Public Employees and Oregon’s Scope of Bargaining

Akin Blitz
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Edited by
Marcus Widenor

Issue No. 18

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# LERC Monograph Series

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The Editor

Marcus Widenor is an associate professor at the University of Oregon Labor Education and Research Center. He received his B.A. in history from Antioch College and a master’s degree in history from the University of Massachusetts. He has worked as an organizer for the International Ladies’ Garment Workers’ Union in Alabama and a labor educator at the University of Minnesota. Widenor has served as editor of the LERC Monograph Series since 1996.

The Authors

Akin Blitz received his J.D. from the Northwestern School of Law at Lewis & Clark College in 1975, and an LL.M. in labor and employment law from Georgetown University Law Center in 1979. He is a member of the firm Bullard Smith Jerstedt Wilson in Portland.

Mr. Blitz represents employers in the public and private sectors in Oregon and Washington. His practice focuses on labor relations and employment law, including collective bargaining and labor contract administration.

Liz Joffe received her J.D. from the University of California at Berkeley, Boalt Hall School of Law in 1993. She is a founding member of the Portland firm McKanna Bishop Joffe & Sullivan LLP, which represents employees and labor unions in the public and the private sectors.

Ms. Joffe is the author of several articles on labor law, including co-authoring the section on the “Duty to Bargain in Good Faith” in the Oregon State Bar’s publication, Labor and Employment Law. She is a member of the AFL-CIO’s Lawyers Coordinating Committee.
This edition of the LERC Monograph marks the first time that we have revisited an issue to update a past volume. In 1988 union advocate Katie Whalen (later an ERB member and today an arbitrator) and management advocate Les Smith wrote the first LERC Monograph on the scope of bargaining question (Oregon’s Scope of Bargaining: From Schools to Public Safety, LERC Monograph Number 6). At that time the ERB was in a transitional period on how scope would be interpreted. While the Ellis and previous boards had sorted most subjects into the two main categories—permissive and mandatory—the parties were becoming more skilled at making arguments to either expand or constrain the list of subjects they were required to bargain over. The result was a period of uncertainty, when issues like school class size, the manning of fire engines, and the scheduling of vacations became fodder for disputes over what was mandatory and what was permissive. Matters were complicated by the 1992 State Supreme Court’s reversal of an ERB scope ruling in its Tigard school class size case.

The changes made in the bargaining statute by Senate Bill 750 in 1995 included various provisions on scope of bargaining questions. But how much did they change the basic terrain? Certainly there continues to be much anxiety about the issue among both labor and management representatives, as workshops on scope have been regularly oversubscribed at our biannual PERC conference over the last ten years.

Evidence that scope is still a volatile issue in labor relations can be seen in the fact as this issue of the monograph goes to press the legislature in Salem has just passed an amendment to the PECBA that alters the definition of scope. Senate Bill 400 allows public safety workers to negotiate over a broader range of staffing and safety issues than had been permitted under the 1995 SB 750 revisions. This monograph does not discuss the changes made by SB 400, and it is too early to know exactly how the ERB will interpret the

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1 C-Engrossed Senate Bill 400. Ordered by the House May 2. The bill adds to the definition of “employment relations,” for public safety employees only, “…safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees.” ORS 243.650(7)(f).
statute. The issue of safety and staffing for public safety workers has been a controversial one since the 1980’s, when it fueled some of the earliest debates on the relationship between employee’s rights and management prerogatives. This recent change in the law illustrates how the scope of bargaining continues to be a crucial issue in Oregon’s public sector labor environment.

This monograph offers an updated perspective on the status of the scope of bargaining under Oregon’s PECBA by two experienced advocates, Akin Blitz, of the Portland firm Bullard Smith Jernstedt Wilson, and Liz Joffe, a partner in the firm McKanna Bishop Joffe & Sullivan, LLP, representing unions. My thanks for their patience and persistence in helping complete the manuscript in what has become a protracted process. We lost one of our principal authors when Ken Bemis, also a member of the Bullard firm, left his position to pursue a new career. The editor and authors would like to thank Ken for his efforts in helping write the initial draft of this monograph. I also want to thank Bullard firm associate David Thompson who stepped in early to help us with research on the monograph while we were shifting co-authorship over to Akin.

I would also like to thank the Hungerford Law firm, which has given us permission to reprint an updated version of the Scope of Bargaining Chart that is published as part of their Oregon Labor Law Today reference guide for management advocates. Nancy Hungerford and the rest of her firm (and family) have been generous supporters of the monograph series. Nancy has authored or co-authored four papers in the series over the years, making her one of our most frequent contributors. She has also been a strong supporter and participant in the PERC conference and we greatly appreciate her allowing us to include this valuable tool for advocates.

As always, there are numerous other people who have made valuable contributions to the monograph. Chief among them is Leola Jewett in the LERC office, who added her patient and professional touch to the layout and production of the final product, and Wendell Anderson, our copy editor.

Marcus Widenor
May 2007
Introduction: Do We Have to Negotiate About That?

At the heart of any collective bargaining statute is the framework for how the parties decide which workplace topics they must negotiate over. This issue speaks directly to the tension between recognized management prerogatives (management rights) and the right of employees and their representatives to have some control over the terms of their employment. This “scope of bargaining” was originally established in the private sector under section 9(a) of the National Labor Relations Act, which created a “duty to bargain” “in respect of rates of pay, wages, hours of employment, or other conditions of employment.”¹ The NLRA model then became the starting point for all subsequent bargaining statutes at the federal, state, and local levels.

National Labor Relations Board and Court interpretations of the National Labor Relations Act made a distinction between three “categories of bargaining subjects” when they defined scope:

*Mandatory.* Issues over which the parties must negotiate, and over which the parties may take economic action at impasse after expiration of the agreement (strike or lockout),

*Permissive.* Issues over which the parties may, but are not required to, negotiate, and over which they may not take economic action at impasse, and

*Prohibited.* Proposals that may not be negotiated at all.

The U.S. Supreme Court made its first distinction between mandatory and permissive subjects in its 1958 *Borg-Warner* decision.² Here the Court enforced a decision of the NLRB, which ruled a company proposal regarding

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¹ 49 Stat., 449 (1935).
² *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). The designation of prohibited subjects of bargaining occurred ten years earlier when the NLRB found a proposal for a closed shop to be illegal in *National Maritime Union v. Texas Co.*, 22 LRRM 1289 (1948).
internal union matters (the conduct of a prestrike authorization and exclusion of the International Union as party to the agreement) lay outside the bounds of “conditions of employment,” and was not something about which the union must negotiate—i.e., it was a permissive, and not a mandatory subject.

Oregon’s Public Employee Collective Bargaining Act (PECBA) was drafted with a broad scope of bargaining in 1973. That is to say, it requires the parties to negotiate over a comprehensive set of issues, with few exclusions or exceptions. The negotiations that led to the passage of the statute involved numerous compromises. These included management prevailing on the issue of who was covered under the law (a broader supervisor exclusion), but labor prevailing with a definition of scope that did not exclude many issues.³

PECBA’s original language specified that labor and management must bargain over all issues related to “employment relations,” defined as:

Includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedure and other conditions of employment.⁴

Interpretations of what constituted “other conditions of employment” would become the main battleground between the parties as collective bargaining in the state matured over the next thirty years.

As a counterpoint to Oregon’s broad scope of bargaining provision, some other state bargaining laws are much more constrained. New Jersey is a good example.⁵ Under its statute there are no permissive subjects at all—items are either mandatory or prohibited. Furthermore, the parties are not permitted to negotiate over the “impact” of management decisions that are not mandatory—something that is permitted under both the NLRA and the PECBA.

³ Marcus Widenor, Public Sector Bargaining in Oregon: The Enactment of the PECBA. LERC MONOGRAPH SERIES, No 8, 1989.
⁴ ORS 243.650(7).
Adoption of the NLRA Scope Standard by the ERB

The three-tiered typology for examining scope of bargaining issues was adopted by the ERB after the passage of the PECBA in a series of three cases that took up a total of ninety-two bargaining proposals and distinguished between the three types of bargaining subjects. As the ERB stated in its 1975 *Springfield Edu. Assn.* ruling:

A prohibited item for bargaining is one which would require either party to do an illegal act or perform an act which is contrary to any other statutory or constitutional provision. A prohibited item is one for which an employer may not enter into an agreement.

A permissive item for bargaining is one which, either because inherently a prerogative of management or within the proprietary function of management, or delegated as an exclusive management prerogative by constitutional or statutory law or state administrative rule, falls within the scope of the managerial or proprietary prerogatives of the school district. A public employer may agree or not agree to talk about a permissive topic, but cannot be required to bargain. A public employer may not be required to take to mediation a permissive topic of bargaining.

Any bargaining proposal within the definition of employment relations which is neither prohibited nor permissive is within the scope of mandatory bargaining. A public employer must bargain with the exclusive representative, through mediation, fact finding and compulsory arbitration, or to the point of a strike, over any proposal falling within the

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scope of mandatory bargaining. However, this obligation to bargain does not require that an employer agree to any proposal, but only that he be willing to enter into good faith discussions concerning the proposal.  

**Use of the “Balancing Test”**

To determine whether a bargaining issue concerning “other conditions of employment” is mandatory or permissive, the ERB has adopted a “balancing test,” following the precedent set by the NLRA. This test is applied to evaluate whether a bargaining proposal in an area not clearly covered by the definition of the duty to bargaining under the law wages, hours, and conditions of employment has a greater effect on management prerogatives as opposed to on the working conditions of the employees.

In introducing the subjects of bargaining and the use of the balancing test, the ERB recognized some differences between the worlds of the public-sector and the private-sector workplace:

Precedent in the private sector has long recognized that certain decisions are central to management control and are therefore solely within the prerogative of management and need not be bargained over without consent of the employer. In the public sector, these elements of management prerogatives may arise in a different fashion than in the private sector, i.e. through statute or through public policy, but it would be contrary to a common-sense approach to the realities of collective bargaining to fail to acknowledge the existence of such prerogatives.

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8 *Springfield* at 350. The decision mentions the relationship of scope to fact-finding, which was eliminated as a mandatory step in the PECBA dispute-resolution process in 1987. The union’s attorney for all three of the early scope cases was Ted Kulongoski, an architect of the PECBA and now governor of Oregon.

9 *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (no duty to bargain over the partial closure of a business). The court referenced its earlier decision in *Fibreboard Paper Corp. v. NLRB*, 57 LRRM 2609, (subcontracting of work found to be a mandatory subject) where Justice Stewart wrote a concurring opinion emphasizing how the court must distinguish between issues that are fundamental business decisions, reserved for the employer, and those that affect employees’ “conditions of employment,” making them mandatory under the Act.

10 *Springfield* at 349.
Seeking a method to apply the balancing test, the ERB analogized it to a teeter-totter in a 1983 case involving negotiations between teachers and a local school board:

On one end of the seesaw we have the school board; on the other ends sits the teaching staff. Before bargaining begins, the parties weigh the same; and thus the seesaw is perfectly balanced. The labor organization that represents the teachers drops a negotiations proposal onto the seesaw. If the proposal has a greater effect on educational policy or management prerogatives than it has on the teacher’s employment conditions, the proposal lands on the school board’s side of the seesaw, which causes the school board to teeter toward the ground while the teaching staff totters upward. That proposal is permissive, then. If the proposal has a greater effect on the teachers’ employment conditions than it has on management prerogatives, the proposal lands on the teaching staff’s side of the seesaw, which causes the teaching staff to teeter toward the ground while the school board totters upward. That proposal is mandatory.\(^\text{11}\)

While the balancing test has been criticized for its subjectivity, it has remained the primary framework for determining close calls on scope of bargaining issues since the inception of the PECBA.

**Setting the Stage for SB 750: The Significant Scope Cases from the mid-1980s to the mid-1990s**

In the decade leading up to the 1995 revision of the PECBA, there were significant developments in the scope-of-bargaining case law. In a number of respects, the Board’s decisions during this period shifted toward a recognition that some matters previously regarded as permissive management prerogatives were, in fact, inextricably linked to traditional mandatory subjects of bargaining. The major developments during that period can be divided into three main case categories: (1) “workload” as a mandatory subject; (2) staffing and scheduling as affecting the mandatory subjects of hours, vacations, and safety; and (3) school class size as a mandatory subject. The cases in these

areas set the stage for amending the statute in 1995 to narrow the definition of “employment relations” in the areas of workload, staffing levels, safety issues, and school class size.

**Workload as a Mandatory Subject: The OPEU v. State Scope Decision**

The Board’s decision in *Oregon Public Employees Union, Local 503 v. State of Oregon*\(^{12}\) involved an analysis of multiple union proposals over which the State had refused to bargain, including transfers, overtime, job security, work schedules, promotions, and workload. The most significant aspect of this case, vis a vis subsequent amendments to the definition of “employment relations,” was the Board’s holding with respect to workload.

The Board held that OPEU’s proposal for extra-duty pay and for a standard for discipline for employees who perform extra duty work was mandatory.\(^{13}\) The Board relied on well-settled private-sector precedent finding workload to fall within “other terms and conditions of employment,”\(^{14}\) noting that “the status of workload as a bargaining subject under the PECBA is not so clearly established.”\(^{15}\) The Board then charted the lack of clarity in its precedents:

- proposals seeking extra pay or preparation time for teachers based on class size were mandatory;

- a proposal requiring extra pay when workload increased because the employer did not hire a substitute for an absent employee was permissive; and

- a proposal regarding the number of rooms custodians were required to clean during the workday was permissive.\(^{16}\)

\(^{12}\) 10 PECBR 51 (1987).

\(^{13}\) Id. at 80.

\(^{14}\) Id. at 75. NLRB precedent regarding workload as a mandatory subject of bargaining began with *Beacon Piece Dyeing and Finishing*, 42 LRRM 1489 (1958) (employer must bargain over workload proposal concerning how many machines a worker must operate).

\(^{15}\) Id. at 75.

