School District Options
In Time of Financial Crisis

Nancy J. Hungerford

OACOA/OASE Winter Conference
January 31, 2009

OASE Conference, Jan. 31, 2009
Nancy J. Hungerford

School District Options
In Time of Financial Crisis

A. Reopen the collective bargaining agreement (CBA) and reduce pay or benefits, with or without a reduction in work days.

1. State law (PECBA) governing bargaining obligations provides for reopening in case of "inability to perform" the terms of the CBA, but utilizing this provision has never been tested because, it is believed, unions would reply that the employer could simply lay off staff under the RIF clause in the CBA or make some other cuts.

"(1) In the event any words or sections of a collective bargaining agreement are declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or the employees to perform to the terms of the agreement, then upon request by either party the invalid words or sections of the collective bargaining agreement shall be reopened for negotiation. (2) Renegotiation of a collective bargaining agreement pursuant to this section is subject to ORS 243.698 [the expedited 90-day bargaining process]." ORS 243.702 (emphasis added).

2. State law or regulations governing length of school year allow districts to fail to meet state standards on instructional time for a period of time.

OAR 581-022-1620 requires the school district to annually adopt and implement a school calendar which provides students at various grade levels a minimum number of instructional hours for a year (K- 405 hours, Grades 1-3 – 810 hours, Grades 4-8 – 900 hours, Grades 9-12 – 990 hours). ORS 327.103 provides that schools districts may fail to meet state standards (including standards for instructional time) without penalty if a corrections plan is filed and the deficiency has been corrected before the beginning of the next school year. However, the State Superintendent may allow an extension of time up to 12 months, if the superintendent determines that deficiencies cannot be corrected or removed before the start of the next school year.

3. Collective Bargaining Agreements may include "funding" or "reopener" clauses, but only carefully worded language allows the District to unilaterally open the contract and to unilaterally implement a change in salary or benefits or work year.

a. If the CBA is currently in force and the district is not currently bargaining a successor agreement:

(1) Some CBAs prescribe a set number of work days for an employee group and a prescribed annual salary. The district may not cut work days and salary unless there is:

--Mutual written and signed agreement with the association to amend or waive these provisions.

OR

--The district has the authority under specific CBA language to reopen the CBA, in which case the district must notify the association and bargain upon demand. If the reopener specifies that the expedited process will be used or refers to bargaining under ORS 243.698, the district may unilaterally implement its last offer if no agreement is reached after 90 days of good faith bargaining. If there is no reference to expedited bargaining or ORS 243.698, then the entire regular process must be exhausted (150 days of bargaining, 15 days of mediation, final offers, 30-day cooling-off period). *In the Matter of the Joint Petition for Declaratory Ruling Filed by the Medford School District and OSEA*, 20 PECBR 721, 725 (2004).

In 2003, the Oregon City Education Assn. grieved, contending a violation of the funding clause, which provides for renegotiation "[i]f the Board determines that resources will not meet the expenditure requirements," because the Board reopened the contract. The grievance was withdrawn as part of an agreement to cut days.

In 1993, the Tigard-Tualatin School District attempted to re-open the contract under a Funding clause that read: "All provisions of this agreement which have a monetary or budgetary effect are contingent on the availability of sufficient funds, as determined by the Board and as reflected in the budget adopted by the Board. The Board and administration will recommend to the Budget Committee funding sufficient to implement all provisions of this agreement. Should sufficient funds be unavailable, whether due to statutory changes or for other reasons, the Board may prospectively suspend for that fiscal year, or portion thereof, designated provisions of this agreement that have an economic or monetary effect and that the Board determines cannot be funded" and begin negotiations over replacement provisions. The Arbitrator found that the School Board acted reasonably in reopening because the District was laying off over 10% of its teachers and its budget for 93-94 was more than 10% less than its 92-93 budget, despite inflation and student growth. *TTEA v. Tigard-Tualatin School District* (Arbitrator Wilkinson, 1993)(emphasis added).

