

Excerpts from *Oregon Labor Law Today* (5th ed. 2008, updated)

“Status quo” and the Duty to Bargain in Good Faith

Duty to bargain during the term of an agreement

"As a general rule, [the] Board has held that it is a *'per se'* violation of the duty to bargain in good faith for an employer to make a unilateral change regarding a mandatory subject of bargaining while the employer has a duty to bargain . . . [this] general rule will be applied where the act complained of directly obstructs or inhibits discussions aimed at reaching an agreement." **AFSCME Local 2752 v. Wasco County**, 1 PECBR 637 (1977), **rev'd and remanded**, 30 Or. App. 863 (1977), **on remand**, 4 PECBR 2397, 2400, **aff'd**, 46 Or. App. 859 (1980).

--Obviously, making a change in a mandatory subject **that has been written into the contract** during the term of the agreement would be a contract violation and would invite a (1)(g) unfair labor practice complaint or a grievance. Indeed, unless the contract contains a reopener provision, the employer will not be able to insist upon renegotiation of a contractual provision during the CBA's term; if the union will not agree to return to the bargaining table to discuss a contract revision, the employer will have to await the expiration of the contract and exhaustion of required bargaining steps before it can make the change.

--Even where a mandatory item **has not been written into the contract** but has been a matter of **past practice**, changing that practice will require notification to the union and bargaining upon demand because the past practice will likely create a "status quo" that must be maintained until bargaining obligations have been satisfied.

Thus, a duty to bargain arose when an employer desired to change its practice of providing reimbursement for parking for employees working at its downtown campus to a practice of providing a parking lot for no-cost parking. This was true even though the contract did not specify how employees would be provided "free parking." Said the Board: "A well-established practice for implementing a contract provision cannot be unilaterally changed simply because another procedure would also comply with the contract. Once that practice was established, the College could not lawfully change it unless it bargained with [the union] or unless [the union] waived bargaining. **Lane Community College Employees Federation v. Lane Community College**, 7 PECBR 5697, 5705 (1983); **see also IAFF v. City of Roseburg**, 10 PECBR 504 (1988) (past practice of converting accumulated vacation hours to pay at time of retirement was status quo).

In 1986, the ERB summarized the considerations for showing an established past practice: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) origin and purpose, and (5) mutuality. **IAFF Local 1395 v. City of Springfield**, 9 PECBR 8533, 8873 (1986).

It is elementary that there is a duty to bargain prior to making changes in mandatory subjects of bargaining ("those that result when the subject matter of the management decision itself falls within the definition of

employment relations"). **FOPPO v. Corrections Division**, 7 PECBR 5649, 5654 (1983). Cited examples were a decision to change pay rates (**Wasco County**) or to change student contact time for teachers (**Gresham Grade Teachers Assn. v. Gresham Grade School District**, 5 PECBR 2889 (1980)).

•It was a change in the status quo for the employer to use a detailed background information form (BIF) when existing employees asked to be transferred into other positions, even though the employer had used the form with new hires for some time. Implementing the use of the BIF with existing employees without bargaining first was a (1)(e) violation. **AFSCME Council 75 v. Oregon Dept. of Transportation**, 19 PECBR 76, on reconsideration, 19 PECBR 344 (2001).

Emergencies may excuse an employer from bargaining before making a change, ERB suggested in **IAFF Local 3340 v. City of Klamath Falls**, 12 PECBR 901 (1991). However, ERB still found a violation of (1)(e) in the unilateral withdrawal of access to the airport gymnasium, which the employer ordered after an injury occurred, in order to investigate safety conditions. ERB found that this did not excuse the employer's unilateral change, as the employer did not promptly check out the condition of the gym. While an emergency could excuse an employer from its duty to bargain prior to making a change in employee working conditions, the employer was in this case not compelled to act unilaterally in order to protect the safety of the employees.

Expedited bargaining procedure applies to interim demands to bargain changes

If the employer's change in a mandatory subject creates a change in the status quo, then the employer must notify the exclusive representative and bargain upon demand. However, as a result of the passage of S.B. 750 in 1995, any bargaining requested in such a situation is subject to a 90-day expedited interim procedure, dated from the day of the employer's written notification to the union of the planned change. Neither mediation nor factfinding are required. The union has 14 calendar days to demand bargaining, or it will lose its opportunity to require bargaining over the change.

Where notice of a planned change in status quo is given before the start of successor or mid-term reopener bargaining and before the parties receive each others' first proposal, then the expedited process applies; otherwise, if the notice is given after the start of regular successor or reopener negotiations, the additional issue (subcontracting, in this case) will be incorporated into the other bargaining going on, and will proceed according to the non-expedited process. **In the Matter of the Joint Petition for Declaratory Ruling Filed by Multnomah County School District No. 1 and SEIU**, 19 PECBR 837 (2002).

•However, ERB found that the Hillsboro School District's use of the expedited bargaining process was not sufficient when the subject was the district's plan to change a trimester block schedule at two high schools, because of current contract language specifying the number of classes that teachers could be required to teach. "Where the parties have express language in their CBA, neither is obliged (absent language to the contrary) to bargain about it further during the term of the contract, except in negotiations for a successor agreement." **Hillsboro Education Assn. v. Hillsboro School District**, 20 PECBR 124 (2002), **aff'd without opinion**, 192 Or. App. 672 (2004).

•The parties may agree to mediation during the 90-day period of expedited bargaining, but are not required to mediate. Agreement to mediate during the 90-day expedited procedure

does not require the use of the rest of the regular non-expedited procedures under PECBA. **OSEA v. Morrow County School District**, 17 PECBR 1 (1996).

At the end of the 90 days, if no agreement has been reached, the employer may unilaterally change the status quo without any further obligation to bargain. Except in strike-prohibited units or where there exists an applicable no-strike clause, the employees may elect to strike over a change in a mandatory subject.

Identifying what constitutes a change in the status quo

Identifying what constitutes a change in the status quo can often be complex. If the topic is addressed by language in the current or expired-but-not-yet-replaced collective bargaining agreement, the status quo is defined by any mandatory language that specifically applies.

ERB will also look at any work rule or policy to help establish the "status quo." **Coos Bay Police Officers Assn. v. City of Coos Bay**, 14 PECBR 229 (1992). A letter of agreement memorializing a grievance settlement can be the basis for the status quo. **OPEU v. State of Oregon, Administrative Services Dept.**, 15 PECBR 567, 584 (1995). Where the initial contract had not yet been bargained, ERB relied upon the employer's personnel manual to determine what was the status quo regarding grievance procedures. **Teamsters v. City of Shady Cove**, 15 PECBR 589 (1989).

•Where no agreement has yet been reached in a newly formed unit, or if the current or expired agreement does not address a topic, the status quo is determined by the employer's past practices, but employers are required to maintain only those employment conditions that have been treated by both the employer and the employees as "customs or conditions that an observer could say 'have always been that way.'" **AFSCME v. Housing Authority of Yamhill County**, 12 PECBR 249 (1990).

•A new police chief's adoption of revised rules, regulations and orders was a violation of good faith bargaining in only three of nine alleged "status quo" changes – in each case where a newly adopted rule provided for possible disciplinary action in situations where there had been no previous threat of discipline, including rules about off-duty compliance with department rules of conduct, rules about discipline for lost or stolen departmental property, and rules regarding leaving a training session. In most of the other instances, no ULP was found because the city had previously exhausted its duty to bargain over the proposed changes, or because the new rules were essentially the same as prior rules and thus there was no change in the status quo. **Lincoln City Police Employees Assn. v. City of Lincoln City**, 18 PECBR 323 (1999).

But sometimes the past practice is not so consistent; indeed the status quo may be defined as "variability":

• The employer's payment over the previous seven years for two employees to take certification tests did not establish a status quo. Instead, the status quo was that the employer had the discretion to approve or disapprove employee requests for payment. **AFSCME v. Housing Authority of Yamhill County**, 12 PECBR 249 (1990).

• In **OSEA v. Lincoln County School District**, 14 PECBR 503 (1993), the district was not found to have changed a 16-year practice of pro-rating insurance benefits for part-time employees.

• In denying a motion to stay its decision that class size was a mandatory subject, ERB saw no danger that changes in class size during the appeal would violate the status quo, since the practice in Tigard schools was not to maintain class sizes at certain strict numerical limits, but rather to adjust class sizes depending upon enrollment, financing, and other factors. **Tualatin Valley Bargaining Council v. Tigard School District**, 11 PECBR 590, 777 (1989).

• Similarly, in dicta in a case involving the setting of parking fees at state-operated garages, ERB questioned whether the rate change was, in fact, a change in the status quo, since it appeared that the past practice, dating back to at least 1981, was for the General Services Department to periodically and unilaterally set rates. "Thus, the established practice is arguably the very rate-resetting procedure objected to in the present complaint." **Oregon State Police Officers Assn. v. Oregon State Police**, 11 PECBR 332 (1989); *see also* **Oregon State Police Officers Assn. v. Oregon State Police**, 14 PECBR 530 (1993), *aff'd*, 127 Or. App. 144 (1994).

