

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-51-04

(UNFAIR LABOR PRACTICE)

NORTH CLACKAMAS	)	
EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
NORTH CLACKAMAS	)	ORDER
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

This Board heard oral argument on December 14, 2005, on both parties' objections to the Proposed Order issued by Administrative Law Judge (ALJ) Susan Rossiter on September 1, 2005. The hearing in this case was held before ALJ Vickie Cowan on April 20, 2005, in Milwaukie, Oregon, and on April 22, 2005, in Salem, Oregon. The hearing closed with submission of briefs on May 9, 2005. After the hearing, the case was reassigned to ALJ Rossiter.

Ralph E. Wisner III, Attorney at Law, 1 Centerpointe Drive, Suite 570, Lake Oswego, Oregon 97035, represented Complainant.

Paul Dakopolos, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

---

On October 29, 2004, the North Clackamas Education Association (Association) filed an unfair labor practice complaint against the North Clackamas School District (District), and an amended complaint on December 17, 2004. In its

amended complaint, the Association alleged that the District violated ORS 243.672(1)(e) by repudiating an agreement reached through collective bargaining, and also violated ORS 243.672(1)(h) by refusing to reduce an agreement to writing and sign it.

The District denied the allegations in the complaint, as amended, and asserted as affirmative defenses that this Board has no jurisdiction to enforce any agreement reached by the parties, that the parties had waived enforceability of any agreement they may have reached, and that the District had no obligation to enforce the agreement because it was not final or binding

The issues presented for hearing are:

1. Does this Board have jurisdiction over this matter?
2. Did the District violate ORS 243.672(1)(h) when it refused to sign the Association's October 12, 2004 draft settlement agreement concerning Karyn McBride?
3. Did the District violate ORS 243.672(1)(e) when it repudiated the Association's October 12, 2004 draft settlement agreement concerning Karyn McBride?
4. Is the District entitled to a penalty against the Association and reimbursement of its filing fee?<sup>1</sup>

In her recommended order, the ALJ determined that this Board has jurisdiction of the parties and subject matter of this dispute. Nevertheless, the ALJ recommended dismissal of the amended complaint. The ALJ concluded that the District neither refused to sign a tentative agreement concerning McBride in violation of ORS 243.672(1)(h), nor repudiated such a tentative agreement in violation of ORS 243.672(1)(e).

---

<sup>1</sup>In its amended complaint, the Association asked for an order directing the District to "pay the Association the maximum penalty allowed by law for its unlawful and egregious conduct." The Association's request for a penalty does not comply with this Board's rule 115-035-0075(2), which requires that a request for a penalty include a statement as to why a civil penalty is appropriate, together with a clear and concise statement of the facts alleged in support of the statement. We will not consider it.

The Association objected to the ALJ's conclusions that the District did not refuse to sign or repudiate a tentative agreement. It argued that the ALJ's proposed findings of fact were incomplete or erroneous, and that her proposed conclusions of law were also erroneous because they failed to take into account the duty of "good faith and fair dealing" which the District owed the Association, the "special status" of labor contracts, and the labor relations history between the parties. The District objected to the ALJ's conclusion that this Board has jurisdiction of the subject matter of this dispute.

We adopt the ALJ's proposed findings of fact as modified. We conclude that the District did not violate ORS 243.672(1)(h). It did not refuse to reduce to writing and sign an agreement, reached through collective bargaining, concerning McBride. We also dismiss the Association's claim that the District repudiated such an agreement in violation of ORS 243.672(1)(e). We do not grant the District's request for a civil penalty and reimbursement of its filing fees. The amended complaint was not filed frivolously or in bad faith, or for the purpose of harassing the prevailing party.

### RULINGS

The ALJ's rulings were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a bargaining unit of teachers, counselors, media specialists, licensed specialists, social workers, and nurses employed by the District. The District is a public employer.

2. The Association and District were parties to a collective bargaining agreement which was in effect from July 1, 2003 through June 30, 2005. The agreement included a four-level grievance procedure. Under the terms of the grievance procedure, a grievance was defined as "a claim by a grievant that a dispute or disagreement exists involving interpretation of inequitable or unfair application of the terms of this agreement, Board Policy, or Standard Practice." A grievant's failure to appeal a grievance to the next level within the time limits specified in the contract "shall be deemed to be acceptance of the decision rendered at that level." At the first level of the grievance procedure, the grievant discussed the grievance with the immediate supervisor. At the second level of the grievance procedure, the grievant appealed to the superintendent who held a hearing and issued a written decision on the grievance. At the third level of the

grievance procedure, the grievant could appeal to the Board of Directors (District Board) in accordance with the following procedures:

“If the grievant is not satisfied with the decision rendered at Level Two or if no decision is reached, the grievance may be appealed to the Board within 20 working days of the hearing decision due date. The appeal shall be in writing and copies delivered to Board members, superintendent, and persons officially involved. The grievant may request and shall be granted an open hearing. \* \* \*”

At the fourth level of the grievance procedure, the grievant submitted the grievance to arbitration. Only grievances concerning the interpretation, meaning, or application of terms of the collective bargaining agreement were subject to arbitration.

3. The District employed McBride as a special education teacher at Linwood Elementary School for the 2002-2003 school year. Because of concerns regarding McBride’s performance, her supervisor placed her on a “Program of Growth” on November 14, 2002.

4. On March 6, 2003, the District voted not to extend McBride’s contract in accordance with ORS 342.895(4)(b).

5. On April 16, 2003, McBride filed a grievance in which she alleged that the District had placed her on a program of assistance which violated several provisions of the applicable collective bargaining agreement. As a remedy for the District’s actions, McBride asked that the District rescind its action not to extend her teaching contract. McBride was represented in this grievance by Oregon Education Association UniServ Consultant Debbie Hagan. McBride’s grievance was denied at level one of the grievance procedure, and she appealed the grievance to level two.

6. In September 2003, McBride was placed on a program of assistance for improvement as required by the collective bargaining agreement and in accordance with ORS 342.895(4)(b).

7. On December 8, 2003, District Superintendent Ron Naso held a hearing on McBride’s grievance at level two of the contract grievance procedure. The superintendent denied McBride’s grievance

8. By letter dated January 20, 2004, Hagan appealed McBride's grievance to the District Board at level three of the grievance procedure, and also requested a hearing before the District Board. Hagan and a District secretary spoke several times about scheduling a hearing for McBride's grievance, but were unable to find an acceptable date.

9. On March 4, 2004, the District Board voted not to extend McBride's teaching contract a second time on the following grounds: inefficiency, neglect of duty, inadequate performance, and failure to comply with such reasonable requests as the District Board may prescribe to show normal improvement and evidence of professional training and growth. ORS 342.865(1)(d), (g), and (h). McBride never filed a grievance under the collective bargaining agreement concerning the District Board's action to non-extend her contract a second time.

10. By letter dated March 18, 2004, McBride's attorney appealed the District's non-extension of her contract to the Fair Dismissal Appeals Board (FDAB). According to FDAB, the "[r]easons for the appeal, without limitation, include the following: Ms. McBride disputes the factual and legal allegations and grounds relied upon for her non-extension by the North Clackamas School District, contests each of them, and asserts that the circumstances leading up to and including the non-extension violate applicable law *and the applicable collective bargaining agreement.*" (Emphasis supplied.) The FDAB hearing was scheduled to begin on August 23, 2004. The parties anticipated that this hearing would last approximately one week.

11. On August 23, 2004, Hagan and McBride arrived for the scheduled FDAB hearing concerning the non-extension of McBride's contract. At approximately 9:30 a.m., Hagan asked District Director of Human Resources Marla Shuman to meet with her to see if they could resolve the issue of McBride's work separation. The FDAB hearing was postponed while Shuman, Hagan, and Association Vice President Patricia Scarratt met.

Hagan told Shuman that the FDAB proceeding was likely to be lengthy and expensive, and that it would be in the best interest of all the parties to try to resolve the matter without a hearing. Hagan proposed that the District pay McBride \$20,000 and pay the full cost of McBride's medical, dental, and vision insurance for a year. Hagan further proposed that the District not contest McBride's claim for unemployment benefits, rescind the non-extension of McBride's contract, destroy the plans of assistance that had been given to McBride, and provide McBride with a letter of recommendation acceptable to McBride and the District. Hagan and Shuman estimated that the overall cost of Hagan's proposal was \$35,000 to \$40,000. Shuman told Hagan that she needed

to talk with the superintendent about Hagan's proposal, and left the meeting to talk to Naso.

12. Shuman returned at approximately 11:30 a.m. to meet again with Scarratt and Hagan. Shuman told them that the District Board had given Shuman and Naso clear direction that there was to be no lump sum cash payment to McBride. Shuman then made the following counter-offer regarding McBride's work separation. The District would pay the full premium cost for family medical, dental, and vision insurance for McBride for one year at a cost of about \$1,238 per month, and pay the full premium cost for employee-only medical, dental, and vision insurance for McBride for a second year at a cost of about \$469 per month. After receiving District-paid medical, dental, and vision benefits for three months, McBride could elect to receive cash equal to the monthly cost of the premiums in lieu of coverage.

McBride would not apply for unemployment benefits. The District would transfer all files for McBride, including computer files, to the District office and the files would be destroyed. The District would agree to develop a letter of recommendation for McBride that would be acceptable to McBride and the District. Any oral recommendation from the District would be made by a person acceptable to McBride and would be consistent with the letter of recommendation. Hagan and Shuman concluded that the total cost to the District of this offer was approximately \$20,000. McBride would receive approximately \$20,000 in health coverage or payments from the District<sup>2</sup>

Hagan told Shuman that she believed that they had an agreement, but that Hagan needed to discuss the matter with McBride. Shuman said that she needed to check with Naso about the settlement. The parties took a lunch break, and agreed to talk later.

13 Hagan, Scarratt, and Shuman reconvened their meeting at approximately 1:30 p.m. Hagan told Shuman that they were willing to accept the District's offer, and Shuman said they had a deal. Hagan's notes set forth her understanding of the deal. They contain 11 separate provisions. Shuman and Hagan went over her notes point by point, and checked off each provision.

