

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-58-05

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY )  
CORRECTION DEPUTIES )  
ASSOCIATION, )  
 )  
Complainant, )  
 )  
v. )  
 )  
MULTNOMAH COUNTY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

ORDER ON RECONSIDERATION

On March 31, 2008, this Board issued an Order which concluded that Multnomah County (County) violated ORS 243.672(1)(e) when it failed to notify the Multnomah County Correction Deputies Association (Association) about planned changes in the Close Street Supervision (CSS) program, and failed to negotiate over its decision and the impacts of its decision to transfer CSS program work to another bargaining unit. The Order also concluded that the County violated subsection (1)(e) by failing to timely respond to an Association request for information regarding changes in the CSS program. As part of the remedy for these violations of the Public Employee Collective Bargaining Act (PECBA), we ordered the County to bargain with the Association about the County's decision to transfer CSS work and the impact of that decision. We also ordered the County to reimburse the Association bargaining unit, as a whole, for lost overtime caused by the closure of the CSS program for the period "from October 17, 2006<sup>[1]</sup> through the completion of bargaining." Both parties petitioned for

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<sup>1</sup>As we note in our discussion, this date is incorrect. The appropriate date on which to begin calculations for reimbursement of overtime wages is October 17, 2005

reconsideration. In its petition, the County asked for oral argument. Each party responded to the other party's petition.

When, as here, this Board issues its final order without a recommended order, we generally grant reconsideration upon the request of either party. *Oregon School Employees Association v. Cove School District*, Case No. UP-39-06, 22 PECBR 298 (2008). Accordingly, we grant reconsideration to address the issues raised by the parties' petitions.

In its petition, the County asks for "clarification" of its bargaining obligations to the Association and to the Federation of Oregon Parole and Probation Officers (FOPPO) regarding CSS program work. In support of its request, the County notes that prior to October 2005, the work of the CSS program was performed by Association bargaining unit members. The County then transferred this work to another County bargaining unit represented by FOPPO, a transfer we concluded was unlawful because the County failed to bargain about it. The County contends that our order—that it must bargain the decision to transfer the CSS work and the impact of that decision—exposes it to "dueling bargaining obligations." According to the County, "[w]ithout direction [from this Board] as to how the outcome of bargaining will affect the bargaining rights of FOPPO, the Board keeps in place the County's obligation to bargain with two units over retention of the same work." The County essentially asks us to define its duty under the PECBA to bargain with FOPPO over changes in the work of the CSS program. For the reasons stated below, we decline to do so.

The first difficulty with the County's argument is its speculative nature. As the Association correctly points out, the County wants us to rule on a matter that is not before us which affects a union (FOPPO) that is not a party to these proceedings. The issues raised by the unfair labor practice complaint in this case concern the extent of the County's duty to bargain with the *Association* about the transfer of CSS program work; we have not been presented with a case or controversy concerning the County's bargaining obligation in regard to *FOPPO*. Both the County and the Association acknowledge that, pursuant to our Order, they are engaged in negotiations over the decision to transfer CSS program work and the impact of that decision. Thus, the effect these negotiations may have on the FOPPO bargaining unit is unknown. Under the PECBA, we are empowered to decide unfair labor practices alleging that a party has committed an unlawful act. We will issue a prospective ruling concerning the effect of a party's proposed action only if the parties ask for a declaratory ruling. OAR 115-015-0000 through OAR 115-015-0040. Since we are not presented with a request for a declaratory ruling here, we will not speculate on the possible impacts the County's negotiations with the Association may have on its duty to bargain with FOPPO.

Even if we were to assume *arguendo* that we have authority to rule on the speculative fact situations posited by the County, we would find no basis for excusing the County from complying with any duty it may have to bargain in good faith with FOPPO. The County suggests two scenarios that could result from negotiations with the Association over the CSS program work. In the first situation described by the County, the County and the Association agree to return the CSS program work to the Association bargaining unit; FOPPO then demands to bargain over the decision to take away this work from its bargaining unit and the impact of that decision.

It is not clear that returning CSS program work to Association bargaining unit employees will give rise to a bargaining obligation with FOPPO. See *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections and AFSCME*, Case No. UP-16-05, 21 PECBR 793 (2007). But if the County is required to bargain with FOPPO, it is not excused from that obligation because of an agreement reached with the Association concerning CSS program work. In *Lincoln County Deputy Sheriff's Association v. Lincoln County*, Case No. UP-31-02, 19 PECBR 911 (2002), the employer unilaterally implemented a new health insurance plan for a sheriff's bargaining unit. We rejected the employer's defense that implementation of the new health plan was required by agreements with other unions, and found that the employer's actions unlawfully changed the status quo in violation of subsection (1)(e):

“\* \* \* [T]he County entered into its various contractual obligations voluntarily. Whatever control it relinquished pursuant to those agreements, it did so deliberately. The County cannot successfully use these other agreements to shield it from its PECBA status quo obligations with the Association. \* \* \*” *Lincoln County Deputy Sheriff's Association*, 19 PECBR at 916.

