

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-58-05

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CORRECTION)	
DEPUTIES ASSOCIATION,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
MULTNOMAH COUNTY,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on September 28, 2007 on both parties' objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 28, 2007 following a hearing held on April 20, 2006, in Portland, Oregon. The record closed with the submission of post-hearing briefs on May 22, 2006.

Thomas K. Doyle, Attorney at Law, Bennett, Hartman, Morris & Kaplan, 111 S.W. 5th Avenue, Suite 1650, Portland, Oregon 97204, represented Complainant.

Kathryn A. Short, Assistant County Counsel, Multnomah County, 501 S.E. Hawthorne Boulevard, Suite 500, Portland, Oregon 97214, represented Respondent.

On October 21, 2005, the Multnomah County Correction Deputies Association (Association) filed this complaint against Multnomah County (County). The Association alleged that the County violated ORS 243.672(1)(e) by failing to bargain about the decision and impacts of a plan to transfer work out of the Association bargaining unit, and by failing to timely respond to the Association's request for information about this plan. The County filed an untimely answer on January 5, 2006.

The issues in this case are:

1. Did the County fail to notify the Association of planned changes in its Close Street Supervision (CSS) program and fail to negotiate the decision to end the CSS program and the impact of that decision in violation of ORS 243.698? If so, did this conduct violate ORS 243.672(1)(e)?
2. Did the County fail to timely respond to Association requests for information regarding the changes to the CSS program? If so, did this conduct violate ORS 243.672(1)(e)?
3. Should the County be required to pay a civil penalty to the Association?

RULINGS

1. The Association filed a request for expedited consideration with its complaint. Member Thomas recused herself from this case. The remaining Board members reviewed the matter and denied the request. The Association requested expedited consideration under OAR 115-035-0060, which permits expedited consideration when the only issue is whether a contract proposal concerns a mandatory, permissive, or prohibited subject for bargaining. This rule is inapplicable to this complaint, which alleges an unlawful unilateral change.

Although scope of bargaining is one issue that is presented in this case, there are also numerous other legal issues that we must decide. As a result, the complaint is not eligible for consideration under this rule.

The Association also asked for expedited consideration under OAR 115-035-0068, which allows this Board, in its sole discretion, to grant expedited consideration to complaints “which do not come within OAR 115-035-0060 and 115-035-0065.”¹ Our decision to expedite a complaint is based on a variety of factors, including our schedule and workload, an estimation of the complexity of the facts and legal issues in the case, the need for prompt action, “and the possibility of immediate

¹Under OAR 115-035-0065, this Board may grant expedited consideration to complaints that allege an unfair labor practice “has been committed during or arising out of the collective bargaining procedures set forth in ORS 243.712 and 243.722 * * *.” ORS 243.712 and 243.722 provide the impasse resolution procedures for strike-permitted and strike-prohibited bargaining units

and irreparable injury, loss or damage to the complainant, or person(s) on whose behalf the complaint has been filed, if the complaint is not processed on an expedited basis.” OAR 115-035-0068(2).

In support of its request for expedited consideration, the Association submitted an affidavit from its attorney in which he states that bargaining unit members have suffered two types of irreparable harm due to the County’s allegedly unlawful contracting out decision: (1) bargaining unit members have lost overtime work opportunities, and “it is likely that the Board will be unable to determine which individuals would have been eligible and would have opted for overtime”; and (2) bargaining unit members have had “substantial changes” in their work schedules, and these changes have disrupted the lives of their families.

The Association apparently contends that the existence of these types of harm make them irreparable. We disagree. While it is unfortunate that bargaining unit members may have lost overtime wages and desirable schedules, these matters can be addressed by an appropriate make-whole remedy if we find that the County’s actions violated the law. Under ORS 243.676(2)(c), we have authority to take “affirmative action” necessary to effectuate the purposes and policies of the Public Employee Collective Bargaining Act (PECBA) if we find that an unfair labor practice has been committed. The types of action we have taken has included awarding employees back pay for work they lost and restoring employees to positions they held prior to an unlawful action. In regard to any difficulty in calculating potential lost overtime wages, we note that the Association provided figures regarding the amount of overtime worked by bargaining unit members in the CSS program in Exhibit C-34. These figures offer a basis for determining the amount of wages employees lost as a result of the County’s transfer of CSS work to employees outside of the bargaining unit.

The circumstances presented by the Association’s request for expedited consideration are not the type of irreparable harm that would require expedited processing of this unfair labor practice complaint. The Association alleged no other reason why the complaint should be expedited. Accordingly, we properly declined to expedite the matter and ordered that the complaint be processed in due course.