(2) Some CBAs (including most classified contracts) do not set a specified number of work days and/or annual salary. The district in that case may reduce work days UNLESS:

--Reduction in work days would be a change in the status quo (i.e., the district has always had a fixed number of work days for a certain employee group), in which case the district must notify the association and bargain upon demand, using the expedited bargaining process in ORS 243.698, and may unilaterally implement its last offer if no agreement is reached within 90 days.

OR

--Some other provision applies (for instance, if the RIF article in the classified contract specifies that reduction in work days will be considered a reduction in force, which must be carried out by specified procedures OR there is a "maintenance of standards" clause which guarantees continuation of economic benefits).

Using a layoff article as the authorization to cut a specific number of work days from all employees in the bargaining unit was found a violation of the teachers' CBA in two instances where the contract provided

that "the work year shall be 190 days." *Columbia 5J Education Assn. v. Columbia School District No. 5J* (David Paull, Arbitrator, 1997) (five-day general "layoff" of teachers violated the layoff provisions of the CBA, which required use of seniority and licensure); *Mid-Valley Bargaining Council v. Willamina School District* (Jean Savage, Arbitrator, 2000) (CBA expressly provided for reduction of the workforce using seniority principles and in so doing, excluded layoffs that did not observe these principles).

However, a reduction of the school year by 11 days in 2002-03 was not a violation of the CBA because the "work year" language stated that "the basic salary schedule. . . shall be based upon the Board adopted annual school calendar which shall designate the number of classroom days taught plus other days of duty not to exceed 190 days. . ." and because of a funding provision stating that "in the event of a partial or complete school closure due to lack of funds or for other reasons . . there shall be no requirement to pay for time not worked or to make up the lost days." *Scappoose Assn. of Classroom Teachers v. Scappoose School District 1J* (Arbitrator Duffy, 2004).

(3) In the absence of a specific written right to reopen the CBA, the district must implement the CBA as written, including all its economic provisions, unless the association agrees to suspend or reduce those provisions.

b. If the CBA has expired and the parties have not yet ratified a successor agreement:

(1) Where the contract has contained a guaranteed number of workdays and an annual salary, the district may propose a reduced number of workdays or discretionary language regarding workdays and a reduced salary schedule and/or language stating how the salary schedule will be adjusted if days are reduced. Such a proposal can be made even late in bargaining if there has been a significant change in conditions, such as the loss of anticipated state funding, since the bargaining process began.

If there is no agreement on reduced days and salary, the district can call impasse any time at least 15 days after the first mediation session. Both sides then have to submit final offers (which should include proposals on work days and salary). ERB will then publish the final offers, and 30 days late the district may unilaterally implement PART or ALL of its final offers. At least five days notice of intent to unilaterally implement must be given in advance. Bargaining and/or mediation sessions may be held during this final 30-day "cooling off" period. Unilateral implementation can happen any time after the 30th day from ERB's publishing final offers and does not have to happen exactly on the 31st day. The employees can go out on strike at the end of the 30-day period if at least 10 days' notice of strike is given and the strike notification letter lists only mandatory items.

(2) Where the expired CBA contained no guaranteed number of workdays and/or annual salary, the district is required to bargain the issue of reduced work year if reducing days would change the status quo. This bargaining would be combined with the regular bargaining for a successor agreement.

(3) If there is no change in the status quo (because the district has historically adjusted the number of work days of all classified employees), then there is no obligation to bargain this issue because of the district's plans to reduce the number of work days. However, in bargaining the next CBA, the association may make proposals to guarantee

workdays in the successor agreement, or to limit the situations in which the district can reduce work days from the current level.

B. Cut hours of current employees

1. Reducing full-time teachers or licensed administrators to less than full-time, or reducing part-time teachers or administrators (.5 FTE -.99 FTE) to below half-time will be considered reductions in force, which can be grieved if the provisions of ORS 342.934 and/or any applicable CBA reduction in force clause were not followed.

2. Reducing part-time (.5 FTE- .99 FTE) teachers or licensed administrators, but to no less than .5 FTE, is not a reduction in force under ORS 342.934 because of ORS 342.845(2). However, specific language in any applicable CBA might bring those reductions under the layoff provisions of the CBA.

