a bargaining unit member. We have explained that:

“* * * [w]hen a labor organization is chosen by the employees as their exclusive representative, it has the statutory right to represent those employees in dealing with the employer. By bypassing the exclusive representative and dealing directly with the employees on contractual

¹⁰The Association has not requested, and we will not order, an affirmative remedy that would require Van Laanen to repay the salary he received because of the City’s unlawful actions or to forfeit that salary in the future. “The purposes and policies of the PECBA are not furthered by a remedy that strengthens a union’s position at the expense of its members” *Northwest Education Association/OEA/NEA v. Northwest Regional Education Service District*, 22 PECBR at 259 n 4.

matters, a public employer undermines the exclusive representative's status and impairs the representative's ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 773 (2007), quoting *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999).

By negotiating and executing a pre-employment agreement with Van Laanen, the City bypassed the Association and dealt directly with a bargaining unit member on salary, a contractual matter. In so doing, the City undermined the Association's status as the employees' exclusive representative in violation of subsection (1)(b). The City's only defense to this claim is that the four percent promotion raise was the *status quo*, a defense which we rejected above. We will order that the City cease and desist from entering into such agreements.

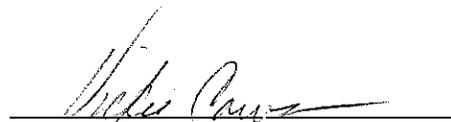
ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(a), (b), and (e).
2. The remainder of the complaint is dismissed.

DATED this 13th day of October 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.