2. The County’s answer is untimely, without good cause. The Association filed this complaint on October 21, 2005. The County was informally served with the complaint on October 25, and asked to provide its informal response by November 8. The County filed its informal response on November 9. On December 21, 2005, the parties were formally served by certified mail, return-receipt requested, with

the complaint and the notice of hearing. The service of complaint and notice of hearing stated:

“Respondent has 14 calendar days from the date of mailing or personal service of this complaint within which to file an answer with this Board. All allegations of the complaint not specifically denied by Respondent’s answer shall be deemed admitted as true and so found by this Board, unless good cause is shown or Respondent states in the answer that it is without knowledge of the matter. Respondent shall set forth any affirmative defenses in its answer. Respondent must serve a copy of the answer on Complainant and file a proof of such service with the answer. ORS 243.672(3) requires payment of a \$100 fee when filing an answer to an unfair labor practice complaint. A respondent that does not submit the filing fee with its answer will not be permitted to participate in the hearing before the administrative law judge or in oral argument before the Board, unless the respondent shows good cause for the failure to pay the filing fee when filing its answer.” (Emphasis in original.)

This Board’s files indicate that the County received the service of complaint and notice of hearing, but the return receipt card does not contain the date of that receipt. In its submissions on this issue, the County provided a copy of a cover letter included with the complaint, date stamped received on December 27, 2005. The answer was due to be filed no later than January 4, 2006. The County did not request an extension of time to file an answer.

The County filed its answer on January 5, 2006, after mailing it on January 4. By a letter dated January 6, the ALJ notified the parties that the County’s answer appeared to be untimely, and gave the County until January 20 to show good cause why it failed to timely file its answer. By a letter dated January 11, counsel for the County replied that they understood that the date of service was the date of receipt by the County, not the date of mailing by this Board. By letter dated January 13, 2007, the ALJ ruled that the County had not established good cause and would not be allowed to present evidence at hearing. The ALJ also ruled that the County would be restricted to making legal argument only.

OAR 115-010-0010 provides in part:

“(5) ‘Date of Filing’ means the date of receipt by the Board.

“(6) ‘Date of Service’ means the date of mailing or the date of personal service.”

OAR 115-035-0035 provides in part:

“(1) Answer. The respondent shall have 14 days from date of service of the complaint in which to file an answer. All allegations in the complaint not denied by the answer, unless the respondent states in the answer that it is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown. Complainant shall be required to establish a prima facie case. The answer will be deemed sufficient if it generally denies all allegations of the complaint. Respondent shall specifically admit by way of answer any undisputed allegations and set forth any affirmative defenses.

“* * * * *

“(3) Failure to File. If the respondent fails to file a timely answer, absent a showing of good cause, it will not be allowed to present evidence at the hearing, and will be restricted to making legal arguments.

“(4) Filing Fee. A filing fee of \$250 [\$100] must be paid by the respondent when the answer is filed. The answer will not be considered to be filed until the fee is paid.”

The complaint in this case was served by mail, not by personal service. Under Board rules, the complaint was served on December 21, 2005, and the answer filed one day late on January 5. This Board evaluates “good cause” for a late filing based upon the circumstances of the individual case. The issue is whether the County has established good cause for the late filing. *Oregon School Employees Association v. Reynolds School District*, Case No. C-237-79, 5 PECBR 4353 (1981). This Board has repeatedly ruled that inadvertence or lack of awareness of the pertinent Board rules or the contents

of the notice of hearing are not good cause for failure to file a timely answer. *Association of Oregon Correction Employees v. State of Oregon, Department of Corrections*, Case No. UP-45-98, 18 PECBR 377 (1999); *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98, 18 PECBR 79, 82 (1999); and *Polk County Deputy Sheriffs' Association v. Polk County*, Case No. UP-43-90, 12 PECBR 503 (1990). Whether the opposing party was prejudiced by the late filing is irrelevant to the determination of good cause. Thus, this Board has held that where a party supplied the text of its answer in time, but its filing fee is late, the party must show good cause for the delay. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 249-50 (1999); and *Mt. Hood Community College Faculty Association and Kotulski v. Mt. Hood Community College*, Case No. UP-7-99, 18 PECBR 636 (2000).

The ALJ properly struck the answer.

3. In his January 13, 2007 letter to the parties in which he ruled that the County's answer was untimely, the ALJ also ruled that the County would be allowed to cross-examine witnesses at the hearing.

OAR 115-035-0042(9) provides:

“* * * A party that fails to answer a complaint or fails to deny an allegation will not be allowed to present or rebut evidence as to the facts alleged. However, the party may present legal argument.”