• In **OSEA v. Colton School District**, 10 PECBR 811 (1988), ERB dealt with the issue of defining the "status quo" in the context of a contracting out claim. A bus driver who was a member of the bargaining unit complained when a substitute driver (not part of the bargaining unit) was not hired to provide summer transportation services for a handicapped child. However, the district had no regular practice of using unit members to drive children to summer programs. No such situation had existed except during the previous summer, when the district had contracted with a private bus service to drive the child part of the way, had paid the child's grandmother to transport the rest of the way, and had employed the complaining district bus driver only part of the summer when the grandmother could no longer drive. ERB found that the contract did not speak to this issue, and there was no custom of unit members performing this work, so there was no (1)(e) violation.

• But a school district committed an illegal change in the status quo -- despite its argument that student contact time had varied from school to school and year to year -- because evidence did not support the district's assertion of past variations. It was immaterial whether teachers at the school favored the change or whether the site council (comprised of a majority of teachers) initiated the change. **Salem Education Assn. v. Salem-Keizer School District 24J**, 15 PECBR 302, 15 PECBR 419 (1994); *see also* **Cascade Bargaining Council v. Crook County School District**, 16 PECBR 231 (1995) (although the district had made minor changes in teachers' student contact time over the years, the changes at issue were substantially greater than those made in the past without bargaining, so the district had the obligation to bargain on demand prior to implementation).

• It was a change in the status quo to increase student contact time at the middle schools by 32-51 minutes a day, because the magnitude of the change was far greater than other increases in student contact time in prior years. Practice at the district's high schools was not relevant, since schedules are determined on a school by school basis. The Court of Appeals found substantial evidence to support ERB's finding that the parties did not bargain to conclusion over student contact time, even though the association withdrew its proposal that prep time would be counted as contact time; therefore, there was no waiver of bargaining over changes in student contact time during the lifetime of the contract. **Lincoln County Education Assn. v. Lincoln County School District**, 19 PECBR 656 (2002), *aff'd*, 187 Or. App. 92 (2003).

• The State had a practice of changing "workload" characteristics, such as processing time, case intake requirements, and caseload ceilings, so further changes did not vary any status quo. Further, since the State had changed performance standards periodically without involving employees or the union, an additional change did not violate (1)(e). **OPEU v. State of Oregon, Administrative Services Dept.**, 15 PECBR 567 (1995).

In a 2005 case, ERB summarized the requirements for establishing the "status quo" as a result of a past practice: (1) The party alleging the past practice has the burden of proving its establishment; (2) The practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties; (3) There must also be evidence of mutuality in that "the practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or

whether the practice arose from the choices made by the employer in the exercise of its managerial discretion without any intention of further commitment."

•Where employees had been allowed to take county cars home for more than a decade, this did not constitute a past practice binding the county because the supervisor lacked authority to grant approval of this practice. Acceptability may be implied from long acquiescence in a *known* course of conduct, but in this case, the practice was not known by higher management. Therefore, the county was not obligated to bargain over the impact of denying building inspectors the right to take county vehicles home at night. **AFSCME Council 75 v. Lane County Human Resources Division**, 20 PECBR 987 (2005).

• Where ERB initially decided the status quo was based on past practice, on reconsideration it agreed that the status quo was created by the County's rule regarding release of information to the media about unit members' sick leave usage, overtime pay and discipline. **AFSCME Local 88 v. Multnomah County**, 22 PECBR 444 (on reconsideration) (2008).

• Requiring high school teachers during the hiatus period to attend an IEP meeting during duty-free preparation time was not a change in the status quo because this was the type of "prep time" activity that principals had been requiring in the past without time off or extra payment. The same status quo finding was reached regarding payment for cancelled Twilight School classes. ERB found "clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. Acceptability means that both parties know about the conduct and consider it the acceptable method of dealing with a particular situation. Mutuality means that the practice arose from a joint undertaking by the labor organization and the employer." **Wy'East Education Assn. v. Oregon Trail School District**, 22 PECBR 108, 149-51 (2007).

Status quo where management retained authority

Sometimes the most recent collective bargaining agreement gives management the authority to make changes in a subject area. These changes do not constitute a change in the status quo that must be bargained:

• The Oregon Court of Appeals overturned ERB's finding that a sheriff's unilateral change from a 4/12 schedule to a 5/8 schedule was a change in the status quo regarding working hours. The court found that the language of a letter of agreement and contract allowed the sheriff to change the work schedule as he might "determine necessary." **Marion County Law Enforcement Assn. v. Marion County and Marion County Sheriff**, 13 PECBR 829 (1992), *rev'd and remanded*, 130 Or. App. 569 (1994), *rev. den.*, 320 Or. 567 (1995), *order on remand* 15 PECBR 840 (1995).

• In **Coos Bay Police Officers Assn. v. City of Coos Bay**, 14 PECBR 229 (1992), the chief's change of promotion review process was not a (1)(e) change of status quo because the existing rule was expressly stated as subject to employer change at any time.

• In a case where the city was charged with a (1)(e) violation for unilaterally reducing the number of firefighters who could take vacation at the same time, ERB found that the expired agreement made vacation scheduling subject to management discretion, and the city had exercised this discretion at times in the past. **IAFF Local 3564 v. City of Grants Pass**, 15 PECBR 390 (1994).

• However, ERB found that a school district had committed an unfair labor practice when it refused to pay longevity stipends to teachers after the 1988-90 agreement had expired. The Board determined that payment of the stipends under the expired agreement was automatic, not discretionary; therefore, the stipends were part of the status quo that had to be maintained. The language written by the district about not establishing a "precedent for future contracts" does not indicate an agreement of the parties that payment of the stipends would cease when the contract expired, nor did it constitute a clear and unmistakable waiver of the union's right to maintenance of the status quo. **Lebanon Education Assn. v. Lebanon Public School Districts 16C and UH-1**, 13 PECBR 160 (1991).

• Refusing to grant a merit step to the incumbent after reclassifying the position was a violation of the status quo that merit steps were automatically given, and therefore an unfair labor practice even though the employee agreed. **Marion County Law Enforcement Assn. v. Marion County**, 15 PECBR 11 (1994).

If the status quo is to be defined by language in the collective bargaining agreement, however, the language must specifically address the current issue, not just the general topic. And sometimes the contract language is not clear, requiring ERB to interpret the language in order to determine if a "status quo" has been changed:

• Although the employer had a contract provision regarding investigation of employee misconduct, it did not mention drug testing as a means of investigation. Failure on the employer's part to bargain over drug testing therefore constituted a violation of ORS 243.672(1)(e). **FOPPO v. Oregon Corrections Division**, 12 PECBR 816 (1991), *aff'd*, 114 Or. App. 214 (1992), **vacated and remanded**, 116 Or. App. 572 (1992), **order after remand**, 14 PECBR 693 (1993).

• ERB will do more than examine the expired agreement. However, where the agreement did not include suspensions as among the management actions covered by the just cause clause, and where the union was unable to produce evidence of any such "just cause" practice independent of the contract, ERB found no status quo obligation. **OSEA v. Glide School District #12**, 15 PECBR 26 (1994).

• ERB found no violation of the status quo when a school district required a higher level of individual contributions for Kaiser insurance than for Blue Cross. Even though the expired contract language did not clearly address the situation, OSEA (the former representative) and district negotiators agreed that they intended that the employees who chose Kaiser insurance would receive the same district payment as those who chose Blue Cross. "Such evidence, which removes any doubt about the intent of the parties concerning this provision in their agreement, is sufficient to cure any defect in the draftsmanship, without resort to other rules of construction." Since the district continued the same insurance payment system after a new union became the representative, it did not make any unilateral change. **SKACE v. Salem-Keizer School District 24J**, 13 PECBR 89 (1991).

• Nor was it a violation of the status quo when a part-time teacher was not picked for a full-time position. ERB found that the expired bargaining agreement furnished all unit members, including part-timers, with rights to apply for a vacancy, be interviewed, be notified if not selected, and to discuss the reasons for rejection with the administrator. Since the complainant received all these advantages, there was no (1)(e) violation. **Silverton Education Assn. v. Silverton Elementary School District**, 16 PECBR 98 (1995).

• It was not a violation of the status quo when the employer made a one-day shift change (to evening hours) without bargaining with the union because ERB found that the CBA language allowed the employer to make such a change. **Assn. of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections**, 22 PECBR 850 (2008).

• There was no unilateral change in the status quo when the employer adopted a new sick leave policy because the change was authorized by the CBA, which allowed management to require a doctor's note and allowed consultation with employees over excessive absenteeism. **AFSCME Council 75 v. State of Oregon, Dept. of Corrections**, 22 PECBR 958, on reconsideration 23 PECBR 83 (2009).

• The City of Portland was found to have violated (1)(e) when it failed to bargain, in advance, over the impact of implementing a return-to-work program for medically restricted firefighters, even though the program itself was permissive for bargaining because ORS 243.650(7) excludes both "staffing levels" and "assignment of duties" from the list of mandatory subjects. The issue of limited duty status is an assignment issue and thus is permissive. However, this RTW program impacted the mandatory subjects of salary, workload, promotional opportunities and job security, all of which needed to be bargained

How long must a practice exist before it becomes the "status quo"

before implementing the RTW program. **Portland Firefighters Assn., Local 43, IAFF v. City of Portland**, 23 PECBR 43 (2009).

