

**FILED: August 31, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF,  
Respondent,

v.

CITY OF PORTLAND,  
Petitioner.

Employment Relations Board  
UP1407

A142845

Argued and submitted on December 16, 2010.

Harry Auerbach, Chief Deputy City Attorney, argued the cause for petitioner. On the opening brief was Stephanie Harper, Deputy City Attorney. With him on the reply brief was Stephanie Harper, Deputy City Attorney.

Barbara J. Diamond argued the cause for respondent. With her on the brief was Diamond Law.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Landau, Judge pro tempore.

SERCOMBE, J.

Reversed and remanded for reconsideration.

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SERCOMBE, J.

Petitioner City of Portland (city) seeks judicial review of an order of the Employment Relations Board (ERB) that held that the city committed unfair labor practices under ORS 243.672(1)(e) and (f) by refusing to bargain with the Portland Fire Fighters' Association, Local 43, IAFF (association) about the impacts of a return-to-work program for permanently disabled fire fighters and by refusing to comply with the notification and bargaining procedures of ORS 243.698.<sup>1</sup> The city seeks reversal of ERB's rulings or remand to the agency for reconsideration. On review for errors of law, ORS 183.482(8)(a),<sup>2</sup> we reverse and remand for reconsideration.

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<sup>1</sup> ORS 243.672(1) provides, in part:

"It is an unfair labor practice for a public employer or its designated representative to do any of the following:

"\* \* \* \* \*

"(e) Refuse to bargain collectively in good faith with the exclusive representative.

"(f) Refuse or fail to comply with any provision of ORS 243.650 to 243.782."

ORS 243.698 details the notification and bargaining procedures that govern when a public employer anticipates changes in employment relations during the term of a collective bargaining agreement.

<sup>2</sup> ORS 183.482(8)(a) provides:

"The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall:

"(A) Set aside or modify the order; or

1           The following facts are undisputed by the parties and come from ERB's  
2 order and the underlying record. The association is the exclusive bargaining  
3 representative for all sworn personnel in Portland Fire and Rescue (Fire Bureau).  
4 Chapter 5 of the city charter establishes the Fire and Police Disability, Retirement and  
5 Death Benefit Plan (Plan), which provides disability and retirement benefits for Fire  
6 Bureau employees, their surviving spouses, and dependent minor children. Chapter 5  
7 also creates the Disability Fund, which administers the Plan; almost all of the sworn  
8 employees of the Fire Bureau are covered by the Disability Fund. Pursuant to Chapter 5  
9 and applicable administrative rules, association bargaining unit members who are unable  
10 to work because of an injury or illness may be eligible for benefits from the Disability  
11 Fund.

12           In 2001, the city council approved, and the Fire Chief implemented, a  
13 policy regarding temporary light-duty work assignments. The policy established five  
14 temporary light-duty positions that could be filled by Disability Fund members who were  
15 temporarily restricted from working in their regular jobs because of injury, illness, or  
16 pregnancy. That temporary light-duty policy continued until March 8, 2007, when it was  
17 replaced by a subsequent policy, which we discuss below. The association supported the  
18 creation of the temporary light-duty positions and never demanded to bargain about the  
19 decision to create the positions or the impacts of that decision.

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"(B) Remand the case to the agency for further action under a correct interpretation of the provision of law."

1           Before 2002, Disability Fund members who were permanently restricted  
2 from working were placed on injury leave, rather than formally separated from  
3 employment. However, beginning in 2002, the city began medically separating from  
4 employment such permanently restricted Disability Fund members, if their restrictions  
5 were not covered by the Americans with Disabilities Act. Also in 2002, the trustees of  
6 the Disability Fund began to consider subsidizing the wages of Fire Bureau employees  
7 who had permanent restrictions if they returned to light-duty work at the Fire Bureau.  
8 Discussions regarding that long-term light-duty work assignment concept continued  
9 through 2006.