---

<sup>2</sup>For ease of calculation, we evaluate the parties' later proposals based on these monthly premium amounts, even though the parties later referred only to future payments in accordance with the then-applicable labor contract.

The first four provisions dealt with the economic terms of the deal (1) the District pays the full family premium of \$1,238 for the first year, and (2) the single party rate of \$469 for the second year. (3) The District pays the premium for the first three months. (4) After that, McBride may cash out the District contribution, without regard to whether or not she is employed.

The non-economic provisions followed. (5) The District Board will rescind both non-extensions at the District Board meeting on September 2. McBride will then submit her resignation. (6) McBride's files will be sent to the District office, and there be expunged and destroyed. There will be no reference to them in the future. (7) The parties will develop a mutually agreeable letter of recommendation. (8) Verbal references will be given as per the letter of recommendation. (9) McBride decides who gives verbal recommendations. (10) McBride will not apply for unemployment. (11) Hagan will prepare a draft of the agreement and submit it to Shuman by e-mail or fax. The parties' later conduct leaves no doubt that Shuman reserved the right to make changes to Hagan's drafts.

At this point, the parties informed the FDAB that the parties had an agreement, and requested that the proceedings be postponed to allow the agreement to be reduced to writing.

14. After Hagan had finished meeting with Shuman and gone home, she received a call from Shuman at approximately 4 p.m. Shuman said that the District had a problem with the second year of the McBride agreement. Hagan told Shuman that she believed that they had reached an agreement regarding McBride's work separation that would give McBride a total of \$20,000 in cash or benefits. Hagan said she was willing to discuss "creative ideas" with Shuman that would not change the total amount of the settlement.

15. On August 24, 2005, Hagan, Shuman, and Scarratt met in Hagan's office to discuss the settlement for McBride's separation from work. Hagan said that she believed that an agreement had been reached on the preceding day, but she was willing to discuss ideas for changing the financial arrangements of the settlement as long as the amount received by McBride continued to be \$20,000. Hagan, Shuman, and Scarratt discussed the second year of the McBride agreement. They decided that it might be possible for McBride to receive unemployment benefits instead of a second year of fully paid employee medical, dental, and vision coverage. Again, Hagan said that she would draft an agreement that included the matters discussed at their meeting, and send it to Shuman for her review.

16. On August 25, 2005, Hagan sent Shuman the following letter:

“As you know, the Association’s position is that the parties reached an agreement regarding Karyn McBride’s appeal to the Fair Dismissal Appeals Board and separation from employment on August 23, 2004. Subsequently, you contacted me to seek to discuss an amendment to the agreement. I advised you that the Association believed that we had an enforceable agreement, but that we were willing to discuss the District’s ideas regarding possible amendments to the agreement. The parties met yesterday in my office to discuss the District’s ideas.

“Following our discussion, I agreed to put the District’s ideas into writing. Enclosed is a document, which contains provisions that I believe are reflective of what we discussed. The document includes a provision regarding insurance and an additional provision regarding unemployment benefits.

“The enclosed document is not a contract proposal or counter offer. We continue to believe that the parties reached and [*sic*] agreement on August 23, 2004 which is enforceable.

“Please contact me so that we may discuss the enclosed document.”

17. Included with Hagan’s letter was a “Draft Separation Agreement Between Karyn McBride and The North Clackamas School District.” Although so-entitled, the Association was to be a signatory to the agreement as well. The first premise of the draft agreement was that McBride and the District “have agreed that it is in their mutual best interest to terminate their employment relationship in accordance with this Agreement without further proceedings.” Pursuant to this, the draft agreement included the following non-economic provisions.

First, the District would rescind its two non-extensions of McBride’s contract, and McBride would resign from the District, effective June 11, 2004. Accordingly, “[t]he parties agree that Karyn McBride will be able to truthfully state to prospective employers and licensing authorities that her teaching contract with the District was never non-extended and Karyn McBride’s separation from employment was solely pursuant to her wholly voluntary resignation.”

All records regarding McBride would be forwarded to the District office, and any records concerning the "Program of Assistance for Improvement and any related documents including but not limited to the Program of Growth and Karyn McBride's 2002-03 and 2003-04 evaluations" would be destroyed. According to the draft, "[t]he practical effect of this is that if asked, District representatives will tell prospective employers that there is no record of Karyn McBride having been on a Program of Assistance of Improvement. The parties agree that \* \* \* Karyn McBride may accurately answer 'no' to any questions regarding having been on a Program of Assistance or having resigned in lieu of termination."

The draft also stated that "this Agreement is for the purpose of, among other things, to support Karyn McBride's efforts to obtain other employment within her licensure." To this end, McBride and the District would mutually agree upon a letter of recommendation for McBride. The District was to agree not to provide information regarding McBride's employment to any persons except potential employers. Prospective employers who inquired about McBride would be solely referred to Shuman or Vickie Chambers (another District employee whom McBride agreed could give a reference), who would give a "positive recommendation" in keeping with the letter of recommendation, "emphasizing Karyn McBride's contributions to the District during her employment."

Finally, the Association draft provided that "[t]his document and any documents related to any grievances filed by Karyn McBride will be stored in a separate file at the District office. The purpose of placement in this file is to ensure confidentiality of the file. If a request for disclosure is made, the District will claim an exemption against disclosure and will use all reasonable means to resist production of the documents."<sup>3</sup>

Hagan's draft agreement also included the following economic provisions:

"6. The District shall pay both the employer and employee portion of premiums for medical/dental/

---

<sup>3</sup>None of the material quoted in the last three paragraphs was discussed or agreed on by the parties on August 23 or 24. None of it was suggested or requested by Marla Shuman. In her testimony, Debbie Hagan suggested that these matters were part of "our creative repackaging" but later conceded that "our" meant "Association." We agree. On August 25, the Association raised more new issues, and made non-economic proposals to which the District had not agreed on August 23 and 24. We further find that these changes had nothing to do with any issues raised by the District regarding its performance during the second year of any agreement.

vision insurance pursuant to the insurance provisions of the applicable Collective Bargaining Agreement for Karyn McBride for a period of fourteen months beginning in September of 2004. For the first two months the District shall pay both the employer and employee portion of single party rate for medical/dental/vision premiums pursuant to the insurance provisions of the applicable Collective Bargaining Agreement. The District will pay both the employer and employee portion of the remaining twelve months of medical/dental/vision insurance premiums at the full family rate pursuant to the provisions of the insurance provisions of the applicable Collective Bargaining Agreement.

- “7. During the first two months of the stipulated fourteen-month period, Karyn McBride will accept a minimum of two months coverage for both the employer and employee portion of the single party rate for medical/dental/vision insurance pursuant to the insurance provision of the applicable Collective Bargaining Agreement. After that time, Karyn McBride may elect to have the District continue to pay the employer and employee portion of full family medical/dental/vision coverage for an additional twelve months at a rate pursuant to the insurance provisions of the applicable Collective Bargaining Agreement or Karyn McBride may elect to have such payments made to her in cash. If Karyn McBride elects cash payments the District will make such payments without regard to her employment status and such payments will be made on a monthly basis. If Karyn McBride elects cash payments, she will notify the District of such an election by the 10<sup>th</sup> day of the month prior to payment of the cash benefit.
- “8. In lieu of Karyn McBride applying for unemployment compensation and her further agreement not to apply for unemployment compensation, the District agrees to pay Karyn McBride an amount equal to nine weeks

of unemployment benefits at \$419 per week. Such payment will be made without regard to Karyn McBride's employment status or job search efforts. The parties recognize that these payments reflect the period of Karyn McBride's unemployment subsequent to her separation of employment beginning June 11, 2004." <sup>4</sup>

Under this draft, the District would pay out and McBride would receive approximately \$19,565, including health benefits or premium payments for 14 months, and payments from the District in lieu of unemployment benefits for 9 weeks

18. On August 27, 2004, Shuman sent Hagan an e-mail in which she asked Hagan to explain why she had changed the economic terms of the McBride agreement in paragraphs 6, 7, and 8 of the August 25 draft agreement. Hagan talked with Shuman about these matters, and told Shuman that she was attempting to "repackage" the financial terms of the settlement in a manner acceptable to the District, and in a way which would allow McBride to receive a total of \$20,000 in cash or benefits.

19. On September 2, 2005, Shuman sent Hagan the following letter, which stated in, pertinent part:

"Here is a proposed draft. Paragraph #6 of this draft speaks to unemployment. I have discovered that when Karyn applies

---

<sup>4</sup>In this proposal, the Association dropped from 24 to 14 months the time in which the District must either provide health insurance coverage, or make payments to McBride in lieu of insurance premiums. On August 24 the parties discussed, and apparently agreed on, the idea that McBride could receive unemployment compensation in lieu of a District payout during the second year of the agreement. This was fundamentally inconsistent with the agreement allegedly reached the day before.

We find that these paragraphs also contain new material which was not included in any agreement that the District and Association reached on August 23, nor in the parties' discussions on August 24. We refer specifically to the Association's proposal that the District make payments to McBride in lieu of unemployment compensation, without regard to her employment status or job search efforts, to the Association's proposal regarding COBRA benefits, and to the Association's alteration of the periods in which McBride would receive either health insurance coverage or payments in lieu of the District's health insurance premium payments.

for unemployment there will be a one week waiting period, and the waiting period cannot go back to June 11.

“Also, if Karyn represents to unemployment that she quit to seek other employment, she will not be allowed benefits. If she indicates that she quite [*sic*] in lieu of termination then benefits will be allowed after the one week waiting period. I think we can work to accomplish the goal of her eligibility for unemployment by using the language in our proposal in paragraph #6. When Karyn applies for unemployment she can make the statement to them about resigning in lieu of termination. That statement only goes to unemployment and back to me. That way she will be eligible for benefits. Her statement to unemployment is only known to her, and me and is not a piece of information ever shared with any future employer. Furthermore, as written in the agreement the district would respond according to the letter of reference.