Muddying the waters further, the Board held that a police-union proposal prohibiting the assignment of non-police duties was permissive, but a proposal attaching premium pay to such assignment of duties was mandatory. 17

After mapping these inconsistent holdings, the Board then applied the balancing test to definitively hold that workload is a mandatory subject of bargaining:

We hold that the topic of “workload” is of like character to monetary benefits, hours, vacations, sick leave and grievance procedures, and that it therefore is a “condition of employment” concerning which bargaining is mandatory. The amount and the type of work an employee must perform in order to earn his “monetary benefits” has a pervasive effect on his working conditions. The employer, of course, has the primary interest in determining how much production must be gained from its work force. The employees, however, have the primary interest in how much of that production each individual is required to contribute. The workload required implicates other recognized “employment relations,” for example, job security issues such as discipline and discharge, as well as monetary benefits. It is only possible to rationally bargain for “an honest day’s pay” if one can also negotiate the boundaries and the contents of “an honest day’s work.” On balance, “workload” as a general subject affects working conditions more than it affects inherent management prerogatives. 18

The Board went on to clarify the distinction between mandatory workload proposals and permissive assignment of duties proposals:

Workload, as a mandatory bargaining subject, encompasses the general types of work to be performed by a class of employee and the amount of such work required in a defined period (e.g., day, week, hour). Assignment of duties, as a permissive subject, concerns the actual direction of employees during the workday. For example, an employer must bargain

18 10 PECBR at 79.
before imposing “substantial additional duties and burdens” on its employees, but need not bargain about changes in the assignment of duties that are within the employees’ normal area of operations.19

This decision significantly altered the law by overruling in part a number of prior cases addressing workload.20 As the Board noted:

We recognize that the conclusions in this day’s Order will overturn some prior determinations of this Board and our predecessor boards. We believe our decision today is necessary to provide coherence and rationality to scope of bargaining decisions concerning hours and workloads.21

Then Board Chair Daniel Ellis wrote a separate opinion concurring with and dissenting from the majority.22 He concurred with all conclusions that held proposals were permissive and dissented from all that held proposals mandatory, “because they constitute radical changes of existing precedent.”23 Chairman Ellis accused his fellow Board members of having “chopped away at the once staunch tree of inherent management prerogative to the point that it is now but a frail reed which must bow to the will of public employees.”24 Under Chairman Ellis’ view, he would have applied the balancing test to the per se mandatory subjects of “wages” and “hours.”25 He dramatically characterized the majority’s conclusion that OPEU’s workload proposal was mandatory as “an egregious inroad into inherent public employer responsibility” and “the most sweeping degradation of inherent management prerogatives ever conceived by this Board.”26

19 Id. (emphasis added).
21 10 PECBR at 80.
22 Id. at 81-89.
23 Id. at 81.
24 Id.
25 Id. at 82-83.
26 Id. at 88.
The Board’s clear holding that “workload” is mandatory for bargaining and Chairman Ellis’ strident dissent contributed to the fervor that lead to SB 750’s exclusion of “workload when the effect on duties is insubstantial” from the definition of “employment relations.”  

**Staffing Levels and Scheduling: The Road to and from the Portland Fire Fighters Decisions**

Another contentious scope issue has involved proposals that relate to employee staffing and assignment, and also to hours, vacations, and safety. While staffing and assignment are traditional management prerogatives and therefore permissive subjects of bargaining, hours and vacations are at the core of mandatory bargaining subjects and are expressly enumerated in the definition of “employment relations.” Likewise, although “safety” is not among the enumerated mandatory subjects, it had traditionally been held to be within the “other conditions of employment” prong of mandatory subjects. For years prior to SB 750, the level of staffing, i.e., the number of employees assigned to a particular shift, station, or event had been held to be permissive, except when staffing substantially affected employee safety or workload. In the years leading up to SB 750, however, Board law on these issues became murkier.

The Board gradually began to recognize that staffing and assignment are inextricably linked to quintessential mandatory subjects of bargaining. In *Oregon State Police Officers’ Assn. v. State of Oregon*, the Board held that shift selection on the basis of seniority and trading shifts were permissive, but changing rotating days off and eliminating day-off trading were mandatory. The practice had been to allow individual police stations to determine separate

27 ORS 243.650(f).
29 See e.g. *Executive Dept. v. Oregon State Police Officers’ Assn.*, 8 PECBR 7874, 7907-7910 (1985) (holding as permissive “assignment” matters proposal requiring two officers in police cars and proposal giving employee sole discretion to refuse undercover assignment he/she deems unsafe, but holding mandatory proposal for hazardous duty pay when fewer than two officers are assigned to patrol car at night); *International Assn. of Fire Fighters, Local 314 v. City of Salem*, 7 PECBR 5819, 5827-29(1983) (holding permissive union proposal allowing up to five firefighters per shift to be on vacation but holding mandatory proposal requiring minimum number of firefighters on trucks sent to fires because of safety), *affirmed*, 68 Or App 793, 684 P2d 605 (1984).
30 9 PECBR 8794 (1986).
31 Id. at 8805-08.
shift selection methods based on officers’ desires, with approval of the station commander. The State wanted to change this practice so that station commanders would assign shifts regardless of seniority, days off would be frozen rather than rotating, and officers could no longer trade shifts or days off. The Board’s holding that the State could not unilaterally change day-off selection and trading but could unilaterally change shift selection and trading was incongruous. How could days of work (days off) be mandatory but hours of work (shifts) be permissive? Board Member Hein accordingly wrote a dissenting opinion explaining why both aspects of the proposed change were mandatory.\(^{32}\) The distinction should be between assignment of *duties* and assignment of *hours*, not between assignment of *days* and *shifts*. Both days and shifts involve the mandatory subject of “hours” of work. While assignment of duties during a shift is permissive, assignment to work certain shifts at certain hours or on certain days is mandatory.

In the midst of the *Oregon State Police Officers’* case came the multiple opinions in the more renown *Portland Fire Fighters* staffing case.\(^{33}\) In the original Board decision, the issue was whether the City committed an unfair labor practice by refusing to bargain over a proposed reduction in the number of firefighters (from approximately fifty-three to twenty-four) who could be on vacation on any given day.\(^{34}\) Management’s chief aim was to ensure proper staffing without incurring “soaring overtime costs during peak [vacation] periods.”\(^{35}\) The union produced evidence that this would significantly affect firefighters’ ability to take vacation at preferred times over the winter holidays and during the summer, for example. It also tried to show that the proposed change would make it impossible for firefighters to use carried-over vacation.

The Board held that the subject of vacations is mandatory for bargaining, but staffing and assignment are permissive bargaining subjects.\(^{36}\) Using a balancing test, it went on to analyze the “nature” of the proposal and whether its effect was greater on the condition of employment (vacation) than on the management right (staffing). The Board concluded that the scale tipped in management’s favor: the City’s “extensive interest” in protecting the public safety by utilizing staff in the most efficient manner outweighed the employees’

\(^{32}\) *Id.* at 8810-14.


\(^{34}\) 8 PECBR at 8468.

\(^{35}\) *Id.*

\(^{36}\) 8 PECBR at 8472-73.
interest in when vacation can be taken because the staffing change did not “unreasonably impinge” on vacations.\(^{37}\)

The Court of Appeals affirmed the Board’s decision.\(^{38}\) While recognizing that vacations were a *per se* subject of bargaining, the court agreed with the Board’s focus on the nature and purpose of the specific proposal.\(^{39}\) The court then held that, because the purpose of the proposal was to maintain consistent staffing levels at optimum cost, “the vacation scheduling change is properly characterized as a staffing proposal and not as a vacation proposal made a mandatory subject of bargaining.”\(^{40}\)

The Oregon Supreme Court reversed on the grounds that matters pertaining to vacations, which is explicitly identified under ORS 243.650(7) as a mandatory subject of bargaining, must be bargained regardless of the relative effect on the employer’s interests.\(^{41}\) The “balancing test,” it held, “was meant to interpret the term ‘other conditions of employment’” and should not be applied to the expressly listed conditions. The upshot of the court’s opinion was that any proposal relating to any of the specifically enumerated subjects—direct or indirect monetary benefits, hours, vacations, sick leave, or grievance procedures—must be bargained, regardless of the impact of the proposal, unless it is a “sham” proposal merely labeled as encompassing a mandatory subject. Disputes over whether proposals are legitimate mandatory subjects of bargaining, or whether they were attempts by one party to “relabel” a permissive topic as mandatory remain a point of contention between labor and management to the present day. On remand, the Board followed the court’s ruling with the following legal conclusion: “The subject of ‘vacations’ is mandatory for bargaining. The IAFF proposal regarding vacation scheduling is a matter concerning vacations. The City was obligated to bargain collectively and in good faith over the proposal.”\(^{42}\)

Following the *Fire Fighters* case, the Board held more clearly that other scheduling-related proposals similarly involved mandatory subjects of bargaining. In *Junction City Police Assn. v. Junction City*,\(^{43}\) the Board held that the city violated ORS 243.672(1)(e) by unilaterally changing employee work schedules.\(^{44}\) The Board followed its holding in *OPEU v. State of Oregon*
that “the issue of hours of work is a mandatory subject of bargaining.” 45 The Board rejected the City’s arguments that the particular exigencies of a small police department should tip the balance in favor of management rights, noting instead that these concerns should be addressed and reconciled at the bargaining table or through the dispute-resolution process. 46

In a case involving police commanding officers, the Board thereafter adhered to its position that proposals regarding shift assignment were mandatory. 47 There, the Board considered a union proposal requiring seven days advance notice of any changed assignment or shift. The Board held that the City was justified in refusing to bargain over the particular proposal because it was permissive insofar as it addressed the assignment of duties. The Board made clear, however, that the portion of the proposal dealing with advance notice of shift changes would have been mandatory had it been separated from the permissive issue of duty assignment. The City was relieved of its duty to bargain over shift changes because the issue was mixed to a substantial degree with a clearly permissive item. 48

A few years later, the Board again held clearly that work-schedule proposals for shift bidding by seniority were mandatory for bargaining because “hours” is an enumerated subject of bargaining and “hours” encompasses shifts, i.e., hours of the day and days of the week employees are required to work. 49

Scheduling-related proposals obviously involve staffing and assignment on the management side as well as hours of work on the employee side. The Board moved from treating such proposals as permissive in and before the

45 Id. at 737.
46 Id. at 738-39. The Board also held that a City proposal to eliminate smoking in police stations and vehicles was mandatory for bargaining as both a work enhancing “personal activity” and as a safety issue. Id. at 739. While this was a less significant issue in the SB 750 veto negotiations, this holding was likely also a motivating factor behind the exclusion from “employment relations” of “reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work.” ORS 243.650(7)(f).
48 12 PECBR at 457. The Board also found a proposal requiring emergency equipment for officers assigned after hours emergency work to be a mandatory safety-related proposal. Id. at 462.
49 Oregon Public Employees Union v. State of Oregon, 14 PECBR 746, 771-73 (1993), on reconsideration, 14 PECBR 722 (1993). Among other proposals, the Board also found mandatory a proposal requiring either security equipment or assignment of a second employee to transport patients because it implicated safety more than staffing or assignment.
mid-1980s to acknowledging their mandatory status in the late 1980s and early 1990s. These decisions recognized the undeniable conclusion that scheduling shifts and days of work are quintessentially “matters concerning ... hours” within the express definition of “employment relations.” They also recognized that certain staffing decisions impact workload and, particularly in the public safety realm, safety. These cases prompted concerns among the employer community that set the stage for some of the specific exclusions that were made from the definition of “employment relations,” including staffing levels, safety, workload, and de minimis proposals.  

**The Tigard School District Class-Size Decisions**

From the early decisions under the PECBA, the Board held that class size was a permissive subject of bargaining. As the years went on, this holding flexed somewhat to acknowledge how closely related class size was to quintessential bargaining issues like pay and workload. In 1980, the ERB held that, while class size itself was a permissive subject, the impacts of class size were mandatory for bargaining. Thus, proposals for extra pay or preparation time triggered by class size were held to be mandatory. A decade later, the Board reversed its prior holdings and held more decisively that class size was mandatory for bargaining. In its first Tigard decision, the Board held that a union proposal imposing grade-by-grade class size limits related to employee workloads and was, therefore, mandatory under

50 ORS 243.650(7)(d) and (f).


52 Gresham Grade Teachers Assn. v. Gresham Grade School Dist., 5 PECBR 2771, 2786 (1980). The distinction between proposals about management decisions that are permissive and proposals around the impacts of those decisions, which are mandatory, was made in the early days of the PECBA, again relying on NLRA precedents. See IAFF Local 1308 v. City of the Dalles, 2 PECBR 759, 769 (1976), citing NLRB v. Royal Plating and Polishing Co., 355 F.2d 191, 60 LRRM 2033 (3rd Cir. 1965) and UAW v. NLRB, 475 F.2d 421, 81 LRRM 2439 (D. C. Cir. 1972) (holding employer had no duty to bargain over decision, but did have a duty to bargain over the impact of the decision).

53 Id.

its decision in *OPEU v. State of Oregon*. In so doing, the Board explained that the subject of the proposal was workload, not class size. It followed from this that whether a proposal that would affect class size is mandatory or permissive depends on its effect, if any, on a condition of employment. The Board found a significant effect on workload because there was “ample evidence” that each student assigned to a teacher requires a certain amount of work beyond group instruction, such as grading, preparation, parent-teacher conferences, and individual assistance. The Board concluded that:

The proposal to limit the number of students assigned addresses a matter concerning workload, therefore, and is mandatory, regardless of its obvious effects on management’s right to establish staffing levels or on other management prerogatives.

Chairman Ellis once again dissented, berating the majority for moving “another step closer to declaring management rights a null set in the calculus of bargainability.”