The question is whether cross-examination constitutes a prohibited presentation of evidence or a permitted presentation of legal argument. OAR 137-003-0008(1)(d) provides, in relevant part: “‘Legal Argument’ does not include * * * cross-examination of witnesses or presentation of factual arguments * * *.” Consistent with this rule, the ALJ properly reversed himself in his recommended order and held that “legal argument” does not include cross-examination of witnesses. The County's cross-examination will be stricken from the record.

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

FINDINGS OF FACT

1. The County is a public employer. The Association is a labor organization representing a bargaining unit of County Sheriff's correction deputies and sergeants.

2. The County and the Association are parties to a 2004-2010 collective bargaining agreement that provides, in relevant part:

Article 21(9 A), "Contract Work":

"Unless mutually agreed, the County will not contract out or subcontract any work now performed by employees covered by this Agreement *when such would result in layoff* of any bargaining unit employee(s) *and* the County is *unable to find suitable or comparable alternate employment* for the employee(s). However, this provision shall not apply to contracting out or subcontracting work when such was anticipated and considered as a part of the budgeting process and when the Association President has been notified of the specific plan and its probable impact at least thirty (30) days prior to adoption of the annual executive budget or formal Board consideration of budget modifications. * * *" (Emphasis added.)

Article 23, "Entire Agreement":

"The parties acknowledge that during the negotiations which resulted in the Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. This Agreement constitutes the sole and entire existing Agreement between the parties. Except as specifically modified by or treated in this Agreement, all policies, matters, questions and terms affecting unit employees in their employment relationship with the County shall be governed by the rules and regulations or Multnomah County Code 3.10. The County and the Association for the life of this Agreement each voluntarily and unqualifiedly waives the right, and agrees that the other shall not be obliged, to bargaining collectively with respect to any subject matter referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or

contemplation of either party or both parties at the time that they negotiated and signed this Agreement. Nothing herein shall prevent the parties from voluntarily entering into written Memoranda of Agreement, Understanding, Interpretation, or Exception concerning matters of contract administration.”

3. During the events at issue in this case, the County had several programs dealing with individuals subject to incarceration. Two programs supervised individuals who had been arrested for crimes and held pending trial, the CSS program and the Pretrial Release Services Program (PRSP).

4. At the direction of the court, the CSS program provided “intensive, individualized supervision and management of multiple need pretrial offenders” who “are considered otherwise ineligible for release.”² CSS clients posed a greater risk to the community than individuals released under their own recognizance or those required to report to a parole officer pending trial. Accordingly, the supervision performed by CSS employees included frequent visits to clients’ homes and places of work; frequent meetings with judges, district attorneys, and criminal defense attorneys; and regular contact with jail staff. County information for applicants for PRSP positions states that CSS work involved more contact with jail staff, Deputy DA’s, Defense Attorneys, and judges than more traditional parole officer positions.

5. CSS existed for over 20 years, and employees doing that work had always been members of the Association bargaining unit who worked for CSS on special assignment. They were typically assigned to CSS for a three- or four-year period, after which they were transferred back to their previous work. During early 2005, six deputies and one sergeant were assigned to CSS.

6. Bargaining unit members considered CSS program work to be a desirable assignment. The work was varied and challenging, all positions were on the day shift with weekends off, and performance of special assignments like CSS enhanced promotional opportunities for the employees.

7. PRSP handled alleged offenders considered to be lower risk to the community than CSS clients. Supervision of PRSP clients was conducted primarily through telephone conversations and client visits to the PRSP office. This work had been

²The Association’s witnesses referred to these individuals, who had been charged with crimes, but not convicted, as “clients.” We will follow that terminology here.

handled by traditional parole officers working in the County Department for Community Justice (DCJ) and represented by the Federation of Oregon Parole and Probation Officers (FOPPO).

8. In July 2005, Association bargaining unit employees observed that some members of the FOPPO bargaining unit were taking measurements of offices used by CSS program employees. After making some inquiries, Association officials learned that the CSS program had been transferred from the Sheriff's Office to the DCJ in a County budget approved June 2, 2005. Association officials learned that DCJ FOPPO probation officers would now perform both the PRSP and CSS work under a new DCJ program called the Pre-Trial Services Program. The Association bargaining unit members who worked in the CSS program would be transferred back to their previous correction positions.

9. On July 19, 2005, Association Attorney Henry Kaplan sent a letter to Chief Deputy Tim Moore demanding to bargain the "implementation and the impact of this change [in the CSS program]." Writing to confirm the parties' scheduled meeting on August 16, County Human Resources Manager Rebecca Gabriel wrote:

"Without agreeing that the County has an obligation to bargain, we are, nonetheless, willing to sit down with you and your members to discuss concerns you may have about this reassignment of responsibility from one department to another."