10           From July 1, 2005 to June 30, 2007, the city and the association were  
11 parties to a collective bargaining agreement (CBA). That CBA included a management  
12 rights clause, which reserved to the city

13           "the exclusive right \* \* \* to reprimand, suspend, demote, discharge, or  
14 otherwise discipline employees for just cause except as modified in Article  
15 26 of this agreement; hire, promote, transfer, lay off and recall employees  
16 to work; \* \* \* expand, reduce, alter, combine, transfer, subcontract out;  
17 assign or cease any job, operation or service[;] \* \* \* determine \* \* \* the  
18 assignment of work, and the size and composition of the work force; \* \* \*  
19 and otherwise generally manage the City and direct the work force."

20 The management rights clause also provided that "[n]othing in this Agreement shall  
21 preclude the City Council from exercising its authority to classify, or reclassify positions  
22 and to establish entrance and promotional examination requirements."

23           In the spring of 2006, the Disability Fund analyzed five jobs that the Fire  
24 Bureau had indicated permanently restricted employees could fill: special operations

1 assistant, low-hazard fire inspector, logistics assistant, driver instructor, and Emergency  
2 Medical Services (EMS) wellness/fitness assistant. Only the driver instructor position  
3 was included on the salary schedule of the 2005-2007 CBA; however, it had not been  
4 filled since 2005. Under the CBA, the driver instructor position was classified as an  
5 inspector, entitled to 15 percent more pay than a fire fighter, if filled by an employee  
6 below the rank of Captain who worked 40 hours per week. In addition, the driver  
7 instructor was entitled to a six percent specialist pay differential. The other positions  
8 were new positions, although, in some cases, the duties assigned to the positions had been  
9 performed previously by fire fighters (low-hazard inspection duties) or several limited-  
10 term light-duty personnel (logistics assistant and EMS wellness/fitness assistant duties).

11 In the summer of 2006, the Fire Bureau notified the association that the city  
12 was considering creating a pilot return-to-work program for permanently restricted  
13 employees. In June 2006, the Disability Fund identified potential candidates for the  
14 program and sent a letter to those individuals about the anticipated restricted duty  
15 assignments. From July through December 2006, the Disability Fund contacted the  
16 disabled fire fighters' physicians, asking that the physicians determine if the disabled  
17 employees were medically able to perform the duties of the restricted assignment  
18 positions. From July through November 2006, Fire Marshal Klum discussed the return-  
19 to-work program with Association President Finders and Vice President Corah. The Fire  
20 Bureau eventually assigned the rank of fire fighter to the low-hazard fire inspector  
21 position and agreed to place the remaining positions in the inspector classification with a

1 six percent specialist pay differential. In October 2006, the Disability Fund and the Fire  
2 Bureau notified approximately 16 medically restricted fire fighters that they had been  
3 selected to participate in the program. A subsequent letter informed the selected  
4 individuals that training would begin on December 11, 2006.

5           Some of the recalled employees were unhappy. On December 11, the  
6 association sent a letter to the city demanding that the city "bargain over any new  
7 bargaining unit positions that the City intends to create, as well as over the terms and  
8 conditions of employment for 'restricted duty' positions that are being created under the  
9 [return-to-work] program and any other mandatory subjects of bargaining that are  
10 included in or impacted by the new program." The city declined the demand to bargain  
11 because it believed that the demand was premature and was related to a permissive  
12 subject of bargaining (assignment of work). Nonetheless, the association continued to  
13 ask the city to bargain about the return-to-work program. Although the city responded to  
14 questions posed by the association and engaged in informal discussions, the city  
15 continued to decline to bargain, maintaining that the CBA governed the terms and  
16 conditions of the returning workers' employment.