The Court of Appeals affirmed, but the Oregon Supreme Court reversed, holding that the Board improperly focused on workload rather than following its prior decisions holding that class size was a permissive subject. It noted the ERB relied improperly on the *OPEU* decision in which it had incorrectly interpreted the statute defining “employment relations,” by elevating an unenumerated subject, workload, to the status of an enumerated item. It remanded the matter to the Board to reconsider the proposal using the balancing test to weigh whether class size impacted teacher working conditions more than it impacted educational policy:

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55 11 PECBR at 602-04.
56 *Id.* at 601-02.
57 *Id.* at 603.
58 *Id.* at 603-04.
59 *Id.* at 604.
60 106 Or. App. 381 (1991). The court noted, however, that the appropriate question should be a qualitative one, not a quantitative one: Whether the proposal related to a mandatory subject, not whether it significantly affected a mandatory subject. *Id.* at 386. Because the Board concluded there was a significant effect on workload, the proposal a fortiori related to workload. *Id.* at 387.
62 *Id.* at 285.
To determine whether a given proposal concerns a condition of employment, the bargaining proposal must be considered in light of the workplace involved and the effect of the proposal on the employees working therein. We express no opinion on whether the class-size proposal involved in this case concerns a condition of employment. That is for ERB to decide, in the first instance, on remand, considering the proposal’s effect on working conditions in the workplace that is the subject of the proposal.\(^{63}\)

The court’s focus on analyzing “a given proposal” and its admonition that ERB relied too heavily on the general “subject” of workload marked a significant shift in scope analysis. On remand, the Board again held that the class-size proposal was mandatory, this time focusing more on the effect of the proposal rather than the broad subject of “workload.”\(^{64}\) The Board first explained at some length how the Oregon Supreme Court’s opinion was a “significant departure” from its previous holdings in \textit{Springfield Edu. Assn. v. Springfield School Dist., Portland Fire Fighters Assn.}, and \textit{Salem Police Employees Union v. City of Salem}.\(^{65}\) The Board then went on to analyze the class-size proposal at issue, first noting the “fairly obvious effects of class size” on hours, workload, and job satisfaction.\(^{66}\) While noting that the school district had an interest in setting class size to further its fiscal and educational policy concerns, the Board found this amounted to classic competition for limited resources, much like other aspects of traditional bargaining:

\begin{quote}
It is inherent in bargaining over matters affecting wages, hours, workload and the like, that the employer’s mission—be it education, child welfare or law enforcement—might adversely be affected by acquiescence to employee demands on limited resources. Just as increased wages and reduced work hours will leave an employer with less to pursue its mission, acquiring more classroom space and additional teachers to meet class size maximums will reduce capacity to meet other academic and institutional needs. Disputes spawned by such competing demands for inevitably finite
\end{quote}

\(^{63}\) \textit{Id.} at 286 (footnote omitted).

\(^{64}\) 14 PECBR 321 (1993).

\(^{65}\) \textit{Id.} at 322-338.

\(^{66}\) \textit{Id.} at 340.
employer resources are what the PECBA procedures were designed to resolve peacefully through bargaining.\textsuperscript{67}

The Board then concluded that the District’s concerns were legitimate reasons for it to bargain for high class limits, or none at all, or to propose longer hours or wage and benefit concessions to “fund” the class-size limits. However, “they are not reasons which relieve the District from PECBA bargaining obligations in the first instance.”\textsuperscript{68}

Chairman Ellis again wrote a lengthy dissent.\textsuperscript{69} The Court of Appeals this time, however, affirmed the majority’s decision without opinion.\textsuperscript{70} The law as of 1994, immediately prior to SB 750, was, therefore, clear that class-size limits were a mandatory subject of bargaining. This invited outcry from school districts and set the stage for the negotiations that resulted in excluding “class size” from the definition of “employment relations” for school district bargaining.

**Scope of Bargaining After Senate Bill 750**

Scope was but one of the issues on the table when the 1995 Oregon Legislature considered significant revisions in the PECBA, but for school districts, it was a crucial concern, especially class size. They sought to exclude it from the definition of “employment relations,” thereby reversing the *Tigard* decision.\textsuperscript{71} The class-size exclusion in the final bill would later be referred to as the “crown jewel” of the scope of bargaining exclusions attained in SB 750.

\textsuperscript{67} Id. at 341-42.

\textsuperscript{68} Id. at 342-43.

\textsuperscript{69} Id. at 362-86.

\textsuperscript{70} 128 Or. App. 59 (1994).

\textsuperscript{71} A detailed discussion of school employers’ perspectives on the changes contained in SB 750 can be found in David Turner, Ronald E. Wilson & Lisa M. Freiley, *The Changing Landscape of School District Negotiations: A Practitioner’s Perspective on the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, WILAMETTE LAW REVIEW, 32:4, Fall 1996. Other specific scope exclusions that were championed by the Oregon School Boards Association and were enacted in section of 243.650(7)(e) of the 750 revisions. These included negotiation of the school or education calendar, standards of performance or criteria for evaluation of teachers, time between student classes, school curriculum, reasonable rules about grooming and personal conduct at work standards and procedures for student discipline, and selection, agendas, and decisions of school site councils.
by the governor’s chief negotiator in the process, Henry Drummonds.\footnote{Henry R. Drummonds, \textit{A Case Study of the Ex Ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law}, LERC MONOGRAPH SERIES, No. 14, p. 33. Professor Drummonds noted, however, that the legislative compromise reached on class size was to go back to the pre-1990 Board law that class size itself was permissive, but the impacts of such decisions were still mandatory. \textit{Id.} at 34.}

Following what has been described as the “\textit{Ex Ante Veto Negotiations Process},”\footnote{\textit{Id.} at 13.} the Oregon legislature delivered a new definition of “employment relations” under SB 750. Although the new statutory definition was more detailed than the prior statutory definition of “employment relations,”\footnote{The prior definition of “employment relations” was limited to stating that it “includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures, and other conditions of employment. \textit{Or. Rev. Stat.} § 243.650(7)(1993), amended by SB 750, 68\textsuperscript{th} Leg., 1995 Or. Laws 286 § 1(7).} most of the changes served to codify existing case law. Indeed, following the passage of the legislation, Professor Drummonds opined that “the final agreement on scope of bargaining in the Derfler-Bryant Act restored much of the existing language and case law.”\footnote{Drummonds at 46.}

While some feared that “the foundation for the analysis of scope questions has now been undercut by SB 750, leaving no stable structure in which practitioners can take refuge,”\footnote{Kathryn T. Whalen and Paul B. Gamson, \textit{Scope of Bargaining After Senate Bill 750}, 14 LERC MONOGRAPH SERIES. 73 (1996).} such did not appear to be the case in the law, or to those who defended the existing law in the “\textit{Ex Ante Veto Negotiations Process}.” Rather, Professor Drummonds summarized the final language as follows:

Five basic principles underlay the final agreement: (1) restoration of (i) the broad definition of scope of bargaining from then current law, including a nonexclusive list of expressly enumerated subjects, (ii) the general catch-all phrase “other conditions of employment,” and (iii) the broadening language that “matters concerning” those subjects were also included; (2) specifically excluded subjects; (3) statutory incorporation by a grandfather clause of all topics declared permissive in prior case law; (4) recognition of ERB’s continuing authority to apply the balancing test to
decide when a subject falls within “employment relations” as a “condition of employment”; and (5) addition of an express de minimis exclusion.”

Notably, the “then current law” on scope of bargaining prior to the passage of SB 750 was the Tigard School Dist. case, wherein the Oregon Supreme Court required the ERB to consider a proposal “in light of the workplace involved and the effect of the proposal on the employees working therein.” In that same case, the court rejected a broad, subject-based analysis of scope issues. However, following the passage of SB 750, the ERB held that SB 750 abandoned the proposal analysis authorized by the supreme court in Tigard School Dist., based on the reference to “subjects” throughout the legislative revisions of SB 750.

As amended, the new definition of “employment relations” at ORS 243.650(7) contained six subparts, as follows:

(7)(a) “Employment relations” includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.

(b) “Employment relations” does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995.

(c) After June 6, 1995, “employment relations” shall not include subjects which the Employment Relations Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.

(d) “Employment relations” shall not include subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.

77 Drummonds at 32-33.
78 See supra note 54.
79 314 Or. at 286.
(e) For school district bargaining, “employment relations” shall expressly exclude class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils established under ORS 329.704, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(f) For all other employee bargaining except school districts, “employment relations” expressly excludes staffing levels and safety issues (except those staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

As stated earlier, the foundation of the definition of “employment relations” was reflected at ORS 243.650(7)(a) and did not change. Presumably, given the state of the law following the supreme court’s pronouncement in Tigard School Dist., the intent was to keep the primary definition unchanged. However, what did change through the “Ex Ante Veto Negotiations Process” was the creation of exceptions to this primary definition, which were added by the legislature to address particular problems and concerns about certain subjects that had arisen over the years. These exceptions served to preserve the exclusion of “subjects” (as opposed to specific proposals) that previously had been deemed permissive by the ERB, to exclude future “subjects,” which the ERB determines, through a balancing test, to have a greater impact on management’s prerogative than on employee wages, hours, or other terms
and conditions of employment, to exclude subjects that have an insubstantial or *de minimis* effect on public employee wages, hours, and other terms and conditions of employment, and to exclude certain expressly enumerated subjects.

The first major case to interpret scope of bargaining issues under SB 750 was *Springfield Police Assn. v. City of Springfield*, in which the ERB addressed the duty to bargain a proposal concerning the removal of personnel records from a personnel file. The union had offered a proposal that rendered reprimands and warning letters stale for use in disciplinary procedures after two years, when the employee’s record had remained clean. The ERB rejected the employer’s argument that the issue already had been deemed permissive. The ERB took a different approach, qualifying the proposal as falling within the category of “other conditions of employment” relating to “disciplinary standards and procedures” and “minimum fairness relating to personnel files.” Most significantly, the ERB concluded that the SB 750 revisions had effectively reverted scope analysis back to its status prior to *Tigard*—centering the analysis on bargaining *subjects*, not bargaining *proposals*.

In *Springfield*, the ERB held that under the new scheme, the two overriding questions concerning disputed language are: (1) What is the subject of the disputed language? (2) Is that subject mandatory or permissive for bargaining? The ERB indicated that the answer to the latter question may be found in the express wording of the statute or in the Board’s precedents, and that it will only employ a balancing test when the subject is not expressly enumerated or excluded in the statute and has not otherwise been previously adjudicated. Despite the lack of change in SB 750’s underlying definition of “employment relations,” the ERB’s decision in *Springfield* amounted to an abandonment of the proposal analysis that was utilized in the cases between *Tigard* and the passage of SB 750.

As a result of the *Springfield* analysis, ERB has created the following framework for analyzing possible scope of bargaining obligations:

1. Is the subject of bargaining at issue expressly enumerated?
2. Is the subject of bargaining expressly excluded?

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81 *Id.* at 721-22.
82 *Id.* at 719.
83 *Id*
84 The scope of bargaining issues covered in this monograph are not intended to address the possibility that a waiver of the duty to bargain may exist, even though the subject does constitute a mandatory subject of bargaining.
3. If the subject is an “other condition of employment,” does the subject have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment?

4. Does the subject have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment?

This framework represents a useful methodology for the advocate to use when analyzing any dispute over the scope of bargaining. How it has been applied by the ERB since the passage of SB 750 is discussed more fully later.

**Determining Whether the Subject of Bargaining Is Enumerated**

Under the *Springfield* approach, the ERB suggests that the first issue is to determine whether the “subject” of bargaining is one of the expressly enumerated subjects listed in ORS 243.650(7)(a). If so, then the ERB would suggest that the analysis ends there. Indeed, this is exactly what the ERB has done with most of the scope cases that have come before it since the passage of SB 750. Only when the subject involves “other conditions of employment” does the ERB continue the analysis and venture into a balancing test for those subjects that it has not previously balanced.

In *Eugene Police Emp. Assn. v. City of Eugene*, the Association proposed that the City agree to indemnify bargaining unit members who successfully defended themselves against criminal charges arising out of the course and scope of employment. Although the City argued that the subject was not expressly enumerated and that it was appropriate to apply the balancing test, the ERB rejected this argument, and found that the subject of the Association’s proposal was a direct or indirect monetary benefit to unit members. The ERB held:

> Direct or indirect monetary benefits are a specifically enumerated subject that we do not balance. . . . Indemnity of the type proposed by the Association serves a public purpose by relieving employees in a high risk occupation from having to defend against unfounded charges. It is not contrary to public policy because it provides a measure of protection for employees performing an essential governmental function.\(^\text{85}\)

Concluding that the subject of indemnity was *per se* mandatory, the ERB rejected efforts to apply the balancing test.

**Determining Whether the Subject of Bargaining Is Excluded**

One of the first post-SB 750 statutory exclusion cases was *Roseburg Fire Fighters Assn. v. City of Roseburg*,\(^8^6\) wherein the Association contended that the City violated its duty to bargain in good faith by making a decision to reduce minimum staffing levels in the department and implementing that decision without completing the bargaining process. The City maintained that the subject of staffing was a permissive topic for bargaining. However, the Association argued that the change related to safety and workload, which were typically found to be mandatory bargaining subjects before 1995. The ERB stated:

> Despite the statutory changes, the parties spent considerable time and effort quibbling about whether the issue here was staffing or safety and workload. As a practical matter, however, following the SB 750 amendments to the definition of employment relations, none of those subjects is mandatory absent certain qualifying criteria. Regardless of whether the subject of a proposal is determined to be staffing or safety or workload, we must decide its bargaining status based on whether the evidence establishes that the proposal will have a direct and substantial effect on employee safety, or what effect, if any, it will have on employee duties. Under the new statutory scheme, when the subject of a proposal concerns safety, staffing or workload, we are required to determine its effect in order to determine its bargaining status.\(^8^7\)

The ERB found the evidence did not establish that the firefighters’ working conditions were significantly less safe or that the workload was significantly greater following the staffing reduction, and concluded that the staff reduction proposal was a permissive subject. ERB also noted that the Association offered no proposals concerning economic impacts of the staffing decision, even though it indisputably affected overtime opportunities, and concluded that the Association waived any right to bargain over the impacts of the staffing decision.\(^8^8\)

\(^8^6\) 17 PECBR 611 (1997).
\(^8^7\) *Id.* at 630.
\(^8^8\) *Id.* at 632.
While the ERB has used the new statutory framework to treat some subjects as permissive that previously were considered mandatory, it has also been willing to revisit certain subjects, previously deemed permissive, to hold they now fell within the mandatory “other conditions of employment” that must be rebalanced under ORS 243.650(7)(c).

