

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-38-09

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 2831,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
LANE COUNTY,)	AND ORDER
)	
Respondent.)	
_____)	

On August 18, 2010, this Board heard oral argument on Complainant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on April 30, 2010, after a hearing held on November 25, 2009, in Salem, Oregon. The record closed on December 23, 2009, following receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, Oregon AFSCME Council 75, Eugene, Oregon, represented Complainant.

Pierre L. Robert, Assistant County Counsel, Lane County, Eugene, Oregon, represented Respondent.

On August 19, 2009, AFSCME Local 2831 (Union) filed an unfair labor practice complaint against Lane County (County), alleging that the County failed to bargain in good faith in violation of ORS 243.672(1)(e) by notifying the Union of its intent to implement its Drug-Free Work Place Policy a week after the parties executed a successor collective bargaining agreement. The County filed a timely answer to the complaint.

The issue is:

Did the County violate ORS 243.672(1)(e) by notifying the Union of its intent to implement a Drug Free Workplace policy on or about May 20, 2009, after failing to pursue bargaining or failing to bargain in good faith over this issue during negotiations for a successor collective bargaining agreement?

RULINGS

1. At the hearing, the ALJ deferred ruling on the admission of Exhibit R-23, the County's minutes from the parties' May 8, 2008 bargaining session. After the Union withdrew its request to submit its May 8 meeting minutes in its post-hearing brief, the County also withdrew its request to submit Exhibit R-23., Therefore, Exhibit R-23 is withdrawn from the record.

2. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of employees who work for the County, a public employer.

2. Union representatives during the time relevant to these events include AFSCME Council 75 Representative Jim Steiner, AFSCME Council 75 Legal Counsel Allison Hassler, Union Steward Paula Medaglia, and Union President Lora Green. Steiner has represented the employees in the Union's bargaining unit since approximately 2000.

3. County managers during the time relevant to these events include Labor Relations Manager Roland Hoskins, Assistant Public Works Director Howard Schussler, Assistant County Counsel Pierre Robert, Health and Human Services Department (HHSD) Director Rob Rockstroh, and HHSD Assistant Director Karen Gaffney. Labor Relations Manager Hoskins began working at the County half-time in June 2007, and then full-time in September 2007.

Background

4. Effective September 1998, the County adopted the following "Drug Free Work Place Policy:"

“It is the policy of Lane County to ensure a drug-free work environment. The unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace. Any unlawful manufacture, distribution, or dispensation of a controlled substance in the workplace shall be cause for immediate discharge. Unlawful possession or use of a controlled substance in the workplace shall be cause for immediate disciplinary action which could result in discharge. The County Administrator shall adopt administrative procedures implementing this policy including the sanctions for policy violation. The Administrator shall also adopt policies necessary to keep Lane County government in compliance with Public Law 100-690 (the Anti-Drug Abuse Act). Pursuant to LC 2.225(1), the Fair Board shall likewise adopt policies and procedures to ensure a drug-free work environment at the fairgrounds.”

5. In 2006, the County began to develop comprehensive drug-free workplace policies and procedures to be incorporated into the County’s Administrative Procedure Manual (APM). During this process, the County did not negotiate with the Union regarding the application of these procedures to bargaining unit members.

6. County Public Works Department employees are represented by three different unions. Two of these unions, Admin Professionals Union and Local 66,¹ represent employees who are covered by the Oregon Department of Transportation (ODOT) drug-testing regulations and a related County Drug-Free Work Place Policy, which includes rigid drug-testing requirements. Assistant Public Works Director Schussler negotiates annually with these two unions over the renewal of the ODOT-related drug-testing policy. At each annual bargaining session, representatives from the Admin Professionals Union and Local 66 told Schussler that it was unfair that other County employees were not subject to any type of drug testing, including pre-employment drug testing.

7. The County and the Union participate in a Joint Labor Management Relations Review Committee (JLMRC). During JLMRC meetings, County and Union representatives discuss and attempt to resolve a variety of issues. Schussler attends the JLMRC meetings. At JLMRC meetings over the past five years, Schussler has regularly raised the issue of drug testing. Union representatives have generally responded that the JLMRC is not the appropriate place to bargain the issue, that Union bargaining unit employees do not hold a license which requires that they be tested, and that any type of random testing would be unconstitutional.

¹Witness Schussler referred to the two unions by these names. The record does not reflect more complete names for these unions.

8. Just prior to the October 2007 JLMRC meeting, Schussler engaged in annual negotiations about the drug-testing policy with the Admin Professionals Union and Local 66. These unions again voiced their concern that other County employees were not subject to drug testing. As a result, Schussler requested that the topic of pre-employment drug testing be placed on the JLMRC meeting agenda.

9. At the October 31, 2007 JLMRC meeting, Hoskins, Schussler, and Director of Information Services Tony Black, represented the County. Then Union President Cheryl Dyer, Union Steward Medaglia, and Council 75 Representative Steiner, represented the Union. Vicki Epperson, a senior program analyst in the Human Resources Department (HR), was also present to take contemporaneous notes of the meeting on her computer. The minutes reflect that the following discussion occurred regarding drug testing:

**"2) PRE-EMPLOYMENT DRUG TESTING FOR ALL EMPLOYEES
NEW TO PW COUNTY**

"Schussler: Each year the ALC and drug testing is reviewed. The same issue is brought up every year: all employees should be tested for drugs (the standard test given by the County). Given that we are a drug free work place they believe that all employees should go for drug screening at the time of hire unless they have DOT or CDL requirements. It is an important gesture to the employees because they believe in a drug free workplace. The suggestion is that all new employees would be tested at the time of hire.