“I know you and Karyn wanted to take her resignation to our Board tonight Sept. 2, that may not be possible, but once we get the agreement finalized between us, I see no reason why Karyn could not answer truthfully about her employment status per the agreement. The Board will be informed tonight of the status of where we are in the process and I fully expect once we have agreement they will act accordingly at the very next Board meeting. (The next scheduled meeting is Sept. 16)”

20. The draft agreement included with Shuman’s letter included the following non-economic provisions McBride would submit a letter of resignation from her teaching position, effective June 11, 2004, and the District would rescind its non-extension of her contract. All records regarding McBride’s performance deficiencies would be kept by District counsel in a separate file, and unavailable to District staff McBride and the District would mutually agree upon a letter of reference for McBride. Only Shuman and another District employee (whom McBride had agreed could give a reference) would speak with prospective employers and would provide references consistent with the agreed-upon letter of reference.

Shuman's draft agreement also included the following provisions:

"5. In settlement of disputed claims, the District shall provide Ms. McBride with the following benefits and disbursements:

"a. From September 2004 through October 2004, the District will provide Ms. McBride with full family medical/dental/vision insurance coverage as described in the collective bargaining agreement (with the District paying the full premium).

"b. From November through August 2005, the District will provide Ms. McBride with either full family medical/dental/vision insurance coverage as provided in the collective bargaining agreement (with the District paying the full premium), or will make monthly disbursements to Ms. McBride in an amount equal to that month's premium for full family medical/dental/vision insurance, at Ms. McBride's election.

"c. From September 2005 through October 2005, the District will provide Ms. McBride with either single-party medical/dental/vision insurance as provided in the collective bargaining agreement (with the District paying the full premium), or will make monthly disbursements to Ms. McBride in an amount equal to that month's premium for single-party coverage medical/dental/vision insurance, at Ms. McBride's election.

"The provision of consideration is made in settlement of disputed claims; in the event Ms. McBride elects to receive monetary disbursement in lieu of medical insurance coverage, the parties agree that the District shall not withhold taxes or other withholdings or

deductions, and Ms. McBride shall be solely responsible for any tax liability on said disbursements

- “6. The parties hereto agree that Ms. McBride may apply for up to nine weeks of unemployment benefits, and that the District will not object to her qualification for unemployment compensation benefits. Ms. McBride must apply for benefits through the State of Oregon, and may indicate that the period of unemployment began June 11, 2004.

“\* \* \* \* \*

- “8. This agreement is made in full resolution of all claims, disputes, grievances, appeals, suits, complaints, and all legal or administrative actions which have been filed, or which may be filed, by Ms. McBride or the Association related to or arising out of Ms. McBride’s employment with the District. Ms. McBride and the Association hereby specifically agree to dismiss Karyn McBride v. North Clackamas School District (FAB Case No. 04-02), and to waive and release any federal or state claim relating to or arising out of the District’s employment actions in relation to Ms. McBride.”

Under this draft, McBride would receive 14 months of medical benefits or payments in lieu of premiums, at a cost to the District of approximately \$15,794. McBride could apply for unemployment benefits for up to nine weeks, at no cost to the District.

Shuman testified that paragraphs 5 and 6 of this proposal were consistent with the discussions she had with Hagan and Scarratt on August 23.<sup>5</sup> According to Shuman, this was not true of the Association’s proposal of October 12, which is discussed below.

21. On September 8, 2005, Hagan sent Shuman a “second language draft for the Agreement we reached on Monday August 23, 2004 regarding the Karyn

---

<sup>5</sup>This Board does not agree, since the District’s proposal does provide for payments over a 24-month period. However, the 14-month time period for medical benefits or premium payments is found in the Association’s August 25 draft.

McBride settlement.” Hagan explained that since retroactive unemployment was not possible for McBride, she changed the provisions regarding insurance benefits so that McBride would receive three additional months of fully paid medical, dental, and vision benefits at the full family rate. Hagan explained that with the change in insurance benefits, the total cost to the District would still be \$20,000.

22. The draft agreement attached to Hagan’s letter contained provisions regarding McBride’s resignation, and written and oral District references concerning McBride that were identical, or substantially similar, to those proposed by the District. The Association draft agreement provided that all of McBride’s records would be forwarded to the District office, and any records concerning a plan of assistance or program of improvement would be destroyed.

This draft agreement also included the following provisions (in which Hagan put lines through language she proposed to delete from the Association’s August 25 draft, and underlined new language):

- “6. The District shall pay both the employer and employee portion of premiums for medical/dental/vision insurance pursuant to the insurance provisions of the applicable Collective Bargaining Agreement for Ms. McBride for a period of ~~fourteen~~ seventeen months beginning in ~~September~~ October of 2004. For the first two months the District shall pay both the employer and employee portion of single party rate for medical/dental/vision premiums pursuant to the insurance provisions of the applicable Collective Bargaining Agreement. The District will pay both the employer and employee portion of the remaining ~~twelve~~ fifteen months of medical/dental/vision insurance premiums at the full family rate pursuant to the provisions of the insurance provisions of the applicable Collective Bargaining Agreement.
- “7. During the first two months of the stipulated ~~fourteen~~ seventeen month period, Ms. McBride will accept a minimum of two months coverage for both the employer and employee portion of the single party rate for medical/dental/vision insurance pursuant to the insurance provision of the applicable Collective

Bargaining Agreement. After that time, Karyn McBride may elect to have the District continue to pay the employer and employee portion of full family medical/dental/vision coverage for an additional ~~twelve~~ fifteen months at a rate pursuant to the insurance provision of the applicable Collective Bargaining Agreement or Ms. McBride may elect to have such payments made to her in cash. If Ms. McBride elects cash payments the District will make such payments without regard to her employment status and such payments will be made on a monthly basis. If Ms. McBride elects cash payments, she will notify the District of such an election by the 10<sup>th</sup> day of the month prior to the payment of the cash benefit. Provision #6 and #7 are made in consideration of settlement of disputed claims; in the event Ms. McBride elects to receive monetary disbursement in lieu of medical/dental/vision coverage specified above, the parties agree that the District shall not withhold taxes or other withholdings or deductions, and Ms. McBride shall be solely responsible for any tax liability on said disbursement.

~~“8. — In lieu of Karyn McBride applying for unemployment compensation and her further agreement not to apply for unemployment compensation, the District agrees to pay Karyn McBride an amount equal to nine weeks of unemployment benefits at \$419 per week. Such payment will be made without regard to Karyn McBride’s employment status or job search efforts. The parties recognize that these payments reflect the period of Karyn McBride’s unemployment subsequent to her separation of employment beginning June 11, 2004.~~

~~“\* \* \* \* \*~~

“8. This agreement is made in full resolution of all claims, disputes, grievances, appeals, suits, complaints and all legal or administrative actions which have been filed

or which may be filed by Ms. McBride or the Association related to or arising out of Ms. McBride's employment with the District. Ms McBride and the Association hereby specifically agree to dismiss Karyn McBride V. North Clackamas School District (FAB Case No. 04-02 , [sic] and to waive and release any federal or state claim relating to or arising out of the District's employment actions in relations [sic] to Ms. McBride.

- “9. This agreement settles all issues between the parties regarding Ms. McBride's employment with and separation from the District; the agreement releases the District from any future grievance, suit, or other legal claim or action arising out of or in any way related to Ms. McBride's employment with her separation from the District [sic], except any suit or other legal claim or action to enforce the terms of this agreement.”

In this draft, the Association increased the number of months the District would provide McBride with health insurance benefits or payments in lieu of premiums from 14 to 17, but deleted any reference to payments in lieu of unemployment benefits. The cost to the District would be approximately \$19,608. In paragraph 8, the Association adopted District language concerning the “full resolution” of all disputes between the parties, but then added new language on this subject in paragraph 9 of the draft.

23. Hagan heard nothing further regarding her September 8, 2005 letter and draft agreement until September 13, 2005. On that date, Association President Bob Rice told Hagan that Shuman had made an offer regarding McBride's work separation to Rice. According to Rice, Shuman made the offer during meetings between Rice and Shuman to discuss Association business unrelated to McBride's work separation. At these meetings, Shuman told Rice that the District would allow McBride to resign her employment with the District, would pay McBride \$5,000, and would store McBride's files in the office of the District's counsel. Shuman made this offer to Rice because the District Board and the superintendent had instructed her to do so.

24. By letter dated September 13, 2005, Hagan wrote Shuman and confirmed the terms of the “so-called counter offer in the matter of Karyn McBride” that Rice had told her about. Hagan told Shuman:

“As you know, we settled this matter on August 23, 2004, the first day of the Fair Dismissal Hearing for Ms. McBride. Your so-called counter offer is predictably unacceptable and not reflective of what we agreed upon. At this time, the Association is prepared to take the appropriate legal action to enforce the Agreement.”

25. By letter dated September 16, 2004, Shuman responded to Hagan. In her letter, Shuman stated:

“In your letter, you indicate that the parties ‘settled this matter on August 23, 2004, the first day of the Fair Dismissal hearing for Ms. McBride.’ In fact, the parties proposed a conceptual agreement, with the understanding that the parties would need to hammer out mutually acceptable settlement agreement language, and that the District would need to obtain Board approval before being bound. That is why Mr. Wisser and Mr. Herron had the Fair Dismissal Appeals Board hearing continued instead of dismissed, as the parties understood the settlement negotiations had only resulted in a conceptual proposal and that the execution of an agreement could break down at several different junctures -- including if the parties were unable to agree to specific language memorializing the conceptual agreement, or if the District Board were to refuse to ratify the deal. I then conveyed to you on the afternoon of August 23, 2004, that there were problems with the conceptual proposal that would prevent its ratification, and you and I and Trish Scarrett met the next day (August 24, 2004), at which time we engaged in further settlement negotiations.

“If you believed that the Association and the District had reached a binding agreement on August 23, 2004, then the time for you to have asserted that position was on August 24, 2004; by continuing to negotiate the terms of settlement, the Association acknowledged that the parties had not entered into a binding, enforceable agreement, and relinquished any claim it may have had that the August 23, 2004 discussions resulted in a binding, enforceable agreement. As you know,

both sides have conveyed numerous proposals and counterproposals since August 23, 2004.

“The District’s last written proposal was conveyed on September 2, 2004, and was a three-page Separation, Release and Settlement Agreement made up of nine paragraphs. I subsequently verbally amended that proposal to Bob Rice on September 9, 2004. At this point in time, the District revokes all pending offers; we will instruct Mr. Herron to notify Linda Kessel that the District is requesting that FAB reschedule Ms. McBride’s appeal hearing as soon as possible.”