3. Reducing the hours of classified employees is legal unless: (a) Reducing the hours of certain employee groups could be deemed a change in a long-term practice (in that case, the employer would have an obligation to notify the union and bargain upon demand prior to implementing the reduction in hours); or (b) There is language in the CBA requiring that the reduction-in-force provision be applied to situations where hours are being cut, or language prohibiting cuts in hours, and, if so, the CBA must be followed. See *OSEA v. Bend-LaPine School District* (Arbitrator Axon, 2002) (CBA provided that cuts in hours constituted a layoff, so reduction of all instructional assistants from 8 to 7 hours was a circumvention of the retention rights of the employees).

C. Bargain collective bargaining agreements with little or no increase in salary and insurance contributions, or bargaining "rollbacks."

1. Districts may bargain for a freeze or reduced salary schedule or insurance benefits during bargaining for a successor agreement as long as the requirements for bargaining in good faith are met.

2. Districts may reduce proposals previously made during the current bargaining process without engaging in "regressive" bargaining if there are changes in economic conditions that lead to such modified proposals.

Introducing a new issue that had previously been agreed upon by the parties made it a ULP for the employer to submit a "modified final offer" that reduced its salary proposal and returned to an earlier lower offer on insurance in response to the possibility of increases in PERS contributions. The district should have asked the union to return to the bargaining table due to the possibility of PERS increases, but these constituted inadequate evidence of "changed circumstances" that would allow a "regressive" proposal. *IAFF Local 2285 v. Douglas County Fire District #2,* 20 PECBR 235 (2003).

The Portland School District did not engage in regressive or surface bargaining, although it changed its proposals as bargaining continued to be less favorable to the association. The change in position resulted from changes in circumstances. The modification of the district's position was not "so unreasonable as to

compel the conclusion that the District had no intention of reaching agreement." The District's proposal requiring significant financial concessions of the association was a response to a serious financial crisis. "Under the circumstances, the proposals were not unduly harsh or unreasonable." *Portland Assn. of Teachers v. Portland School District*, 15 PECBR 692 (1995).

It was not a failure to bargaining in good faith when a county proposed throughout bargaining the same salary schedule and wage increase agreed to by other employee groups. ERB found this was not a ULP, either as "surface bargaining" or under the "totality of the conduct" test. ERB noted that the employer offered the same salary settlement as agreed to with other groups or the option of retaining the current salary schedule structure. The county also remained willing to consider other options that met its financial goals. *Public Works Assn. Local 626 v. Lane County*, 17 PECBR 879 (1998).

3. Under the PECBA, if the CBA has expired and no new agreement has been reached (the "hiatus" period), "the 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).

4. Regardless of economic conditions, the parties are obligated to "make some reasonable effort in some direction to reach agreement" with each other at the bargaining table and may not engage in "surface" bargaining.

ERB refused, 2-1, to find a ULP in the employer's insistence that its contributions for medical insurance be capped at the same level as the County paid for other employees. The County made no concessions or changes in this position during the more than one-year bargaining process, but the Board majority pointed out that ERB had never based a finding of surface bargaining solely on a party's refusal to make concessions at the bargaining table. But dissenting Board member Gamson said that the County did not fulfill its obligation to "make some reasonable effort in some direction to reach agreement" with the union. *AFSMCE Local 2936 v. Coos County*, 21 PECBR 360 (2006).

ERB will decide claims of "surface bargaining" based on these factors: Whether dilatory tactics were used; the content of the party's proposals; the behavior of a party's negotiator; the nature and number of concessions made; whether the party failed to explain its bargaining positions; and the course of negotiations. Although unusually harsh or unreasonable bargaining proposals can be evidence of failing to bargain in good faith, the proposals will be considered in light of the needs of the employer, such as severe financial crisis. *SEIU v. School District No. 1, Multnomah County*, 20 PECBR 420 (2003).