"Steiner: The Union agreed to all the drug testing and background testing with Tony's group. This item can be brought in at bargaining. Doesn't believe the Union would have any problem with it. Let him know what the policy would look like before it was implemented and a timeline of implementation.

"Schussler: We should test anyone who was hired after the policy was adopted.

"Steiner: Show where the policy would go and what it would look like. Asked Howard to email the policy."

10. The County adopted a comprehensive Drug-Free Work Place Procedure in November 2007.² This procedure covers prohibited conduct and its consequences, testing procedures and standards, employee rights, and return to work agreements. The section addressing consequences provides that violations of any provisions of the procedure will result in: 1) immediate termination for probationary, seasonal, temporary, and extra help employees; and 2) discipline, up to and including termination, for other County employees. The procedure provides for pre-employment and reasonable-suspicion drug testing. Regarding random drug testing, it states:

“This policy specifically does not provide for an ongoing random testing program for all Lane County employees. Lane County may determine a need to conduct random testing in certain instances in order to comply with federal and/or state requirements or because of the safety sensitive nature of specific jobs. Random testing may also be required as a condition of a Return To Work/Performance Agreement.”

Successor Contract Negotiations

11. On approximately January 8, 2008, AFSCME Representative Steiner notified the County of the Union’s intent to begin bargaining over a successor collective bargaining agreement. Steiner requested that the parties agree on a bargaining schedule.

12. After receiving Steiner’s bargaining request, Human Resources (HR) Manager Hoskins discovered that other County managers were so preoccupied with budget issues that he would have a difficult time bringing together a team. By letter dated February 28, 2008, he proposed to Steiner that the parties wait until April to begin bargaining due to the County’s involvement in an extremely difficult budget process. The Union was unwilling to delay bargaining, and filed a grievance over the County’s response to its demand to bargain. The parties finally scheduled their first bargaining session in May 2008, and resolved the grievance over the bargaining delay.

13. On May 8, 2008, the parties met to discuss the ground rules for their successor contract negotiations. Hoskins, Schussler, Steiner, and Medaglia attended the meeting. Valerie Sanchez from the County Labor Relations Department was also present and took contemporaneous notes on a computer of the discussions during this and subsequent negotiation meetings. During the May 8 meeting, the parties agreed that “[a]ll proposals shall be on the bargaining table no later than the third negotiation session, not including the parties’ first meeting discussing ground rules.” The County did

²The parties referred interchangeably to the Drug-Free WorkPlace Procedure as both a policy and a procedure.

not raise the issue of its Drug-Free Work Place Policy or make a proposal regarding that policy at this meeting.³ During this meeting, Steiner gave Hoskins copies of two U.S. Supreme Court drug-testing cases and a copy of the Three Rivers School District⁴ case.

14. The parties' next bargaining session was held on July 1, 2008. During this session, the Union presented its first proposal, which included a change in Article VI, the parties' grievance procedure. The Union proposed to delete the language in the current contract that required that unemployment insurance be deducted from an arbitrator's back pay award. At the time the Union presented this proposal, it referred the County to the *Three Rivers School District* case. When the County asked Steiner if he had copies of the case, Steiner indicated that he would provide it, but that the County could also find the case on the internet.⁵

³The Union made the following allegations regarding the County's attempts to raise drug policy issues early in discussions about successor contract negotiations: 1) that prior to the May 8 meeting, Hoskins sent Steiner an e-mail regarding the County's desire to present a drug testing proposal; 2) that the parties discussed the County's Drug-Free Work Place Policy before they began bargaining; and 3) that the County discussed drug testing at the parties' May 8 meeting. The Union failed to prove these allegations, however. The Union never produced a copy of the e-mail Hoskins supposedly sent Steiner prior to the parties' May 8 meeting. Although Steiner testified that he placed drug testing on the agenda for a Union bargaining team meeting after he received Hoskins' e-mail, the Union never produced a copy of this agenda. Nor did the Union present any evidence to support its claim that the parties discussed drug testing at their May 8 meeting.

We find it more likely than not that the discussion about the County's Drug-Free Work Place Policy occurred at the parties' October 31, 2007, JLMRC meeting. The County produced minutes of the meeting that verified the parties' discussion about this issue. Steiner's recollection of the timing of many of the events about which he testified was not clear. While Steiner recalled that discussion about the drug policy occurred prior to bargaining, he admitted that he did not remember the exact date of the discussion and also admitted that it could have occurred during a JLMRC meeting. We need not resolve this conflict about County efforts to raise drug policy issues early in successor contract bargaining, however. The County clearly expressed its desire to bargain about its drug policy in discussions about the Doe incident in July 2008. Since the parties were in successor bargaining when this occurred, whether the issue also arose earlier during the ground-rules meeting is not critical to our decision.