When an employer unilaterally increased the work week from 36 to 37.5 hours, it argued that the 36-hour week, which had existed the prior two years, was only a temporary reduction from the real status quo of 40 hours. ERB disagreed, finding that the previous change from 40 to 36 hours per week had created a new status quo. **OPEU v. Deschutes County**, 15 PECBR 221 (1994); *see also* **AFSCME v. City of Lincoln City**, 14 PECBR 83 (1992) (requirement of longevity and repetition not met since discontinued Christmas gift certificates had been given only twice before); **McKenzie Education Assn. v. McKenzie School District**, 16 PECBR 227 (1995) (a one-year "tinkering" with long-established schedules, even in the absence of a complaint by the union, is not enough to establish a new status quo that allows the district to make non-bargained changes in employment conditions).

Status quo" is defined in terms of "standard" for a class of employees

Since working conditions will vary for individual members of a bargaining unit, it is common for conditions to vary from year to year for a single employee. However, an individual employee's past working conditions do not establish a status quo that must be maintained or announced and bargained upon demand. Rather, the status quo is apparently established within a group of like employees, united by a common work place and assignment in many cases:

- Where the collective bargaining agreement defined the work day as an eight-hour day but two employees had been approved for half-time work, a later change of their work schedule from half-time to full-time did not constitute a change in the status quo. While "it is probably inevitable that individual members of a class of employees may enjoy (or be subject to) working conditions that vary from the 'standard' of their class," such differences do not establish a new status quo. **Willowcreek Education Assn. v. Willowcreek School District**, 14 PECBR 427, 14 PECBR 599 (1993).

- In **Riddle Assn. of Classified Employees v. Riddle School District #70**, 13 PECBR 654 (1992), the District did not commit an unlawful unilateral change when it assigned more work units to a custodian, because the total amount of work expected, even with the additional work units, did not exceed the status quo concerning custodial workload. The increase in one employee's workload did not constitute a change in that status quo.

- However, although "the status quo cannot be defined one bargaining unit member at a time" and ERB will "look to the 'standard' condition for the class of employee in defining the status quo for individual members of the class," when the class is so small or diverse in member working conditions, there may be no "standard" for the class and changes in an individual's working conditions may invoke a (1)(e) bargaining obligation. Thus, a reduction in hours of one custodian was a (1)(e) violation, even though her hours (before the change) differed from the work schedule of the two other custodians. **Days Creek Assn. of Classified Employees and Mary Stephens v. Days Creek School District**, 16 PECBR 187 (1995).

- In 1991, ERB ruled 2-1 that drug testing must be bargained with members of the corrections employees bargaining unit represented by FOPPO, even though the employer already tested members of other units. It is the employer's practice with this particular bargaining unit that determines the "status quo." Testing of other units' members would only put this unit's representative "on notice" that they might be subject to mandatory urinalysis. **FOPPO v. Oregon Corrections Division**, 12 PECBR 816 (1991), *aff'd*, 114 Or. App. 214 (1992), *vacated and remanded*, 116 Or. App. 572 (1992), *order after remand*, 14 PECBR 693 (1993).

• Bargaining over the impact of a change in a permissive subject not in the contract is required even though the practice applied to only a portion of the unit. **Oregon State Police Officers Assn. v. Oregon State Police**, 9 PECBR 8794, 8807 (1986).

Duty to bargain over "substantial additional duties"

In 1990, ERB found an obligation on the part of the employer to bargain with the union before assigning "substantial additional duty" (performing clean intermittent catheterization for a handicapped student once a day) outside of the "normal area of operations" of special educational assistants, even though no argument was raised that the new assignment increased the amount of work required of the aides. ERB distinguished this duty from the other personal hygiene tasks regularly performed by aides because CIC is a nursing task which cannot be performed without specialized training. The assignment of a substantial additional duty is a change in workload requiring bargaining upon demand. **OSEA v. Woodburn School District**, 12 PECBR 237 (1990).

Duty to bargain over permissive matters

The general rule is that changes in permissive items may be made at any time without first bargaining (unless, of course, the permissive item is written into the contract) .

"Such changes are those that clearly are within the sole discretion of management and do not directly affect the working conditions of employees. These are in essence managerial decisions concerning the general operation of the employer's enterprise." **FOPPO v. Corrections Division**, 7 PECBR 5649, 5654 (1983).

Unilateral changes in non-mandatory subjects (either permissive or prohibited) do not require bargaining before implementation. *See* **Washington County Police Officers Assn. v. Washington County**, 13 PECBR 627 (1992) (employer had no obligation to bargain over changes in complaint procedures manual that were made to meet minimum legal requirements). **Coos Bay Firefighters Assn. v. City of Coos Bay**, 18 PECBR 515 (2000), *aff'd without opinion*, 171 Or. App. 523 (2000) (city not obligated to bargain over reorganization of command structure of fire department during time period after collective bargaining agreement had expired and no new agreement had been negotiated).

• This type of change is illustrated in **OSEA v. North Bend School District No. 13**, 6 PECBR 4887 (1981), where the district obtained a job and task analysis of its custodial duties and, as a result, reduced four custodial positions by eliminating positions filled by substitutes or vacant. Work duties were not significantly changed but work loads -- a permissive subject of bargaining -- were increased. The district refused to bargain these changes, and the ERB found no unfair labor practice had been committed. No custodial position was substantially altered in type of work, only in quantity of work. Furthermore, the Association had not proven any impact of the workload increase on the custodians' "employment relations" or "other conditions of employment."

• In a similar case a decade later, ERB again found no (1)(e) violation when work assigned to custodians was changed. **Riddle Assn. of Classified Employees v. Riddle School Dist.**, 13 PECBR 654 (1992).

• Likewise, ERB found no duty to bargain over the impact of a management decision by a city to require all firefighters and rescue personnel to be certified as instructors in CPR

techniques, with the training to occur during work hours. The union claimed an impact of this decision on working conditions but the Board found no significant impact on hours of work or safety risks; any impact on actual duties was purely speculative. Nor was there a duty to bargain just because the city was reaping extra benefits from better trained employees without more pay. **IAFF Local 314 v. City of Salem**, 7 PECBR 5917 (1983).

However, if the change to be made is in a permissive *subject not in the contract*, the employer may still have a duty to bargain over the *impact* of the decision if the change in the permissive item would also have a direct impact on conditions of employment. For example, the assignment of employees to work schedules is a permissive subject, but when restructuring of the work schedule had the effect of increasing pupil contact time and reducing unassigned preparation time of teachers the school district employer had the duty to bargain over the impact of its proposed schedule changes. And this "duty to bargain must be carried out before the proposed change is implemented, unless the employee representative waives its right to bargain." **Greater Albany**, *supra*, 5 PECBR at 4166; **see also IBEW v. Forest Grove**, 4 PECBR 2168 (1979) (classification of employees is permissive; wages for classifications are mandatory); **East County Bargaining Council v. David Douglas School District**, 9 PECBR 9184 (1986) (district required to bargain through entire bargaining process over impact of increase in student contact time before change was implemented).

•Tri-Met violated (1)(e) when it failed to bargain over the impact of its changes in the qualifications for the bargaining unit position of buyer. Previously, applicants could apply for this position if they could acquire the necessary computer skills within 60 days after hire, but then Tri-Met notified the union that intended to require applicants to have the skills at the time of hire. The employer was not required to bargain over its determination of minimum qualifications but required to bargain over the mandatory impact on salary because the buyer position paid more than many other positions in the department. **Amalgamated Transit Union, Division 757 v. Tri-Met**, 23 PECBR 34 (2009).

Waiver of the duty to bargain by inaction

Where a duty to bargain exists, the employer's actual obligation is a duty to give the labor organization "sufficiently clear and timely notice of the impending change. It is then incumbent upon the labor organization to demand bargaining," **Greater Albany**, 5 PECBR 4158, 4166 (1980), and the union's failure to do so in a timely fashion will excuse the employer from the duty to bargain. The employer may then proceed to implement its planned change, unless that change would violate a continuing contract.

As a result of S.B. 750, passed in 1995, the period of time for "timely response was set by statute: "Within 14 calendar days after the employer's notification of anticipated changes . . . is sent , the exclusive representative may file a demand to bargain." ORS 243.698.

In **Greater Albany**, ERB agreed that a waiver of the union's right to bargain "can be construed from a failure to demand bargaining in a timely fashion in response to sufficient notice." However, the Board declined to require that a waiver be in "clear and unmistakable language" (in other words, a written confirmation that the union would not demand bargaining). 5 PECBR at 4166. *See also AFSCME v. Board of Higher*

Education, 2 PECBR 1012 (1977), **rev'd** 31 Or. App. 251 (1977), **on remand** 3 PECBR 1729 (1978).

"Allowing such implied waivers is appropriate as a matter of business necessity, for otherwise a union could prevent change during the term of a contract simply by refusing to make a bargaining demand." **Corvallis School District 509J v. OSEA**, 6 PECBR 5409, 5414 n.2 (1982).