10. The parties met on August 16, 2005. Jim Younger, County labor relations manager, and Jennifer Ott, Sheriff's Office human relations manager represented the County. Association Officials Darcy Bjork, Tim Moore, Bob Miller, Uwe Pemberton, and Association Attorney Hank Kaplan represented the Association. During the meeting, the County representatives asserted that the decision to make the transfer had already been made.

11. On August 17, Kaplan sent an extensive request for information to Younger. At the close of the letter, Kaplan wrote:

"* * * The relevance of these requests is to aid the Association in assessing the costs and benefits of the proposed transfer, and to aid the Association in determining whether the proposed transfer would be in the interests and welfare of the public. * * *"

12. Kaplan requested that some documents be provided by the end of August to allow “meaningful bargaining discussions” at the parties’ scheduled September 6 meeting. The County did not provide documents in response to the request prior to the September 6 meeting.

13. On September 6, 2005, the parties met again. The County provided the Association with one document in response to the Association’s August 17 request, a draft “Pre-Trial Services Program Status Report” dated September 2. This report included a plan to transfer the clients served by bargaining unit members in the CSS program to the new Pre-Trial Services Program which would be staffed by probation officers from the FOPPO bargaining unit. The transition plan anticipated that the transfer would be completed by October 14. County officials stated that the decision to transfer the CSS program was made for economic reasons.

14. In a letter to Kaplan dated September 8, Younger denied that the County had any duty to bargain about the changes in the CSS program:

“This letter confirms our conversations that the County believes that it has no obligation to bargain the County’s decision to merge the Pre-Trial Service Program (PRSP) and Close Street Supervision Program (CSS).

“The Department of Community Justice, the Sheriff’s Office and the District Attorney’s Office were all asked during the last budget process to submit program offers to merge the PRSP and CSS.

“Department of Community Justice submitted a program offer that merged PRSP and (CSS) into one seamless program. * * *

“Based on the program offers submitted, the County Board of Commissions [*sic*] purchased the Department of Community Justice’s program that merged the two programs.

“It is the County’s position that the County has no obligation to negotiate with the Union the Board’s decision to purchase the Department of Community Justice’s program offer. Whereas the Board’s decision impacted MCCDA

members, the County is willing to enter into impact bargaining with MCCDA.

“To date we have had two meetings wherein it was the County’s hope that by the sharing of information that we could resolve any concerns MCCDA has. Obviously MCCDA wants to bargain the Board’s decision, which we are not willing to do.

“The County is more than willing to continue meeting as long as it’s understood that the sole purpose of meeting is considered impact bargaining.”

15. On September 8, Kaplan filed a grievance regarding the change in the CSS program. In the grievance, Kaplan alleged that the County’s proposed transfer of Association bargaining unit work violated a number of contract articles, including Article 21. Kaplan requested the following remedy for the grievance:

“* * * We respectfully request that the County forestall implementation of the transfer until these issues have been satisfactorily resolved through the appropriate dispute resolution process. The Close Street program has been under the aegis of the MCSO [Multnomah County Sheriff’s Office] for almost two decades, and we have heard nothing to suggest that a modest delay in implementation will harm the Close Street program, the MCSO, the Department of Community Justice, the Court system, or the clients served by Close Street. However, premature implementation could cause the County to waste enormous amounts of money should the transfer be rescinded. A reasonably prudent approach weighs strongly in favor of delaying implementation.”

16. Also on September 8, Kaplan proposed the following change to Article 21:

“The County will not transfer bargaining unit work from the Close Street Supervision (CSS) program to any other bargaining unit, unless compelled to do so by program service obligations arising from law or agency requirements outside

of the County's control. However, the County may transfer all or part of CSS unit work to another County agency if it provides the Association with (1) 90 days notice of its intent to transfer such work, and (2) clear and convincing evidence that the transfer of CSS bargaining unit work will be in the best interest and welfare of the public. The County will give the Association sixty days to respond. If the dispute cannot be resolved to the parties' mutual satisfaction, the County's proposal will be subject to interest arbitration procedures under ORS 243.746; but the County shall retain its burden of proof. For purposes of such decision, the parties mutually agree to waive the preliminary steps of any grievance and impasses procedures, but not last best offer procedures."

17. On September 13, Younger replied to Kaplan's September 8 bargaining proposal. He stated, in part:

"The County is not interested in modifying Article 21, nor is the County obligated to open negotiations on Article 21 or any other article of the Agreement at this time.

"We had two meetings with MCCDA to hear and address any concerns you may have about Close Street, they were considered meetings only to hear concerns, not negotiations."