⁴We assume that the Union was referring to the Oregon Supreme Court's decision in *Zottola v. Three Rivers Sch. Dist.*, 342 Or 118, 149 P3d 1151 (2006), in which the court held that the Fair Dismissal Appeals Board was not authorized to deduct unemployment compensation from an employee's back-pay award.

⁵The Union claimed that the County brought up drug testing at this first bargaining session and made a proposal on the issue which it subsequently withdrew. The Union presented (...continued)

15. The parties met to bargain on July 15, 2008. Neither party made a proposal regarding the Drug-Free Work Place Procedures or drug testing during this meeting.

16. Sometime prior to July 22, 2008, a supervisor notified HHSD Assistant Director Gaffney that Jane Doe⁶ (Doe) appeared to have been impaired when she came to work. Doe was a medical assistant responsible for direct patient care, including giving injections. Gaffney consulted the APM, Drug-Free Work Place Procedure, and, working in conjunction with the HR Director, sent Doe for reasonable-suspicion drug testing. After receiving the results of the drug test, the Department began the process to discipline Doe.

17. When Steiner learned that Doe had been drug tested, he told HHSD managers and Hoskins that the County could not require Doe to submit to a drug test because the Union and County never bargained about the County's Drug-Free Work Place Procedure. Hoskins was surprised at Steiner's statement. He assumed that his predecessor negotiated about the procedure with the Union since it had been in place since 2007. On July 22, Hoskins notified Steiner that he would look into the situation. Between July 22 and July 25, 2008, Hoskins reviewed prior bargaining minutes and e-mails to discover if prior County labor relations manager Frank Forbes bargained over the drug-free workplace procedure with the Union. Hoskins found no documentation that any such bargaining occurred.⁷

(...continued)

no evidence to support this contention, however. Although Steiner testified that the County raised the drug testing issue in bargaining, he also testified that he was the first person to bring up the matter when, on May 8, he gave County bargainers Supreme Court cases concerning drug testing. Union Steward Medaglia also testified that Steiner was the one who raised the issue. Our conclusion that the Union, not the County, raised the issue of County drug policy does not affect our decision, however. As discussed above, it is undisputed that the County stated its desire to bargain about its drug policy in July 2008, when the incident involving Doe occurred.

⁶"Jane Doe" is a pseudonym.

⁷We find credible Hoskins' testimony that prior to the Doe incident, he and other County managers believed that the County had bargained the Drug-Free Work Place Procedure with the Union. The record shows that Hoskins and other County managers acted in a manner consistent with their belief that the procedure applied when they sent Doe for reasonable-suspicion drug testing. When Steiner told Hoskins that the procedure did not apply, Hoskins expressed surprise and told Steiner he needed to research prior bargaining records and e-mails to determine if Steiner was correct. Although Steiner testified that prior to the Doe incident, he and Hoskins discussed the inapplicability of the drug testing policy to Union bargaining unit members, there is no evidence that Steiner either expressed disbelief at Hoskins' need to research the issue or reminded Hoskins of their prior discussion.

18. While Hoskins researched bargaining history, Hoskins and Steiner talked several times about Doe's situation. The County was interested in working with the Union to obtain help for Doe, even if the procedure did not apply. The Union was also interested in determining what assistance Doe might need. While Hoskins continued to search for documentation that Forbes had bargained the policy with the Union, he primarily focused on Doe's situation. As a result, Hoskins felt unprepared to raise the drug-free workplace policy in successor contract negotiations.

19. On Friday, July 25, 2008, Hoskins sent Steiner the following e-mail:

"Hello Jim, I wanted to update you on the [Doe] situation. It was my belief that the union was notified of the County's reasonable suspicion policy because I have notes which indicated Frank [Forbes] provided draft versions of the policy to the union as far back as October of 2006 and he appeared to be working with the union as the policy was drafted and implemented. We were working within the constraints of the current policy, until it was brought to my attention that you notified Rob that the union was not involved in the development of the policy.

"The County is going to bring [Doe] back and has no intentions of disciplining [Doe] as a result of this situation. Hopefully, you can help us achieve our mutual goal of working with [Doe] to determine what help, if any, she feels she needs at this time.

"I would be interested in bargaining the implementation of a policy with the union outside of the current bargaining sessions in the future. I would prefer to continue working through the current proposals that have been brought to the table at this time."⁸

20. The parties' third bargaining session was held on July 29, 2008. This was the last session for the parties to raise new issues under their ground rules. Neither party made a proposal regarding the drug-free workplace procedures or drug testing during this meeting or at any other time during successor contract negotiations.

⁸There is no evidence in the record regarding if or how the Union responded to Hoskins' e-mail.

21. Successor contract negotiations were very contentious and, at one point, the Union took an intent to strike vote. Steiner and Medaglia believe that had the County made a proposal regarding the Drug-Free Work Place Procedure during contract bargaining, it would have substantially affected the bargaining process. During a mediation session on February 27, 2009, the parties reached a tentative agreement, which was subsequently ratified by the Union's bargaining unit members and the County commissioners.