D. Lay Off Staff

1. State law provides a required procedure for teachers and licensed administrators but not classified employees.

ORS 342.934 governs layoff for licensed teachers and administrators below the rank of assistant superintendent: "The procedure for reductions in teacher staff positions resulting from the school district's lack of funds to continue its educational program at its anticipated level or resulting from the district's elimination or adjustment of classes due to administrative decision shall be as provided in this section. . ." ORS 342.934(1).

Classified employee layoff is not addressed in the Oregon statutes or administrative rules. Arguably, ORS 332.544 (requiring a school board hearing for a non-licensed employee who has been demoted or dismissed) applies where there is no CBA language on RIF.

2. Collective bargaining agreements generally provide procedures and criteria for laying off specific employees but do not restrict the school board's decision-making regarding when RIFing will be required and which programs/positions will be eliminated.

Few collective bargaining agreements set forth conditions to be met before layoff can be instituted, although grievances challenging a district's right to make such reductions are not unknown. See *North Clackamas Ed. Assn. v. North Clackamas School District No. 12* (Arbitrator Abernathy, AAA File 75-390-0264-91, 1992) (The district did not violate CBA provisions by laying off a teacher, even though funding for the following school year was still in doubt after Ballot Measure 5, because the district had to meet notice timelines set by the CBA); *Central Education Assn. v. Central School District* (Arbitrator Keltner, 1999) (Arbitrator found no violation of the CBA because at the time of the layoff there was a proposed reduction in the instructional budget for the following school year, there appeared to be a reduction in the number of students from earlier months of the school year, and counseling services, although continued at the middle school, were provided in a different way through regular teaches and administrators.)

3. Individual employment contracts, now required under ORS 342.603 for each administrator (excluding those licensed administrators subject to ORS 342.934) should contain provisions making those contracts subject to availability of funding. Language in the agreement should specify conditions under which the contract can be terminated, and any "bumping" or "recall" rights (although these must not violate rights of other employees under their CBAs and/or ORS 342.934).

A school district shall "enter into an employment contract with each administrator, that has provisions that cover the duration of the contract, conditions for contract termination and extension and conditions for employee resignation." Administrator means "a person who is employed as an administrator or is performing administrative duties, regardless of whether the person is required to have a license, and includes but is not limited to superintendents, assistant superintendents and business managers." Administrator "does not include a person who is subject to ORS 342.805 to 342.937." ORS 342.603.

4. Local board policy or procedures may also govern layoff and/or recall provisions for employees, especially those not covered by CBAs.

The local school district "shall establish" procedures to govern recall of licensed administrators and teachers after consulting with those employees or their representatives. ORS 342.934(6).

In Vernonia, an arbitrator found no violation of the RIF statute or district policy when an administrator (who had never been a teacher in the district) was not allowed to bump a less senior counselor. The district had the right to keep the less senior teacher (a counselor) on the basis of "competence" since the vice-principal had last worked full-time as a counselor more than 10 years previously. *McClellan v. Vernonia School District* (Arbitrator Lankford) (2003).

5. Challenge of layoff decisions will be through arbitration, which is an individual right of those covered by ORS 342.934 (licensed teachers and administrators) regardless of any provision of the CBA.

In general, when eliminating positions, school districts have laid off the least senior teachers from among each license/endorsement group where positions will be cut. However, there are these exceptions:

(1) Oregon law allows a school district to keep a junior teacher or administrator who has greater "competence" (defined as "the ability to teach a subject or grade level based on recent teaching experience related to that subject or grade level within the last five years, or educational attainments, or both, but not based solely on being licensed to teach" ORS 342.934(9)(a)). Since 1997, the law has prohibited districts from bargaining away "competence" as a criteria for layoff. The law allows districts and associations to bargain alternative definitions of "competence," however.

The district did not violate the CBA when it defined "grade level" as K-5, 6-8, and 9-12, and therefore recalled two elementary teachers to elementary vacancies rather than two more senior middle and high school teachers who had the appropriate license but no recent elementary teaching experience. *Junction City Ed. Assn. v. Junction City School District* (Arbitrator Hein, 2004).