17           On March 7, 2007, the Fire Chief issued Memorandum 07-07, "Return to  
18 Work Policy--Pilot Program," which established a pilot program pertaining to temporary  
19 light-duty assignments and light-duty assignments for Disability Fund members with  
20 permanent restrictions. At the time the pilot program was implemented, the city charter  
21 provided that Disability Fund members who retired while still on disability for work-

1 related illness or injury received lifetime reimbursement benefits for injury-related  
2 medical expenses. However, an employee who went on disability, returned to work, and  
3 then retired received reimbursement for work-related medical expenses only until  
4 retirement.

5 In response to implementation of the pilot program, in April 2007, the  
6 association filed an unfair labor practice complaint with ERB against the city. The  
7 association alleged that the pilot program addressed "numerous mandatory subjects of  
8 bargaining" that were not covered by the existing CBA, including but not limited to

9 "the wages for newly-created 'restricted duty' positions;

10 "the change in process for filling 'tested' positions without tests, and the  
11 availability of untested positions to non-disabled bargaining unit members;

12 "the creation of a 'recall' procedure for medically separated former  
13 employees;

14 "job security issues for [return-to-work] employees who are unable to  
15 satisfactorily perform the duties of positions in which they are placed  
16 because of their permanent disabilities;

17 "the loss of medical benefits after retirement that will result from the  
18 reemployment of permanently disabled [association] members; \* \* \*

19 "leave availability and usage for [return-to-work] employees who are still  
20 receiving treatment for their disabilities;

21 "the elimination of EMT certification requirements; [and]

22 "workload issues."

23 The association claimed that the city had violated ORS 243.672(1)(e) when it refused to  
24 bargain about the decision, or the impacts of the decision, to create the return-to-work  
25 pilot program prior to the program's implementation. The association also claimed that

1 the city violated ORS 243.672(1)(f) when it failed to comply with the requirements of  
2 ORS 243.698 to bargain about changes in employment relations during the life of a  
3 contract.

4 The city answered and generally denied having a duty to bargain because  
5 "there were no anticipated changes in any mandatory subject of bargaining." The city  
6 also asserted an "affirmative defense" that

7 "[a]ny alleged mandatory subjects of bargaining outlined in \* \* \* the  
8 complaint are governed by the terms of a collective bargaining agreement  
9 between the parties. The City asserts that some of the alleged items are  
10 permissive for bargaining and some of the alleged items are prohibited for  
11 bargaining. As for the items that would otherwise be mandatory subjects of  
12 bargaining, no change has occurred that triggers a duty to notify under ORS  
13 243.698 or a duty to bargain under ORS 243.698 or ORS 243.672(1)(e)."

14 Further, the city asserted the separate "affirmative defense" that it "already had bargained  
15 to completion over any mandatory subjects and executed a collective bargaining  
16 agreement that reflects the complete and entire agreement of the parties as to all  
17 bargaining issues." The city requested that the complaint be dismissed and a declaration  
18 made that the city did not violate ORS 243.672(1)(e) or (f).

19 While the matter was pending, city voters passed Measure 26-93, which  
20 amended the city charter to provide that disabled Fire Bureau employees who return to  
21 work will receive lifetime reimbursement for medical expenses caused by a work-related  
22 injury or illness. The city asked ERB to take official notice of those election results and  
23 argued that the amendment to the city charter rendered "moot" that aspect of the  
24 association's complaint regarding the loss of post-retirement medical benefits for recalled



1 employees.

2           Ultimately, ERB took official notice of the election results, but held that it  
3 had jurisdiction over the parties and the subject matter of the dispute. ERB concluded  
4 that the city did not violate ORS 243.672(1)(e) by refusing to bargain about the decision  
5 to create the return-to-work program; however, ERB nonetheless determined that the city  
6 did violate ORS 243.672(1)(e) and (f) by failing to give the association notice of the  
7 return-to-work program and refusing to bargain about the impacts of the program.