22. On February 19 and March 3, 2009, the Union filed two unfair labor practice complaints over the County's conduct during the successor negotiations. The parties subsequently entered into consent orders regarding both complaints.⁹ In the first consent order, issued August 24, 2009, the County acknowledged that it called a news conference contrary to the parties' ground rules in violation of ORS 243.672(1)(g).¹⁰ In the second consent order, issued on September 27, 2009, the County acknowledged that it violated ORS 243.672(1)(e) when it unilaterally implemented a change in an employee's right to sell time management hours (leave time) before the parties reached an impasse in their negotiations.¹¹

23. In February 2009, a supervisor notified HHSD Assistant Director Gaffney that Doe again appeared to be impaired. Gaffney documented the supervisor's observations and findings. Because the APM procedure did not apply to the Union-represented employees, she did not send Doe to be drug tested. Gaffney notified the HR Department about the second incident with Doe.

24. Beginning in May 2009, Steiner took a leave from work for six weeks because of the critical illness of a family member. Steiner notified the County about his absence and the reason for the absence. He told the County that if an issue arose during his absence, a County representative should contact either AFSCME Council 75 Legal Counsel Hassler or Representative Rick Hensen.

25. The parties executed their 2008-11 collective bargaining agreement on May 13, 2009. Article V of that agreement addresses discipline and discharge procedures and standards. Article XVII includes several miscellaneous provisions, that provide in part:

⁹Under OAR 115-035-0070, parties to an unfair labor practice proceeding may submit a settlement agreement resolving all issues in the complaint to this Board. Upon approval of the agreement, this Board issues a consent order reflecting the agreement.

¹⁰See *AFSCME Local 2831 v. Lane County*, Case No. UP-13-09, 23 PECBR 307 (2009).

¹¹See *AFSCME Local 2831 v. Lane County*, Case No. UP-10-09, 23 PECBR 357 (2009).

“Section 1 — Change in Conditions

“* * * * *

“(B) If the COUNTY proposes to implement a change in matters within the scope of bargaining as defined by ORS 243.650(7) and not specifically mentioned in this Agreement that would result in more than a de minimus effect on the bargaining unit, the COUNTY will notify the UNION in writing prior to implementing the proposed change. Upon timely request of the UNION (within fourteen (14) days), the following ORS 243.698 shall apply.

“* * * * *

“Section 3 — Waiver

“The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, except as otherwise specifically provided in this Agreement, the COUNTY and the UNION, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter covered by this Agreement without mutual consent.” (Emphasis in original.)

Expedited Negotiations Process

26. Sometime prior to May 20, 2009, Department managers and Hoskins’ supervisor, HR Director Greta Utecht, pressured Hoskins to bargain the Drug-Free Work Place Procedure with the Union. On May 20, 2009, Assistant Public Works Director Schussler gave newly-elected Union President Lori Green a letter from Hoskins, which stated:

“In conformance to ORS 243.698 and Article XVII, Section 1 (B), the County is notifying AFSCME of its intent to move forward with the administration of the County’s Drug and Alcohol Policy, currently in the

APM, to ensure compliance with Federal grant funding requirements. The grants fund many of the positions and services delivered by AFSCME members. The policy is attached for your review. If you would like to meet to discuss this issue, please notify me within 14 days to commence the obligatory 90-day bargaining period to reach an agreement or absent an agreement the County can implement the policy.

“If AFSCME does not notify the County within the 14 day time frame, it will move forward with the implementation.”

A copy of the APM Drug-Free Workplace Procedure was attached to the letter. The letter indicated that Steiner and Union Steward Medaglia had been sent a copy, although neither of them received it.

27. Green gave Hoskins' May 20 letter to AFSCME Council 75 Legal Counsel Hassler. Hassler then sent the County a demand to bargain over the implementation of the policy, which the County received on May 27, 2009. Hassler requested that the County provide AFSCME with available bargaining dates between June 22 and July 31 to allow time for Steiner to return from leave and prepare for bargaining. On May 27, the County provided the Union with seven potential bargaining dates between June 22 and July 24. Steiner returned from leave either at the end of the first week or the beginning of the second week in June. On June 9, Steiner notified the County that the first date he was available for bargaining was July 2.

28. On June 25, Steiner sent the County a request for information about the federal grants the County had referred to in its May 20 letter. On July 1, 2009, Hoskins and Steiner exchanged a series of e-mails regarding the information request. Initially, Hoskins sent an e-mail to Steiner describing the primary grants that applied to the Union-represented positions. Steiner then requested information about which of the grants required post-employment drug testing. Hoskins responded that “[t]he grant programs do not require drug testing. The Feds require the organizations that receive grant dollars to implement a drug free workplace policy, which is what we are attempting to do.”

29. Under the Drug Free Workplace Act of 1988, 41 USC §701 (1988), federal grant recipients must agree to provide a drug-free workplace. The Act specifies that these recipients must meet a number of requirements, such as providing a statement to employees that the unlawful use or possession of a controlled substance in the workplace is prohibited and specifying the consequences of violating this prohibition; instituting a requirement that all employees receive a copy of this statement; establishing a program

to notify employees about the dangers of drug abuse, employer resources for assistance with drug problems, and penalties for drug abuse violations; and imposing sanctions on employees or requiring employees to receive assistance for convictions of any criminal drug statute based on workplace conduct. The Act does not require that employees be subjected to drug-testing. The County had not received any new grants since it had engaged in the bargaining for the 2008-11 agreement.