26. By letter dated October 12, 2004, Hagan sent Shuman two copies of the agreement Hagan believed had been reached with the District on August 23, 2004. Both copies of the agreement were signed by McBride and Rice. The agreement included in Hagan’s letter contained, in pertinent part, the following provisions:

- “1. The District shall pay the employer and employee portion of premiums for medical dental/vision insurance for Karyn McBride for a period of twenty-four months, beginning in September, 2004. For the first twelve months of the twenty-four month period, the District shall pay both the employer and employee portion of premiums for medical/dental/vision insurance for Karyn McBride at the full family rate of \$1,238. For the second twelve months of the twenty-four month period, the District shall pay both the employer and employee portion of premiums for medical/dental/vision insurance for Karyn McBride at the single party rate of \$469.
- “2. During the first three months of the stipulated twenty-four month period, Karyn McBride will accept a minimum of three months coverage for both the employer and employee portion of the full family rate for medical/dental/vision insurance. After that time, Karyn McBride may elect to have the District continue to pay the employer and employee portion of full family medical/dental/vision insurance coverage for

an additional nine months and Karyn McBride may elect to have the District pay an additional twelve months of the employer and employee portion of single party medical/dental/vision insurance coverage for an additional twelve months or Karyn McBride may elect to have such payments made to her in cash. If Karyn McBride elects cash payments, the District will make such payments without regard to her employment status and such payments will be made on a monthly basis.

- “3. The Board of Directors of the North Clackamas School District will take action at the Board meeting on September 2, 2004, to rescind and nullify the initial non-extension of Karyn McBride’s teaching contract and the second non-extension of Karyn McBride’s teaching contract.
- “4. Karyn McBride will submit a letter or [*sic*] resignation to the Board at the September 2, 2004 Board meeting. Karyn McBride’s resignation will be effective June 11, 2004.
- “5. Any and all records including, but not limited to, computer records maintained at any work site that pertain to Karyn McBride will be forwarded to the District office for inclusion in the personnel file at the District office. The District will expunge and destroy the Program of Assistance for Improvement and any related documents including but not limited to the Program of Growth and Karyn McBride’s 2003-04 evaluation from the personnel file.
- “6. The District agrees that it does not wish to harm Karyn McBride’s career. Accordingly the District and Karyn McBride have agreed to the attached letter of recommendation.
- “7. Any requests for information regarding Karyn McBride’s employment history with the District will

be solely responded to by Marla Shuman. Marla Shuman will give a positive recommendation in keeping with the attached letter of recommendation.”

No letter of recommendation was attached. The District never agreed to give McBride a “positive” recommendation. No mention is made of unemployment compensation.

27. The Association has not sought to reopen proceedings before FDAB.

### CONCLUSIONS OF LAW

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

2. The District did not violate ORS 243.672(1)(h) when it refused to sign the Association’s October 12, 2004 draft agreement concerning Karyn McBride.

3. The District did not violate ORS 243.672(1)(e) when it repudiated the Association’s October 12, 2004 draft agreement concerning Karyn McBride.

4. The District is not entitled to a penalty against the Association, nor is it entitled to reimbursement of its filing fee pursuant to OAR 115-035-0075. The Association’s amended complaint in this case was not filed frivolously or with the intent to harass the District, nor was the amended complaint filed in bad faith.

### DISCUSSION

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

The District contends that this Board has no jurisdiction over the subject matter of this dispute because no grievance filed by the Association on McBride’s behalf was pending on August 23, 2004. In its objections, the District argues that there is no evidence in the record that the August 23 agreement was intended to resolve the April 16, 2003 grievance regarding the plan of assistance given McBride. Therefore, according to the District, the settlement agreement in this case was reached through a negotiations process intended to resolve a statutory proceeding before the FDAB and not to resolve a contract grievance. The District would have us find that this case does not involve a collective bargaining process. The District has cited no authority in support of

its position, in proceedings before the ALJ or before this Board. We conclude that this Board has subject matter jurisdiction of this dispute.

According to the District, the Association abandoned McBride's April 16, 2003 grievance by failing to schedule a hearing before the District Board as required by level three of the grievance procedure in the collective bargaining agreement. According to the relevant contract provisions, however, Association acceptance of a District grievance decision occurs only if the Association fails to timely appeal the decision to the next level of the grievance procedure. Here, the Association made a timely appeal of the superintendent's denial of McBride's grievance to the next level of the grievance procedure. Although the District and Association were unable to agree upon a date for the hearing before the District Board, the contract places no time limit on the date by which a hearing must be held, places no requirement that the Association must insist that the District schedule a hearing, and imposes no consequences for failing to hold a hearing. As FDAB noted, McBride's appeal was based in part on her contention that the District had violated the collective bargaining agreement. The Association's April 16, 2003 grievance concerning McBride's plan of assistance remained pending in August 2004, and the parties's settlement negotiations at that time were intended to address resolution of that grievance.

As of August 23, then, the discussions concerning McBride's separation were intended to resolve *all* pending legal matters, including the grievance. Both the District and the Association included language in the proposed agreements they exchanged, which made the Association a signatory, and specified that the settlement was intended to resolve all outstanding grievances and disputes. Indeed, the District's September 2 draft went so far as to state that:

"This agreement is made in full resolution of all claims, disputes, *grievances*, appeals, suits, complaints, and all legal or administrative actions, *which have been filed, or which may be filed, by Ms. McBride or the Association* related to or arising out of Ms. McBride's employment with the District. \* \* \*"  
(Emphasis supplied.)

We have held that since a grievance procedure results from collective bargaining, an employer's refusal to execute a settlement agreement which was reached as part of this contractual process violates ORS 243 672(1)(h). *AFSCME Council 75 and Worthington v. City of Sweet Home*, Case No. UP-107-89, 12 PECBR 224, 231, n. 5 (1990). The August 16, 2003 grievance was pending when the District proffered the settlement language just quoted. The grievance is clearly covered by the District's own

settlement proposal—as, apparently, would be any future grievance. The District’s own proposal only bolsters our own conclusion that this Board has subject matter jurisdiction here.

The District did not violate either ORS 243.672(1)(h) or (1)(e) when it refused to sign the Association’s draft agreement of October 12 concerning Karyn McBride.<sup>6</sup>

We first ask if the parties reached final and enforceable agreement concerning McBride’s separation from employment—as embodied in the Association’s October 12 draft—which the Association can compel the District to sign. For reasons set forth below, we conclude that the Association has not met its burden of proving that there was a meeting of the minds on such an agreement. Thus the District did not violate the Public Employee Collective Bargaining Act (PECBA), when it refused to sign the Association’s October 12 draft settlement agreement.

The Association’s position on the issue of contract formation is simplicity itself: the parties “had a deal” on August 23, 2004. This “deal” is embodied in the Association’s October 12 proposal; and so this Board must therefore direct the District to sign the October 12 draft. The Association says that the conduct of the parties after that date is neither relevant to, nor probative of, whether the District and the Association reached an enforceable agreement. It argues that, in any event, Hagan did not engage in any sort of bargaining with the District between August 23 and October 12, but rather engaged in the “trade or exchange of creative ideas, which is not bargaining.”

In its objections to the recommended order, the Association further argues that the District violated the implied covenant of “good faith and fair dealing” when it refused to sign the October 12 draft. The Association asks this Board to recognize that labor contracts have a special status, such that the existence of an agreement must be determined under standards derived from the PECBA and other case law, not solely through contract law principles of offer and acceptance. It then relies on contract law principles of offer and acceptance to argue that Hagan never intended to make any new offers to the District after August 23. Therefore the District could not legally accept any of her purported offers—and therefore it must sign the October 12 draft.

---

<sup>6</sup>ORS 243.672(1)(h) makes it an unfair labor practice for a party to refuse to reduce to writing and sign an agreement reached through collective bargaining. ORS 243.672(1)(e) makes it an unfair labor practice for a party to refuse to bargain collectively in good faith.

We will discuss the Association's primary arguments in more detail below. For now, we note that this Board has applied the concept of "good faith and fair dealing" to performance under a contract, not to its formation. *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93, 15 PECBR 476 (1994). In *Lane Unified Bargaining Council v. South Lane School District*, Case No. UP-36-98, 18 PECBR 1 (1999), *aff'd* 169 Or App 280, 9 P3d 130 (2000), *rev'd in part* 334 Or 157, 47 P3d 4 (2002), we specifically held that the "special status" accorded labor contracts in general does not extend to grievance settlements. 18 PECBR at 17, n. 7.

In proceedings before the ALJ, the District first argued that no legally binding agreement had been reached, according to the standards enunciated in *LUBC and OPEU v. State of Oregon, Department of Administrative Services and Department of Transportation/ODOT v. OPEU*, Case Nos. UP-23/44-97, 17 PECBR 593, 602 (1998), of which more below. It also contended that there could be no enforceable agreement without ratification by the school board. Finally, it argued that on October 12 the Association sent it a proposal which contained material terms to which the District had not agreed on August 23.