In a 2001 case, *Federation of Oregon Parole and Probation Officers v. Washington Co.*, the employer was alleged to have changed its firearms policy to prohibit employees from storing firearms in their vehicles while on County property, whether on duty or off duty. 89 The employer made the decision pursuant to the ERB’s previous ruling in a 1991 case, *Assn. of Oregon Corrections Employees v. State of Oregon*. 90 In *AOCE* the Board held that a proposal to provide a concealed weapons depository for employees to check in concealed weapons carried to and from work was permissive because the carrying of such a weapon was not “reasonably necessary” for employment. 91 The ERB applied a *Tigard*-era scope analysis and concluded that the proposal for a concealed weapons depository for employees who were not allowed to take concealed weapons into correctional facilities did not concern the employer-employee relationship in the direct manner necessary to constitute a condition of employment because it did not concern the health or safety of employees while performing their duties. In short, the proposal did not fall within the “other conditions of employment” over which the employer was required to bargain. 92

*AOCE* might have foreclosed future analysis of the subject of weapons storage as a grandfathered permissive matter under ORS 243.650(7)(b). However in *Washington County*, the ERB rejected that argument to reach a conclusion that the employer was required to bargain over a firearms storage policy arising from similar circumstances. Utilizing the subject-based scope approach, ERB characterized the weapons depository issue as a safety and off-duty restrictions proposal. Despite the fact that the storage-of-weapons issue had shifted from inside the office (*Assn. of Oregon Corrections Employees*) to the parking lot (*Washington County*), ERB’s change in the focus of its analysis enabled the Board to conclude that it had become a mandatory subject. Both cases touched on an off-duty practice (carrying a concealed weapon), but the ERB found that the effect on the employment relationship was relatively

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90 14 PECBR 832, 843 (1993).
91 Id. at 867.
92 Id. at 843.
minor in AOCE, but more intrusive in Washington County, thereby justifying its categorization as a mandatory subject.

A similar outcome was achieved in Springfield Police Assn. v. City of Springfield, wherein the scope of a “staleness-of-personnel-records” proposal was revisited. The City alleged that the proposal was a permissive subject based on pre-SB 750 precedent, wherein the ERB held the contents of personnel files to be permissive. Despite substantive consistency between the staleness-of-records proposal in Springfield and the prior ERB rulings concerning the permissiveness of proposals relating to the content of personnel files, the ERB held that in addition to addressing the permissive subject of content of personnel files, the policy addressed matters concerning “disciplinary standards and procedures” and “minimum fairness relating to personnel files.” Using a balancing test, the Board found these subjects to be mandatory. ERB acknowledged that ORS 243.650(7)(b) “freezes the status of subjects found to be permissive.” However, the Board held that the proposal was entirely mandatory despite the policy addressing the content of personnel files because it also concerned matters relating to “disciplinary standards and procedures” and “minimum fairness relating to personnel files.”

“OTHER CONDITIONS OF EMPLOYMENT” AND THE APPLICATION OF THE BALANCING TEST

Not surprisingly, most of the ERB activity since the passage of SB 750 has focused on application of the balancing test to subjects that are not specifically enumerated or excluded under the new statutory definition. In International Assn. of Fire Fighters v. Klamath County Fire Dist. the ERB stated:

If we determine that the disputed language does not fall within the specifically enumerated subjects [ORS 243.650(7)(a)], we next must decide whether it concerns a subject that the statute expressly makes permissive under subsection (7)(e) or (7)(f), or that this Board has previously declared permissive (subsection (7)(b)). If we conclude that the language at issue is neither an enumerated mandatory subject nor an expressly permissive subject nor one previously held to be permissive we will, in appropriate circumstances, apply the balancing test set forth in subsection (7)(c).

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93 16 PECBR 712 (1996).
94 Id. at 721.
95 19 PECBR 533 (2002).
Under this framework, and applying the balancing test of (7)(c), the ERB held that a nepotism policy that allowed an employer to terminate or transfer an employee for a violation of the policy was a mandatory subject of bargaining because it affected an employee’s job security. The ERB denied the District’s argument that the policy was an expression of the employer’s right to transfer and assign duties because the ultimate consequence could be demotion or termination. The ERB also held that the District had to bargain over its newly adopted family medical leave policy because leave is a mandatory subject of bargaining and the leave statutes (FMLA/OFLA) do not prohibit employers from granting additional protections beyond the minimum statutory requirements. Finally, the ERB held that a proposal stating that “hours of employment shall be fixed by the Fire Chief” was per se mandatory because it involved hours, a clearly enumerated subject. In doing so, the ERB rejected the employer’s argument that the proposal fit within the new SB 750 exclusion for “scheduling of services provided to the public.”

Similarly, the ERB held that a traffic-violation policy was not a minimum qualification as the employer argued but, rather, a mandatory subject of bargaining because it involved discipline for an employee’s off-duty conduct. Conversely, the ERB used a balancing test in the same case to hold that the part of the traffic-violation policy that required employees to report traffic violations was a permissive subject because it affected the employer more than it affected the individual employee.

Several other post-SB 750 cases have utilized the balancing test outlined in (7)(c), as follows:

**Involuntary Transfers.** In the 1997 *Sandy Union H.S. Dist. v. East County Bargaining* case, the ERB ordered the union to stop striking over a proposal that would have required the district to pay an involuntarily transferred teacher a $500 “inconvenience award,” along with two extra paid days and more prep time to make the transition. The Board went through its prior cases on transfers, noting that the subject of transfers is neither entirely mandatory nor entirely permissive. In this case, however, the balance tipped in

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96 The ERB followed this holding, rejecting the employer’s effort to overrule *Klamath County Fire Dist.* and held definitively that it “has consistently held, both before and after the legislative changes in 1995, that scheduling the particular hours of the day and days of the week an employee is assigned to work constitutes ‘hours of work,’ a per se mandatory subject of bargaining under ORS 243.650(7)(a).” *AOCE v. State of Oregon,* 20 PECBR 890 (2005), *rev’d on other grounds* 209 Or. App. 761 (2006).

97 19 PECBR 533 (2002).

98 *Id.* at 545

99 17 PECBR 151 (1997).
management’s favor, and the proposal’s imposition of a monetary penalty did not render the effect on employee wages, hours, or conditions of employment greater than the effect on management prerogatives. The ERB also held that a proposal requiring the school district to provide teachers with “support services” to ensure that special-needs students can succeed in the classroom was permissive because, although “support services” was vague, it had to mean something that would have delved into the management prerogatives of hiring additional staff, assigning additional resources, or changing educational policy. SB 750 had no apparent effect on the issues in this case because the issue of transfer does not fit into any of the new law’s language. Rather, the Board relied on its pre-750 line of transfer cases.

Prohibition of Drugs. In a declaratory ruling involving AFSCME and the Department of Justice, the ERB used the balancing test while making a distinction between disciplinary policies for employee conduct on the job and those applied to off-duty conduct. It found that management changes to a policy prohibiting drugs (use, sale, or under the influence) at work is a permissive subject. A general prohibition on drugs in the workplace constituted “reasonable employee behavior,” and workers had no “countervailing interest in being allowed to use or traffic in illegal drugs at work, nor do they have an interest in being able to work while under the influence of drugs or alcohol.” However, the ERB also used a balancing test in finding that rules regarding the use of drugs during an employee’s off-duty time are mandatory because “employees do have a fundamental interest in the unrestricted use of their personal time.”

Background Information Reviews. In a 2001 case, AFSCME v. State of Oregon Department of Public Safety, the ERB used a balancing test to hold that the use of a background information form as a screen in making promotions for current employees is a mandatory subject of bargaining. The ERB distinguished between management’s right to establish the background check procedure for particular positions, and its duty to bargain over the particular process. ERB’s application of the balancing test concluded that the use of a background information check had a “greater impact on employee personal life than management’s right to ensure employee suitability for a position,” and thus was mandatory.

100 In the Matter of the Petition for Declaratory Ruling Filed Jointly by Oregon AFSCME Council 75, Local 3351, Oregon Association of Justice Attorneys and State of Oregon, Department of Justice. 19 PECBR 40 (2001).
101 Id. at 47-48.
102 Id.
103 19 PECBR 76 (2001).
104 Id. at 97.
Teacher Evaluations. In Lincoln County Edu. Assn. v. Lincoln County School Dist., the ERB found that an Association proposal that the teacher-evaluation process be in accordance with the requirements of ORS 342.850, the teacher-evaluation statute, was a mandatory subject based on a balancing test. The ERB found that the District had no reason not to comply with the statute. However, if the statute were enforced using the labor agreement, it could affect teacher seniority and job security because certain teachers could be disciplined based on the terms of the statute. Therefore, the ERB held that the inclusion of ORS 342.850 was a mandatory subject because it would have a greater effect on the employees’ working conditions than on the employer who was already required to adhere to the statute. (On appeal, the court, on its own motion, vacated the appeal in an unpublished opinion and, therefore, the ERB decision may have no precedential effect.)

Determining Whether the Subject Is De minimis

There have been no cases that have addressed the “de minimis” standard since the passage of SB 750. Several commentators suggested upon the passage of SB 750 that this language may be irrelevant based on the probability that application of the balancing test would have already concluded permissive subjects to be de minimis in relation to the competing impacts on managerial rights and prerogatives. The only potential relevance of this language would be its possible application to an enumerated mandatory subject, or a proposal within a subject previously deemed mandatory by the ERB, which itself has such a minor or insignificant impact on the employee that the employer is deemed justified in not bargaining over it.

What has Become of the “Subject” Versus “Proposal” Debate?

Over the years, there has been debate in the case law and legal commentary about whether the mandatory-permissive analysis should be applied to general subjects or to specific proposals. Until the Oregon Supreme Court’s decision in the Tigard class-size case, the Board used a general subject-based analysis. That is, the Board considered whether the general subject of the proposal was mandatory for bargaining without regard to its particular language, purpose, or reasonableness. Indeed, in its first opinion in the Tigard class-size case, the Board held that the subject of the union’s class-size-limit proposal was workload

105 19 PECBR 475.
106 Id. at 484.
and was, therefore, mandatory. The Oregon Supreme Court reversed on the grounds that the Board had focused too much on the presumptive mandatory nature of all proposals regarding workload rather than balancing the effect of the particular proposal on workload versus management rights.\textsuperscript{107}

Senate Bill 750 came just a few years after the \textit{Tigard} opinion’s emphasis on proposals over subjects. Kathryn Whalen and Paul Gamson had this to say about the new law’s effect on this issue:

SB 750 apparently abandons the \textit{proposal} analysis. In at least six different places in SB 750, the Legislature added the word \textit{subject} to the language on scope of bargaining. In doing this, SB 750 appears to revert back to a pre-\textit{Tigard} analysis in which subjects, rather than proposals, are either mandatory or permissive.\textsuperscript{108}

This prediction proved correct. In its first post-750 case tackling this issue, the ERB analyzed its conclusion to return to a subject-based analysis as follows:

Our reading of the newly-adopted section (7) leads us to conclude that the legislature basically rejected this Board’s and the court’s approaches in Tigard School Dist. to deciding whether negotiations proposals address “other conditions of employment.” As noted above, SB 750’s amendments to section (7) are entirely expressed in terms of bargaining subjects. Subsection (c), for example, states that “employment relations” shall not include subjects found to be permissive by this Board because the subjects affect management prerogatives more than they do employee working conditions. This basically describes the “balancing test” used by this Board prior to Tigard School Dist. Using that test, this Board would determine whether subjects of bargaining, not individual proposals, were “other conditions of employment.” Under that system, the bargaining status of a proposal could be decided based on the previously-determined (by this Board) mandatory or permissive nature

\textsuperscript{107} 314 Or. at 285-286.

\textsuperscript{108} Whalen & Gamson, p. 76.
of the subject addressed by the proposal. Thus, for example, proposals concerning employee discipline and a layoff and recall system (subjects that had been “balanced” by this Board and found mandatory for school district bargaining) were held to be mandatory when submitted to a county government, without any “re-balancing” of the effects of such proposals on county management and employees. AFSCME v. Clackamas County, 7 PECBR 5839 (1983), affirmed 69 Or App 488, 687 P2d 1102 (1984). …

The court’s decision in Tigard School Dist. was issued three years before the enactment of SB 750, and we must assume that legislators were aware of the holdings in that case, including the holding that the legislature did not intend for this Board, by case law, to declare bargaining subjects to be mandatory or permissive and that the balancing test is to be applied to individual proposals only. Regardless of the correctness of that ruling prior to SB 750, this Board concludes it is no longer supportable in light of the bill’s amendments to section (7). We find that it is clear, based on the text and context of ORS 243.650(7), that the legislature mandated that we employ a subject-based mode of analysis in deciding scope-of-bargaining cases.109

Thus ERB settled the query shortly after SB 750 took effect by unequivocally returning to the subject-based approach for analyzing whether a proposal is mandatory or permissive.

Commentary

MANAGEMENT PERSPECTIVE: A PAST DIFFERENT FROM WHAT YOU REMEMBER

It is not insignificant that the drafters of SB 750 expressly referenced the statutory exclusions in terms of “subjects,” in contrast to the underlying foundational definition of employment relations, which remained unchanged and which, immediately preceding SB 750, had been interpreted by the ERB

and the Oregon Supreme Court with a “proposal”-based analysis. Although one could argue that the plain language of the statutory exclusions should be applied on a broad subject basis, in contrast to the specifically enumerated subjects, which arguably were not impacted by SB 750, this is not how the ERB has approached its analysis of the enumerated exclusions post-SB 750. And despite what many thought would lead to greater predictability in scope cases, that has not necessarily been the result.