18. On September 15, Younger denied the Association grievance, stating:

"* * * MCCDA has offered nothing that would cause the County to delay its decision or reconsider its decision. Therefore the County will implement the programs as scheduled. * * *"

In his letter denying the grievance, Younger also stated that "[t]he County has met with MCCDA twice to discuss any impact concerns [regarding the elimination of CSS]. As of this date MCCDA has not raised any impact concerns "

19. Kaplan contacted County Counsel Short to request that the County delay implementation of any changes in the CSS program. On September 16, Short denied Kaplan's request.

20. By letter dated September 19, Younger told Kaplan that the County believed that the Association had waived bargaining over the impact of the elimination of the CSS program. Younger stated:

“This letter is a follow-up to my September 15, 2005 Step 3 letter wherein I mentioned that the County has met with MCCDA twice to discuss any impact concerns and as of this date MCCDA has not raised any impact concerns.

“Whereas MCCDA has raised a demand to bargain the Close Street merger decision and has ignored the County’s request to talk impact, the County considers MCCDA position [*sic*] on impact bargaining a refusal and therefore a waiver of any impact bargaining request that MCCDA may raise in the future.”

21. By letter dated September 26, 2005, Kaplan responded to Younger and told him that the previous negotiations were “both decisional and impact; that was the language used in the demand to bargain.” Kaplan also noted that the County had not responded to information requests relevant to bargaining over the impact of the County’s decision.

22. By letter dated September 30, Younger responded to Kaplan. Younger denied that the Association ever requested to bargain the impact of the CSS changes, and said that the Association never raised impact as an issue in the parties’ two previous meetings. Younger noted that most of Kaplan’s information request dealt with the decision to eliminate CSS. Younger stated that since the County refused to bargain this decision, most of Kaplan’s request for information was moot. Younger concluded, “Please let me know if there are any impact concerns that you may have or any requests for information request [*sic*] that I have yet to respond to.”

23. On October 12, 2005, Kaplan replied to Younger. Kaplan cited the language concerning impact in the July 29 demand to bargain, and stated that the information request pertained to impact as well as decision bargaining. Kaplan also included two proposals regarding the effect of the County’s CSS decision on the amount of unit employees’ overtime and the number of day-shift positions.

24. On October 14, Younger provided Kaplan with documents in response to the July 18 information request. The documents produced were responsive

to all of Kaplan's requests except one. The documents did not include minutes of the June 2, 2005 meeting in which the decision to end CSS was made.

25. On October 17, 90 days after Kaplan's July 19, 2005 demand to bargain, the County implemented its decision to eliminate CSS and transfer the work formerly performed by Association deputies to the PRSP that was staffed by members of the FOPPO bargaining unit. Association bargaining unit members previously assigned to the CSS program were transferred back to regular correction positions.

26. On October 21, the Association filed this unfair labor practice complaint.

27. On October 27, Kaplan wrote Younger to request mediation through the Employment Relations Board.

28. On October 31, Younger e-mailed Kaplan to suggest a November 8 meeting "for the purpose of Close Street impact bargaining." Younger reiterated his offer in a letter dated November 1, 2005.

29. On November 8, the parties met for impact bargaining. The County proposed remaining in the post-transition *status quo*. There was little or no discussion of the Association proposals. The parties agreed to proceed to mediation.

30. On November 9, Kaplan wrote Younger to memorialize part of their previous day's conversation. The letter stated, in part:

*** [Y]ou confirmed that the County's position now is as follows: (1) the County asserts it has no current obligation to bargain the decision to transfer work, and refuses to do so; (2) the County never had any obligation to bargain over this decision to transfer work; and (3) the County does have an obligation to bargain the impact of the work transfer. Without waiving the Association's objection over the County's refusal to bargain the decision, we discussed the status of the 90-day bargaining obligation under ORS 243.698, and you suggested that the 90 days start yesterday."

31. By letter dated November 14, Younger informed Kaplan that Kaplan's November 9 letter "correctly captured our discussions and agreements of November 8th."

32. As a result of the transfer, unit members have lost an undetermined amount of overtime. In addition, one former CSS employee had to change from day shift to swing shift.

33. A deputy who has successfully completed a special assignment, such as an assignment to CSS, has a greater, but indeterminate, likelihood of being promoted.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(e) by failing to notify the Association of planned changes in its CSS program, and by failing to negotiate in good faith over its decision to transfer the work of the CSS program to another bargaining unit and the impact of that decision as required by ORS 243.698.

This case concerns the County's plan to reorganize its programs by assigning pre-trial supervision work, formerly performed by Association bargaining unit members in the CSS program, to a newly-created Pre-Trial Services Program. As a result of this change, Association members lost desirable positions, since the Pre-Trial Services Program is staffed entirely by members of the FOPPO bargaining unit. The Association alleges that the County violated its duty to bargain in good faith under ORS 243.672(1)(e) when it failed to notify the Association of the proposed changes in the CSS program, and failed to bargain about the decision to change the CSS program and the impact of that decision. We begin our analysis of the Association's complaint by considering the relevant law.