As a threshold issue, the District objected to the ALJ's conclusion that this Board has jurisdiction of this dispute. We have previously disposed of that objection. The District agreed with the ALJ's proposed findings of fact and conclusions of law on the other issues in the case. From this, we assume the District to have abandoned its position that ratification by the school board was a prerequisite to an agreement. In any event, the District did not let the Association know of its position on ratification on August 23 or at any time thereafter, until it withdrew all offers on September 16. The District's position is not well taken.<sup>7</sup>

Before we engage in further legal analysis, it is useful to summarize the facts. On August 23 the District offered, and the Association accepted, a proposal to

---

<sup>7</sup>We are unpersuaded by Shuman's assertion that she *assumed* that Hagan understood that any settlement discussed on August 23 was contingent upon ratification by the District Board. Hagan reasonably inferred that Shuman was in touch with the District Board and the superintendent, and had authority to bind the District in settlement negotiations. Nor are we convinced by the District's argument that Board ratification is necessary to create an enforceable collective bargaining agreement. We have held that an agreement is enforceable, even though not ratified by a school board, where the board's authorized representative makes a proposal which is not conditioned on ratification. *South Benton Education Association v. Monroe Union High School District #1*, Case No. UP-97-85, 9 PECBR 8556 (1986), *aff'd* 83 Or App 425, 732 P2d 58, *rev'd en* 303 Or 331, 736 P2d 565 (1987).

settle the McBride dispute. The District's offer, as memorialized by the parties, provided that: (1) the school board would rescind its non-extensions of McBride's contract at their next meeting, following which McBride would resign; (2) the District would pay full family health insurance premium cost for McBride for one year, at a cost of about \$1,238 a month, following which it would pay her premiums for single-employee coverage for another year, at a cost of about \$469 a month; (3) after receiving District-paid benefits for three months, McBride could elect to receive the cash equivalent each month for the next twenty-one months; (4) the District would transfer all McBride's files to the District office where the files would be destroyed; (5) the District would develop a letter of recommendation acceptable to McBride and to it; (6) Any oral recommendation given by the District, regarding McBride, would be consistent with the letter of recommendation and would be made by a person acceptable to her; (7) McBride would not apply for unemployment compensation; and (8) Hagan would write up a draft agreement and submit it to Shuman for her review. Under this arrangement, McBride would receive from the District about \$20,000 in benefits or compensation, most of which would be paid in the first twelve months.

Hagan and Shuman met the next day, to discuss concerns the District had regarding the second year of the agreement. This resulted in an agreement to restructure, reduce, and shorten the District's payout of health insurance premiums. Hagan's draft of August 25 came out of these discussions. It contained non-economic provisions which the Association had developed, which were not part of the August 23 deal, and which had not been discussed on August 24. Its economic terms were fundamentally inconsistent with those on which the parties seemingly had agreed on August 23. The District's payout of health insurance premiums was shortened to 14 months. For an additional 9 weeks, the District was to make payments in lieu of unemployment compensation. After she received this draft, Shuman asked why Hagan had changed the economic terms of the agreement. Hagan replied that she was trying to repackage the financial terms of the agreement to make them more acceptable to the District, and still allow McBride to receive \$20,000 in cash or benefits.

Shuman responded on September 2 with a proposal which reduced the District's payout period to 14 months, cost the District no more than \$16,000, and which made up the difference from unemployment compensation benefits which McBride would apply for and receive. Shuman did not adopt the non-economic terms of Hagan's August 25 draft, but proposed new ones. Shuman explained that it would not be possible for the school board to resolve this matter on September 2, as the parties had previously agreed. Shuman's proposal was also fundamentally inconsistent with whatever agreement the parties reached on August 23.

On September 8, Hagan furnished Shuman with a “second language draft for the Agreement we reached on Monday August 23, 2004.” Hagan explained that McBride could not apply for retroactive unemployment benefits, so she had changed the payout period from 14 to 17 months, thus giving McBride 15 months of full family health insurance coverage or its cash equivalent and keeping the total cost to the District at around \$20,000. The Association dropped its proposal that the District make payments to McBride in lieu of unemployment compensation.

The Association also dropped, among other things, its proposals that McBride be given a “positive recommendation” which would emphasize her “contributions to the District during her employment,” that one of the purposes of the agreement was to support McBride’s efforts to obtain other employment, and that the District would resist any outside request for disclosure of McBride’s employment records. Instead, the second draft contained provisions regarding resignation, and written and oral District references which were the same as, or substantially similar to, those proposed by the District. No draft letter of recommendation was attached.

On September 13, Hagan learned that the District had made a new settlement offer: McBride would be allowed to resign, the District would store McBride’s records in its attorneys’ office, and the District would pay McBride a lump sum of \$5,000. Hagan responded that this counter-offer was predictably unacceptable and not reflective of what was agreed upon on August 23. On September 16, Shuman sent Hagan a letter in which she asserted that there never had been a binding agreement between the Association and the District, and revoked all pending offers.

On October 12, the Association sent the District its final proposal, executed by both the Association and McBride. It essentially recited the parties’ August 23 agreement, but then added new language regarding the letter of recommendation. This included a proviso that the District “agrees that it does not wish to harm Karyn McBride’s career” and accordingly has agreed to a letter of recommendation, together with a requirement that, in response to requests for information, the District will “give a positive recommendation in keeping with the attached letter of recommendation.” The District had rejected similar proposals in its September 2 contract draft.

As we have seen, neither the Association nor the District ever produced a written draft agreement which set forth, completely and without changes, the terms reached by the parties on August 23. The parties never agreed on a letter of recommendation. Indeed, they never agreed on how to characterize the letter of recommendation, let alone any statements made by the District. The parties agreed that the District would rescind its non-extensions of McBride’s contract, and that McBride

would, in turn, resign. However, the parties never agreed, in writing, on the length of the District's payout, the amount of that payout, whether McBride would receive unemployment compensation and whether that would be included in computing the payout, the precise disposition of McBride's records, or all of the things that the settlement agreement was supposed to accomplish.

We turn now to the law. In subsection (1)(h) cases, this Board examines the facts of each case to determine whether the parties' conduct objectively indicates a meeting of the minds on a contract. *AFSCME Council 75, Local 328 v. OHSU*, Case No UP-37-96, 17 PECBR 343, 359 (1997), involved negotiations for a new collective bargaining agreement. We stated that:

“\* \* \* If the Complainant is able to show by a preponderance of the evidence that *Respondent's conduct was such as to objectively indicate that the parties had reached agreement*, which respondent had refused to sign, then a violation of ORS 243.672(1)(h) is established notwithstanding the contention that Respondent subjectively had not agreed to the matters in dispute. \* \* \*” (Citation omitted, emphasis in original.)

This Board went on to note that “[a]lthough the conduct of both parties is considered in determining whether objective manifestations of agreement exist, the main focus must be on the respondent's conduct. If a complainant *believes* an agreement has been reached, its conduct will likely reflect that belief.” 17 PECBR at 360, n. 17, emphasis in original. Further, “absent a meeting of the minds on all terms, [respondent] ha[s] no obligation to sign the agreement.” 17 PECBR at 362.

We dismissed AFSCME's subsection (1)(h) claim for two reasons. First, AFSCME did not establish by a preponderance of the evidence that an agreement had been reached. We found that while AFSCME behaved as though an agreement had been reached, OHSU's conduct was “equivocal.” More importantly, AFSCME's draft agreement contained a provision which the parties had never discussed in negotiations. Since there had not been a meeting of the minds on all terms of the contract, OHSU had no obligation to sign it.

We have applied the objective test of contract formation in a number of cases involving grievance settlements. In *ODOT*, 17 PECBR at 602, for instance, we

dismissed the State's subsection (2)(e) claim<sup>8</sup> that OPEU unlawfully refused to sign a document embodying a settlement the parties reached on the eve of arbitration—even though the parties (ODOT, OPEU, and the grievant) had negotiated the framework of an agreement at that time, and both OPEU and the grievant said they would be willing to agree to the terms discussed that day. A number of issues, however, were left unresolved. Negotiations between OPEU and ODOT continued for several weeks. The employer and the union came to an agreement, which the grievant refused to sign.

This Board did not look only to the grievance settlement document, but instead reviewed the parties' entire course of conduct. We then concluded that there was insufficient objective evidence to establish a meeting of the minds on a contract. In so doing, this Board relied on three factors. Most importantly, OPEU had always made its ultimate approval of the settlement contingent on grievant's acceptance. Since grievant did not accept the later draft, there simply was no contract. Second, we found that the parties' framework for agreement was insufficiently precise. The employer and the union had to engage in additional negotiations to fill in the blanks originally left in the framework. Third, OPEU and ODOT asked the arbitrator to retain jurisdiction of the case, until they notified him that "the case had been resolved by written agreement." We viewed this as additional evidence that the parties understood that no final deal had been reached. At the request of OPEU, we ordered ODOT to proceed to arbitration on the grievance

In *LUBC*, the parties also unsuccessfully sought to negotiate a grievance settlement.<sup>9</sup> The Association filed a subsection (1)(h) claim against the District. This Board stated that:

“Our general approach in determining contract formation issues is similar to the 'objective' theory of contracts adopted by the Oregon Courts. \* \* \*

“\* \* \* [T]he relevant inquiry is not into the parties' “undisclosed intents and ideas,” but into their “communications and overt acts ”

---

<sup>8</sup>ORS 243.672(2)(e) makes it an unfair labor practice for a labor organization to “[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.”

<sup>9</sup>In its opinion, this Board referred to the Lane Unified Bargaining Council as the “Association.” We do the same here.

[Citation omitted.] According to the Restatement of Contracts (1932), which incorporates the objective theory of contracts, the manifestation of assent to an offer may be made "wholly or partly by written or spoken words or by other acts or conduct" (section 21), but acceptance must be "unequivocal." Section 58.' *Blakeslee v. Davoudi*, 54 Or App at 13-14." 18 PECBR at 17-18

We then adopted the position taken by the Oregon Supreme Court in *Wagner v Rainier Mfg. Co.*, 230 Or 531, 538, 371 P2d 274 (1962), in which the Court said that "such acceptance must be 'positive, unconditional, unequivocal and unambiguous, and must not change, add to, or qualify the terms of the offer.'" 18 PECBR at 18 We dismissed the Association's subsection (1)(h) claim because its purported acceptance did not meet this standard.

In *LUBC*, the Association grieved a teacher's plan of assistance and the non-extension of this contract. The District made a settlement offer which, among other things, said that the offer was made to fully resolve the grievance, that the District would "recommend" that the school board extend grievant's contract status, and that the Association would draft the details of a "final signed resolution document" subject to the District's right to review and suggest changes.<sup>10</sup> The District asked the Association to "let [it] know" if the offer was accepted. The Association said it verbally accepted the offer, and later reduced it to writing, only to have the District refuse to sign it. 18 PECBR at 6-7.