30. On July 2, 2009, Steiner sent Hoskins the following e-mail:

“Please provide the material you are referring to that ‘require the organizations that receive grant dollars to implement a drug free workplace policy.’ Also per my original request please provide what is different now versus when the County wanted to bargain this issue in 2008? Are there new classifications? Are there different programs? Are there now new requirements? The Union needs this information as it is extremely relevant to ascertain who, what or if anyone the ‘regs’ (as you call them) require to undergo post employment drug testing. Hopefully you can gather this information by today’s session.”

31. The same day, Hoskins responded by e-mail to Steiner, stating:

“At one point, in 2008, I acted as though the policy was implemented in the organization and you informed me that AFSCME never had an opportunity to bargain this issue with the County. We agreed that some of the impacts of the policy implementation were mandatory subjects. I believe that we briefly discussed the drug policy during our contract negotiations last year, but the issue was shelved.

“I can provide you a copy of the Drug Free Workplace Act of 1988. Again, we need to implement a policy to comply with the act.”

32. Also on July 2, the parties met for their first bargaining session. The County team included Legal Counsel Robert, Hoskins, Gaffney, and Schussler. The Union team included Steiner, Green, and Medaglia. At this meeting, Steiner notified the County that he did not believe the Union had an obligation to bargain over the policy since the County had raised this issue and failed to pursue it during the successor bargaining process. Steiner stated that the Union would participate in bargaining because it also had an interest in a drug-free workplace, but was not waiving the right to assert this legal issue at a later time.

33. During the July 2 meeting, the parties engaged in a discussion about a variety of issues related to the County’s proposed drug-free workplace procedure,

including the federal requirements, cases addressing drug-testing issues decided under the Public Employee Collective Bargaining Act (PECBA), the APM drug-testing requirements and procedures, and the Union's concerns about drug-testing. The Union's bargaining minutes reflect that the following discussions occurred:

"Steiner - Trying to resolve if parties don't bargain, why should employer bargain afterwards? Did not bargain it then.

"Hoskins - Shelved it during bargaining. I assumed Frank [Forbes] bargained this before. Focused on diff. [different] thgs. [things], then came back to it.

"Robert - Implemented in 11/07. Don't think anythg has chgd. Heard about employee could be required to take drug test - intoxicated. That's why we're here today."¹²

At the end of the meeting, the parties scheduled their next bargaining session for August 4. For reasons that do not appear in the record, this meeting never occurred.

34. On August 5, 2009, Steiner sent Hoskins and Robert the following e-mail:

"I am writing you as a follow up to discussions during our last meeting to about [*sic*] the County's desire to implement drug testing. I made it clear during our last meeting discussing that the Union does not believe we have a duty to bargain a new policy at this time. The Unions [*sic*] willingness to meet and discuss this issue with you is for preserving our rights under the PECBA. We are not mutually bargaining at this time however we will continue to meet and discuss the issue.

"Gentlemen, this is not a new issue. The County has wanted AFSCME to agree to drug testing several times in collective bargaining and the Union has consistently not agreed and the issue has been dropped. In the most recent negotiations you were going to bring a proposal, yet dropped it. Through the Collective Bargaining Agreement Article XVII section 3 you will have the right to bargain this issue again during successor negotiations. With the knowledge of the current contractual language and your acknowledgement [*sic*] that you could not get drug testing in the recent negotiations what makes you believe that you can get drug testing now?"

¹²The speakers were identified in these minutes by an initial. Medaglia, who took these minutes, testified to the identify of these speakers. The speakers' names have been substituted for the initials.

35. On August 14, Hoskins responded to Steiner, stating:

“* * * The answer your [*sic*] question is that Sec. 3. of Art XVII does not apply. That section states that no matter addressed in the contract may be re-negotiated during the 3yr term without mutual consent. Of course, the contract has no provision implementing impacts of our APM on drug testing.

“If I understand your argument, you believe the fact that the parties discussed implementation of that APM during the contract bargaining, but ultimately dropped the issue, acts to legally bar interim bargaining until bargaining for the next contract. If I understand you, please furnish to me legal authority on point. It would surprise us: such a rule would compel parties to resist raising some issues at bargaining for fear that, if they can't get to an agreement, the other side could bar it being brought up again for the life of the contract, as you wish to do here. Such a rule would have the effect of restricting, not encouraging, the free and open discourse that collective bargaining is intended to produce.

“The provision that controls is Sec. 1 of Art XVII that explicitly permits employers to compel bargaining on mandatory subjects between contract negotiations. That provision incorporates the process laid out in ORS 243.698. Accordingly, Council 75 formally demanded to bargain this issue in it's letter to us in late May. I've attached a scanned copy for your convenience. You provide no authority showing that you may now reverse course and simply refuse to bargain. Please let me know if I am misinterpreting your response.

“The 90 day bargaining window stated in the statute elapses on August 18, 2009. Please accept this as the County's continuing demand to bargain implementation of the impacts in good faith by promptly replying with proposed meeting times for your team. Otherwise, the county has met its obligations on this matter.”

36. The parties met for another bargaining session on August 17, 2009. During this meeting, Steiner again told the County that he did not believe the Union was required to bargain over the drug-testing policy and that the Union intended to file an unfair labor practice complaint. After the meeting, Hoskins sent Steiner an e-mail, stating “I am looking forward to the next steps. I am assuming that the union agrees to

extend the 90 day bargaining to accommodate another session to build on the progress we experienced today because we agreed to have Valerie [Sanchez] schedule another meeting. Is that correct?" Sanchez and Steiner subsequently exchanged e-mails attempting to set another meeting in either September or October. They never scheduled an additional meeting, however.