An employer is obligated, in most circumstances, to bargain with a labor organization if it wishes to make a unilateral change in a condition of employment considered mandatory for negotiations. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89 (2001). ORS 243.698 requires an expedited process for bargaining over an employer's proposed change in a working condition during the life of a collective bargaining agreement. Under ORS 243.698(1), mid-term bargaining generally may not exceed

90 days. Subsection (2) requires the employer to give the exclusive representative 14-days notice of any proposed changes that trigger an obligation to bargain, and subsection (3) permits the labor organization to demand bargaining within 14 days of receiving this notice. Subsection (4) allows the parties to jointly request mediation, but only within the 90-day period, and it also prohibits either party from requesting binding arbitration during the 90-day period.

In order to determine the extent and nature of the County's duty to bargain over the changes it made in the CSS program, it is first necessary to decide if the County's actions constitute a change to the *status quo*. There is no serious dispute that the County's actions changed the *status quo*: members of the Association bargaining unit have traditionally performed the CSS program work. The County transferred this work out of the Association bargaining unit.

We must next determine whether the changes concern a subject which is mandatory for bargaining. Here, the County removed work from the Association bargaining unit when it transferred the duties formerly performed by employees of the CSS program to FOPPO bargaining unit members working in the new Pre-Trial Services Program. In deciding whether a public employer is obligated to bargain about a decision to transfer bargaining unit work to employees outside of the bargaining unit, we use an "all-things-considered" approach.³ We consider all the circumstances relevant to the employer's action and balance the employer's right to manage its enterprise against the interests of the bargaining unit members. *Milwaukie Police Employees Association v. Milwaukie Police Department*, Case Nos. UP-111-92/UP-19-93, 15 PECBR 1, 7 (1994) (citing *Federation of Oregon Parole and Probation Officers v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5655 (1983)). A major consideration in our analysis is the impact of the proposed change on employment conditions for bargaining unit employees. If a union demonstrates that the transfer of work traditionally performed by bargaining unit members has potentially significant and adverse effects on bargaining unit members' working conditions, we will require the employer to bargain its decision to transfer bargaining unit work and the impacts of that decision. *International Association of Fire Fighters v. City of Klamath Falls*, Case No. UP-43-92, 13 PECBR 810, 818 (1992).

³Our analysis does not distinguish between transferring bargaining unit work to an outside entity, and transferring bargaining unit work to a different bargaining unit of the same employer. *Milwaukie Police Employees Association v. Milwaukie Police Department*, Case Nos. UP-111-92/UP-19-93, 15 PECBR 1, 8 (1994), citing *Oregon School Employees Association v. Sherman Union High School District No. 1*, Case No. C-218-80, *reconsid.*, 6 PECBR 5009, 5011 (1982)

Here, the parties do not dispute that members of the Association bargaining unit traditionally performed CSS program work, and that the County took this work away from them when it implemented the Pre-Trial Services Program in October 2005. The County contends, however, that the impact of these changes was *de minimis* in accordance with our conclusion in *FOPPO v. Corrections Division*, 7 PECBR at 5656. In that case, we held that an employer has no obligation to negotiate about a decision to transfer bargaining unit work if the transfer has only a *de minimis* impact on bargaining unit members' conditions of employment.

In *FOPPO v. Corrections Division*, bargaining unit members had traditionally transported prisoners between Oregon and other states. The county decided to contract out these duties to a private company. We noted that transportation of prisoners was a small part of the duties of a few bargaining unit members, and that the "primary benefits to those unit members participating in the trips are the travel itself, the break in routine, some professional contact, and an increase in exchange time." *FOPPO v. Corrections Division*, 7 PECBR at 5657. We concluded that the loss of prisoner transportation duties had an insignificant effect on bargaining unit members' working conditions. As a result, we refused to require the employer to bargain about its decision to transfer these duties to employees outside of the bargaining unit.