8           ERB reasoned:

9           "Prior to March 2007, Association members who went out on disability and  
10 who were permanently restricted from performing their regular jobs had no  
11 obligation to ever return to work at the Fire Bureau. As a result of the  
12 City's March 2007 return-to-work program, many of these individuals were  
13 required to return to jobs at the Fire Bureau or lose their disability benefits.  
14 Thus, the program clearly changed working conditions for disabled  
15 employees. In addition, the return-to-work program changed conditions of  
16 employment that affected other Association bargaining unit members. In  
17 its return-to-work program, the City created new jobs with new salaries.  
18 The City also specified new requirements for filling these positions; these  
19 requirements barred all but permanently disabled Association bargaining  
20 unit members from filling these jobs. Accordingly, we conclude that the  
21 return-to-work program changed the status quo."

22 (Emphasis omitted.) Because the program concerned the city's right to assign work,  
23 however, ERB determined that the decision to create the program was a permissive--not a  
24 mandatory--subject of bargaining.<sup>3</sup> ERB then went on to determine that "the City's  
25 decision to implement a return-to-work program affects numerous working conditions  
26 that are mandatory subjects for negotiations, including salary, workload, promotional

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<sup>3</sup> ORS 243.650(7)(g) provides, in part, that "'employment relations' excludes \* \* \* assignment of duties."

1 opportunities, and job security." Accordingly, ERB concluded that the city was required  
2 to bargain about the "numerous mandatory impacts of its decision." ERB also rejected  
3 the city's affirmative defense that it had already "bargained to completion" over the issues  
4 raised by the return-to-work program.

5           On judicial review, the city raises five assignments of error; we write only  
6 to address the city's fourth assignment of error.<sup>4</sup> The city, relying on [Association of](#)  
7 [Oregon Corrections Employees v. DOC](#), 209 Or App 761, 770, 149 P3d 319 (2006),  
8 argues that ERB erred by failing to consider already existing CBA provisions, long-  
9 standing city policies, and the parties' course of conduct in determining that the city was  
10 required to bargain over the mandatory impacts of the decision to implement a return-to-  
11 work pilot program. The city contends that "[t]he return to work assignments[,] covering  
12 already existing bargaining unit members with already existing rights, did not happen in a  
13 vacuum" and that "ERB's reasoning on mandatory impacts fails to take into account  
14 already existing authority that answered any questions about impact." The association  
15 responds that ERB did not so err because the CBA "did not cover the new positions being  
16 created under the return to work program," the city "had never created 'restricted duty'  
17 positions for disabled workers and many questions arose from that choice," and "[i]t was  
18 clear to ERB that these issues had never been ironed out in formal negotiations despite

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<sup>4</sup> We reject without discussion the city's first three assignments of error, which pertain to whether the city had a duty to bargain over the reimbursement of post-retirement medical expenses of recalled employees in light of the enactment of Measure 26-93. In addition, the city conceded its fifth assignment of error in its reply brief.

1 the parties' attempt to work out a deal informally." For the reasons that follow, we  
2 conclude that ERB erred when it failed to construe the CBA before determining that the  
3 city's unilateral action in implementing the return-to-work program affected mandatory  
4 subjects of bargaining.

5           Under the Public Employees Collective Bargaining Act (PECBA), public  
6 employees have the right to "collective bargaining with their public employer on matters  
7 concerning employment relations." ORS 243.662. The term "employment relations" is  
8 statutorily defined by ORS 243.650(7) and includes, among other things, "matters  
9 concerning direct or indirect monetary benefits, hours, vacations, sick leave, [and]  
10 grievance procedures." ORS 243.650(7)(a). Matters that are within the statutory  
11 definition of "employment relations" are referred to as "mandatory" subjects of  
12 bargaining, whereas those matters that are outside the definition are known as  
13 "permissive" subjects of bargaining. *See Salem Police Employees Union v. City of*  
14 *Salem*, 308 Or 383, 390-91, 781 P2d 335 (1989) (describing the mandatory-permissive  
15 dichotomy and noting that it has been criticized and is not expressly incorporated into the  
16 governing statutes). It is an unfair labor practice for a public employer to "[r]efuse to  
17 bargain collectively in good faith with the exclusive representative" over mandatory  
18 subjects of bargaining. ORS 243.672(1)(e).