37. On August 19, 2009, the Union filed this unfair labor practice complaint.

38. Sometime prior to September 4, HHSD Assistant Director Gaffney realized that the parties were not going to promptly resolve the issue of drug-testing. Gaffney consulted with HHSD Director Rockstroh about the Department's obligations under the Drug-Free Workplace Act. As a result, the Department prepared materials for distribution to HHSD employees regarding the APM Drug-Free Workplace Procedure and provided training to HHSD supervisors on those materials. Supervisors were told during the training that the drug-testing portion of the procedure did not apply to the Union-represented employees.

39. On September 4, 2009, Gaffney telephoned Steiner and left a message notifying him that HHSD would give employees a copy of the Lane Manual policy and APM procedure and would also require that employees sign a statement regarding their receipt of and obligation to comply with the requirements of the APM Drug-Free Workplace Procedure. Gaffney also sent Steiner an e-mail, to which she attached the materials the Department intended to provide to employees, stating:

"This is to follow up on my phone message to you earlier this week about H&HS's [HHSD's] continuing efforts to meet our federal mandates around drug-free workplace. Next week Rob [Rockstroh] will be sending an email to employees, and then supervisors will be following up with the material attached below. I wanted you to have a copy in case you get questions from members. The supervisors are all clear that this is NOT about drug testing. This is only about the policy and education requirements of the Drug Free Workplace Act. Please let me know if you have any questions." (Emphasis in original.)

40. Not long after September 4, HHSD supervisors met with employees and gave them a fact sheet on the effects of alcohol and drugs, a copy of the Lane County Manual Drug-Free Work Place Policy, and the APM Drug-Free Work Place Procedure. The cover sheet for the information provided to the employees included statements that the employees had been informed about the County's policy and procedures, resources for drug issues, the dangers of drug use, penalties related to violation of the County's

policy, and the employee's need to comply with the policy. The cover sheet also contained a signature line and an explanation that by signing this line, an employee indicated that the employee had received copies of the County policies and procedure and agreed to comply with them. When providing this information to employees, HHSD supervisors directed employees to sign the cover sheet.

41. The Union notified employees that they should sign the cover sheet attached to the materials provided by the County if so directed. After receiving the materials, however, several employees contacted the Union, explaining that they were confused. Although the employees were told that the drug-testing procedures would not apply to them, the information provided by HHSD indicated that the procedures did. On October 12, 2009, after Steiner notified HHSD Director Rockstroh about the employees' concerns, Rockstroh sent an e-mail to Steiner and HHSD employees confirming that the drug-testing procedures did not apply to them because the County was still negotiating drug-testing with the Union.

42. After the Union filed this unfair labor practice complaint, Hoskins searched the County's bargaining minutes and other documents and found no record that showed the parties had discussed drug-testing during the bargaining for the 2008-11 agreement. Hoskins did find documentation that the parties had discussed drug-testing during the October 31, 2007, JLMRC meeting.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County did not violate ORS 243.672(1)(e) by notifying the Union of its intent to implement a Drug Free Work Place Policy on or about May 20, 2009, after failing to pursue bargaining or failing to bargain in good faith over this issue during negotiations for a successor collective bargaining agreement.

DISCUSSION

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to refuse to bargain in good faith with the employees' exclusive bargaining representative. The Public Employee Collective Bargaining Act (PECBA) contains two different bargaining procedures. ORS 243.712-.756 describes the employer's duty to negotiate a collective bargaining agreement (or its successor). For strike-permitted employees, such as those at issue here, the process includes 150 days of good-faith bargaining, 15 days of mediation, and a 30-day cooling off period before the employer can implement its final offer. ORS 243.712. ORS 243.698 describes the expedited bargaining process the parties must use if the bargaining obligation arises during the life of a collective

bargaining agreement. For strike-permitted employees, this statute generally requires that the employer notify the union of a proposed change in employment relations and engage in no more than 90 days of bargaining before implementing the change. ORS 243.698(4).

We explained the difference between these two bargaining processes as follows:

“[T]he legislature intended ORS 243.698 to provide a relatively expeditious process to address those mid-contract change proposals which arise outside the normal bargaining period. The expedited process was not intended to override the regular bargaining process. Put another way, the expedited process applies when the employer’s bargaining obligation arises because of its desire to make a mid-term change in working conditions, and no other avenue exists for resolving the dispute.

“* * * * *

“Where the parties are already engaged in bargaining for a successor contract, the employer has a suitable process available to it to address any proposed changes. The regular bargaining process would be undermined if the employer was allowed to segregate out a particular (and usually difficult) issue for expedited treatment. It would also promote inefficiency to require the parties to conduct separate expedited and regular negotiations concurrently.

“The expedited process of ORS 243.698 must be limited to the situation dictated by its text and context; that is, where the employer’s duty to bargain *only arises* because of its desire to make a mid-term change. Where successor negotiations are going on, the employer’s duty to bargain is already governed by ORS 243.672(1)(e) and 243.712-756.” *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699, 705 (1996). (Emphasis in original.)