Here, as in *Lincoln County Deputy Sheriff's Association*, the County cannot use an agreement into which it voluntarily may enter to shield itself from complying with its duty to bargain in good faith under the PECBA.<sup>2</sup>

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<sup>2</sup>See also *W. R. Grace and Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 US 757 (1983), where an employer was faced with conflicting obligations under a conciliation agreement it reached with the Equal Employment Opportunity Commission (EEOC) and a collective bargaining agreement as interpreted by an arbitrator. The Court upheld the validity of the arbitrator's award and rejected the employer's argument that the EEOC conciliation agreement made it impossible for the employer to perform its contractual obligations. The Court reasoned that any dilemma the employer faced was of its

In the second hypothetical situation suggested by the County, the County and the Association bargain to impasse over the transfer of CSS program work. An interest arbitrator then orders restoration of the CSS program work to the Association, and FOPPO demands to bargain about the loss of work for its bargaining unit members. According to the County, such a scenario would create conflicting legal obligations: if the County complies with the interest arbitrator's award, it may breach its duty to bargain in good faith with FOPPO.

An employer's need to obey one law does not justify its violation of another. *See Washington County Police Officers Association v. Washington County*, 321 Or 430, 439, 900 P2d 483 (1995) (“[t]he fact that two legal duties may collide, or appear in conflict, does not excuse an employer from making good faith efforts to comply with those duties, or excuse ERB from enforcing them”). Here, any potential conflict between an interest arbitrator's award and the County's good faith bargaining duty under the PECBA does not excuse the County from attempting to comply with both obligations. If there is a dilemma, the County created it by its unlawful actions in transferring the work of the CSS program.

In addition to asking us to reconsider our conclusions of law regarding the County's obligation to bargain with the Association about the CSS program work, the County also asks that we clarify our order that the County reimburse the Association for overtime lost as a result of the transfer of CSS program work. The County acknowledges that it is currently bargaining with the Association about reimbursement for overtime pay, but asks us to “retain jurisdiction” over the case so that the parties can “invoke the jurisdiction of the Board to conduct a full evidentiary remedial hearing” if they are unable to agree on the amount of overtime pay.

The appropriate method for seeking clarification of the remedy in a Board Order is a petition for reconsideration. *Lane Unified Bargaining Council and Triangle Lake Education Association v. Blachly School District*, Case No. UP-11-96, 17 PECBR 51, 53 (1996). Here, where the parties are actively negotiating about the appropriate amount of reimbursement for lost overtime, the purposes and policies of the PECBA will best be served by encouraging this process. Accordingly, we will modify our original order as follows: We order the parties to continue negotiations regarding the amount of reimbursement for overtime lost as a result of the transfer of CSS program work for 21 days from the date of this Order on Reconsideration. If the parties are unable to reach agreement, they will, within 14 days of that date, submit to us a fact stipulation

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own making, since it resulted from the employer's decision to voluntarily commit itself to conflicting contract obligations. *W. R. Grace and Co.*, 461 US at 770.

regarding the issue of reimbursement for lost overtime wages and briefs to support their legal positions. If the parties are unable to reach complete agreement on a fact stipulation, they will so inform us and we will schedule a compliance hearing. We will issue an order regarding the appropriate amount of reimbursement for overtime lost as a result of changes in the CSS program within 21 days of the date on which we receive the fact stipulation and briefs, or within 21 days of the close of the compliance hearing.

Finally, we turn to the Association's petition which asks that we reconsider our decision not to require the County to restore the *status quo* that existed prior to the transfer of CSS program work. We find no valid reason to change this portion of our original Order. An interest arbitrator may ultimately decide who will perform CSS program work. Given this possible outcome, it would be unduly disruptive to the program to order a change that could be overturned by the arbitrator. We also note that we typically order a return to the *status quo* in cases where an employer made an unlawful unilateral change in order to promote equality of bargaining power between the parties. In a case such as this, where the union represents a strike-prohibited bargaining unit, there is less need to do so; the fact that the dispute may ultimately be resolved by an interest arbitrator provides greater equality in the parties' bargaining relationship. See *International Association of Fire Fighters, Local #890 v. City of Klamath Falls*, Case No. UP-43-92, 13 PECBR 810, 820 (1992)

The Association correctly notes in its petition that we mistakenly ordered that the County reimburse the Association for overtime wages lost for a period beginning on October 17, 2006. We agree with the Association that the period for which the County owes reimbursement of overtime wages should begin on October 17, 2005, the date on which the County implemented the unlawful change in the CSS program. We will modify our order to reflect the correct date.

### ORDER

Reconsideration is granted. Our March 31, 2008 Order is modified as follows:

1. The parties will continue negotiations regarding the amount of reimbursement for overtime wages lost as a result of the transfer of CSS program work for 21 days from the date of this Order on Reconsideration. If the parties are unable to reach agreement, they will submit to us, within 35 days of this Order on Reconsideration, stipulated facts and briefs on the issue of appropriate reimbursement for lost overtime. If the parties are unable to stipulate completely to the facts within the specified time, they will notify us immediately and we will schedule a compliance

hearing. We will issue an order regarding reimbursement for lost overtime within 21 days of the date on which we receive stipulated facts and written argument, or within 21 days of the date of the compliance hearing.

2. The County will reimburse the Association for lost overtime beginning on October 17, 2005.

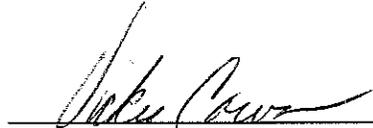
3. The County's request for oral argument is denied.

4. We adhere to all other provisions of our original Order as clarified herein.

DATED this 12<sup>th</sup> day of June 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183 482.