It is also problematic that in numerous instances since the passage of SB 750, the ERB has revisited proposals that fell within subjects previously deemed permissive, and has chosen to allow parties to creatively recast the subject of a proposal and to revisit issues that the legislature clearly chose to grandfather as permissive. In *Federation of Oregon Parole and Probation Officers v. Washington Co.*, ERB characterized differently what appeared to be the same basic underlying weapons-depository subject matter deemed permissive in *AOCE*. Although the SB 750 exclusion of subjects previously deemed “permissive” does not appear to be contingent on utilization of a particular analytical scope of bargaining framework, the framework for analyzing safety issues under SB 750 was clearly different from the framework in place under *AOCE*, and appeared to be part of the justification for how ERB reached its final conclusion. Under the new safety (and staffing level) exclusion, the issue is not balanced to compare the impacts of a proposal on the employer and employees, but is analyzed in terms of the “direct-and-substantial effect” standard. As such, the analysis considers only whether the proposal (1) expressly raises a direct and substantial safety issue, and (2) affects the on-the-job safety of the employee.

The ERB categorized the weapons depository proposal in *Washington County* as a safety and off-duty restrictions proposal. The County acknowledged that the matter implicated off-duty conduct (while on County property), but took the position that such implications did not directly and substantially effect “on-the-job” safety to a degree that overcame the conditional safety and staffing exclusion from the new definition of “employment relations” under SB 750. The ERB rejected this argument, and in so holding, signaled that

111 In *AOCE*, the safety exclusion of ORS 243.650(7)(f) did not exist, nor did the ERB apply a balancing test. Rather, ERB analyzed the subject (a concealed-weapons depository) to determine if it was of like character to the enumerated subjects in the statutory definition of “employment relations” to constitute a condition of employment over which the employer was required to bargain.
112 ORS 243.650(7)(f).
form would prevail over substance when considering whether to preserve the permissive nature of grandfathered subjects.

ERB decisions like Washington County take away the predictability that parties need to make decisions that can significantly impact labor relations, are costly, and carry time consuming implications for labor and management. This perversion of SB 750 means an unpredictable future for labor relations decision makers and represents a resurrection of a test that fosters litigation and rewards creativity of characterization of a proposal or subject. Unless the ERB refuses to do so, or is told not to do so by the courts or the legislature, there is no reason to expect that labor or management, rewarded by ERB’s acceptance, won’t continue to present creative arguments and characterizations. Such activity renders the grandfather provision of the PECBA meaningless and dilutes the predictability that SB 750 was intended to foster.

Advice For Advocates

Recognize the Impact of Uncertainty. The divergence from the SB 750 on scope issues along with a number of recent interest arbitration decisions seems to signal scenarios for public employers in Oregon that favor a “short-term,” focus on a union’s particular goal when it is analyzed in a manner that ignores or at least devalues the long-term effects on government’s ability to provide services within its means. At some point, every labor organization will take this into account. The question is: When and how dire must the public condition become? As labor organizations continue to march forward with their singular perspective being current public employees’ perceived needs and maintenance of other benefits, public employers will continue to be faced with the challenge of providing services with fewer funds, greater employee costs, and ever-increasing bargaining demands.

In Yamhill County and Federation of Oregon Parole and Probation Officers (Arbitrator: Greer, IA-16-05, April 28, 2006), the arbitrator awarded the union contract language allowing probation officers to carry weapons on the job. The arbitrator concludes, “Primarily based upon the public’s interest in having County PPOs be armed in the same manner that PPOs are armed in ten of 11 comparable counties, I conclude that the welfare and interest of the public is better served by FOPPO’s last best offer.” The arbitrator’s analysis that “they should be able to be armed because everyone else is armed” completely ignores the scope of the decision and undermines the community's ability to make fundamental decisions regarding what is in the best interest of specific communities. A situation that allows an arbitrator to arm public employees without concern to the many intricacies of the decision should be of concern to all public employers.
Strategically Framing the Issue. In the face of these challenges, employers must begin to think more strategically at all points in the bargaining process. This includes carefully framing the issues before the parties arrive at the bargaining table, understanding how labor has creatively argued mandatory subjects are more inclusive, and reliance on the potential impacts on public employers’ operations and costs. All should come to the table recognizing that “life is a negotiation,” with a greater willingness to move, compromise, and give due regard to the right values and a global understanding. Play chess, not checkers. When in doubt, bargain about it, and remain true at the table to the public and organizational interests, with due regard for the collective interests of employees. It is usually better to bargain and explain “no” than to incur delay, ill will, and ULP defense costs.\textsuperscript{114}

With strike prohibited units, characterization of an issue as mandatory means that absent agreement, resolutions comes at a cost of delay and interest arbitration litigation and loss of control. Ultimately, the decision of an arbitrator, who owes no public accountability, trumps managers and elective officials views concerning an appropriate outcome for the community they are elected or appointed to serve.

Make the Challenges Known and Understood. SB 750 sought to restore equity to a broken process a decade ago and to enable government to be more responsive. Over time, with the creativity of the ERB and arbitral community, we have seen the intended effect of the Derfler-Bryant amendments diluted. Correction can emerge only from the legislative process, a forum that is intuitively supportive of labor and usually responsive only to the clearest, least partisan issues of public interest. Oregon courts will continue to defer to regulatory agencies like ERB and BOLI on the basis explained in \textit{City of Portland}. Thus, without legislative limitations, public employers can look forward to no significant change until a crisis in need of correction is recognized.

Clearly, the demand for public service outpaces the public’s ability and willingness to fund it in many cases. Although already underfunded and committed beyond available resources, public employers must make real and clearly understood to the public and political leaders the tangible effects of labor’s decisions and the labor-friendly decisions of ERB and the arbitrators. The need for adequate funding of public services must be understood more broadly. Employer interests must demonstrate how labor demands and the

\textsuperscript{114} Of course, mischaracterization of midterm changes as mandatory in order to tie an employer’s hands or drive up costs and extort a price for sound management change represents another issue and opportunity for collaboration in the public interest.
current-labor relations process affects public employers’ ability to provide services, and the public’s willingness to pay. At the same time, public employers must find ways to demonstrate to their workforce, its unions, and the public just how beneficial public employment has become for employees and their families, and how public employees’ total compensation exceeds or falls short in the labor market. Most employees represented by unions have no way to see what is happening to their competitiveness as “laborers.” With respect to PERS, for example, most PERS-covered employees are much more aware of what they have “lost” as the result of recent changes and unaware of how much their employers (and taxpayers) are paying for the “reduced” benefit. Health care costs provide a second, obvious illustration. Employees are more focused on the fact that they now have “some” or “some relatively meager” out-of-pocket expense rather than how their “public benefit package” compares to those of the taxpayer, or how the cost of benefits has accelerated over the past decade. Employer-provided information and unions that step up responsibly to assist in educating their members in partnership with employers are critical to any movement and realistic positioning in bargaining.

In most cases, public employment has progressed beyond a “working man’s struggle” to achieve an honest day’s pay, or to keep pace, and labor’s quest for increasing compensation and escalating time off for committed men and women in public employment must find some limit based on shared values, not adversity in interest arbitration or positional bargaining. Unfortunately, in the public sector, change often occurs only when there is a crisis and is often the result of politics, not economics. Change in government and changes in the bargaining process occur incrementally. Change agents include the media, politicians, and employers who bear the burden of marshalling data, illustrations, and arguments to demonstrate that recent trends in Oregon public-labor relations are not in the long-term best interest of the State as a whole or its local governments.115 Not until these challenges are made real for Oregonians will things begin to change.116

115 The impacts of what must be bargained and litigated pales in comparison to the trends in interest arbitration where, on the backend of the bargaining process deadlocked at impasse, arbitrators and advocates have devised clever arguments to circumvent the legislative intent of SB 750 and achieve gains for labor that, while nice to receive in the short term, cannot help but result in erosion of service and degradation of bargaining units over time. In short, Oregon is on a “doomsday” course of pricing public employment “out of the market” with COLA’s, catch-up wage increases, and perks in total compensation, the combined costs of which exceed growth in the cost of living as well as growth in government revenue.

116 Usually, a labor-management dispute is a “lose-lose” for all concerned. On the
A Labor Perspective

While management’s hope in the early versions of SB 750 was to radically change the scope of the bargaining terrain, it is generally agreed that what came out of the legislative and veto negotiation process was much less dramatic. In fact, relatively little changed. SB 750 largely codified existing case law. The essential definition of employment relations did not change. Most of the newly enumerated exclusions from that definition had already been held to be permissive by ERB. The balancing test was unchanged. The law did bring some new restrictions, like the exclusion of class size from the definition of employment relations, but, by in large, it left scope matters unchanged. Given that the law simply did not change that much with respect to the scope of bargaining, the management rhetoric about ERB’s discounting of SB 750 is more about dashed hopes than it is an accurate description of the current law.

The management perspective in this article claims that ERB has frustrated the intent of the SB 750 drafters because it returned to a subject-based scope analysis where the ERB had previously followed a proposal-based analysis. This is a misrepresentation of both ERB precedent and the legislative history of SB 750. The ERB used a subject-based analysis for many, many years prior to the Oregon Supreme Court’s decision in the Tigard class-size case. When the Oregon Supreme Court reversed ERB’s decision in that case and ordered ERB to go back and reanalyze the effect of the particular proposal at issue, ERB underscored that the opinion was a “significant departure” from the Court’s own prior holdings in Springfield Edu. Assn. and Portland Fire Fighters Assn. After analyzing the case history, ERB explained:

We now are informed that the subject-balancing which guided well over a decade of Board (and Court of Appeals) decisions somehow misapplies the statute. Proposal-analysis, however, while forbidden in matters related to listed subjects,

one hand, public officials and employees must have community trust to pass funding measures. When voters hear of the labor-management conflict, they see and hear the “battle” and cannot discern who is righteous, and rarely care beyond framing an attitude reluctant to fund what they perceive as in chaos. At another level, astute managers whose job security may hinge on the absence of conflict are reluctant to do what they recognize as being in the public interest if it will cause labor strife. That can develop as contrary to the appointees personal interest. These dynamics further complicate scope issues and labor relations practice.

117 14 PECBR at 322.
is required for matters concerning “other conditions.” The question raised by this bifurcated construction of the statute is whether the same legislative policy can guide both paths of analysis. It obviously cannot. The Portland approach is weighted heavily in favor of bargaining “all matters” potentially subject to dispute in the statutorily-listed areas. Tigard, on the other hand, starts the parties out essentially even, proposal by proposal, in all other aspects of the employment relationship. The court’s view of legislative policy in Portland is consistent with its holding there, but clearly not with the proposal-based analysis rejected there and required in Tigard.118

My management-side co-author is wrong about ERB’s historical scope analysis. They are also off base to suggest that, because the word “subject” appears only in the exclusions, the intent of SB 750 was to use a proposal-based analysis for determining what falls within the essential definition of “employment relations” but to use a broader subject-based analysis with respect to exclusions. That makes no sense.

First, nowhere in SB 750 does the word “proposal” appear. Rather, the legislature specifically added the word “subject” to the scope-of-bargaining language in at least four different places. Contrary to the management perspective on this point, those are not limited to exclusions. The newly codified balancing test, under which some matters come out on the mandatory side of the scale and some come out on the permissive side, is clearly worded in terms of bargaining subjects.119 Moreover, the unchanged essential definition of “employment relations” includes “matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.”120 As ERB recognized in the quoted language earlier, “matters” are “subjects,” not “proposals.”

Those involved in the legislative process were aware of the Tigard decision. ERB legitimately understood the express reference only to “subjects” and not to “proposals” as a deliberate effort to return to the subject-based approach. To conclude otherwise is simply wishful thinking.

The plain fact is that management did not get what it wanted in the

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118 Id. at 332-33 (footnote omitted).
119 ORS 243.650(7)(c).
120 ORS 243.650(7)(a) (emphasis added).
negotiations for a final version of SB 750. My co-author refers to ERB’s interpretation of SB 750 as a perversion of the “intended effect of the Derfler-Bryant amendments.” The “Derfler-Bryant amendments” never became law though. As Professor Drummond’s detailed chronicle explains, the original and amended versions of the Derfler-Bryant Bill would have been vetoed, and the final language of the Act was developed in private discussions with the governor in the ex ante veto process.\(^\text{121}\) What Derfler and Bryant hoped to achieve is simply irrelevant to the meaning of the compromise law that was ultimately enacted. Put another way, management has set itself up to be disappointed by making arguments that the new law made changes it simply did not make.

For example, employers’ arguments that the new law took proposals about “hours” out of the definition of “employment relations” simply pressed too far.\(^\text{122}\) This boldly wishful argument attempted to use the new exclusion from “employment relations” for the “scheduling of services provided to the public” to exclude from bargaining certain proposals regarding the hours employees worked, not the hours services were provided to the public.\(^\text{123}\) The position taken by management in the Klamath Fire Dist. case, that a proposal giving the fire chief complete discretion over hours of work, clearly stretched the interpretation of the SB 750 changes beyond what was intended by the Legislature.

Contrary to the management perspective presented here, the ERB cases in the last decade have actually lent more predictability to public-sector bargaining law. ERB has continued to rely on long-held precedents that were left unchanged by the 1995 law. There has been no effort to relabel or recast previously held permissive subjects as mandatory. That is a gross mischaracterization of the cases. For example, my co-author claims that, before SB 750, ERB held in the AOCE case that weapons depositories were permissive for bargaining, but after SB 750, ERB allowed a union to recast what appeared to be the same basic underlying weapons-depository subject matter. But there were key differences between the pre-750 AOCE and the post-750 Washington County cases. While the AOCE case involved a union proposal requiring the employer to provide a locked weapons depository on its premises for employees to deposit their firearms during their shifts, the

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\(^{121}\) Drummonds at 15.