The Union alleges that the County misused the expedited bargaining process, asserting that the County bargained in bad faith in violation of subsection (1)(e) when it “subverted the bargaining process by withdrawing a drug testing proposals [*sic*] during successor bargaining, holding it in reserve and informing the Union of its intent to implement the same policy one week after signing the collective bargaining agreement.” According to the Union, “[t]he County acted with intent and foresight in withdrawing its proposal during successor bargaining and trying to implement the same proposal

using expedited bargaining under ORS 243.698. The County knew that the Union would be disadvantaged using this type of bargaining.” *Id.* The question before us is whether the County’s initiation of expedited bargaining under ORS 243.698, immediately after the execution of its successor agreement, over an issue that had been raised during the negotiations for that agreement, violated ORS 243.672(1)(e). We begin our analysis of the Union’s charges by considering the nature and extent of an employer’s good faith bargaining duty.

There are two types of bad-faith bargaining. An employer may violate subsection (1)(e) either by “[c]onduct so inimical to the bargaining process that it amounts to a *per se* violation of the duty to bargain in good faith, or by the totality of conduct during the period of negotiations that indicates an unwillingness to reach a negotiated agreement.” *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 583, *adhered to on recons*, 16 PECBR 707 (1996). Here, the complaint does not allege (and the Union does not argue) that the County committed a *per se* violation of ORS 243.672(1)(e). Instead, the Union asserts that the totality of the County’s conduct in negotiations about its Drug-Free Work Place Policy violated subsection (1)(e).

Good-faith bargaining under ORS 243.672(1)(e) requires that a party do more than go through the motions of bargaining; it must come to the table with a sincere willingness to negotiate an agreement. ORS 243.656(5); *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433, 451-52 (1996), *AWOP*, 146 Or App 777, 932 P2d 1216 (1997); *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85, 8 PECBR 8160 (1985). In a “totality of conduct” or surface bargaining case, we “determine whether the party engaged in behavior intended to frustrate an agreement; in other words, [we] judge the overall *quality* of bargaining.” *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97, 17 PECBR 683, 704 (1998) (emphasis in original). We typically consider the following factors to determine whether a party’s conduct constitutes unlawful surface bargaining:

“(1) whether dilatory tactics were used; (2) the content of a party’s proposals; (3) the behavior of a party’s negotiator; (4) the nature and number of concessions made; (5) whether a party failed to explain its bargaining positions; and (6) the course of negotiations.” *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04, 21 PECBR 360, 393 (2006).

Particularly important to our consideration of a surface bargaining charge is the employer's intent. As we explained in *McKenzie School District*, "the subjective intent, or bad motive, of an employer is the very gravamen of a surface bargaining charge." 8 PECBR at 8208.

The Union does not contend that County negotiators behaved in an offensive manner, or made unduly harsh or unreasonable proposals. Nor does the Union assert that the County failed to explain its proposals, refused to make concessions, or engaged in a course of negotiations that was hurried or perfunctory. The Union's allegations concern the County's dilatory tactics in bargaining its Drug-Free Work Place Policy. The Union asserts that the County purposely did not pursue bargaining about the Drug-Free Work Place Policy in successor contract negotiations,¹³ but waited until after the parties executed their agreement to do so. The Union notes that one week after the parties executed their collective bargaining agreement, the County notified the Union that it intended to implement this policy. According to the Union, the County delayed notice of its proposed actions until the parties completed the 150-day bargaining process for their successor agreement to force bargaining over the drug policy into the less rigorous 90-day expedited process. We consider these Union allegations under the specific standards we have developed to determine if an employer's actions indicate conduct so dilatory as to constitute bad-faith bargaining.

A party engages in unlawful dilatory conduct if it uses tactics that might unreasonably impede negotiations. Deliberate delay which frustrates or obstructs the PECBA bargaining process is contrary to the intent of the statutory scheme and evidence of bad faith bargaining. *McKenzie School District*, 8 PECBR at 8197. We determine whether a delay constitutes bad faith bargaining based on the circumstances of each case. *Portland Association of Teachers v. Portland School District No. 1J*, Case Nos. UP-35/36-94, 15 PECBR 692, 726 (1995).

In determining if an employer's negotiations tactics are so dilatory as to impede the PECBA process, the difference between the two bargaining processes is significant. An employer cannot use the expedited bargaining process to undermine successor contract negotiations. As discussed above, bargaining under ORS 243.698 arises only when an employer wishes to make a change in employment relations during the life of

¹³We reject the Union's contention that the County bargained in bad faith by proposing the Drug-Free Work Place Policy in successor contract negotiations and withdrawing it. The evidence does not support this contention. As discussed in our Findings of Fact, the first (and only) mention of the Drug-Free Work Place Policy occurred on July 24, 2009. On that date, Hoskins e-mailed Steiner to explain that he hoped to resolve the Doe incident without disciplinary action and wanted to negotiate the County's Drug-Free Work Place Policy after the successor contract was resolved.

a contract. When an employer is already engaged in successor negotiations, its duty to bargain is governed by ORS 243.712-.756. *In the Matter of the Petition for a Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-04-96, 16 PECBR 699, 705.