To find a waiver by inaction, however, "the notice of impending change [must be] sufficient to apprise the labor organization of the nature and probable effects of the proposed change and [must be] given sufficiently in advance of the actual implementation of the change to allow a reasonable period of bargaining." **Greater Albany**, 5 PECBR at 4166.

Furthermore, the Board will not find that constructive notice occurred in such cases unless the probable impact on working conditions of a unilateral change was "an inescapable inference." 5 PECBR at 4167. (This definition of waiver was objected to by Board Chairman Dan Ellis, who condemned the majority's test as leaving "union representatives with a minimum burden for diligence, or even curiosity." 5 PECBR at 4169).

- In 2002, however, the Board held that even if no notice is given, if the 180-day ULP filing period is exhausted, then the ULP will be dismissed. The union alleged that it first knew about a unilateral change in past practice – the use of substitute bus drivers to drive activity runs – in May 2002, although the change took place the prior September. But ERB held that barring circumstances such as the employer and an employee conspiring to keep a change secret, "an exclusive representative is presumed to know about a unilateral change when the employees know of the effects of that change." **OSEA v. Astoria School District**, 20 PECBR 46, 63 (2002).

- Where the district had told the association in June that no change in student contact time was planned and promised to notify the association if a change was contemplated, the association did not waive its right to bargain over the matter by not insisting on bargaining until October, after the change was implemented. **Salem Education Assn. v. Salem-Keizer School District 24J**, 15 PECBR 302 (1994).

- Although the district and teachers discussed various alternatives regarding the high school schedule, and although the district in budgetary actions eliminated an elementary PE specialist position, ERB was unwilling to find "constructive notice" since neither the budgetary actions nor the discussion of the schedule created an "inescapable inference" that the result would be a reduction in preparation time. **McKenzie Education Assn. v. McKenzie School District**, 16 PECBR 156 (1995).

- ERB has found that implied waiver by inaction does not apply to the employer -- the party who wanted to make a change (recouping overpayment that had occurred during a prior contract, before a new agreement was bargained). **Klamath County Fire District #1 v. IAFF Local 890**, 16 PECBR 130 (1995).

- When the employer provided clear notice but implemented the change in a mandatory subject before sufficient opportunity for bargaining was provided, the union will not be held to have waived its right to bargain if it made no bargaining demand for the next several months, since the change was already a "fait accompli." **Teamsters Local 57 v. City of Brookings**, 16 PECBR 267 (1995).

- In the case cited above, ERB rejected the city's argument that the equitable doctrine of laches should be applied because the city relied, to its detriment, on the union's silence

about the step freeze for several months. ERB found that the city demonstrated no significant prejudice as a result of the delay; further, any prejudice was due to the city's unlawful conduct, the union's delay was not unreasonable, and earlier notice by the union would not have changed the city's conduct. **Id.**

On the other hand, the union has been held to have the burden of pursuing bargaining once the employer gave notice of a planned change in the status quo:

- Where the union demanded to bargain the impact of reclassifying a position, but made no definite proposal concerning impact and failed to re-contact the county after county officials said they were not ready to bargain yet, leaving the parties without contact for four months, the union did not satisfy this burden. **Marion County Law Enforcement Assn. v. Marion County**, 15 PECBR 11 (1994).
- Similarly, where the association demanded to bargain over changes in a smoking policy and the parties held an initial bargaining session, but the association did not get back to the district to schedule additional bargaining sessions and the district implemented eight months after its original notice, no unfair labor practice occurred. Since the association was the party with the most to gain by delaying bargaining, the association was obliged to do more than sit back and wait. **Tualatin Valley Bargaining Council v. Hillsboro Union High School District**, 14 PECBR 541 (1993).

Just as an employer is excused from bargaining if the union makes no response after proper notification, a union's *refusal to discuss* a change in a past practice concerning a mandatory subject not contained in the contract also amounts to a waiver, the Board said in **Lane Community College**, supra. Such a refusal to bargain allows the employer to unilaterally change the past practice without violating ORS 243.672(1)(e).

However, if the employer has already made the change without bargaining, the union does not have to make a demand to bargain to avoid a waiver of its rights to bargain. **AOCE v. State of Oregon**, 20 PECBR 890 (2005). Nor does a later expression of willingness to bargain shield the employer from an unfair labor practice if the change is not rolled back. **IAFF v. City of Roseburg**, 10 PECBR 504 (1988). (However, ability to pursue an unfair labor practice will depend upon filing within 180 days of the date when the change was made.)

In **AOCE v. State of Oregon**, 20 PECBR 890 (2005), no waiver by inaction was found, although the union had never demanded changes in previous bidding of hours and days off. ERB "will not punish a party for settling its dispute in an informal manner" by making that resolution a waiver of future bargaining rights. However, the Court of Appeals reversed and remanded, 209 Or App 761 (2006). The Court found that ERB should have attempted to construe the collective bargaining agreement to determine whether it authorized the employer to make unilateral schedule changes. Because the matter was remanded for reconsideration, the Court did not find it necessary to address whether ERB erred in concluding that AOCE did not waive its right to bargain on these changes in conditions of employment.

Waiver derived from bargaining history

If a party introduces a proposal that is bargained but not included in the final contract, it may be argued that the party waived its right to bargain over that subject for the duration of the contract. The Board found such a waiver by virtue of extensive bargaining over disability insurance and incentive pay, such that later, after the new contract went into effect and both were discontinued, there was no unfair labor practice. **Oregon**

State Police Officers Assn. v. Oregon State Police, 9 PECBR 8794, 8808 (1986).

ERB clarified when an employer is excused from bargaining due to prior bargaining over a matter: "An employer may defend itself against a mid-contract unilateral change charge by pointing to contractual provisions relating to the subject matter of the change . . . A party exhausts its duty to bargain over a subject when it reaches a negotiated agreement on the matter." **OSEA v. Astoria School District**, 13 PECBR 474, 478 (1992).

But if the employer made a unilateral change in a matter that was bargained but did not get addressed in final contract language, ERB will first look at the amount of bargaining, if any, as opposed to the substance of a bargain struck. It would be inconsistent of the policies of the collective bargaining statute (PECBA) if the Board were to attempt to resolve any matter of interpretation of the contract, the Board said. If language on the subject did end up in the agreement, ERB "generally will conclude that an employer had exhausted its bargaining duty concerning the subject matter of a dispute when an extant written agreement includes a provision that is specifically relevant to the issue in dispute." **Id.**, 13 PECBR 474 (1992).

The defense in a unilateral change case that the parties had already bargained to completion would normally apply to a claim of failure to bargain during the term of an agreement, but not once the collective bargaining agreement had expired and the parties were engaged in successor negotiations. **Lincoln County Education Assn. v. Lincoln County School District**, 19 PECBR 656 (2002), **aff'd**, 187 Or. App. 92 (2003).

- No waiver by bargaining was found in a case where the parties disagreed about whether an issue would be bargained as part of the successor negotiations or separately, and where the employer made substantive proposals but the issue was not included in final offers by either side. The association did not "consciously yield" its position that its proposed language would be included in the parties' collective bargaining agreement. **Eugene Police Officers Assn. v. City of Eugene**, 19 PECBR 463 (2001).

- The union's prior unsuccessful introduction of proposals allowing probation officers to carry weapons at work did not operate to waive the union's right to bargain over a policy restricting employees' off-duty but on county property possession of firearms. **FOPPO v. Washington County**, 19 PECBR 411 (2001).

- In another case, ERB found no duty to bargain over mid-term changes in insurance benefits, because this general subject had been bargained already in regular negotiations. ERB concluded that the employer had already exhausted its duty to bargain over the general subject of insurance benefits. Where an agreement is in effect that arguably addresses the subject matter that a union is demanding to bargain, "the necessary inquiry is whether the employer fulfilled its bargaining duty concerning the issue in dispute. Our resolution of this inquiry naturally turns on negotiations history, as evidenced primarily by the terms of the contract itself." Since the parties' contract in this case provided that employer insurance contributions "will be for use in the SEBB Flexible Benefits program," the Board stated that "it is clear that the parties bargained over and reached agreement on the general subject of insurance benefits." **Oregon State Police Officers Assn. v. State of Oregon**, 13 PECBR 362 (1991).

- An employer does not breach its duty to bargain changes in working conditions where it has already bargained contract language "specifically relevant" to the practice at issue. But

in **Riddle Assn. of Classified Employees v. Riddle School District #70**, 13 PECBR 654 (1992), although a contract provision concerning working hours existed, ERB concluded that the contract's general reference to work hours, and the bargaining which shaped it, did not evidence an agreement specifically relevant to the immediate question, i.e., paid versus nonpaid lunch periods.

• Even though contract language addressed guaranteed prep time for teachers, this did not excuse the district from bargaining over student contact time -- a different mandatory issue. **Salem Education Assn. v. Salem-Keizer School District 24J**, 15 PECBR 302 (1994).

• The agreement contained specific language concerning pay for working in a higher classification; therefore, the employer had no duty to bargain before adjusting the pay rate for unit members working temporarily in higher classifications. Disputes about implementation of that contract language should be addressed through the grievance process. **IAFF Local 890 v. Klamath County Fire District No. 1**, 15 PECBR 340 (1994).