19           To lawfully change a mandatory subject of bargaining during the term of a  
20 CBA,

21           "the public employer must notify the exclusive representative of the  
22 anticipated change and complete the bargaining process. ORS 243.698(2).

1 Even if the changed employment qualification does not concern a  
2 mandatory bargaining subject, the employer may still be required to bargain  
3 with the exclusive representative concerning the *impacts* of the change.  
4 [*Salem Police Employees Union*, 308 Or at 393]."

5 *Beaverton Police Assoc. v. City of Beaverton*, 194 Or App 531, 536, 95 P3d 1160 (2004)

6 (emphasis in original). However, impacts on otherwise mandatory subjects of bargaining

7 that are insubstantial or *de minimis* do not trigger a duty to bargain. See ORS

8 243.650(7)(d) ("Employment relations' does not include subjects that have an

9 insubstantial or de minimis effect on public employee wages, hours, and other terms and

10 conditions of employment."); *Beaverton Police Assoc.*, 194 Or App at 536-37 (noting that

11 "[t]he changed minimum qualifications for a sergeant position" (a permissive subject)

12 had "an impact on monetary and nonmonetary benefits" (mandatory subjects) that

13 satisfied ORS 243.650(7)(d)).

14 In sum, an employer breaches the duty to bargain during the term of a CBA

15 by unilaterally implementing a decision that directly "changes" or derivatively "impacts"

16 a mandatory subject of bargaining in a manner that is substantial enough to matter. See

17 *Salem Police Employees Union*, 308 Or at 394 ("ERB is clear that the controlling

18 question in determining if state law requires advance negotiation in good faith is whether

19 the action or decision affects 'employment relations.'). Put another way, if an employer's

20 unilateral action sufficiently affects, either directly or derivatively, the status quo with

21 respect to mandatory bargaining subjects, the employer had a duty to bargain. Where a

22 "CBA authorizes an employer to act unilaterally with respect to certain conditions of

23 employment, then changing those conditions is not a change in the status quo, and a

1 failure to bargain before changing them cannot be an unfair labor practice." *Association*  
2 *of Oregon Corrections Employees*, 209 Or App at 769 (citing *Marion Cty. Law*  
3 *Enforcement Assn. v. Marion Cty.*, 130 Or App 569, 883 P2d 222 (1994), *rev den*, 320 Or  
4 567 (1995)). It does not matter whether the alleged change is direct or derivative, *i.e.*, an  
5 impact. In either case, ERB must construe the CBA in the first instance, and, "[i]f the  
6 CBA is ambiguous, then ERB is required to resolve the ambiguity by examining extrinsic  
7 evidence of the contracting parties' intent, if such evidence is available." *Association of*  
8 *Oregon Corrections Employees*, 209 Or App at 770 (citation omitted).

9           Returning to the instant case, ERB made findings of fact respecting certain  
10 provisions of the CBA, including the management rights clause. ERB also made findings  
11 of fact regarding the city's March 2007 policy that implemented the return-to-work  
12 program. However, in reasoning that the status quo had been changed and that  
13 mandatory subjects of bargaining, including salary, workload, promotional opportunities,  
14 and job security, had been affected by the city's unilateral decision to implement the  
15 return-to-work policy, ERB did not construe the CBA for the purpose of determining  
16 whether it provided for or authorized those changes and impacts. It has been the city's  
17 contention throughout these proceedings, both below and on judicial review, that already  
18 existing CBA provisions authorized the city's actions and that no change occurred to  
19 mandatory bargaining subjects so as to trigger the city's duty to bargain. ERB, and not  
20 this court, must interpret, in the first instance, the pertinent provisions of the CBA to  
21 determine whether they authorized the city to unilaterally affect mandatory subjects of

1 bargaining in the manner that it did.

2 Reversed and remanded for reconsideration.