Here, the Union alleges that the timing of the County's announcement that it planned to implement its Drug-Free Work Place Policy is evidence of bad-faith, dilatory tactics. We agree that the timing of the County's announcement of the planned implementation of its drug policy is suspicious. In July 2008, during the Doe incident, the County understood and acknowledged the need to bargain about the applicability of its Drug-Free Work Place Policy to Union bargaining unit members. Despite this realization, the County did not immediately pursue bargaining about this matter, even though the parties were engaged in successor contract negotiations. Instead, the County waited until one week after the parties executed their collective bargaining agreement to announce plans to implement the Drug-Free Work Place Policy. The County offered no reason for its actions. The County's actions suggest that it sought to put itself in a better bargaining position by waiting to pursue negotiations about a single issue under the more abbreviated expedited bargaining process.¹⁴

On its face, then, the County's conduct suggests an attempt to obstruct orderly PECBA negotiations by waiting to pursue bargaining about a single issue until the parties settled their contract and the County could use the expedited bargaining process. Our analysis does not end here, however. To determine if the totality of an employer's conduct in negotiations indicates bad faith bargaining, we analyze all relevant circumstances. As noted above, we particularly look to the employer's motive and intent, "the very gravamen of a surface bargaining charge," as evidence of an unwillingness to bargain. *McKenzie School District*, 8 PECBR at 8202.

Here, the County proposed to delay bargaining about its Drug-Free Work Place Policy for two reasons: it was occupied with the Doe matter and felt unprepared to raise the issue of drug testing in successor contract negotiations; and, it did not want to

¹⁴As Board Member Gamson noted in his dissent in *Oregon School Employees Association v. Clatskanie School District*, Case No. UP-9-04, 21 PECBR 599, 627 (2007), *AWOP*, 219 Or App 546, 183 P3d 246 (2008), if the employer had raised the issue "in successor bargaining when the entire contract was open for negotiation, it would have been part of the larger mix of issues in dispute and subject to the type of 'horse trading' that is characteristic of good-faith bargaining. The parties could have explored a wide range of potential trade-offs and compromises, making agreement * * * more likely. Instead, the District isolated the * * * issue in expedited bargaining * * *."

introduce a new proposal that might complicate already contentious negotiations.¹⁵ Thus, the County's proposal to postpone negotiations about its Drug-Free Work Place Policy resulted from a desire to devote attention to a sensitive employee matter and to avoid further conflict in bargaining. The County specifically told the Union it wanted to postpone negotiations about its Drug-Free Work Place Policy. In his July 25, 2008, e-mail to Union negotiator Steiner, County manager Hoskins explained that he was "interested in bargaining the implementation of a policy with the union outside of the current bargaining sessions." The Union did not respond. Had the Union wanted to bargain about the County's Drug-Free Work Place Policy during successor contract negotiations, it could and should have objected to the County's plan and insisted that negotiations about the policy immediately begin. The Union did not do so, however.¹⁶

To decide if the totality of circumstances demonstrate bad faith bargaining, we weigh the timing of the County's proposal to implement the Drug-Free Work Place Policy and the lack of explanation for it against the County's motives for postponing bargaining and the Union's failure to respond to the County's announcement of its plan. Although it is an extremely close question, our weighing of the relevant factors persuades us that the County's conduct regarding the proposed implementation of its Drug-Free Work Place Policy demonstrates no deliberate intent to frustrate the bargaining process in violation of subsection (1)(e).¹⁷

¹⁵In fact, the Union apparently agreed with the County that introducing a proposal concerning the drug-free workplace policy into successor contract negotiations would significantly (and presumably negatively) affect these negotiations.

¹⁶Since the County did not plead that the Union waived its right to bargain over the policy by not responding to Hoskins' e-mail, we do not address that issue. Waiver is an affirmative defense which must be pled by the respondent. *Oregon School Employees Association v. Morrow School District*, Case No. UP-22-95, 16 PECBR 299, 300 n 1 (1996), *AWOP*, 142 Or App 595, 922 P2d 729, 730, *rev den*, 324 Or 394, 927 P2d 599, 600 (1996). However, we are not precluded from considering evidence that the Union did not object to the County's request to delay bargaining in evaluating the totality of the County's conduct.

¹⁷As additional evidence of dilatory bargaining tactics, the Union cites the County's initiation of the expedited bargaining process at a time when Union representative Steiner was on leave. According to the Union, the County's conduct delayed the parties' negotiations so that half of the 90-day period had elapsed by the date of the parties' first bargaining session. The timing of the County's notice to the Union about the proposed implementation of the drug-free workplace policy is unfortunate. The Union exaggerates the impact of this timing on the bargaining process, however. The County notified the Union on May 20 that it wanted to

Based on the totality of circumstances, we conclude that the County did not violate ORS 243.672(1)(e) by engaging in bad faith surface bargaining regarding its Drug-Free Work Place Policy. We will dismiss the complaint.

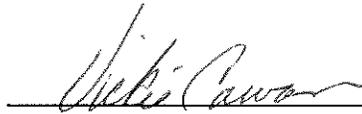
ORDER

The complaint is dismissed.

DATED this 28 day of February, 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

negotiate the drug-free workplace policy; Steiner returned to work by the second week of June. Any delay resulting from Steiner's absence was thus closer to 19 days, not 45. In addition, the Union waited to meet until July 1, even though the County proposed earlier dates for bargaining.