• Where contract language specifically addressed vacation leave requests, the district had exhausted its duty to bargain over the subject matter, so no (1)(e) violation occurred when the district denied a unit member's vacation leave request. **OSEA v. Crook County School District**, 15 PECBR 30 (1994).

• Where contract language gave supervisors discretion in establishing starting times for employees' work days, an employer who changed an employee's work day from a split shift with mostly daytime hours to a straight shift with mostly evening hours committed a (1)(e) unfair labor practice by refusing to bargain before implementing the change. The contract language on starting times was not specifically relevant to the kind of change the employer made, and so the language did not operate as a waiver of the obligation to bargain. **OSEA v. Klamath County School District**, 14 PECBR 1 (1992).

• Nor was ERB willing to find a waiver of the obligation to bargain over increased teacher-student contact time when the association joined the district in seeking a waiver from State Board of Education standards. The association's letter in support did not refer to a change in the status quo or indicate that the status quo regarding preparation or contact time would be changed, ERB noted. **McKenzie Education Assn. v. McKenzie School District**, 16 PECBR 227 (1995).

• In another district where the elementary music teacher position was eliminated and classroom teachers had increased student contact time, ERB refused to find a waiver based upon bargaining history, despite the fact that a new contract was ratified within a few weeks after the increase in student contact time, and no unfair labor practice was filed until almost the end of the 180-day period, after the district had reinstated the music teacher position. An affirmative defense of waiver by bargaining history is found only: (1) If the parties adopt clear and unmistakable contract language on the topic; (2) There was unequivocal bargaining history showing the union's intent to waive further bargaining over the issue after it was fully discussed and consciously explored; or (3) There was unequivocal extrinsic evidence bearing on ambiguous contract language. **Central Linn Education Assn. v. Central Linn School District**, 17 PECBR 194 (1997).

• The city had no obligation to bargain over asking lead workers to temporarily fill in as first responders for after-hours public works service problems because the union and city had bargained to agreement about the subjects in dispute; thus, the only question was whether the city had complied with that contract language. **AFSCME Local 2909 v. City of Albany**, 18 PECBR 26 (1999).

**Waiver clauses
in the contract:
initial ERB
interpretation**

Ruling on a claim that explicit contract language (i.e., a waiver clause or zipper clause) constitutes a waiver of the statutory right to bargain a mandatory subject, ERB initially said that waiver must be in "clear and unmistakable language," following the private sector precedent of **N.L. Industries v. NLRB**, 92 LRRM 2937, 2938 (1976). This rule will be applied "[i]n cases where a waiver of bargaining is grounded in

contract language, particularly where it is claimed that a party has waived its right to make proposals during bargaining concerning a successor agreement." **Corvallis School District 509J**, supra, 6 PECBR at 5414 n.2.

- A case where the contract contained an unqualified waiver of the right to bargain, according to a footnote in the decision, is **AFSCME Local 2909 v. City of Albany**, 18 PECBR 26 (1999).
- A general contract management rights clause did not constitute a waiver such that the employer could change, without bargaining on demand, a policy concerning the mandatory subject of possessing firearms off-duty. **FOPPO v. Washington County**, 19 PECBR 411 (2001).
- Such a waiver was found in contract language providing for a designated procedure to be used to determine salary if the employee added a "specialty" position. ERB found that by agreeing to bargain over such matters under the terms of the collective bargaining agreement, the association had waived any PECBA bargaining rights. **City of Portland Planning and Engineering Employees Assn. v. City of Portland**, 16 PECBR 386 (1996).
- A waiver was also found in a case where the employer cut the hours of work for bargaining unit members and temporarily laid off 26 of them. The union filed an unfair labor practice under ORS 243.672(1)(e) for failure to bargain in good faith over the matter. But the Board found that no bargaining was required prior to those changes because the matter had already been bargained during the previous round of negotiations and had been addressed in the contract. The Board indicated that in deciding a (1)(e) complaint it would not look at the specifics of the bargain struck, but only at the evidence as to whether good faith bargaining on those topics had occurred.

Furthermore, the Board noted, the parties had agreed to an "entire agreement" clause in the contract that memorialized a mutual waiver of bargaining over (1) "any subject or matter referred to or covered by this agreement" and (2) "with respect to any subject or matter which was or might have been raised in bargaining but which is not specifically referred to or covered in this agreement..." This language met the "clear and unmistakable" test for a valid waiver. **AFSCME Council 75, Local 1393 v. Umatilla County Board of Commissioners**, 8 PECBR 6559 (1984), **on reconsideration**, 8 PECBR 6767 (1985).

Board Member Hein, in a concurring opinion upon reconsideration, elaborated on what kind of contract language can meet the "clear and unmistakable" waiver test. "One-sided" unilateral waivers, such as some "maintenance of standards" or "zipper" clauses, will almost never be interpreted as clear and unmistakable relinquishments of all bargaining rights, Hein argued. "Where such provisions include only a unilateral promise, it is necessary to take into consideration such factors as bargaining history, other contract provisions and prior interpretations of such language by arbitrators, labor boards and courts in order to determine the extent of any alleged bargaining waiver." 8 PECBR at 6774, n. 2.

Hein also noted that, even under the terms of the Umatilla County contract, the waiver applies only to those items that are "specifically" covered by the agreement and would not allow the employer to make unilateral changes in areas only generally referred to in the contract. 8 PECBR at 6775 n.4.

- General contract language stating that "there shall be no further collective bargaining during the term of this agreement except by mutual consent" did not serve as an effective waiver to the union's right to bargain over a change in the method for compensating for accrued vacation time, even though the employer changed a practice that was not memorialized in a collective bargaining agreement. **IAFF v. City of Roseburg**, 10 PECBR 504 (1988); *see also* **Riddle Assn. of Classified Employees v. Riddle School District**, 13 PECBR 654 (1992) (general zipper clause did not act as a waiver of right to bargain); **Klamath County Fire District #1 v. IAFF Local 890**, 16 PECBR 130 (1995) (zipper clause did not constitute an express waiver by the employer of its right to bargain because the clause was not a "clear and unmistakable" waiver); **Days Creek Assn. of Classified Employees and Mary Stephens v. Days Creek School District**, 16 PECBR 187 (1995)

(general language such as a management rights clause did not waive district's obligation to bargain over a reduction in hours).

• But a hospital did not violate (1)(e) by unilaterally changing working conditions by adopting new personnel policies because specific collective bargaining agreement language stated that the union recognized the hospital's authority to implement its responsibilities by written work rule, and the hospital agreed to give the union at least seven days notice of implementation of new work rules, which would not be arbitrary or capricious. That language, plus consistent past practice, convinced ERB that the union had waived its right to bargain over any new personnel policies. **SEIU v. Pacific Communities Hospital**, 13 PECBR 753 (1992).

In 2002, ERB renounced the “specifically relevant” analysis enunciated in the **Umatilla** decision. Now, an employer defending a (1)(e) ULP charge based upon an alleged unilateral change must show that waiver has occurred by “clear and unmistakable conduct” whenever claiming that there is express contract language on the subject or that bargaining has been completed. **OSEA v. Bandon School District**, 19 PECBR 609 (2002).

Waiver based on contract language: Current ERB position

In 2006, the Oregon Court of Appeals ruled that in cases where employer contends that it had a right to make some change because the change was authorized by specific language in the CBA, ERB must construe the CBA to determine whether it authorized the employer to

make the change subject to dispute. If so, then the employer's change in a mandatory condition of employment is not a ULP. If ERB determines that the CBA language is ambiguous, then ERB must resolve the ambiguity by examining any extrinsic evidence of the parties' intent.

Assn. of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections, 20 PECBR 890 (2005), **rev'd and remanded**, 209 Or. App. 761 (2006). On remand, ERB once again concluded that the employer violated (1)(e) by failing to bargain changes in work schedules because the CBA did not authorize the employer to unilaterally change those schedules. The Management Rights clause language was ambiguous, and recent bargaining history did not support the employer's defense. 23 PECBR 222, 361 (2009).

ERB recited the past case history and tried to resolve “the interplay between the collective bargaining agreement and the unilateral change doctrine” in 2008. The upshot of recent Court of Appeals decisions, ERB determined, “is that there are actually two separate defenses, each with a separate analysis. The first defense asserts that the contract language permits the employer to take the specific action it did. In such cases we must interpret the contract language to determine whether the contract does in fact authorize the action. The second defense does not assert that the contract expressly allows the action, but rather that the contract in some fashion waives the union's right to bargain over the matter. In such case, we will continue to apply the ‘clear and unmistakable’ standard as articulated in **Bandon School District**.” In the case at issue, the employer argued waiver, but ERB found that the CBA language did not mention bargaining, waiver, or charges for supplying information to the Association and therefore, “it does not clearly and

unmistakably waive the Association's statutory right to bargain over District charges for providing information." **Lebanon Education Assn. v. Lebanon Community School District**, 22 PECBR 323, 366 (2008).

In cases where the assertion is that the CBA operates as a waiver, prior case law decided under the "clear and unmistakable" standard would still provide appropriate guidance:

What contract language will act as a waiver?