The District denied that the Association had ever accepted the offer. It also argued that the Association's draft agreement did not amount to an unconditional acceptance of the District's offer. We found, among other things, that the Association's draft differed from the District's offer in two material provisions. First, the Association's draft said that the school board would rescind its non-extension of grievant's teaching

---

<sup>10</sup>The District offered to extend the grievant's contract, continue him on a plan of assistance, and remove all reference to non-extensions from his file. After setting forth these substantive terms, the offer stated that "[i]n considering this proposed grievance resolution, you may assume that the District will permit the Association to draft the details of a final signed resolution document. However, the District reserves the right to review and recommend changes to the language suggested by the Association prior to signing. Please let me know whether this proposed grievance resolution is acceptable to the Association and [grievant]." 18 PECBR at 7.

contract (not just that the District would recommend such action to the school board); and second, that the grievance would be withdrawn “without prejudice” (not that the grievance was completely settled).

This Board rejected the Association’s argument that a binding agreement was reached when it verbally accepted the District’s proposal. We also rejected its contention that the contents of the draft document, which the Association later prepared, had nothing to do with the issue of contract formation. We stated that “[t]he District’s offer expressly permitted the Association, consistent with its offer, to draft the details of the final document. Thus, not only is [the Association representative’s] verbal conduct relevant to the issues of ‘acceptance’ but also the written words she chose to show a meeting of the minds.” 18 PECBR at 18.

We held that all aspects of the parties’ conduct, including written proposals and counter proposals, were grist for the mill. We applied the objective theory of contracts, and concluded that “there was no meeting of the minds here, because the Association’s [written] response to the District’s offer added to, changed, and qualified the terms of the offer. As such, the Association’s response constitute[d] a counteroffer and a rejection of the District’s offer. *Small v. Paulson*, 187 Or 76, 209 P2d 779 (1949).” 18 PECBR at 18.

The Court of Appeals affirmed our conclusion on this issue.<sup>11</sup> However, the Court took our reasoning one step further. While this Board assumed that the Association could have verbally accepted the District’s offer, the Court disagreed. It concluded that the Association could not accept the District’s offer without submitting a conforming written document to the District. This was so, because the Association was to draft the terms of the final agreement, subject to the District’s right to review and propose changes. The Court held that the Association’s written acceptance of the District’s offer was not unequivocal, and thus did not result in an enforceable agreement. According to the Court

“\* \* \* If [District’s] proposal was an operative offer, it required Association to reduce the parties’ agreement to

---

<sup>11</sup>This Board also concluded that the District did not unlawfully refuse to go to arbitration under ORS 243.672(1)(g), because of the grievance moratorium in ORS 342.895(5). This statute states that no grievance shall be filed while a teacher is on a plan of assistance. The Court of Appeals affirmed our dismissal of this unfair labor practice claim. The Supreme Court took review to consider the proper construction of this statute. The question of contract formation was not before the Supreme Court.

writing for their execution. Because Association did not produce a writing that conformed to its purported offer, District did not violate [subsection (1)(h)].” 169 Or App at 288.

We apply the objective theory of contracts as we conclude that the Association failed to meet its burden of proving a meeting of the minds on the Association’s October 12 draft agreement. The language of this draft and the conduct of the parties both show this.

As noted above, the Association contends that the parties had a deal on August 23, which is sufficient and enforceable. The Association argues that this Board should not consider the parties’ subsequent conduct. The Association is incorrect. This Board always considers, not only the language of any alleged agreements, but the effect to be given to both parties’ conduct. *LUBC, AFSCME Council 75 v. OHSU*, and *ODOT*. Reliance on the August 23 “deal” alone is also insufficient, because the Association does not seek to enforce that deal, but rather its October 12 draft agreement.

As part of the deal, the Association was to reduce the parties’ agreement to writing and send it to the District for review. In the days and weeks which followed, the Association made several written proposals. The Association never did prepare a draft agreement which conformed completely to the parties’ understanding of August 23.

The October 12 draft contains provisions regarding the character of the District’s letter of recommendation and comments to possible employers, which were not part of the August 23 deal, and to which the District had not agreed. On August 23, the parties agreed that the District would prepare a letter of recommendation which was agreeable to McBride. After August 23, the Association attempted to change this to a “positive” recommendation. Language to this effect is found in the Association’s draft of August 25, its second draft of September 8, and the October 12 draft. The October 12 draft also contained a proviso that in crafting the letter of recommendation the District “does not wish to harm Karyn McBride’s career.” Similar language is also found in the Association’s earlier drafts, but not in the District’s draft. The importance that both parties attached to the content of the letter of recommendation is shown by the Association’s efforts to change, and the District’s efforts to retain, the language on which the parties agreed on August 23. It is also shown by the fact that the Association never submitted a draft letter of recommendation, and the parties never agreed on one.

Under the analysis used by the Court of Appeals in *LUBC*, the Association’s responses of August 25 and thereafter, including its October 12 draft

agreement, constituted counteroffers and amounted to a rejection of the District's offer, to which the Association agreed on August 23. As part of the August 23 agreement, the Association was to prepare a final agreement which conformed to its terms. Since that never happened, the District did not violate subsection (1)(h).<sup>12</sup>

We reach the same result if we apply this Board's own analysis in *LUBC*. This Board's decisional law is clear: unless there has been a meeting of the minds on *all* of its terms, a party has no obligation to sign a written agreement under subsection (1)(h). In *LUBC*, we looked at the language of the Association's draft agreement. Since it differed from the District's offer, we concluded there had been no meeting of the minds, and hence no contract. As noted, we specifically rejected the Association's contention that its alleged verbal acceptance of the District's offer was all that was relevant to the issue of contract formation. That is precisely the argument that the Association makes in this case, and we reject it here also. The Association's October 12 draft differs from the parties' August 23 agreement. Hence, the District is not obligated to sign it. *See also, AFSCME Council 75 v. OHSU*.

In this case, like *LUBC*, the Association was to give the District a draft agreement for review. The agreement would not become final until signed by the Association and the District Board. Unlike *LUBC*, the parties engaged in protracted negotiations between August 23 and October 12. As we have repeatedly stated, we examine the conduct of the parties to determine if either has acted as if a final agreement had been reached, which must be reduced to writing and signed. *See, e.g., AFSCME Council 75 v. OHSU and ODOT*. We look first at the District's conduct, and then the Association's. We conclude that the conduct of the parties also shows that there was no meeting of the minds on the Association's October 12 draft agreement.

At no time did the District behave as if it regarded the agreement reached after lunch on August 23, as final. First, its efforts to renegotiate the agreement started on August 24 itself, and never stopped. Its draft agreement of September 2 is fundamentally inconsistent with the terms reached by the parties on August 23. So is its "modification" of its position on September 13 to reduce its offer to a \$5,000 lump sum payment. Although the District mistakenly assumed that no agreement was final until ratified by its school board, it did not convey this position to the Association until September 16. In any event, from August 23 the District tried to change the economic

---

<sup>12</sup>Our concurring colleague argues that the Court's decision in *LUBC* is distinguishable. We disagree. In both cases, the Association was to submit a draft agreement to the District for its review; and in both cases, the District reserved the right to make changes to the Association's draft.

terms of the deal. It met with success, thanks to the Association. Finally, of course, the District withdrew all offers on September 16.

The behavior of the Association is more equivocal. It continued to insist that the parties had reached an agreement on August 23, but did not reduce that agreement to writing in the weeks which followed. Although the Association attempted to characterize its actions as involving only creative conversations, we find that the Association engaged in negotiations with the District during this time, beginning on August 24.

The Association did prepare a draft settlement agreement based on the parties' discussions on that date. In that draft, and later, the Association repeatedly made proposals inconsistent with the agreement of August 23. Its draft agreements of August 25 and September 2 also added provisions favorable to McBride which the parties had not discussed on August 23 or August 24. The Association also was willing to change virtually any of the economic terms of the August 23 agreement, so long as the settlement either cost the District around \$20,000, or McBride received cash and benefits in roughly that amount. The amount of the District payout did not matter: unemployment benefits would do, or payments in lieu of unemployment benefits. The length of the payout, and the amount of each installment, did not matter: two years would do, as would 14 or 17 months; likewise McBride could receive a combination of full family and single employee premium payments over two years, or full family payments for 14 or 17 months. We conclude that the Association also did not treat the understanding of August 23 as final, and not subject to renegotiation.

We also note that the parties did not dismiss, but only set over, proceedings before the FDAB. In *ODOT*, we regarded this as evidence that no final pre-arbitration agreement had been reached. We reach the same conclusion here. In addition, as we look at the parties' course of negotiations after August 23, we must conclude that the agreement reached that date was insufficiently precise for enforcement. In *ODOT*, we relied on the imprecision of the framework for agreement to support our conclusion that the parties never reached an enforceable agreement. We do so here as well.

In his concurrence, Member Gamson cites *Ken Hood Construction Co. v. Pacific Coast Construction, Inc.*, 201 Or App 568, 120 P3d 6 (2005), *adhered to as modified on reconsider*, 203 Or App 768, 126 P3d 1254 (2006), as controlling. We disagree. The facts of that case, and the relief sought, are quite different than in our case. We do not, however, view the Court's reasoning as necessarily inconsistent with ours. The Court

applied the objective test of contract formation, as do we. However, the facts of that case required a different result.

As the Court said, that case arose after an agreement to build a restaurant fell apart. A third party, Fong, put out a bid for the construction of the restaurant. The bid specifically stated that performance would commence upon acceptance, even if no signed contract then existed. Pacific Coast submitted a bid. Fong accepted the bid. Pacific Coast began performance in accordance with the bid. No written agreement was ever reached. Fong refused to pay for the work. Pacific Coast sued for contract damages, and in the alternative for recovery under *quantum meruit* (implied contract) for the reasonable value of its services. Pacific Coast did not sue for specific performance of the agreement to build the restaurant.

The Court ruled for Pacific Coast. It reasoned that when Pacific Coast submitted a bid, it made an offer; and when Fong accepted the bid, he accepted the offer. More importantly for our purposes, the Court then looked at the parties' subsequent conduct as evidence for the existence or non-existence of a contract and found that both parties behaved as if they had an agreement. Pacific Coast commenced performance, while Fong kept saying he would sign a contract. The Court concluded that "[c]ertainly Pacific Coast, and perhaps Fong, anticipated that their agreement would be reduced to a formal, written contract. But as of the date of the award letter—and based on the parties' conduct in the weeks thereafter—mutual assent to the terms set forth in the bid package had already occurred." 201 Or App at 580.