\(^{123}\) ORS 243.650(7)(f).
The Washington County case involved an employer’s unilateral imposition of a policy prohibiting employees from, among other things, keeping firearms in their personal vehicles in the parking lot and possessing weapons off duty on County property. It is obvious how the off-duty Washington County policy more dramatically affected employee personal life issues than the workplace proposal in AOCE, that had no off-duty component. Moreover, the employer in Washington County opted strategically to frame its policy as a critical safety issue.\textsuperscript{124} Given this approach, it should not have been surprised when ERB applied the new statutory language including in the definition of “employment relations” safety issues that “have a direct and substantial effect on on-the-job safety of public employees.”\textsuperscript{125}

Hopefully by now, more than a decade after passage of SB 750, employers have accepted the reality that Oregon still has a public-sector collective bargaining law that continues to require bargaining over matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures, and other conditions of employment. The reality of bargaining is that most matters relate in some way—directly or in a more attenuated fashion—to these mandatory categories even if they also involve some management prerogative. The scale truly does tip in the employees’ favor much of the time because that is the raw nature of the workplace. When you get right down to it, it really is all about how much employees should be compensated for the work they do. If they perform harder work, under less favorable conditions, at difficult hours, they deserve better compensation. This should come as no surprise to the management Bar. They simply choose to miss the forest for the trees when they try to limit what goes into the bargaining cauldron.

SB 750 was a historical moment in public-sector bargaining not so much for any radical changes in the law but more for the service it paid to the debate over what parties must talk about at the bargaining table. It is a debate that has been given far too much attention in Oregon. The management Bar’s efforts to eliminate more and more from what parties should discuss is an unfortunate trajectory. History shows that the more subjects on the table, the easier it is for parties to get to “yes” on an agreement. It is important to recognize that the purpose of collective bargaining is to channel labor disputes into negotiation and mediation. As the Oregon Supreme Court has recognized:

\textsuperscript{124} Washington County, 19 PECBR at 425-27.
\textsuperscript{125} ORS 243.650(7)(f).
If negotiation and mediation are to be effective means of resolving labor disputes, the scope of the definition of those matters subject to mandatory negotiation and mediation must be broad enough to encompass all matters over which labor disputes are likely to arise.\textsuperscript{126}

A final word must be said about my co-author’s perspective that “public employment has progressed beyond a ‘working man’s struggle’ to achieve an honest day’s pay.” This perspective demonizes unions and their members and does not serve us well in the ongoing debate over how we use our public resources. It is plain wrong in the first instance. Moreover, it has nothing to do with the scope of bargaining—before or after SB 750. Would my co-author like to see the day where wages and benefits are no longer subject to bargaining—in other words, an end to collective bargaining in the public sector altogether? Nobody would argue that SB 750 even aimed at that goal. If we gut the collective-bargaining process beyond recognition, we will return to the strife-ridden days of economic self-help.

The challenges posed by limited public funding are shared by public employers, public employees, and the public. In my co-author’s view, the ERB, arbitrators, courts, and the legislature are all “labor friendly” and public employers are all alone in an increasingly unjust doomsday world. This is not the case. These are difficult times for everyone. Some public employers understand that employees cannot carry the entire burden of limited funding, and that forcing them to do so ultimately hurts the public. Public employers should join forces with public employees in changing the antigovernment, Reagan-era zeitgeist. If we want to live in a society made better by beautiful parks, strong schools, ample social services, and equipped public safety personnel, we need to support the workers who make these things happen. This means providing fair compensation packages and other decent employment conditions. But when the funds are not there to increase wages and benefits in step with the market, management should not seize the opportunity to roll back noneconomic protections in collective-bargaining agreements. Unfortunately, many public employers have used the so-called “funding crises” as leverage to gut collective-bargaining agreement provisions in a power grab.

A broad scope of bargaining is in the public interest and does not require either party to agree to anything. If employers cannot or do not wish to agree

\textsuperscript{126} Portland, 305 Or. at 283-84.
to certain union proposals, they can just say “no.” But allowing employers to eliminate issues from bargaining’s give-and-take process altogether just narrows the resolution possibilities. The management perspective shared here ignores the fact that SB 750 ultimately made only very modest changes to the scope of bargaining in Oregon and, more important, that this modesty was in the public interest.
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<tr>
<th>Chart of Bargaining Subjects</th>
<th>Under Oregon’s PECBA</th>
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by The Hungerford Law Firm

Excerpted from *Oregon Labor Law Today*  
(Oregon City: Oregon Labor Law Digest, L.L.C., 2001)
**Mandatory**


Separability clause. *Eugene*, 4 PECBR at 2408.

Status of agreement clause that provides that the district will print and distribute copies of the agreement. *Springfield*, 1 PECBR at 357.

Management rights clause and funding clause. *Eugene*, 4 PECBR at 2407, 2409.


Language describing duration of agreement, including retroactive effective date. *City of Portland v. PPCOA*, 16 PECBR 43 (1995).

**Permissive**

Language requiring that terms of the agreement would apply to all members of any units represented by the Association, “both existing and as determined in the future.” *ONA v. Oregon Health Sciences University*, 7 PECBR 6072 (1983).

Proposal to change recognition clause from a general inclusion statement to one referring to positions listed in an index. *AFSCME v. Clackamas County*, 9 PECBR 9298 (1987).


Ground rules (except where a provision is to be added to contract language [i.e., paid time for bargaining team members]). *AFSCME v. Polk County*, 11 PECBR 536 (1989).


The question of status of police chief (whether inside or outside the unit). *Teamsters v. City of Gold Beach*, 17 PECBR 892 (1999).
<table>
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<tr>
<th>Mandatory</th>
<th>Permissive</th>
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<tbody>
<tr>
<td>Zipper clause giving the employer the unilateral right to modify any employment condition not covered by the CBA without bargaining the decision or impact. Benton County Deputy Sheriff’s Assn., 20 PECBR 551 (2004).</td>
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Association Rights

Mandatory

Proposals requiring the district to provide reasonable paid release time for employees serving on the association’s negotiating team or attending grievance sessions. Eugene Education Assn. v. Eugene School District 4J and Richard Miller, 5 PECBR 3004, 3008; OSEA v. School District No.9 of Jackson County, 4 PECBR 2352, 2353 (1979).

Proposals requiring the district to provide 30 days of released time for association representatives to participate in negotiations, grievance resolution, and to enter into written and signed contracts with the district. Eugene, 5 PECBR at 3008.

Proposals to allow a member unpaid leave to serve as an officer or employee of the local association and to receive experience credit for the period of time. Eugene, 5 PECBR at 3009; Springfield, 1 PECBR at 355.

Proposals which assist the incumbent labor organization in its duty of fair representation. South Lane, 1 PECBR at 473-74.

Language providing that all written district communications be posted in the staff room of each school. Eugene, 1 PECBR at 455.

Association-school communications, including use of bulletin boards, inter-school mail and mail boxes, announcements by association, access to district’s financial information, use of school equipment at reasonable cost for supplies, right to speak at faculty meetings. Springfield, 1 PECBR at 355.

Proposal to allow association president or representative up to ten hours per month without loss of pay to conduct meetings where benefit was to individual, not association. Assn. of Oregon Corrections Employees v. State of Oregon, 14 PECBR 832 (1993).

Permissive

NOTE: Proposals to allow member to use paid leave to attend a “conference of affiliates” of the state labor union is a prohibited subject of bargaining.

NOTE: Proposal to allow a member unpaid leave to serve as an officer of the NEA or OEA and receive experience credit are prohibited subjects of bargaining. Eugene, 3 PECBR at 3010,6 PECBR at 4851-52.

A proposal allowing the association to call faculty meetings during building hours even though such meetings would not take precedence over regularly assigned duties, Springfield, 7 PECBR 6357, 6388 (1984).

Proposals which commit the school board to furnish any information the association believes necessary and placing association items first on all school board meeting agendas. South Lane, 1 PECBR at 473-74.
Transfer and Assignment

Mandatory

Voluntary transfer - provisions that would permit teacher requests for transfer to another position in the district and would require employer’s response within a specified time. Springfield, 1 PECBR at 351.

Involuntary transfer - teacher will have opportunity to make his preferences known as to a new assignment; notice will be given as soon as possible. Also, provisions that would require teachers to be informed about appropriate vacancies at the time the transfer is being made and allow the teacher to visit the new assignment. Springfield, 1 PECBR at 351.

Language that specifies how requests for transfer are made; procedural requirements relating to requests, indicating that transfer will be made by written notice by the director of personnel after consultation with principals and requiring attention to the “general welfare” of the district and individual desires of teachers. Eugene, 1 PECBR at 453.

Teachers under contract shall be notified of their assignments for the next year. South Lane Education Assn. v. South Lane School District 45J, 1 PECBR at 459, 463.

Shift trading or job sharing. Gresham, 5 PECBR 2771.

Proposals concerning conditions of employment for job sharing teachers (but language requiring any openings to be available to employees desiring to job share and requiring that such openings be filled only by employees who have agreed to work together are permissive). Springfield, 7 PECBR 6357, 6395(1984).

Effects of transfer such as moving expenses, subsidy for additional commuting costs, etc. OPEU v. State of Oregon, 10 PECBR 51 (1987).

Permissive

Voluntary transfer - standards for transfer, the reasonableness of the standards, and assignment of teachers to specific positions. Springfield, 1 PECBR at 351.

Notice of involuntary transfer no later than two weeks prior to the beginning of the contract year or any fixed deadline. Also, standards and criteria for involuntary transfer, plus the mechanics of involuntary transfer and its susceptibility to the grievance procedure. Also, requirements that teacher forced to transfer will be given priority in filling known vacancies and limiting transfer to a certain number of times within a period of years. Springfield, 1 PECBR at 351.

Language requiring that all requests for transfer must be satisfied before new personnel from outside the district are hired. Eugene, 1 PECBR at 452.

Proposals that restrict the duties assigned to a teacher and provide that such duties may not be substantially altered or increased without negotiation. Springfield, 1 PECBR at 357.

Language requiring notice of next year’s assignments by a specific date. South Lane, 1 PECBR at 463.

Language prohibiting the district from assigning any teacher more than one course new to the school without providing a summer workshop. Eugene, 1 PECBR at 451.

Proposals that would prohibit the district from assigning teachers to nonprofessional duties such as lunchroom, playground, or bus loading supervision, collecting money from students, and clerical functions. Springfield, 1 PECBR at 365.
**Transfer and Assignment**

### Mandatory


Requirements that employees have a valid driver’s license and liability insurance in order to drive the employer’s vehicles. *AFSCME v. Polk County*, 11 PECBR 114 (1988).


A proposal that no unit member will be transferred to a non-bargaining unit position unless bona fide voluntary consent is given by the affected employee. *Portland Police Commanding Officers Assn. v. City of Portland*, 12 PECBR 424,646 (1990).

Language that would prevent the involuntary transfer of unit members to positions outside the unit. Also, language allowing unit members to take advantage of promotional opportunities (raises in position or rank). *Springfield Police Assn.*, 15 PECBR 324 (1994).

Proposal primarily concerned with setting minimum notice of vacancies to allow employees to take advantage of promotional opportunities. *Assn. of Oregon Corrections Employees*, 14 PECBR 832 (1993).

### Permissive

Proposal requiring that whenever reorganization required transfer to another location, a monetary penalty would be paid if any but the least senior employee is transferred. Assignment of duties restricted to only those normally performed by employees within a classification. *OPEU v. State of Oregon*, 10 PECBR 51 (1987).

Proposal requiring the district to interview a teacher being involuntarily transferred for all indicated preferences in open positions and requiring that teacher visit the assignment first and have five duty-free days to prepare. *Springfield*, 7 PECBR 6357, 6394 (1984).

Proposal requiring any non-promotional transfer of association representative must be mandated by operating needs. *Oregon State Police Officers’ Assn.*, 8 PECBR 7874 (1985).


Decision to shift job duties in position from one unit to another, where similar job duties had been performed in the past by both unit and non-unit employees, and where shift didn’t affect unit employees’ work hours or job security. *Milwaukie Police Employees Assn. v. Milwaukie Police Dept. and City of Milwaukie*, 15 PECBR 1 (1994).
Transfer and Assignment

Mandatory


Elimination of trading days off involved a change in a mandatory subject. Oregon State Police, 9 PECBR at 8808.

Officers’ choice of days off, absent a paramount interest in unilaterally assigning such day, is mandatory. Oregon State Police, 9 PECBR at 8806.

Language that limits the teaching load in secondary schools to 10 semester traditional periods during the entire school year, or the equivalent in a block schedule. Hillsboro Education Assn. v. Hillsboro School District, 20 PECBR 124 (2002).

Permissive

Language limiting assignments to detective unit to no more than 24 months, providing process for assignment to the unit. Springfield Police Assn., 15 PECBR 325 (1994). Even if the assignment offered opportunity for “professional enrichment,” that fact did not affect the balancing test and make the proposal mandatory. 134 Or. App. 26 (1995), on remand, 16 PECBR 139 (1995).

Proposal requiring employer to provide light duty positions for reinstatement of employees with off-duty illnesses. Marion County Law Enforcement Assn. v. Marion County, 15 PECBR 832 (1995).

Proposal requiring police force to assign most senior interested corrections officer to police services vacancies. Lane County v. Lane County Peace Officers Assn., 15 PECBR 53 (1994).

Language giving employees the right to bid for shift and workdays; proposals giving employees the right to choose which duties they would and would not perform. Assn. of Oregon Corrections Employees v. State of Oregon, 14 PECBR 832 (1994).


### Mandatory

The number of work days in the work year.

Language which provides that teachers shall not be required to report to school when inclement weather cancels student attendance. **South Lane,** 1 PECBR at 468.


Proposal requiring a minimum of four half-days free from student re-responsibility preceding conference days. **Springfield,** 7 PECBR 6357, 6390 (1984).


Proposals setting the length and season of spring, Thanksgiving, and Christmas vacations. **East County Bargaining Council,** 6 PECBR at 5569.


### Permissive

The composition of the work year to include so many pupil days, so many holidays, so many teacher in-service days, etc. **Springfield,** 1 PECBR at 362-63.

Teacher holiday and vacation period. **Scappoose Assn. of Classroom Teachers v. Scappoose School District,** 5 PECBR 2819, 2826 (1980); but see **Eugene,** 6 PECBR at 4654.

Proposals giving a beginning or ending date to vacation periods or relating to teacher workdays and professional days. **Eugene,** 6 PECBR at 4653-54 (1981).