- General language on the subject will not operate as a waiver if the issue arose in the contest of a different situation. For example, language provision that "vacancies are filled at the discretion of the district" did not operate as a waiver when the district made changes in how temporary vacancies were filled. **OSEA v. Bandon School District**, 19 PECBR 609 (2002).

- A general waiver clause is insufficient to find a waiver over changes made during the lifetime of the collective bargaining agreement and unknown to the union at the time that the collective bargaining agreement was executed. Dissenting Board member Thomas argued in Bandon that to require the parties to waive the duty to bargain by an express waiver would give the unions the option of demanding additional bargaining whenever the union discovered a supposed gap or oversight after completion of negotiations, and any dispute about meaning of certain collective bargaining agreement language should be resolved through the contractual grievance procedure. **OSEA v. Bandon School District**, 19 PECBR 609 (2002).

- In another case decision about the same time as **Bandon**, ERB held that there was no obligation for the state police to bargain before withholding a merit increase in pay from an officer under investigation because the issue of timing of merit pay increases had already been subject to bargaining, and the parties had agreed to include collective bargaining agreement language providing that merit increases could be disapproved due to unsatisfactory performance on the part of the employee. **Oregon State Police Officers' Assn. v. Oregon State Police**, 19 PECBR 552 (2001).

- A management rights clause did not give the district the unfettered right to increase student contact time, which was not mentioned in the collective bargaining agreement, without notice and bargaining upon demand. **Lincoln County Education Assn. v. Lincoln County School District**, 19 PECBR 656 (2002), **aff'd**, 187 Or. App. 92 (2003).

Other reasons why an employer may be excused from bargaining

Like the waiver situation, the employer may also be completely excused from bargaining a decision is the change would have a de minimus impact upon the working conditions of employees. If "the impact on employment conditions of management's decision is not significant or is merely peripheral," then the bargaining obligation simply does not arise. **FOPPO v. Corrections Division**, 7 PECBR 5649, 5655 (1983).

- Even when the city unilaterally implemented a change in disciplinary procedures (discretion of city manager to impose any type of unpaid suspension of battalion chiefs) because of a federal judge's ruling that such discipline made battalion chiefs subject to the Fair Labor Standards Act, ERB found a (1)(e) violation. The city should have done what it could to fulfill both duties, implementing the change but agreeing to bargain over the change in working conditions mandated by the court. If handled in this manner, although still technically a legal violation, the city's remedial exposure would reflect the legal dilemma it was in. **Portland Firefighters Assn. v. City of Portland**, 16 PECBR 245 (1995).

- However, a city's deduction of the employees' 6% PERS contribution from employees' salaries, following expiration of the collective bargaining agreement that had provided for employer "pickup" of the employees' contribution, was not a (1)(e) violation, but was proper under the necessity doctrine in order to ensure compliance with the Oregon Constitution, as

amended by Ballot Measure 8. **Bend Firefighters Assn. v. City of Bend**, 16 PECBR 378 (1996).

ERB clarified that the "de minimus" exception refers to "subjects" that have an insubstantial or de minimus effect on public employees' wages, hours and other terms and conditions of employment. The subject of work hours does not have a de minimus effect on public employees, said ERB in finding a (1)(e) violation for failure to bargain upon demand over changes in employees' days off and start-stop changes of up to two hours. **AOCE v. State of Oregon**, 20 PECBR 890 (2005), **rev'd on other grounds and remanded**, 209 Or. App. 761 (2006).

Duty to bargain when there is a "business necessity" for a prompt decision

While a waiver or de minimus impact may totally excuse an employer from negotiating over a unilateral change otherwise requiring bargaining, a "legitimate business necessity" will only modify "the extent of the duty to bargain *before* implementation or decision." **FOPPO v. Corrections Division**, 5 PECBR at 5655. But the "business necessity" exemption is apparently very narrow. Although the Board acknowledged such an exception in **IAFF v. Tualatin Fire District**, 6 PECBR at 5236, and **OSEA v. Sherman Union High School District**, 6 PECBR 5009 (1982) (order on reconsideration), it has found only a single instance where a legitimate business necessity excused an employer who had unilaterally implemented a change in a mandatory subject.

In **Teamsters Local 57 v. Lower Umpqua Hospital**, 12 PECBR 748 (1991), ERB set forth criteria which made the instant case, but none ever reviewed before, a case where a unilateral change was justified by "business necessity."

Extent of the duty to bargain over a change during the term of agreement

Except for the business necessity situation, an employer's obligation to bargain continues during a 90 day expedited bargaining period if the employer's notice is given during the term of the contract. After 90 days the employer free to unilaterally implement -- at the same time that employees are free to strike. Initially, S.B. 750 was written with a 45-day expedited bargaining requirement and a provision making it unlawful for employees to strike during the term of the agreement if the parties were unable to agree during the 45 days. But the final version of the bill made it legal for public employee unions to declare strikes over labor disputes that arise pursuant to a reopener provision in their contract or renegotiation under the expedited midterm bargaining process.

Mediation may be agreed upon during the 90-day expedited period, but is not a required part of the process.

Even where it is only the **impact** of a management decision over a permissive item that is required to be negotiated, the decision may not be implemented until bargained through the end of the bargaining period, the Board confirmed in **Sherman Union High School District**, *supra*. Chairman Dan Ellis dissented, however, arguing that such a rule "eviscerates," for all practical purposes, the distinction between

"decision" and "impact" bargaining, and therefore employers "will find themselves bargaining the decision as well as the impact." *Id.*, 6 PECBR at 4721 (original order).

On reconsideration, the majority of Mosey and Hein attempted to answer that objection by adding that the employer would not, in all cases, be required to bargain the impact through the dispute resolution process before decisions could be implemented. In the **Sherman Union High School District** case, if the district had bargained in good faith in July, shortly after it had notified the Association of the elimination of a position and had received a bargaining demand, "it lawfully could have implemented the decision in late August, regardless of whether the parties had reached statutory impasse." *Id.* at 5012. Afterwards, of course, the district would have been obligated to continue to bargain to impasse. *Id.* at 5017 n.5. No subsequent case has presented such a fact situation, where the employer implemented a decision regarding a permissive matter before the completion of bargaining over the impact.

In a rare case where the *employer* filed (2)(b) charges, alleging that the union had refused to bargain over recouping overpayments made under a previous contract, ERB found no obligation on the part of the union to bargain, even though it had a right to demand to bargain in such a situation. However, ERB noted that usually the union's refusal to bargain leaves the employer free to take its proposed action (unless, of course, that action would violate the collective bargaining agreement). **Klamath County Fire District No. 1 v. IAFF Local 890**, 16 PECBR 130 (1995).

If the unit includes non-strikeable employees, of course, the employer will not be able to unilaterally implement its final offer, but must go through interest arbitration. However, in a case where the employer retracted plans to make changes in expense allowances and reimbursement after failing to reach agreement with the union during the 90-day interim bargaining, the employer had no further obligation to bargain or arbitrate. It is not a ULP for the union to persist in wanting to arbitrate, but the employer may simply ignore the interest arbitration proceeding, as any award will be moot if the employer cancelled the plans to change the status quo, which had created the right to bargain in the first place. **State of Oregon, Dept. of Justice v. Criminal Investigators' Assn.**, 18 PECBR 630 (2000).

**Unilateral changes
after expiration
of the contract**

Just as it may be an unfair labor practice for failing to bargain in good faith to make unilateral changes during the term of a contract without agreeing to bargain upon demand, it may also be an unfair labor practice to make certain changes *after the expiration of the contract* if impasse resolution procedures have not been concluded. "This general rule is grounded on the theory that a unilateral change frustrates the objectives of the Public Employee Collective Bargaining Act (PECBA) much as does a flat refusal to bargain," explained the Board in **OSEA v. Salem School District**, 6 PECBR 5036 (1982).

Prohibiting certain unilateral changes -- that is, requiring "maintenance of the 'status quo' after expiration of a contract and during negotiations for a new agreement [—] is important because it serves to continue the balance in the bargaining power of the parties as well as the flexibility necessary to reach agreement in the 'give and take' inherent in the collective bargaining process." **Blue Mountain Community College Faculty Assn. v. Blue Mountain Community College**, 3 PECBR 2025 (1978).

In the private sector, certain unilateral changes are prohibited, even after the expiration of the contract, until "impasse" is reached. In Oregon's public sector, the duty to maintain the status quo continues through the "hiatus period" (from the expiration of the contract to 30 days after ERB's publication of the parties' final offers or, if factfinding is mutually agreed upon, to 30 days after the publication of the factfinder's report) because "efforts to reach a collective bargaining agreement will be obstructed or inhibited where the employer acts unilaterally to implement its last offer on a mandatory subject for bargaining prior to the exhaustion of the statutory dispute resolution procedures." **AFSCME v. Wasco County**, 4 PECBR at 2400.

(Even where the district does not make a unilateral change until after the bargaining period, however, if there is no evidence of any good faith willingness to bargain the change prior to exhaustion of the statutory dispute resolution process, the Board will not find the implementation of the change lawful. **Gresham Grade Teachers Assn.**, supra, 5 PECBR at 2895.)