Thus, the facts in *Ken Hood Construction Co.* differ from ours in a number of ways. In our case, the Association never accepted the District's offer without qualification. Moreover, the August 23 agreement was not to be effective until reduced to writing. After August 23, the parties behaved as if they did not have an agreement. There was no partial performance. The Association does not seek damages under contract or quasi-contract.

We therefore dismiss the Association's amended complaint under subsection (1)(h). The Association has not established an independent violation of the District's duty to bargain in good faith under ORS 243.672(1)(e). Even if the Association's subsection (1)(e) claim is properly before this Board,<sup>13</sup> the Association has

---

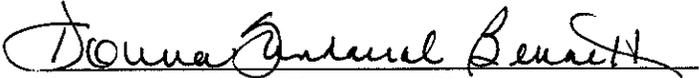
<sup>13</sup>Contrary to our characterization in *ODOT*, 17 PECBR at 603, this Board has never specifically held that repudiation of an oral agreement reached through collective bargaining can constitute an unlawful refusal to bargain in violation of ORS 243.672(1)(e). In *Portland Police Association v. City of Portland*, Case No. UP-34-91, 13 PECBR 371, 372 (1991), this Board stated

not established that the parties ever reached a meeting of the minds on an enforceable agreement. No agreement, no repudiation.

ORDER

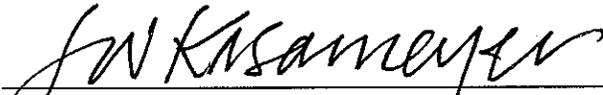
The Association's amended complaint is dismissed.

DATED this 22<sup>nd</sup> day of February 2007.

  
Donna Sandoval Bennett, Chair

---

\*Paul B. Gamson, Board Member

  
James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Gamson concurring.

This case involves the parties' attempt to settle pending litigation over a teacher's dismissal. The Association alleges that the District violated ORS 243.672(1)(h)<sup>14</sup> when it refused to sign a settlement agreement the parties reached. This

---

that "[w]hether either breach or repudiation of an oral contract is actionable under ORS 243.672(1)(e) is problematic." This Board then found this issue to be of "no consequence" because the Association failed to establish the existence of any enforceable contract between the parties. We reach the same result in this case.

<sup>14</sup>ORS 243.672(1)(h) makes it an unfair labor practice for a public employer to "[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign such

allegation raises two separate questions:<sup>15</sup> (1) Did the parties reach an agreement; and (2) did the District refuse to sign a contract that accurately reflects the terms of that agreement?

The majority concludes the parties did not reach agreement so the District had no obligation to sign anything. I conclude the parties reached an agreement, but I find no subsection (1)(h) violation because the District never refused to sign a document that accurately reflects the agreement. My difference with the majority is not over the outcome of this case, but in what happens next. Under the majority's holding, the parties have no agreement and hence no further Public Employee Collective Bargaining Act (PECBA) obligations. In my view, the parties reached agreement, and they therefore remain obligated under subsection (1)(h) to sign a contract that accurately memorializes the agreement.

### **I. Did the parties reach agreement?**

I begin the analysis, as does the majority, by noting that Oregon subscribes to the objective theory of contract formation. *Kabil Development Corp. v. Mignot*, 279 Or 151, 566 P2d 505 (1977). Under that theory, we determine whether a contract exists by examining objective manifestations of intent, as evidenced by the parties' communications and conduct. *Ken Hood Construction Co. v. Pacific Coast Construction, Inc.*, 201 Or App 568, 578, 120 P3d 6 (2005), *adhered to as modified on reconsid.*, 203 Or App 768, 126 P3d 1254 (2006).

---

contract." See also ORS 243 650(4) (defining "collective bargaining" as, among other things, "the mutual obligation of a public employer and the representative of its employees \* \* \* to execute written contracts incorporating agreements that have been reached \* \* \*") and ORS 243.656(5) (stating a purpose of the Public Employee Collective Bargaining Act (PECBA) is to require the parties "to enter into written and signed contracts evidencing agreements resulting from such negotiations.")

<sup>15</sup>I agree with the majority's conclusion that we have jurisdiction over this dispute. The Association asks us to enforce a settlement agreement that would resolve a case before the Fair Dismissal Appeals Board (FDAB). One issue in the case before the FDAB concerned alleged violations of the collective bargaining agreement. See ORS 342 895(5) (conferring authority on FDAB to hear certain alleged violations of a collective bargaining agreement) Thus, discussions to resolve the FDAB case necessarily included discussions to resolve the alleged violations of the collective bargaining agreement. ORS 243 650(4) defines "collective bargaining" to include conferring about "any dispute concerning the interpretation or application of a collective bargaining agreement." The parties' settlement discussions thus involved collective bargaining, so this Board has jurisdiction to decide this dispute which arose out of those discussions.

Here, the outward and objective manifestations of mutual assent are clear and unequivocal. The parties were scheduled to begin a one-week administrative hearing concerning the dismissal of teacher Karyn McBride. Just before the hearing started, McBride's union representative, Debbie Hagan, asked the District to sit down and talk about a possible settlement. Hagan made a proposal. Marla Shuman, the District's representative, rejected it but made a counterproposal. Hagan said they had a deal on the District's counterproposal, but she needed to run it by McBride; similarly, Shuman said she needed to run it by the District superintendent. Hagan and Shuman then went through the terms of the counterproposal point by point and broke for lunch at about 11:30 a.m. The parties reconvened about two hours later. At that time, Hagan said they accepted the District's offer and Shuman said they had a deal. Hagan again went through the District's offer point by point, and for each point, Shuman said "yes."

Whether the parties entered a contract depends on whether they "manifest assent to the same express terms." *Newton/Boldt v. Newton*, 192 Or App 386, 392, 86 P3d 49 (2004). The manifestation of mutual assent "ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties." *Ken Hood Construction Co.*, 21 Or App at 578 (quoting *Restatement (Second) of Contracts* § 22(1) (1981)). Here, the District made a proposal and the Association accepted it. The parties reviewed the terms point by point. After a break to give the parties an opportunity to get approval from their principles, the Association confirmed its acceptance and the District confirmed there was a deal. The parties again reviewed the terms point by point and expressed agreement on each individual term. It would be hard to imagine objective indications of mutual assent any clearer than these. The objective conduct of the parties plainly establishes that they formed an agreement.

The majority nevertheless concludes the parties did not reach agreement.<sup>16</sup> It relies extensively on events that occurred after the parties agreed to settle. Although we can consider post-settlement conduct in determining whether the parties reached agreement, the post-settlement conduct here does not invalidate the earlier unequivocal offer and acceptance.

Here is what occurred after Hagan accepted the District's offer. On August 23, several hours after the settlement, Shuman called Hagan and said the District

---

<sup>16</sup>In actuality, the majority's position is not so clear. In some places, the majority indicates the parties never reached agreement. In numerous other places, it discusses "the August 23 agreement" or "the agreement of August 23," but indicates that subsequent actions of the Association somehow annulled or otherwise invalidated the agreement. These positions seem inconsistent and serve to confuse the majority's analysis.

had a problem with the financial terms of the second year of the agreement. Hagan said there was already an agreement in place, but she would be willing to discuss “creative ideas” to address the District’s concerns. Hagan and Shuman met the next day. In the meeting, Hagan repeated three times that the parties reached an agreement the day before, but she remained willing to discuss ideas. One idea involved changing the term in the original agreement that required the District to provide McBride with two years of health insurance coverage. The parties discussed replacing the second year of insurance coverage with unemployment benefits. Hagan agreed to draft a document that included this change.

The day after the meeting, on August 25, Hagan sent Shuman a draft which attempted to incorporate the new ideas they discussed at the meeting. The cover letter accompanying the draft expressly stated that the enclosed draft “is not a contract proposal or counter offer. We continue to believe that the parties reached and [*sic*] agreement on August 23, 2004 which is enforceable.”

The District did not agree to Hagan’s draft. The parties continued to discuss ideas and trade drafts, but did not agree. Finally, on October 12, when it seemed clear that these discussions had failed, Hagan sent Shuman a draft which for the first time purported to memorialize the terms of the parties’ August 23 agreement.

The majority draws several unwarranted inferences and conclusions from these facts. First, it says the Association did not act as though it had an agreement on August 23 because it did not reduce that agreement to writing in the weeks that followed. In fact, it was the District, not the Association, that was responsible for any delay. The District asked the Association to engage in discussions about some concerns the District belatedly raised. Hagan testified that she actually drafted an agreement after the August 23 settlement, but she did not send it during the ongoing discussions.<sup>17</sup> She sent it after those discussions broke down. Under the circumstances, this shows only that the Association was willing to accommodate the District’s request and work in good faith to address a new issue of concern to the District. It is not an outward manifestation that the parties lacked an agreement.

More fundamentally, the majority concludes that the August 24 meeting “resulted in an agreement to restructure” parts of the settlement. The record contains no evidence to support the existence of such an agreement. There certainly was not the

---

<sup>17</sup>Transcript (Tr ) at 196. I include transcript cites for facts that differ from or add to those found by the majority.

type of clear offer and acceptance that is the hallmark of an agreement.<sup>18</sup> To the contrary, Hagan stated on the phone with Shuman on August 23 that the parties had already reached an agreement but she was willing to discuss ideas; Hagan repeated that statement to Shuman three more times during their meeting on August 24; and on August 25, Hagan stated in writing that the parties reached an enforceable agreement on August 23 and that her draft was not a proposal or counter offer.

At the time, Shuman did not disagree with any of Hagan's statements. A party would normally disagree or object in some way if it believed the other side had inaccurately asserted that they reached an agreement. Shuman's silence in the face of Hagan's repeated assertions that the parties reached agreement on August 23 is another objective indication of mutual assent.