Language requiring preparation days to be scheduled at beginning and end of grading periods (but 2-1 Board majority suggests this may be found mandatory in the future). **Yoncalla,** 7 PECBR at 5796; but see **Springfield,** 7 PECBR at 6390.

Proposal requiring city to grant vacation to up to five firefighters from one shift at one time unless replacement employees are unavailable. **IAFF v. City of Salem,** 7 PECBR 5819, 5826 (1983).
<table>
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<tr>
<td>Policy dealing with implementation of FMLA and OFLA or union proposals to provide leave benefits in excess of statutory requirements. <em>Klamath Falls Fire District</em>, 19 PECBR 533 (2001).</td>
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</tr>
</tbody>
</table>
Substitutes and Student Teachers

**Mandatory**

Proposals to require an active search to locate a good supply of substitute teachers and to require that a list of substitutes be provided to all teachers upon request. *Springfield*, 1 PECBR at 363.


**Permissive**

Proposals that require that a teacher to be replaced is given the first opportunity to select his/her substitute. *Springfield*, 1 PECBR at 363.

Proposal that teacher being replaced must be given the opportunity to recommend a substitute before the district assigns one. *East County Bargaining Council*, 6 PECBR at 5568.

Proposals that would require that substitute be paid at the base teacher’s salary after two weeks of substituting. *Springfield*, 1 PECBR at 363.

Language that specifies when regular teachers may be required to substitute for absent teachers. *Eugene*, 1 PECBR at 452.

Language that gives the required qualifications for substitute teachers and prescribes a summer training program. *Eugene*, 1 PECBR at 452.

Language relating to student teacher supervision and the role of the association in negotiating a contract with university providing student teachers and in dispersing funds received from the university for supervision and training provided by classroom teachers; this proposal found prohibited by ERB in *Springfield*, 1 PECBR at 362, but termed permissive by the Oregon Court of Appeals, 42 Or. App. 93 (1979).
**Compensation and Benefits**

### Mandatory

Proposals which would set the compensation for teachers who voluntarily decide to transport students to activities. *Springfield*, 1 PECBR at 366.

Proposals on extra pay for those in the bargaining unit who are assigned extra responsibility, such as a department chairmanship. *Springfield*, 1 PECBR at 364.


Special trip and meal rates and compensation for time in training. *Gervais*, 5 PECBR at 4222.

Reduced-cost company provision of meals or housing where most employees take advantage of the benefit. *AFSCME v. Board of Higher Education*, 2 PECBR 1012, rev’d on other grounds, 31 Or. App. 251 (1977), on remand, 3 PECBR 1729 (1977).

Generally, retirement plans are mandatory, although ERB did not specifically decide whether plan provider is a mandatory subject. *IAFF v. City of Astoria*, 8 PECBR 6604 (1984).


Increases in parking fees at work (except where setting fees is delegated by statute to a state agency). *AFSCME v. OHSU*, 11 PECBR 1525 (1989).

### Permissive

Language which would state that teachers shall not be required to drive students to activities. *Springfield*, 1 PECBR at 366.

Proposals on extra pay for those not in the bargaining unit, such as administrators, classified employees, or substitutes. *Springfield*, 1 PECBR at 364.

Proposal requiring participation in PERS rather than another retirement program. While benefits are mandatory, it is a management prerogative to determine how benefits will be provided. *Salem Police Employees Union v. City of Salem*, 8 PECBR 6642 (1984).

Proposal spelling out procedures to request reclassification and subsequent placement on the salary schedule, and to challenge reclassification downward and new rate of pay. *OPEU v. City of Tualatin*, 8 PECBR 8214 (1985).


Employer’s proposal to “undo” a compensation increase (addition of a step) bargained into a contract but taking effect after that contract’s expiration. *Executive Dept. v. FOPPO*, 92 Or. App. 331 (1988).

Mandatory


PERS pick-up is still mandatory, despite constitutional amendment to prohibit employer-paid pick-up; proposal for employee contributions to be made from pre-tax dollars. **Declaratory Ruling filed by OSEA, et al.**, 15 PECBR 645 (1995).


Mandatory

Proposal for employer to provide a direct deposit option for employees’ payroll checks. **SEIU/OPEU v. Homecare Commission**, 20 PECBR 144 (2002).

Requiring new hires to sign, as a condition of initial employment, an agreement to repay training costs if they did not stay three years. **Washington County Peace Officers Assn. v. Washington County Sheriff’s Office**, 20 PECBR 274 (2003).

Mandatory


Language requiring one additional period for planning for all head teachers. *Eugene*, 1 PECBR at 458.

Language to give athletic directors (within the unit) an additional period of release time per day. *Eugene*, 1 PECBR at 458.

Proposals concerning who will be offered overtime, penalty for employer if employee has pre-existing commitments, requirement of employer to cancel overtime if it creates a burden for employee and cannot be reassigned. *OPEU v. State of Oregon*, 10 PECBR 51 (1987).

Permissive

Proposals that indicate the total number of pupil contacts per day. *Springfield*, 1 PECBR at 361.

Assignment of teaching duties and the assignment of matter and number of preparations per day. *Springfield*, 1 PECBR at 361-62.

Proposals providing for supplemental preparation time when students are sent to playground or other non-academic activity. *Eugene*, 6 PECBR 4849,4855 (1981).


Proposal to allow employees to decide what training they would engage in during work day and a "work hours. proposal that would set the actual hours during a shift when certain normal duties could be assigned. *IAFF v. City of Salem*, 7 PECBR 5819, 5829 (1983).


Practices regarding meals and rest breaks taken at an employee’s residence where those practices affect management's right to assign patrol areas. *Oregon State Police*, 9 PECBR at 8807.


Proposal requiring establishment of joint committees to address and resolve workload issues, requiring assignment of non-represented employees to one committee. *OPEU v. State of Oregon*, 14 PECBR 722, on reconsideration, 14 PECBR 746 (1993).
**Mandatory**

Changes in work day or work year for a class of employees (i.e., custodians, instructional assistants) would have to be bargained on demand if the employees involved were part of a recognized or certified bargaining unit at the time the decision was made. *OSEA v. Aumsville School District*, 12 PECBR 639 (1990).


Work hours that were standard for a class of employees that includes more than a few individuals are mandatory, such that a reduction is subject to bargaining upon demand. *Assn. Of Classified Employees v. Day Creek School District*, 16 PECBR 187 (1995).

Proposal regarding work time trades (which were judged to deal with "hours"). *Assn. of Oregon Corrections Employees*, 14 PECBR 832 (1994).

Proposal allowing MacLaren-Hillcrest employees to bid on work shifts and work days (because proposal was determined to deal with "hours," an enumerated mandatory subject). *OPEU v. State of Oregon*, 14 PECBR at 772 (1993).

Policy stating that "hours of employment shall be fixed by the Fire Chief." Policy concerning scheduling of particular hours of the day and days of the week for work. *Klamath Falls Fire District*, 19 PECBR 533 (2001).

**Permissive**

Shift scheduling is a matter directly concerning the subject of hours and thus is mandatory. *911 Professional Communications Employees Assn. v. City of Salem*, 19 PECBR 871 (2002).

Reducing work hours that were standard for a class of employees. *Days Creek Assn. of Classified Employees v. Day Creek School District*, 16 PECBR 187 (1995).
## Work Day / Work Load

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**Mandatory**

Language prohibiting any restrictions against the hiring of related teachers (except to the extent that ORS 342.515 may prohibit hiring a teacher related to a member of the school board). *Eugene*, 1 PECBR at 455.

Proposal that any certified employee employed more than 96 days during the year shall advance on the salary schedule (mandatory to the extent that these temporary teachers are in the unit). *Eugene*, 1 PECBR at 455.

Proposal prohibiting district from selecting teachers on the basis of ability to handle extra-duty assignments. *Eugene*, 1 PECBR at 451.

Contracting out of services performed by bargaining unit members. *Gervais*, 5 PECBR at 4222.

Proposals determining the order in which employees are to be laid off and recalled, as long as the layoff scheme does not require the district to assign an employee to a position for which he is not qualified. *Eugene*, 6 PECBR 4849, 4856 (1981).

Proposal to establish job classifications and to assign duties to employees (but not the assignment of a pay rate). *OPEU v. City of Tualatin*, 8 PECBR 8221 (1985).

Proposal on teacher layoff and recall, specifically reasonable notice requirement, is not permissive because of a governing state statute, since proposal seeks to supplement and does not directly conflict with statute. *Springfield*, 7 PECBR 6357,6395 (1984); *see also Glendale Education Assn. v. Glendale School District*, 10 PECBR 763 (1988).

Proposal for strict seniority layoff in fire department, even though city claimed it would undermine ability to keep firefighters who were also EMTs. Also, proposal entitled “Safety” that would require a city to continue certain manning levels established as goals by the city itself. *IAFF v. City of Salem*, 7 PECBR 5819, 5828 (1983).

**Permissive**

Language providing that temporary teachers who teach more than one-quarter time shall be classified as probationary and have all the rights of regular teachers (permissive because this relates to employees not within the bargaining unit and because tenure is controlled by state statute). *Eugene*, 1 PECBR at 455.


Minimum manning proposal requiring a minimum number of deputies on patrol and in county jail. *Polk County v. Polk County Deputy Sheriff’s Assn.*, 5 PECBR 4641, 4649 (1981).

Proposal to establish job classifications and to assign duties to employees (but not the assignment of a pay rate). *OPEU v. City of Tualatin*, 8 PECBR 8221 (1985).

Proposal requiring two men in patrol car between 10:00 p.m. and 6:00 a.m. *Oregon State Police*, 8 PECBR 7874 (1985).


Proposal requiring school districts to provide teachers with “support services” needed to ensure that special needs students placed in the classroom can succeed. *Sandy School Districts v. ECBC/SEAI SETA*, 17 PEBR 151 (1997).
Hiring and Staffing / Qualifications

Mandatory

Proposal requiring extra pay when only one officer is in a patrol car between 10:00 p.m. and 6:00 a.m. Oregon State Police, 8 PECBR 7874 (1985).


A classification or allocation process when employee compensation is involved. AFSCME v. Dept. of State Police, 17 PECBR 715-718 (1998).

Bidding job assignments / shift assignments by seniority when a certain assignment results in longer work hours. OSEA v. Bandon School District, 19 PECBR 609 (2002).

Policy providing that an employee who has a direct supervisory relationship with an employee who is an immediate family member or involved in a relationship with the employee may be demoted or terminated. IAFF v. Klamath County Fire District, 19 PECBR 533 (2001).

Policy stating that employees who may be required to drive on the job are subject to warnings or discipline if their driving record reflects traffic violations. Klamath County Fire District, 19 PECBR 533.

Requirement that employees have an Oregon driving license if they will be driving as part of their job. Klamath County Fire District, 19 PECBR 533.

Permissive

Bidding job assignments by seniority, where bidding did not result in some employees having more hours than others. OSEA v. Bandon School District, 19 PECBR 609 (2002).

Policy requiring an employee to notify employer of traffic offenses and licensing status. Klamath County Fire District, 19 PECBR 533.

Policy stating that positive attitude, courtesy and conduct on and off the job are important to the employee and the employer. Klamath County Fire District, 19 PECBR 533.

Changes in rank necessary for certain positions (the decision whether to assign a corporal or a sergeant to a position). AOCE v. State of Oregon, 20 PECBR 890 (2005) (on appeal).
## Provision of Auxiliary Services

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<tr>
<td>Proposal requiring that school health services shall be coordinated with counseling and instructional program (because school health services may have a direct effect on members of the teachers’ unit). <strong>Eugene</strong>, 1 PECBR at 453.</td>
<td>Proposal requiring that when school nurses are involved in instructional program, additional personnel will be hired to perform the nursing functions. <strong>Eugene</strong>, 1 PECBR at 454.</td>
</tr>
<tr>
<td>Proposal for academic year positions which specifies how such employees shall be treated during RIF and interim periods. <strong>OPEU v. State of Oregon</strong>, 10 PECBR 51 (1987).</td>
<td>Proposal that school nurses (not members of the bargaining unit) shall enjoy the same professional rights as certified staff members. <strong>Eugene</strong>, 1 PECBR at 454.</td>
</tr>
<tr>
<td>Language regarding teacher aides and other paraprofessionals (not part of the bargaining unit), including prohibitions against using aides in certain instructional roles. <strong>Eugene</strong>, 1 PECBR at 454.</td>
<td>Language that would require the hiring of auxiliary personnel (outside the unit) who express the intent to serve the full year and would restrict their transfer from position to position. <strong>Eugene</strong>, 1 PECBR at 458.</td>
</tr>
<tr>
<td>Proposals to require the district to hire a certain number of specialists or aides to assist teachers or perform supervisory tasks. <strong>Springfield</strong>, 1 PECBR at 360, 366; <strong>Eugene</strong>, 1 PECBR at 450.</td>
<td>Proposal requiring districts to provide teachers with “support services” necessary to ensure that special needs students can succeed in the classroom. <strong>Sandy School Districts</strong>, 17 PECBR 151 (1997).</td>
</tr>
</tbody>
</table>
### Student Discipline and Grading

#### Mandatory

Proposals providing that teachers will receive written notice of discipline procedures; establishing procedures by which teachers may register their objections to discipline decisions made by administrators; and proposals which allow a teacher to temporarily remove a student from the classroom in order to protect the teacher’s physical safety. *Lincoln County Education Assn. v. Lincoln County School District*, 4 PECBR 2519 (1979).

Proposals that would give the teacher the exclusive right and responsibility under statewide standards to determine grades and other evaluations of students and to prevent grades from being changed without the approval of the teacher. *Springfield*, 1 PECBR at 360.

#### Permissive

Student discipline language, including the right to develop and adopt student discipline procedures and policies; the right to assign decision-making authority to discipline; the right to assign and place students; the right to make final and binding decisions on disciplinary matters; any proposal which provides that a student shall be the responsibility of an administrator during the appeal process; language that states that the prior subparts of this proposal do not restrict an administrator’s consideration of any matter in the course of deciding a student discipline problem. Also matters involving the assignment and utilization of personnel. *Lincoln County Education Assn. v. Lincoln County School District*, 4 PECBR 2519 (1979).
Mandatory

Language calling for a teacher-administrative liaison committee to review and discuss local school problems, and for an association-superintendent meeting once a month. **South Lane**, 1 PECBR at 465.