- The obligation to maintain the status quo may extend for years if the bargaining process is not completed. In **Multnomah County Corrections Officers Assn. v. Multnomah County Sheriff's Office**, 9 PECBR 9529, 10 PECBR 1056 (1987), the expired contract contained a just cause clause. No agreement was reached after one year of bargaining, a new representative was then certified and finally interest arbitration determined the contract. Although disciplinary actions could not be grieved because of the expiration of the contract, to discipline without just cause was a (1)(e) violation throughout the three-year hiatus period.

- The prohibition of unilateral changes during the hiatus period applies regardless of whether the employer adds or subtracts benefits. It was an unfair labor practice for Polk County to take unilateral action to *decrease* all employees' wages by 7% following expiration of a contract because the parties were still in mediation. **AFSCME v. Polk County**, 6 PECBR 5437(1982).

- But it was also unlawful for Wasco County to implement its proposed 8% wage *increase* during factfinding. Allowing the employer to grant additional benefits while bargaining is still continuing could undermine the union's bargaining position and bargaining team and could erode employees' resolve to hold out for still greater gains.

- In cases where a collective bargaining agreement ceases to cover employees due to change in representatives, it is still the obligation of the employer to maintain the status quo while the bargaining process with the new exclusive representative is completed. Thus, when a prison employee transferred by legislation to Oregon Corrections Enterprises (OCE) and while represented in a new bargaining unit was dismissed, he had a right to a just cause standard, which had been part of the collective bargaining agreement that covered him before his transfer. ERB, applying the standard used by an arbitrator in interpreting the just cause language, determined that the discharge was not for just cause because of serious flaws in the investigation of the employee's alleged misconduct. OCE

was thus judged to be in violation of (1)(e) for failing to maintain the status quo. **AOCE v. State of Oregon, Dept. of Corrections**, 18 PECBR 847 (2000).

• An ESD was required to maintain the status quo on mandatory subjects of bargaining during the time period after the expiration of a CBA bargained by the previous representative and before a new contract was executed. Thus, the dismissal of a probationary teacher was found to be a (1)(e) violation because the status quo regarding due process, as found in the expired agreement, was not maintained. **OEA v. Willamette ESD**, 22 PECBR 585 (2008).

• A school district did not change the "status quo" regarding the calculation of its insurance contribution for partial months based on a pro-ration of days actually worked during a month when employees went on strike. The record demonstrated no consistent past practice of pro-ration; in three cases, teachers were required to pay the full insurance premiums if they were in paid status for less than a full pay period. The Association's evidence did not show a past practice that was clear, consistent, and repeated over a long period of time. **Wy'East Education Assn. v. Oregon Trail School District**, 22 PECBR 668 (2008).

Step increases and insurance cost increases after expiration of the collective bargaining agreement

With the passage of S.B. 750 in 1995, for the first time the PECBA specified the obligations of the employer to maintain aspects of the status quo during the hiatus period: "[T]he status quo with respect to employment relations shall be preserved until completion of impasse procedures except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise." ORS 243.712(2)(d).

This subsection superceded a line of cases regarding employer obligations for insurance and pay increases during the hiatus period.

Petition for Declaratory Rule filed by Lincoln County School District, 11 PECBR 607 (1989); **OSEA v. Clatsop Community College**, 10 PECBR 774 (1988) ; **Declaratory Ruling sought by Portland Community College**, 9 PECBR 9018 (1986); **Teamsters v. Yamhill County**, 9 PECBR 9344 (1987); **Declaratory Ruling sought by Multnomah County ESD and Multnomah County ESD Education Assn.**, 6 PECBR 5341 (1982); **South Benton Education Assn. v. Benton County School District UH-1**, 6 PECBR 5516 (1982).

In a case originating before the effective date of S.B. 750 but decided afterward, ERB found that the employer had violated (1)(e) by freezing salary step increases after the expiration of the agreement. The freeze was found to alter the status quo, based on past practice, but not based on any language in the expired agreement. **Teamsters Local 57 v. City of Brookings**, 16 PECBR 267 (1995).

The "de minimus" exception

During the hiatus period as well as in midterm bargaining, the duty of the employer to bargain with the union upon demand prior to implementing will not apply in cases where the change in status quo is "de minimus." However, changes in one employee's work shift, from mostly day to mostly evening, were not "de minimus," in the opinion of ERB. **OSEA v. Klamath County School District**, 14 PECBR 1 (1992).

Some changes that can be made before exhaustion of the bargaining

The prohibition of unilateral changes during the "hiatus period" is not absolute, however. Permissive items need not be maintained, even if they were included in the recently expired contract. And even some mandatory items, including those that were part of the expired

process

agreement, may be altered.

Several cases from the late 1980s illustrate the nature of changes during the hiatus period that were found to violate ORS 243.672(1)(e) because they constituted unilateral changes without bargaining:

- Contractual requirements that govern an employer's disciplinary action, such as a "just cause" clause, survive the contract. If the conduct leading to the discipline occurs before the expiration of the agreement even though disciplinary action occurs after expiration, a violation of just cause standards would be a (1)(g) violation. But even if the employee conduct occurred after contract expiration, the employer must continue to observe these provisions during the hiatus period or be in violation of the (1)(e) requirement to maintain the status quo. **OSEA v. Klamath County School District**, 9 PECBR 8832 (1986). See also **AFSCME and James Tedder v. DEQ**, 10 PECBR 287 (1987) (employer obliged to maintain disciplinary standards of a "reasonable employer" during hiatus period after certification and before first contract was signed); **Multnomah County Corrections Officers Assn. v. Multnomah County Sheriff's Office**, 9 PECBR 9529, 10 PECBR 105-06 (1987) (four of five disciplinary actions found to be without just cause and therefore (1)(e) violations); **Assn. of Oregon Corrections Employees v. Oregon Dept. of Corrections**, 15 PECBR 621 (1995).
- An unfair labor practice was found when the city paid police overtime for only the three hours of extra patrol at a striking paper mill although the expired contract provided that "[e]mployees who are called to return to work on their regularly scheduled days off shall be guaranteed a minimum of four hours of overtime pay"; even though the extra patrol time was assigned only to volunteers. ERB looked to past practice to determine the status quo. In this case, although scheduling of police officers on their days off was infrequent, the city had consistently paid them four hours of overtime. **Oregon City Police Employees Assn. v. City of Oregon City**, 11 PECBR 615 (1989).
- A school district violated (1)(e) when it laid off a worker without giving the two-week notice required by the expired contract, provided lesser benefits for a part-time worker than required by that contract, and failed to post notice of a vacancy as required by that agreement. **OSEA v. Glendale School District**, 11 PECBR 56 (1988).
- The employer violated (1)(e) when it notified teachers that in case of a strike, teachers calling in sick, even for one day, would be required to provide a doctor's verification (contrary to the provisions of the expired agreement), and that all scheduled vacations would be canceled (although the contract did not address this matter, past practice was that management did not unilaterally reschedule vacations). **Hillcrest-MacLaren Education Assn. v. Executive Dept., State of Oregon**, 11 PECBR 96 (1988).
- In **Coos Bay Education Assn. v. Coos Bay School District**, 9 PECBR 9039 (1986), the ERB concluded, 2-1, that an early retirement provision in the expired contract had to be maintained during the hiatus period, and that a teacher who qualified during that period but did not meet the age requirements at the time of contract expiration must be allowed to participate.
- It was an unfair labor practice for a county to discontinue pay for bargaining team members bargaining during working hours since this was not a "purely contractual right" that expired with the agreement. **AFSCME v. Polk County**, 11 PECBR 536 (1989).
- The employer illegally changed the status quo when it changed employment conditions regarding work plans and opportunity to train for a vacant position (as provided by the expired contract), and requiring teachers to work during snow closure days, contrary to past practice. **Hillcrest-MacLaren Education Assn. v. State of Oregon**, 13 PECBR 866, 14 PECBR 66, 14 PECBR 236 (1992).
- The employer violated (1)(e) when it implemented a new pension plan during a period of bargaining but prior to the completion of all required bargaining processes, since the altered provision regarding pension plans is mandatory for bargaining. **AFSCME v. Oregon Health Sciences University**, 17 PECBR 343 (1997).

Exceptions to obligation to maintain status quo during hiatus period

• A school district violated the status quo during a hiatus period when it cut off reimbursement for tuition because the amount paid out already exceeded the budgeted amount by fall of the school year. ERB found that the best indicator of the status quo was the expired agreement, which required reimbursement for all district-sanctioned courses. The district was obligated to continue the practice of paying for all requests that fit this language, even in excess of the budgeted amount, until it bargained new language to the contrary. **Coos Bay Education Assn. v. Coos Bay School District**, 17 PECBR 502 (1998).

