



Oregon

Kate Brown, Governor

Employment Relations Board

Old Garfield School Building

528 Cottage St. NE, Ste 400

Salem, OR 97301-3807

Phone: 503-378-3807

Fax: 503-373-0021

EmpRel.Board@oregon.gov

<http://www.oregon.gov/ERB>

April 29, 2021

VIA EMAIL ONLY

Jeffrey Chicoine
Miller, Nash, Graham & Dunn LLP
111 SW 5th Avenue, Suite 3400
Portland, OR 97206-4
jeff.chicoine@millernash.com

Elizabeth Joffe
McKanna Joffe Bishop LLP
1635 NW Johnson St
Portland, OR 97209
ljoffe@mbjlaw.com

Re: *Oregon Institute of Technology v. Oregon Tech American Association of University Professors*
ERB Case No. DR-001-21

Supplemental Letter Ruling Dismissing Petition

Counsel:

On April 21, 2001, Oregon Institute of Technology (Oregon Tech) filed a petition to declare the strike noticed by Oregon Tech American Association of University Professors (Association) as unlawful. The Board initially set the matter for a hearing to take place on April 30, 2021. On April 27, 2021, the Association moved to dismiss the petition. On April 28, 2021, Oregon Tech filed its response to the Association's motion. On April 29, 2021, the Board issued a letter ruling dismissing the petition and cancelling the scheduled April 30, 2021, hearing. The Board stated that it would provide its reasoning in a subsequent order, but issued the letter ruling as a courtesy to counsel for both parties, given that the hearing was scheduled to take place tomorrow and submissions for the hearing needed to be submitted by 5:00 p.m. today. In a subsequent email to the Board Chair, counsel for Oregon Tech asked the Board to "provide an explanation, even if brief for the dismissal." This letter is in response to that request; the Board still intends to issue an expeditious final order with a thorough explanation of its decision.

In this case, the Board majority concluded that the petition does not allege facts sufficient to establish Oregon Tech's claim that the strike is in violation of ORS 243.726 or 243.732. In order to proceed to hearing on a petition to declare a strike unlawful, the petitioner must allege specific, non-conclusory facts that, if proven, would be sufficient to establish that the "strike is or would be in violation of ORS 243.726 or 243.732[.]" OAR 115-040-0020. The sufficiency of the petition is governed by OAR 115-040-0020, which provides: "The petition [to declare a strike unlawful] shall contain a detailed statement of the facts on which petitioner bases its request for a declaration of an unlawful strike."

The Board established the legal standard for declaring a strike unlawful in *Oregon Trail School District No. 46 v. East Education Association East County Bargaining Council, OEA/NEA*, Case No. DR-01-05 (2005). In relevant part, the Board reiterated that “[a] strike unlawfulness petition is not an alternative to an unfair labor practice proceeding. *Eugene School District No. 4J v. Eugene Education Association*, Case Nos. UP-32-87 and DR-2-87, 9 PECBR 9455, 9485 (1987). The lone issue [in a petition case] is whether the strike violates ORS 243.726.” *Oregon Trail*, DR-01-05 at 13. When assessing a claim that the union did not satisfy the final offer requirement, the Board assesses whether the union’s alleged conduct prevented the final offer from serving its “basic purpose.” *Id.* Relying on *Eugene*, the Board held that “not every violation is sufficient to render a strike unlawful.” *Id.* Rather, there must be specific factual allegations sufficient to establish that the final offer caused “significantly deleterious effects to the bargaining process.” *Id.*

With respect to the cost summary requirement, “an inaccurate cost summary is not a violation of a party’s duty to bargain in good faith,” nor is it a basis to declare a strike unlawful, which requires a higher standard. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 31-32, 16 PECBR 559, 589-90 (1996). *See also Oregon School Employees Association v. Baker School District 5J*, Case No. UP-21-11 at 23 (2012) (“[A]bsent evidence of a deliberate effort to misrepresent, submission of an inaccurate cost summary is not a violation of a party’s duty to bargain in good faith.”).

In this case, even assuming that all of the well-pleaded, specific factual allegations in the petition are true, the Board majority concluded that those facts are insufficient to establish that the strike is or would be in violation of ORS 243.726 or 243.732.

Member Umscheid disagreed with the Board majority, and concluded that the petition (including its exhibits) alleges sufficient facts creating an issue for hearing with respect to whether the Association submitted a cost summary and final offer that did not comply with ORS 243.712(2)(b). She concluded that the petition contains a “detailed statement” of facts, *see* OAR 115-040-0020, that, if true, demonstrates that the Association’s cost summary did not comply with ORS 243.712(2)(b). In addition, Member Umscheid concluded that the petition adequately alleges detailed facts that, if true, demonstrate that the Association’s final offer unlawfully included new issues resulting in a significantly deleterious effect on bargaining. *See East Education Association/East County Bargaining Council, OEA/NEA*, DR-01-05 at 13, 21 PECBR at 169. Consequently, Member Umscheid would deny the motion to dismiss with respect to the Association’s alleged non-compliance with the cost summary and final offer requirement of ORS 243.712(2)(b), and would proceed with the scheduled hearing on those two issues on April 30, 2021.

As noted above, we have provided this additional explanation at the request of counsel for Oregon Tech. This supplemental letter is not intended to replace a subsequent final order, but rather to honor that request. We further note that Oregon Tech has filed a related unfair labor practice complaint, which the Board is reviewing to determine whether that complaint should be expedited. In light of our ruling today on the petition, we will not consolidate those two matters, but will further process the complaint. The Board will promptly notify the parties for its decision on whether to expedite the complaint.

For the Board,

A handwritten signature in blue ink, appearing to read "ARL", is positioned above the printed name of the signatory.

Adam Rhynard
Board Chair