Here, the loss of the CSS program work had a greater impact on Association bargaining unit employees than did the loss of prisoner transport duties in *FOPPO v. Corrections Division*. Association bargaining unit members lost overtime work opportunities when the CSS program ended and they were transferred to other positions in the County's Correction Division. We have noted that loss of overtime is an adverse effect on bargaining unit members' working conditions. *FOPPO v. Corrections Division*, 7 PECBR at 5658. Although the record is not clear as to the *amount* of overtime Association bargaining unit members may have lost, this does not affect our conclusion. We have held that an employer's bargaining duty may be triggered even by potential effects on employees' working conditions. *Salem Police Employees Union v. City of Salem*, Case No. UP-2-87, 9 PECBR 9378 (1987), *aff'd*, 92 Or App 418, 758 P2d 427 (1988), *aff'd*, 308 Or 383, 781 P2d 335 (1989); and *FOPPO v. Corrections Division, reconsid.*, 7 PECBR 5664 (1983). Accordingly, we conclude that the County's transfer of CSS program work from the Association bargaining unit significantly impacted bargaining unit members' employment conditions and the County was obligated to bargain both the decision to transfer and the impacts of this decision before implementing it.

Since the County's bargaining duty arose during the life of a collective bargaining agreement, the County was required to comply with the provisions of ORS 243.698. The County failed to do so. It did not give the Association notice of the

anticipated transfer of bargaining unit work before implementing the transfer, and it did not bargain with the Association for at least 90 days from the date on which it notified the Association of the proposed change.⁴ We conclude that the County violated ORS 243.698 and as a result, failed to comply with its duty to bargain in good faith under subsection (1)(e).

3. The County failed to timely respond to Association requests for information regarding the CSS changes in violation of ORS 243.672(1)(e)

As part of the duty to bargain in good faith, employers and labor organizations must provide information to each other upon request if the information sought is of “probable or potential relevance” to a grievance or other contract administration issue. *Olney Education Association v. Olney School District 11*, Case No. UP-37-95, 16 PECBR 415, 418 (1996), *aff’d*, 145 Or App 578, 931 P2d 804 (1997). *See also Deschutes County 911 Employees Assoc. v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 416, 428 (2006). Here, the County initially refused to provide the Association with information it requested on August 17, 2005. The County gave the Association one of the requested documents on September 6. On October 17, the

⁴In its post-hearing brief, the County argues that language in Articles 21 of the parties’ collective bargaining agreement constitutes a clear and unmistakable waiver of the Association’s right to bargain further over transfers of work. However, waiver is an affirmative defense which must be pled in a party’s answer. OAR 115-035-0035(1). Because the County’s answer is untimely, we do not consider the County’s affirmative defense of waiver.

Even if the County had timely raised a defense of waiver, we do not find that the language in Articles 21 waives the Association’s right to bargain about the transfer of bargaining unit work. Article 21(9 A) prohibits the County from unilaterally contracting out work that would result in layoff of bargaining unit members. It also provides an exception to this restriction: the County may contract out bargaining unit work if the change was considered as part of the County budget process and if it notifies the Association about the proposed change. This contract language does not mention the type of contracting out that occurred with the CSS program, since the County’s actions resulted in no loss of jobs for bargaining unit members. We note also that the record does not demonstrate that the County’s decision was part of the budgetary process, or that the County notified the Association about the proposed change in accordance with the requirements of Article 21. A union’s right to bargain a unilateral change can only be waived by contract language that is “clear and unmistakable.” *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609 (2002); and *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 366 (2008) Here, the contract language at issue does not clearly indicate that the Association waived its right to negotiate about a decision to transfer bargaining unit work that resulted in no layoffs or that was not considered during the County budget process.

County turned over all of the materials sought by the Association, with the exception of the notes from a June 2, 2005 meeting at which the County decided to end the CSS program. The Association alleges that the County unreasonably delayed in responding to its request for information.

The Association has the burden of establishing that the County failed to provide information in a timely fashion OAR 115-035-0042(6). Whether the period of time between the request and the response is reasonable depends on the “totality of the circumstances.” *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 672 (2004), citing *Oregon School Employees Association v. Colton School District*, Case No. C-124-81, 6 PECBR 5027, 5031 (1982). These circumstances include “the accessibility of the data, clerical time necessary to produce the information, the workload priorities of the responding party, and the amount of data requested.” In addition, “the reasonable time in which to provide information may be considerably lengthened or, in extreme cases, the obligation to provide it may be excused altogether” if the parties’ history includes a pattern of numerous requests or “fish-and-grieve” expeditions. *Colton School District*, 6 PECBR at 5032.

In *Marion County Law Enforcement Association v. Marion County and Marion County Sheriff's Office*, Case No. UP-58-92, 14 PECBR 220 (1992), the employer took 30 days to respond to a labor organization’s request for information, and did so only after the union filed an unfair labor practice complaint. We concluded that the delay was unreasonable and violated subsection (1)(e). We noted that :

“* * * The issue is not the length of the delay, but the timing of the release. The County did not suggest that it would have been too difficult to release the information on request. The County did not establish any legitimate reason for the delay in providing the reports.” 14 PECBR at 227.