The Board has noted that in the private sector there are at least three exceptions to the rule requiring the employer to negotiate to impasse before taking unilateral action on a mandatory subject of bargaining. **NLRB v. Katz**, 369 U.S. 736 (1962):

"First, the employer may unilaterally terminate or repudiate conditions of employment which do not extend beyond the duration of an expired contract. In the private sector, the principal examples of such items are union security provisions and contract grievance procedures. Second, the employer may take unilateral action where the union has in effect authorized the employer to make those modifications and is thus said to have waived its statutory privilege to require the employer to bargain. Third, the employer may take action which is consistent with maintaining the "status quo." In the private sector, the "status quo" is maintained where the employer's conduct is consistent with past practice and/or where the employer does not violate the reasonable expectations of employees. But "status quo" is changed where an employer acts to obstruct or inhibit discussion of a particular matter by preempting a labor organization's position or by unilaterally canceling employee benefits." **Blue Mountain Community College**, supra, 3 PECBR at 2029.

Under subsequent ERB case decisions, the obligation to maintain the status quo during the hiatus period appears to be very broad. The only certain exceptions are these:

• An employer has no duty to process through a contractual grievance procedure a dispute that arose after the expiration of the agreement and prior to the negotiation of a new contract. **OSEA v. Salem School District**, 6 PECBR 5036 (1982). However, if the dispute concerned an action taken prior to the expiration of the agreement, the employer must process a grievance filed after contract expiration. The Board refused to reconsider this decision as requested by the complainants in **ONA and Linda Vaile v. Eastern Oregon Psychiatric Center**, 9 PECBR 9236 (1986).

• An employer has no obligation to maintain provisions pertaining to permissive subjects of bargaining. **Id.** A contractual requirement that only certain "factors" or "criteria" be used in judging employee performance was a permissive subject and therefore did not survive the contract expiration as part of the status quo. No "just cause" standard was ever established, by the expired contract or by practice, so neither the "bases" for the employee's evaluation nor the sufficiency of the "cause" for the evaluation can be challenged under the status quo doctrine. The contract's requirement of progressive discipline, however, did survive its expiration. **ONA and Linda Vaile v. Eastern Oregon Psychiatric Center**, 9 PECBR 9246 (1986).

• "Purely contractual rights" and certain provisions concerning the rights of the exclusive representative, such as fair share deductions expire along with the contract itself. **Id.** Thus, it was not an unfair labor practice for an employer to discontinue fair share deductions and access to grievance arbitration after the expiration of the contract since these were "purely contractual rights" that did not

survive the contract. **AFSCME v. City of Salem**, 11 PECBR 422 (1989); **Linn County Employees Assn. v. Linn County**, 13 PECBR 804 (1992).

Although a number of ERB decisions have clarified some of the items that must not be changed in order to fulfill the obligation to maintain the status quo, uncertainty continues to exist concerning some subjects. In such a situation, the employer may find it helpful to ask for a declaratory ruling from the Board rather than risk an unfair labor practice charge following a modification.

Penalties for unilateral implementation

ERB has considerable latitude in adopting "affirmative action" to cure unfair labor practices (see Section 2). In some cases where ERB has found illegal unilateral action ERB has ordered the parties to bargain over a remedy.

Effects of language extending a contract beyond its expiration date

In some cases, "evergreen" provisions included in the expired collective bargaining agreement (providing that contractual provisions will be in effect until a new contract is negotiated) will cancel out the employer's right to make unilateral changes during the hiatus period — even in those areas (like grievance procedures) that could be changed under ERB law. Where an employer refused to process a grievance after the expiration of the contract, the Board found a (1)(g) unfair labor practice because the employer violated that part of the contract providing for its continuance "until ... negotiations are discontinued by either party or a new Agreement has been mutually accepted." The Board found that neither party could discontinue negotiations until the conclusion of mediation, factfinding, and the 30-day cooling-off period. The Board suggested that a (1)(e) violation may also have occurred. **AFSCME Council 75 v. Richard L. Barron, Judge and William E. Brough, Director, Coos County Juvenile Dept.**, 8 PECBR 7819 (1985).

• In **ONA v. Bay Area Health District**, 8 PECBR 5937 (1983), the Board found a (1)(g) but not a (1)(e) violation when employer discontinued making fair share deductions after the expiration of the contract but before the end of the 30-day cooling off period, since the expired contract provided for its continuation "during the period of negotiations."

• In **David Slawson and IAFF 1817 v. Jackson County RFP District No. 3**, 9 PECBR 8921 (1986), the grievance procedure remained in place after contract expiration because contract provided it would survive during "negotiations for a successor agreement" and the parties had not completed factfinding.

Remedies for violations of duty to bargain in good faith

Generally, ERB's remedy for a violation of the duty to bargain in good faith by either party is an order to that party to cease and desist from refusing to bargain in good faith.

In some cases, where the employer has taken unilateral action in violation of ORS 243.672(1)(e), the Board has been forced to impose further remedies, in an attempt to restore the two parties' previous bargaining positions and to compensate individual employees for illegal

actions. However, the Board has not always ordered the unilateral action rescinded.

- Thus, in the **Gervais** case, the school district was ordered to cease and desist from contracting out services performed by the bus driver members of the unit, but the order was issued in December, 1980, some 15 months after the district began the contracted bus service. The district was ordered to pay to former bus drivers the amount they would have been paid during the previous year, plus interest for a portion of the period, but not ordered to reinstate the drivers. 5 PECBR at 4225.

- In another contracting out case, the employer was ordered to bargain in good faith with a unit of corrections deputies, to interest arbitration if necessary, over a remedy for contracting out work previously done by the unit members, but ERB did not order reinstatement of unit members in order to avoid the disruption of more than one change in the staffing of the program. **Multnomah County Corrections Deputies Assn. v. Multnomah County**, 22 PECBR 422 (2008).

- ERB did order reinstatement of hundreds of laid off employees whose mental health jobs were contracted out, but later agreed to grant a partial stay regarding reinstatement because there could be irreparable harm otherwise. The County had gotten rid of all infrastructure to operate the mental health services, including office space and equipment. Further, the County had appealed the decision, and ERB noted that unless it stayed its order for reinstatement, the County might not be able to obtain full relief if it ultimately won the case. **AFSCME, Local 3694 v. Josephine County**, 22 PECBR 190, **on motion to stay**, 22 PECBR 292 (2008).

- In a case where the school district had reduced the rate of pay for a kitchen storekeeper position when it became open, without bargaining the reduction with the association, the ERB ordered the district to make whole the employees who held the storekeeper position after the unilateral reduction in pay until the time when the two parties renegotiated the pay rate to the lower position in the next contract. **OSEA v. David Douglas School District**, 6 PECBR at 4686 (1981).

- In some cases, where the district has eventually agreed to bargaining, the ERB has fashioned a remedy that addresses only the interim prior to bargaining. Thus in the **Sherman Union High School District** case, the Board awarded the employee who was decreased from five hours to one hour per day the extra earnings she would have received for the two months between the date of implementation and the time the district and the association were first to meet for bargaining. The district was also ordered to reinstate her to her former duties until bargaining was concluded. 6 PECBR at 4720.

- The Board faced the question of appropriate remedies for failure to bargain upon the remand of **Gresham Grade Teachers Assn. v. Gresham Grade School District No. 4 and Fred Larson**, 6 PECBR 4953 (1981). The Court of Appeals had supported the ERB's finding that the district had violated ORS 243.672(1)(e) by refusing to bargain before implementing a change in student contact hours, but had ordered the Board to reconsider what remedies were called for by ORS 243.676, requiring ERB to "take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as necessary to effectuate the purposes of [the Act]." 52 Or. App. 881 (1981).

The Board on first hearing had issued only a cease and desist order. But on remand the ERB agreed that other "affirmative action" is necessary because otherwise employers "will feel no compulsion to bargain about the change prior to its implementation" if they know that any relief ordered will be prospective only from the date of the decision. In this case, the Board concluded that a bargaining order requiring the employer to negotiate with the union concerning the impact on employees of the change in working conditions is not enough of a remedy, but a "make-whole" order requiring reimbursement of employees for any losses suffered as the result of the unilateral change was too speculative. Therefore the Board ordered the two parties to commence bargaining concerning what the additional remedy should be; should agreement not be reached within 45 days from the date of the order, then the Board would choose from among each party's last proposals.

While maintaining that the Board itself has the power to fashion the remedy, the ERB concluded that its "innovative remedy" would best effectuate the purposes of the PECBA. 6

PECBR at 4958. In subsequent similar cases, ERB continued to order that the parties bargain an appropriate remedy or ERB would choose one of the two final proposals if the parties could not reach agreement. See **Salem Education Assn. v. Salem-Keizer School District**, 15 PECBR 302 (1994).

- When the parties cannot agree in bargaining upon a mutually agreeable remedy, ERB will award one of the proposals. For example, in **Teamsters v. City of Vale**, 20 PECBR 398 (2003), the Board selected the union's proposed remedy requiring the city to maintain wages and benefits for police officers laid off during the entire statutory bargaining period following the demand to bargain.

- Where an employer has illegally made a unilateral change, the remedy chosen will vary with the fact situation, but ERB will not fashion a remedy that penalizes members of the unit by forcing them to return benefits extended through unilateral implementation. Thus, in the case of **Roseburg Education Assn. v. Douglas County School District**, *supra*, the district was ordered to withdraw a pay increase that was in excess of the district's final offer to the union. However, employees were not required to return any of the increase already paid, although it would be used as an offset against any increase subsequently agreed to or properly unilaterally implemented. 8 PECBR 7938, 7962 (1985).