Elimination of elementary positions in music, media, PE have resulted in difficult decisions regarding whether "competence" will be used to prevent the return of more senior teachers to elementary classroom positions (if licensed) or to "bump" junior teachers in secondary music or PE positions. Since 2003, more associations have bargained guarantees of elementary prep time within the student day; this will make it much more difficult to lay off elementary specialists.

(2) Oregon law allows a school district to keep a junior teacher or administrator who is determined by the district to have greater "merit" (defined as "the measurement of one teacher's ability and effectiveness against the ability and effectiveness of another teacher." ORS 342.834(9)(b)), but many districts have bargained this away because of the difficulty of defending this decision in arbitration.

Typically, OEA locals have filed grievances whenever a more senior teacher was laid off and a less senior teacher was retained because of greater "merit" and/or "competence" However, some cases are not pushed by the union and are therefore dropped (i.e., retention of less senior middle school music teacher in Tillamook while more senior elementary music teacher was laid off).

(3) When a more senior teacher is laid off because of lack of required license or endorsement, grievances are less likely to be filed or pursued. In some cases, however, grievances have been filed over a district's refusal to request alternative licenses to allow more senior teachers to retain a job by teaching outside their endorsement areas, but this is less common with the arrival of Highly Qualified requirements as part of the federal "No Child Left Behind" law.

A district complied with its CBA when it reduced its staff of school psychologists from 4 to 1.6 positions, but expanding the number of Special Education Assessment Specialists, which required an Oregon teaching license or handicapped learner endorsement as well as prior K-12 classroom teaching experience, and

therefore retaining a psychologist who was junior to three others laid-off. *Corvallis Ed. Assn. v. Corvallis School District* (Arbitrator Axon, 2004).

A small district violated ORS 342.934 by laying off a second-year teacher who was more senior than four others because the district determined that the teacher did not have the proper licenses at the time of layoff to fill the remaining positions since his Transitional license was due to expire Sept. 5 and could not be renewed. Nevertheless, the teacher held an initial license with social studies endorsement and he could have been assigned to teach social studies in grades 7-8 as well as 9-12. Further, since the district had commonly asked for waivers in the past and had asked for waivers for two of the retained less-senior teachers, the district could have assigned the grievant so he was less misassigned than the two other teachers. *Long Creek Ed. Assn. v. Long Creek School District* (Arbitrator Tornquist, 2003).

6. Options upon elimination of administrative positions

ORS 342.845(5)(b) gives the district the right to transfer an administrator to any other administrative position, even a lower-ranking position, without creating FDAB rights for contract administrators, as long as the prior year's salary is not reduced. If a reduction in salary is the result, then the district's action would have to meet statutory requirements for a "reduction in force" or a "dismissal."

Nothing in ORS 342.934 implies an obligation to promote an administrator, whose position was eliminated, to a higher administrative opening. The provisions of ORS 342.934(2), requiring a district to "make every reasonable effort to transfer teachers of courses scheduled for discontinuation to other teaching positions for which they are licensed and qualified" does not apply to administrators. Instead, ORS 342.934(5) provides the right to return to a teaching position for those administrators who had been teachers in the same district at one time. *Wilkins v. Portland School District 1J* (Arbitrator Pesonen, 2004).

A district did not violate ORS 342.934 when it reduced a more senior administrator (placing her back in the teaching ranks) on the basis of competence (interpreted in the case of administrators as experience in groupings of positions, including "principals," "assistant principals" "central office directors" and "central office coordinators.") The Arbitrator also found that the school board can delegate to the superintendent the authority to make layoff decisions, subject to the approval of the board, and requires no formal hearing process to make the RIF decisions. *Walker v. Baker School District 5J* (Arbitrator Runkel, 2002).

E. Contract out services currently provided by district employees

1. The bargaining obligation (except as noted below) under the PECBA covers bargaining both the decision and the impact of "contracting out," which is defined as taking work exclusively assigned to members of the bargaining unit and paying to have non-unit members perform that work.