Further, controlling case authority specifically rejects the type of inferences the majority draws from the parties' post-agreement discussions and from their intent to put the agreement in writing. In *Ken Hood Construction Co. v. Pacific Coast Construction, Inc.*, 201 Or App 568, 120 P3d 6 (2005), *adhered to as modified on reconsideration*, 203 Or App 768, 126 P3d 1254 (2006), the court stated that the parties' objective manifestation of offer and acceptance resulted in an agreement. *Id.* at 579. One term of their agreement was to prepare a written contract. The court expressly held that its analysis did not change simply because the parties never reduced their agreement to writing: "Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof." *Id.* (quoting *Restatement (Second) of Contracts* § 27 (1981)). The court further held that the parties' subsequent discussions about changes to the terms of the agreement did not impact the analysis. Because the parties had already agreed to the essential terms of the contract, "those discussions are more accurately characterized as proposed modifications to the contract." 201 Or App at 580.

The majority notes that some of the facts in *Ken Hood Construction Co.* differ from the facts here. Although that is true, the *pertinent* facts are the same, and the same general legal principles apply. In both cases, the parties expressly agreed that their agreement would be reduced to writing, but it never was. The court held that this fact

---

<sup>18</sup>I am puzzled by the shifting standard the majority uses to determine if the parties reached agreement. On August 23, Shuman made an offer to settle and Hagan accepted it, but the majority finds no agreement. On August 24, there was no offer or acceptance, and Hagan expressly stated numerous times that she was not there to negotiate, but the majority nevertheless finds "an agreement to restructure."

did not undermine the formation and continued existence of an agreement. Despite this holding, the majority here states that the lack of a writing means there was no agreement. Further, the parties in both cases discussed changing the terms after they had already struck a deal. The court said those discussions were merely proposed modifications to the agreement. Despite this holding, the majority here says the post-settlement discussions indicate there was no agreement in the first place

The majority relies instead on *Lane Unified Bargaining Council v. South Lane School District*, Case No. UP-36-98, 18 PECBR 1 (1999), *aff'd* 169 Or App 280, 9 P3d 130 (2002), *rev'd in part on other grounds* 334 Or 157, 47 P3d 4 (2002). There are some factual similarities but one crucial and controlling distinction. In *LUBC*, the employer sent the union a written “resolution proposal” to settle a contract grievance. The proposal asked the union to let the employer know if it accepted and to draft “the details of a final signed resolution document.” 169 Or App at 284. The court held that the employer’s proposal

“restricted [the union’s] power of acceptance to submission of a conforming draft of the settlement agreement. *See Cochran v. Connell*, 53 Or App 933, 937, 632 P2d 1385, *rev den* 292 Or 109 (1981) (offeror may restrict the manner of acceptance, provided the intention to do so is clearly expressed).” 169 Or App at 286.

The union in *LUBC* sent a draft settlement that did not conform to the employer’s offer, so the court concluded there was no acceptance and thus no enforceable agreement. *Id.* at 288.

Here, the District did not limit the manner of acceptance. The parties certainly intended to develop a written memorial of their agreement, but unlike *LUBC*, doing so was not an express condition of acceptance.<sup>19</sup>

---

<sup>19</sup>The majority also relies on *Oregon Public Employees Union v State of Oregon, Department of Administrative Services and Department of Transportation/ODOT v. OPEU*, Case Nos. UP-23/44-97, 17 PECBR 593 (1998). That case is similarly distinguishable. There, the union expressly made its acceptance of a grievance settlement contingent on the approval of the individual grievant. The individual grievant did not approve, and this Board held that the union’s refusal to sign the agreement was not unlawful. 17 PECBR at 604. By contrast, the majority here (in footnote 7 and accompanying text) specifically concludes that the agreement was not contingent on approval by another.

Reading the two cases together, *Ken Hood Construction Co.* states the general rule and *LUBC* states an exception: parties are generally bound by their expression of mutual agreement even though they intend to prepare and adopt a written memorial of that agreement; however, if acceptance of an offer is expressly conditioned on the submission of a conforming writing, there is no agreement absent such a writing.

Here, the majority states that Hagan's agreement to prepare a written document was "part of the deal." I agree. Preparation of a written document was also part of the deal in *Ken Hood Construction Co.*, and there, as here, the lack of a writing does not undermine the existence of an agreement. There is absolutely no evidence that the District made preparation of a written agreement an express condition of acceptance,<sup>20</sup> so the *LUBC* exception does not apply.

For policy reasons, I am especially concerned that the majority opinion will have a chilling effect on the future willingness—of these parties and all others covered by the PECBA—to meet and resolve differences. After the August 23 settlement, Hagan and the Association accommodated the District's request to sit down and discuss creative ideas to address a new District concern, but Hagan made clear there was already an agreement in place. The majority draws negative inferences against the Association because it participated in these post-settlement discussions. In my view, the Association engaged in precisely the type of conduct we should encourage rather than punish. The parties' mutual willingness to seek creative resolutions to their problems, even when there is an agreement already in place, strengthens the long-term stability and effectiveness of a bargaining relationship. But under the majority's opinion, the Association would have been better off if it refused to meet with the District after August 23 and refused to make a serious attempt to resolve a new problem. This is repugnant to the core policies of the PECBA which encourage parties to meet and attempt to adjust their differences. ORS 243.656(1) (the state has "a fundamental interest in the development of harmonious and cooperative relationships between government and its employees"); ORS 243.656(3) (the public is best served by "encouraging practices fundamental to the peaceful adjustment" of labor disputes between public employers and their employees.)

---

<sup>20</sup>The majority repeatedly says there was no agreement until it was reduced to writing. As a factual matter, there is no evidence in this record that the majority points to, or that I am aware of, that supports this statement. To the contrary, Shuman, on behalf of the District, said on August 23 that the parties had a deal, even though it had not yet been reduced to writing. As a legal matter, the majority's statement is contrary to *Ken Hood Construction Co*

And just as the Association engaged in conduct we should encourage, the District engaged in conduct we should discourage. The District told the Association the parties had a deal. The District later said it had a new problem it wanted to discuss with the Association. The Association stated several times that the parties already had an agreement and that any further discussions would not be negotiations. The District's silence in the face of these statements indicated it agreed to these limits on the discussions. Then, after luring the Association into discussions, the District pulled a "gotcha" when the discussions did not go the District's way—it used the Association's participation in the discussions as a way to back out of the deal. The majority condones the District's actions even though they weaken the trust and long-term stability of the parties' collective bargaining relationship, even though such conduct clearly is not a practice "fundamental to the peaceful adjustment" of a labor dispute, and even though such conduct does not foster "harmonious and cooperative relationships" between labor and management.

The majority also relies on two other factors as evidence that there was no agreement. First, the majority notes that the District's offer included a mutually agreeable letter of recommendation for McBride, but the parties never drafted the letter. Although it was not drafted, the parties knew generally what it would say. The record indicates that such letters are a common feature of settlement agreements between these parties. Hagan testified that mutually agreeable letters are usually neutral.<sup>21</sup> Shuman testified that such letters generally recite the teacher's assignment, the students the teacher worked with, and the nature of the programs the teacher participated in.<sup>22</sup> This testimony demonstrates that the parties had a sufficiently clear understanding of the intended contents of the letter of recommendation to make the term enforceable. But even if there was more to discuss regarding the letter, the parties still had an agreement on the other terms. The law requires the parties to negotiate in good faith on any remaining terms, but that does not prevent the formation of an enforceable agreement. *Hughes v. Misar*, 189 Or App 258, 266, 76 P3d 111 (2003); and *Van v. Fox*, 278 Or 439, 449, 564 P2d 695 (1977).

The majority also notes that the parties did not immediately dismiss the FDAB case. Instead, they asked the FDAB to hold the hearing in abeyance while they committed their settlement agreement to writing. I view this as prudent lawyering rather than an indication that the parties had not reached agreement. Under the PECBA, this Board has authority to enforce only *written* contracts. ORS 243 672(1)(g) and (2)(d).

---

<sup>21</sup>Tr. 54.

<sup>22</sup>Tr. 143.

The Association indicated that it intended to wait until it had an enforceable written settlement agreement in hand before dismissing the pending litigation. In hindsight, in light of the majority's conclusion that there was no settlement, it becomes clear just how prudent it was to wait. Imagine the pickle McBride would have been in if the litigation had been dismissed and this Board later said there was no settlement. She would have been completely without recourse. I would not draw a negative inference against a party simply because they guarded against this type of disastrous scenario.

In sum, the objective conduct of the parties indicates they reached agreement. The District made an offer, the Association accepted it, and the District said they had a deal. It is hard to imagine clearer evidence of agreement. It would take equally clear and unequivocal evidence to tip the scales in the other direction. As described above, any countervailing evidence fails to rise anywhere near that level of clarity. In my view, the preponderance of the evidence clearly demonstrates the parties reached agreement.

## **2. Did the District refuse to sign a contract that accurately reflects the terms of the parties' agreement?**

The second step of the subsection (1)(h) analysis requires us to determine whether a party refused to sign a written memorial of the parties' agreement.

On October 12, Hagan sent Shuman a document that purported to memorialize the parties' August 23 agreement. The District refused to sign the document. The question is whether the document accurately reflects the parties' agreement.

The majority concludes that the document "essentially recited the parties' August 23 agreement, but then added new language regarding the letter of recommendation." I agree with this characterization. The proposed draft adds language stating that the District does not wish to harm McBride, and it requires a "positive" recommendation rather than a mutually agreeable one. The Association describes these as "micro or blemish-sized" variations. Regardless of their size or significance, the District did not agree to them and therefore did not violate subsection (1)(h) when it refused to sign an agreement that contained them.<sup>23</sup>

---

<sup>23</sup>There are certain "standard provisions" that the parties are deemed to have incorporated into their agreement even though they did not specifically discuss them. *Hughes v Misar*, 189 Or App at 266; and *Newton/Boldt v Newton*, 192 Or App at 393. The provisions at issue here do not fall into that category.

I concur in the majority's conclusion that the District did not violate subsection (1)(h). Unlike the majority, however, it is my view that the District reached an agreement with the Association, and the parties remain obligated to sign a contract that accurately incorporates that agreement.<sup>24</sup>



---

Paul B. Gamson, Board Member

---

<sup>24</sup>In addition, the majority dismissed the Association's claim under ORS 243.672(1)(e) on grounds that there was no agreement. In my view, there was an agreement, so the majority erred by refusing to consider the merits of this claim.