Proposals establishing a "council on professional conditions" and determining its duties and meeting times and membership, as long as it produces only recommendations on conditions of employment. **Springfield**, 1 PECBR at 365.

Language on professional development and educational improvements, including the establishment of a professional development committee, and sponsoring of workshops, within the school day if attendance is required. **Eugene**, 1 PECBR at 457.

Language which requires notice to an educational development council as to the outcome and reasons for decisions on proposals for experimental programs. **South Lane**, 1 PECBR at 464.

Language on professional development and educational improvement, calling for cooperative in-service workshops and conferences. **South Lane**, 1 PECBR at 471.

Permissive

Any committee that would restrict the areas of program development, assignment of duties, and staffing. **South Lane**, 1 PECBR at 471.

Curriculum development, including determination of curriculum content, courses of instruction and related activities, prerequisites for experimental programs, set-aside of budget funds for curriculum development. **Springfield**, 1 PECBR at 355-56.

Language on innovative programs, requiring changes in current guidelines to be discussed by the association. **Eugene**, 1 PECBR at 458.

Language prohibiting any contract that will result in instruction being provided, supervised, or otherwise influenced by any organization other than the association without written approval of the association. **South Lane**, 1 PECBR at 453.

Language which outlines how an experimental program can be implemented and the amount to be spent for innovative programs. **South Lane**, 1 PECBR at 465.

Language requiring a summer program for professional development, to be funded with a specified amount of budgetary resources. **South Lane**, 1 PECBR at 471-72.
### Employee Conduct / Personal Freedom

#### Mandatory

Proposals that state that the teacher is entitled to the full rights of citizenship and no religious or political activities shall be the grounds for discipline or discrimination as long as those activities do not violate the law. *Springfield*, 1 PECBR at 364.

Academic freedom proposals that safeguard the teacher’s right to use controversial material and to express personal opinions within guidelines. *Springfield*, 1 PECBR at 364.

Language that states that the personal life of an employee is not an appropriate concern of the school board, as long as it does not require bargaining over qualifications set forth in the statutes or regulations concerning hiring and retention. *Springfield*, 1 PECBR at 363.


Policy provisions regarding methods and procedural aspects of a policy on general drug and alcohol use. *Klamath County Fire District*, 19 PECBR 533.

#### Permissive

Reasonable at-work personal conduct requirements, including prohibition or use of trafficking in drugs at work and appearing at work in an impaired condition. *Declaratory Ruling for AFSCME and Dept. of Justice*, 19 PECBR 40, 48 (2001).


Policy requiring attorneys in Dept. of Justice to notify employer if arrested or convicted of violation of criminal drug statues. *Declaratory Ruling for AFSCME and Dept. of Justice*, 19 PECBR 40, 52 (2001).


Policies implementing a comprehensive drug and alcohol policy and employer’s ability to require drug testing based on reasonable suspicion. *Klamath County Fire District*, 19 PECBR 533.
### Employee Discipline

#### Mandatory


Just cause language that precludes discipline, reprimand, reduction in rank or compensation, suspension, demotion, non renewal, dismissal and termination without just cause and making any such action subject to the grievance procedure. **Eugene**, 1 PECBR 446, 448; **Gresham**, 5 PECBR 2771, 2779-80.

Definition of due process to include minimum fairness procedures. **Gresham**, 5 PECBR at 2779.

Just cause proposals requiring that a negative employment sanction be reasonably related to the offense upon which it is based. **Gresham**, 5 PECBR at 2781.

Proposal requiring that criticism of teachers be made in private and providing for complaint procedures for processing complaints against individual teachers by anyone except school administration. **Springfield**, 1 PECBR at 353; **Gresham**, 5 PECBR at 2783.

Proposal requiring suspension with pay prior to final school board action. **Gresham**, 5 PECBR at 2783.

Proposal requiring that before disciplinary action is taken, there must be a teacher-administrator conference and a written explanation. **Gresham**, 5 PECBR at 2779.

Proposal requiring investigator not to use “threats or intimidation,” allowing tape recording of interviews. **Assn. of Oregon Corrections Employees**, 14 PECBR 832 (1994).

#### Permissive

Just cause language precluding transfer or deprivation of any professional advantage without just cause. **Gresham**, 5 PECBR at 2779-80.

Definition of just cause that would allow an arbitrator to substitute his judgment for that of the district. **Gresham**, 5 PECBR at 2780.

Proposal that would require evaluation before any discipline and require a “complete review of the personnel file.” **Gresham**, 5 PECBR at 2782.


Proposal to require employers to notify employee of complaint within 48 hours and to divulge all information regarding complaint at least 72 hours prior to questioning employee; to allow employee’s representative to “consult” with employee during investigatory interview. **Assn. of Oregon Corrections Employees**, 14 PECBR 832 (1994).

Specific proposal requiring establishment of extensive measures in all cases where force is used by a police or corrections officer. **Assn. of Oregon Corrections Employees**, 14 PECBR 832 (1994).

Proposals governing how to conduct abuse investigations, requiring that employee being investigated be given “first opportunity to provide information.” **OPEU v. State of Oregon**, 14 PECBR at 768.
Employee Discipline / Personnel Files

**Mandatory**

Complaint procedures, requiring notice of documents prepared for personnel files and four-week notice period; forbidding the use of documents not so noticed. *East County Bargaining Council*, 6 PECBR at 5567.

Language allowing inspection of an employee’s personnel file by the employee’s representatives only with permission of the employee. *ONA and Linda Vaile v. Eastern Oregon Psychiatric Center*, 9 PECBR 9236 (1986).

Language requiring that no critical information would be kept in the employer’s or employee’s records without the signature of the employee. *OSEA v. Medford School District*, 10 PECBR 402 (1988).


Proposal requiring employer to provide copies of personnel file to employee free upon request. *Gresham*, 5 PECBR at 2782.


Proposals imposing an investigation time frame, requiring employer to identify complaining party before suspending or reassigning employee pending investigation; procedure to be used after incidents of use of force by police or guards. *OPEU v. State of Oregon*, 14 PECBR at 767-68 (1993).

**Permissive**


Language allowing employee to have written warnings or reprimand removed after two years if no other discipline had occurred. *Springfield Police Assn.*, 15 PECBR 325 (1994).
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<tr>
<td>Rules requiring off-duty police officers to conform to all rules of department or suffer discipline. <strong>Lincoln City Police Assn.</strong>, 18 PECBR 323 (1999).</td>
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<tr>
<td>Rules providing that police officers are liable for lost or stolen department property and may be disciplined or required to reimburse the city. <strong>Lincoln City Police Assn.</strong>, 18 PECBR 323 (1999).</td>
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<tr>
<td>Rules providing that employees leaving a training session without authorization will be subject to disciplinary action or required to reimburse the city. <strong>Lincoln City Police Assn.</strong>, 18 PECBR 323 (1999).</td>
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</tr>
<tr>
<td>Policy warning attorneys in Dept. of Justice that commission of any crime may result in discipline or dismissal. <strong>AFSCME v. Dept. of Justice</strong>, 19 PECBR 40, 51 (2001).</td>
<td></td>
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<tr>
<td>Policy giving fire chief the sole discretion to remove documents from personnel files. <strong>Klamath Falls Fire District</strong>, 19 PECBR 533 (2001).</td>
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</tbody>
</table>
### Grievance / Arbitration / Governance

#### Mandatory

Proposal to subject the question of just cause for teacher discipline, reprimand, reduction in rank or compensation, suspension, demotion, nonrenewal, dismissal, or termination to the grievance procedure. *Gresham*, 5 PECBR at 2783.

Proposals to give employees the opportunity to present their concerns over employer policy or decision-making, with all authority remaining in employer hands. *Gresham*, 5 PECBR at 2784.

#### Permissive

Proposal to subject an adverse evaluation to the grievance procedure. *Gresham*, 5 PECBR at 2783.


Proposal requiring right to grieve over retirement benefits, since retirees were not unit members. *Springfield Police Assn. v. City of Springfield*, 16 PECBR 712 (1996).

Proposal that would allow grievances over any dispute of an employee or former employee about eligibility for any benefit under a retirement plan or any other benefit the employee might be eligible for; because this proposal is so broad, ERB found the proposal may include permissive subjects of bargaining, so the entire proposal was found permissive. *Springfield Police Assn. v. City of Springfield*, 17 PECBR 319 (1997).

Employee Evaluation

**Mandatory**

Minimum fairness procedures in evaluation, ensuring notice of and opportunity to respond to evaluation reports, right to have evaluations reduced to writing, right for teacher to attach objections to the report, and opportunity to request evaluation. *Springfield*, 3 PECBR at 1958.

Proposal which states that the criteria for teacher evaluation shall be clearly defined. *Springfield*, 290 Or. 217, 240 (1980).

Proposals requiring: (1) Written criteria for evaluation, which include performance goals; (2) Criteria for evaluation to be clearly defined; (3) Opportunity to request another evaluation if supervisor recommends dismissal or nonrenewal; and (4) Notice to teacher of documents to be inserted in file within four weeks of their preparation. *East County Bargaining Council v. Centennial School District*, 6 PECBR 5556 (1982).

Proposals requiring teacher evaluation process to be conducted "in accordance with the requirements of ORS 342.850" (mandatory where intent is to establish an enforcement mechanism not available through state courts). *East County Bargaining Council*, 8 PECBR 6776 (1985) (on remand); see also *Lincoln County Education Assn.*, 19 PECBR 475 (2001), vacated as moot, ___ Or. App. ___ (2002).

**Permissive**

Proposals which define the basis for evaluation, including criteria or standards by which performance is evaluated, areas to be evaluated, and the use of evaluations. *Springfield*, 3 PECBR at 1957.

Proposals defining the mechanics of teacher evaluation, including the form and format to be used, the content of the evaluation report, the number of evaluations and timing, sequencing and length of observations, recommendations for improvement of deficiencies, and the selection of evaluation. *Springfield*, 3 PECBR at 1957-58.

Proposals requiring: (1) The establishment of job description and performance standards; (2) A pre-evaluation interview including the establishment of performance goals; (3) Annual evaluations for probationary teachers and biennial evaluations for permanent teachers; (4) Use of the state evaluation form; (5) Evaluators who sign the form to hold a teaching certificate; and (6) Rules of access to personnel files. *East County Bargaining Council v. Centennial School District*, 6 PECBR 5556 (1982).

Proposals requiring an annual evaluation for firefighters, the use of evaluations to award or deny a pay increase, and the right to grieve a performance appraisal. *OPEU v. City of Tualatin*, 8 PECBR 8214 (1985).
## Facilities and Equipment

### Mandatory

- Proposals to prohibit the use of unsafe technology. Salem Police Employees Union v. City of Salem, 8 PECBR 6642 (1984).

- Proposals requiring provision of teacher lunchroom, restroom, lounge, telephone and parking facilities. Springfield, 1 PECBR at 360.

- Language requiring the district to allocate $50 per year per classroom teacher for the purchase of items the teacher deems necessary and requiring a cash fund from which to reimburse teachers for out-of-pocket expenses. Eugene, 1 PECBR at 455, 458.

- Language requiring a faculty room large enough to hold 2/3rds of the staff and specifying furnishings. Eugene, 1 PECBR at 458.

- Classroom standards, requiring the maintenance of all classrooms in the district in a manner equal to the newest in the district. Eugene, 1 PECBR at 458.

- Language providing that teachers will not be required to work under unsafe or hazardous conditions. South Lane, 1 PECBR at 467.

- Language providing that teachers not be held responsible for student charges or damages of any school supplies or equipment. South Lane, 1 PECBR at 466.

- Language providing a ready room for bus drivers. Gervais, 5 PECBR at 4222.

- Proposals requiring the parties to confer regarding various teaching materials and equipment. Springfield, 1 PECBR at 358-59.

### Permissive

- Proposal making it a city responsibility to provide reasonable standards for safety concerning the technology which is introduced by management and the manner in which the police officer is expected to utilize this technology in an emergency. Salem Police Employees Union v. City of Salem, 8 PECBR 6642 (1984).

- Determination of use of equipment by employees (however, bargaining over impact of changes in assignment of patrol cars to officers on standby was required). Oregon State Police, 9 PECBR at 8806.

- Language that would commit the district to keep the schools equipped and maintained as agreed to in the contract. South Lane, 1 PECBR at 466.

- Proposals that commit the district to keeping the schools equipped and maintained as agreed to in conferences with the association. Springfield, 1 PECBR at 358-59.

- Proposal requiring establishment of a concealed weapons depository and a child care center for employees. Assn. of Oregon Corrections Employees, 14 PECBR 832 (1994).
Mandatory

Proposals requiring the district to provide duplicating facilities, office furniture, daily teaching supplies, chalkboards, appropriate teaching apparel for specialized subjects, and a teacher reference library. Springfield, 1 PECBR at 359.


Proposal to require commanding officer assigned certain duties beyond normal work hours to be provided with “safety equipment,” including pager, radio, and auto. City of Portland v. PPCOA, 12 PECBR 424 (1990).


Proposal concerning transportation of mental health patients (a matter involving safe working conditions). OPEU v. State of Oregon, 14 PECBR at 774.


Permissive

Proposal prohibiting use of portion of firefighters’ living quarters for a public meeting room. IAFF v. City of Hermiston, 9 PECBR 8964 (1986).

Proposal to allow smoking in the briefing room or jail area or in police cars. Junction City Police Assn. v. City of Junction City, 11 PECBR 732 (1989).

Any matter regarding personal pursuits of employees (i.e., drinking coffee, chewing gum, smoking) during performance of work duties. Junction City, 11 PECBR 732 (1989).


Discontinuation of use of steel handcuffs to restrain patients at State Hospital. SEIU/OEPU v. State of Oregon, Oregon State Hospital, 20 PECBR 189 (2003).