The record contains no evidence of any factors that would excuse the County in delaying its response to the Association’s information request, such as difficulty or expense in producing the information, or repeated abuses of requests for information by the Association. The only reason offered by the County for the delay was its belief that the information was irrelevant to bargaining; the Association had requested information related to the decision to transfer the CSS program work and the County thought it was not required to bargain about this decision. We have concluded that the County was obligated to bargain about its decision to transfer CSS program work. Accordingly, the County had no legitimate basis for delaying its response to the

Association's request for information. Based upon the totality of the circumstances, we conclude that the County failed to respond in a reasonable time to the Association's request for information in violation of subsection (1)(e).⁵

Remedy

We have found that the County made an unlawful unilateral change in violation of ORS 243.672(1)(e) when it transferred CSS program work before bargaining to completion about the transfer in accordance with the requirements of ORS 243.698. We will order the County to cease and desist from refusing to bargain about its decision to transfer CSS program work. ORS 243.676(2)(b). Our usual remedy in a case involving an unlawful unilateral change such as this one also orders restoration of the *status quo*. Under the circumstances presented by this case, however, we do not find it necessary to order restoration.

We will order the parties to negotiate in good faith about the County's decision to transfer CSS program work and the impact of that decision under ORS 243.698. Because the Association bargaining unit is strike-prohibited, the parties will proceed to interest arbitration if unable to reach agreement. The interest arbitrator could require a return to the *status quo* that existed prior to the October 2006 changes in the CSS program, if the arbitrator finds it appropriate. To avoid the disruption caused by more than one possible change in the CSS program, we will not order the County to reinstate Association bargaining unit members to positions they formerly held in the CSS program. *See also IAFF v. City of Klamath Falls*, 13 PECBR at 820; ORS 243.742; and ORS 243.698(4).

After the County implemented its decision to transfer CSS program work, the parties began to negotiate about the impact of the County's decision and agreed that the 90-day period of bargaining required by ORS 243.698 would begin on November 8, 2005. Because the County violated the law by refusing to bargain about its decision to transfer CSS program work, the entire course of bargaining undertaken by the parties is tainted. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 79 n 6 (2005). Accordingly, we will not give the

⁵The County refused to provide the Association with minutes of a June 2, 2005 meeting at which the County decided to end the CSS program. The County apparently believed this document was irrelevant to its negotiations about the CSS program. Because we have concluded that the County must bargain its decision to transfer CSS program work, we also conclude that the June 2 meeting minutes are relevant to these negotiations and the County must provide these minutes to the Association.

County credit for any time spent in negotiating about the CSS program. The provisions of ORS 243.698, including the requirement that the parties bargain for at least 90 days, will begin on the first date the parties meet to negotiate as required by this Order.

Under ORS 243.676(2)(c), we may order affirmative relief to effectuate the purposes and policies of the PECBA when we find that a party has committed an unfair labor practice. When we conclude that an employer's illegal actions resulted in a loss of wages, we invariably require the employer to reimburse employees for lost salary. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 101-02 (2007), *appeal pending*. We have found that the County's unlawful transfer of CSS program work resulted in a loss of overtime pay for Association bargaining unit members. Consistent with our practice, we will order the County to reimburse the bargaining unit for the lost overtime.

The Association has requested that we order a civil penalty. We may award a civil penalty when a party commits an unfair labor practice "repetitively, knowing that the action was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious." ORS 243.676(4)(a). The record contains no evidence that the County's actions were repetitive, or taken with knowledge that they were unlawful. Nor do we find that the County's conduct was egregious. Accordingly, we decline to order a civil penalty.

Finally, the Association has asked that we order the County to reimburse its filing fees. Under ORS 243.672(3), we may order reimbursement of filing fees to a prevailing party in an unfair labor practice proceeding if we find that an answer was frivolous or filed in bad faith. Here, we refused to consider the County's answer because it was not timely filed. Accordingly, we also decline to conclude if the answer was either frivolous or filed in bad faith.

ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain with the Association about the County's decision to transfer CSS work and the impact of that decision.

2. The parties are ordered to bargain in good faith over the County's decision to transfer CSS work and the impact of that decision in accordance with the provisions of ORS 243.698 and 243.742.

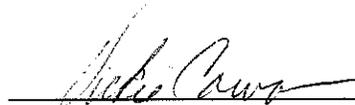
3. The County shall cease and desist from refusing to provide information to the Association to which the Association is entitled under the PECBA. If it has not already done so, the County will immediately provide the Association with minutes of the June 2, 2005 meeting at which the decision was made to end the CSS program.

4. The County will reimburse the Association unit, as a whole, for lost overtime caused by the closure of CSS from October 17, 2006 through the completion of bargaining.

DATED this 31st day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.