2. A school district's plan to contract out services currently performed by bargaining unit members will trigger an obligation to bargain, upon demand by the association, over both the decision and the impact of contracting out UNLESS the current CBA has enabling language, specifically recognizing that the association has given up that right.

3. The district may choose at what point in the process of studying, getting quotes, going out to bid, opening bids, etc. that notice will be given, but notice must be given in a timely fashion such that there is a reasonable period for bargaining before the final action

(accepting a bid) is taken. Generally, that means bargaining will be conducted under the 90-day expedited process spelled out in ORS 243.698 UNLESS

--If the current CBA refers to bargaining over contracting out, but doesn't provide for such bargaining to be conducted under ORS 243.698, then ERB's position is that bargaining must be under the regular process (150 days' at the table, etc.).

--If the current CBA does not reference contracting out, then the 90-day expedited bargaining process under ORS 243.698 is the one that will apply, if notice is given before the parties are in bargaining over a successor agreement. *In the Matter of the Joint Petition for Declaratory Ruling Filed by Multnomah County School District No. 1 and SEIU*, 19 PECBR 837 (2002).

--If the current CBA has expired or is going to expire and the association has already come to the table with a bargaining proposal, ERB takes the position that the longer, "regular" bargaining process applies and the bargaining over contracting out must be rolled into the successor bargaining. *Sandy Union High School District Declaratory Ruling Petition*, 16 PECBR 699 (1996).

4. Bargaining over contracting out must be conducted by each side in good faith. However, hard bargaining does not constitute bad-faith bargaining, nor does a district's unwillingness to consider other options that do not save as much money. See *OSEA v. Clatskanie School District*, 21 PECBR 599 (2007), aff'd without opinion, 215 Or App __ (2008); *SEIU v. School District No. 1, Multnomah County*, 20 PECBR 420 (2003) (good faith bargaining over the decision to contract out requires timely notice; allowing a meaningful opportunity to bargain the ultimate decision and the impacts; completion of the process before implementation; and consideration by the employer of alternatives to contracting out).

F. Change staffing schedules or ratios to reduce staffing costs.

1. Changes that increase teacher contact time with students (instruction and/or supervision) without bargaining to completion before implementing will be deemed ULPs because teacher-student contact time is a mandatory subject of bargaining.

2. On the other hand, changing schedules so that guaranteed minutes of prep time are placed outside the student day is a management prerogative in most cases because the scheduling of prep time is a permissive subject. (However, if there is a resulting increase in student contact time, that change must be bargained to completion before implementation).

3. Increasing class sizes need not be bargained because class size is a permissive subject of bargaining.

GUIDE FOR ADMINISTRATORS: CAN I TAKE THIS ADMINISTRATIVE ACTION? Ask yourself:

1. Does this action violate any portion of the applicable collective bargaining agreement?

a. If there is specific contract language on this topic, does the action violate the clear and unambiguous language of the CBA?

b. If there is specific language on the topic, but it is ambiguous (susceptible to two or more possible interpretations), then consider:

--Is there other language in the CBA, or in the context of the disputed language, that supports my interpretation of ambiguous language?

--Is there bargaining history (generally statements of intent or interpretation at the bargaining table) supporting my interpretation of ambiguous language as allowing me to make this change?

--Is there past practice that is so clear, repeated, and known to the Association that the past practice indicates a mutual intent as to the meaning of the ambiguous CBA language?

--If none of the above aids to interpretation exists, the dispute will be decided against the party whose team drafted the ambiguous language.

2. If there is no violation of any portion of the applicable CBA, the action would constitute an unfair labor practice (ULP) if the Association can prove:

a. The administrative action constituted a change in the "status quo" (a practice that is clear, consistent, and repeated over a long period of time) concerning a matter that is not dictated or covered by the CBA, and

b. The subject of the change is a mandatory term or condition of employment, as defined in ORS 243.650(7), and

c. The District made the change without notifying the Association in advance of implementation and/or without bargaining in good faith for at least a 90-calendar-day period over the change (if bargaining has been demanded within 14 days of the notice).