Your Resource for Labor Relations and HR Assistance

LGPI Newsletter

FROM LOCAL GOVERNMENT PERSONNEL INSTITUTE

Second Quarter
2020

Local Government Personnel Institute Gets a New Home

By Brenda Wilsons/Executive Director - LCOG

Local Government Personnel Institute (LGPI) will soon have a new home. Beginning on July 1, 2020 the services presently being furnished by LGPI will begin being offered and administered by the Lane Council of Governments (LCOG) under the new name of Local Government Personnel Services (LGPS).

As you no doubt remember, the League of Oregon Cities (LOC) agreed to bring the LGPI line of services in-house. Over the last two years, LOC attempted to provide local governmental units in Oregon quality human resources and labor relation services as the LGPI administrator. Despite LOC's best efforts, its ability to be the administrator and provider of LGPI-type services was not sustainable.

LCOG, however, provides a wide variety of services statewide, and is in a strong position to provide Oregon local governments with the LGPI-type services they need. For over 70 years, LCOG has provided high-quality services to local governmental agencies statewide. LCOG employs over 280 people and provides services are offered over four broad areas: Administration, Government Services, Senior and Disability Services, and Business Services, and is the designated comprehensive planning and review agency for a number of federal and state programs. LCOG provides assistance for a wide variety of local government needs such as helping develop special plans, applying for grants, managing special projects, providing business loans, coordinating one of the state's largest broadband projects, and operating an internationally award-winning video production studio.

While LGPS will be a new service area for LCOG, the transition is expected to be seamless with no impact on current LGPI members. In fact, LGPI attorney and staff member Pierre Robert, will become an employee of LCOG on July 1, 2020 – performing the same valuable labor relation services to local governments across Oregon at the same rates and under the same conditions current LGPI members already enjoy.

LCOG has some big goals and large changes in store for LGPS, all of which work toward becoming an even greater resource for Oregon's local governments. LCOG has already reached out to local governments to hear about your experiences with LGPI and the services you need and expect in the future. This will help to ensure LCOG is heading in the right direction in planning for LGPS's future.

I am excited for the new LGPS program and hope to grow the program to better serve Oregon's local governments into the future.

This Issue

1201 Court St. NE, #200
Salem, OR 97301
(503) 588-2251
(503) 399-4863 fax
asklgpi@lgpi.org

ASK LGPI

Q "With the pandemic, should we just do a one-year agreement?"

A Along with employers around the world, Oregon public employers have been rocked by shocks to workplace routines brought by the coronavirus pandemic. The U.S. economy is contracting at a rate unheard of in modern times causing swarming uncertainty about how acute this sudden new recession will become and how long it will last. However, what's become clearer with every passing week since mid-March is that the revenue streams that fund Oregon local governments and special districts, be they property, gasoline and lodging taxes, Oregon Lottery funds or utilities or other local enterprises, will decline sharply for several quarters to come.

LGPI members and other Oregon public employers who are now bargaining with their unions for collective bargaining agreements (CBA's) to succeed those that will expire June 30 have an important option to consider: whether to bargain agreements for the most common terms of 3 or more years, or instead, bargain with their unions to do no more than extend (or "rollover") their current agreements for a period of one year. In practice, the effect of such a short term causes the parties to simply continue the status quo of most agreements on operations and benefits, confining the bargaining to wage increases for just the coming fiscal year.

Our view: if ever there was good cause for an Oregon public employer to consider the option of a short, one-year extension, this pandemic is it. The downturn in economic activities that generate revenue streams for Oregon local governments has produced of fog that clouds the ability predict whether revenues will be stable enough to support the year-over-year increases in personnel costs that come with a multi-year bargaining agreement. There's an old saying in bargaining: "You can't bargain in the dark." Limiting the term of a successor CBA to one-year limits the exposure to the risk that declining revenue will be insufficient to fund such increases.

As against this, limiting your renewed agreement to one-year means that your organization will have to return to the bargaining table again next Spring, incurring the same costs in time and money. Further, rolling your current agreement over for there is the chance that the economic uncertainty that is gathering so quickly today will still exist when its time to return to bargain in one year.

If your organization is now bargaining for a new CBA, its bargaining team should confer among themselves – and with LGPI – to weigh the pros and cons of proposing a one-year roll over. We invite you to use the Technical Assistance benefit of your membership by calling me at (541) 359-9417 or emailing me at probert@orcities.org to confer.

When is a Negotiated Agreement with a Union *Not* Collective Bargaining?

Portland Firefighters' Association v. City of Portland, UP-059-13

By Pierre Robert, Sr. Labor Law Attorney

On February 26, the Oregon Court of Appeals announced its decision in an appeal from the Oregon Employment Relations Board (the Board) of its decision in an unfair labor practice complaint filed in December 2013 by the Portland Firefighters' Association, IAFF Local 43 (the union) against the City of Portland (the city). The complaint required over two years to be decided by the Board in December 2015. It then took nearly two more years for its appeal to be argued before the Court of Appeals, then another two years and four months for the court to issue its decision. In all, the six and one-half total years to date is a ridiculous length of time for one case to be decided – and it is not over yet.

One of the several rulings by the Board (and appealed to the court), make the case very noteworthy. The union complained that the city made unilateral changes in the mid-term of the parties' collective bargaining agreement (CBA) over which it refused to bargain. The city countered that it had fully bargained the proposed changes to a complete agreement with the union's president, therefore exhausting its duty to bargain any further.

The Issues. The key issues for decision by the Board were (1) whether negotiations that produced a verbal agreement on how to implement budget cuts constituted collective bargaining; and (2) if not, then did the union waive its right to demand to bargain changes that their implementation caused in mandatory subjects in mid-term?

The Facts. In late 2012, the city began its budget process for the 2013-14 fiscal year anticipating a shortfall. The city asked the Portland Fire & Rescue Bureau (the Bureau) to develop its budget using a modified zero-based budget approach, requesting up to 90 percent of current appropriation levels with prioritized add back packages for cut items. The bureau developed its proposed budget through a budgetary advisory committee. The union's president served on that committee. The bureau submitted the resulting budget to the city's budget office.
On May 15, 2013, after considering the proposed budgets of all bureaus and departments, the mayor submitted a proposed budget to the city council reflecting a projected budget reduction for the Bureau of $4.4 million (or 4.7 percent). To achieve this, the proposed budget directed the Bureau to replace four companies with four rapid response vehicles to permit the layoff of 26 firefighters and then eliminated 10 additional positions and the Bureau's Dive Rescue Team.

Between May 9 and May 23, the union president met three times with the mayor's budget liaison to negotiate how the bureau would implement the budget cuts, including consideration of the availability of a federal grant that might fill budget gaps. The Fire Chief attended one of those meetings. At arbitration before the Board, the parties presented conflicting testimony as to whether an agreement materialized. The Board found that, in the third meeting, the mayor's liaison and the union president reached an oral agreement as to how the cuts would be implemented which included that the union president agreed not to contest the changes through a grievance. On June 20, 2013, the city council approved the budget, which included an emergency clause and became effective immediately.

During this period, the parties were subject to the CBA in effect through June 2016. During the life of a collective bargaining agreement, there is a continu-

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ing duty to bargain over mandatory subjects of bargaining. Also, ORS 243.698 provides that, during the life of a collective bargaining agreement, the employer "shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain." The exclusive representative then has 14 days within which to file a demand to bargain. The statute provides that, if a demand to bargain is not filed within 14 days of the notice, the exclusive representative waives its right to bargain over the change or the effect of the change identified in the notice.

Argument Before the Board. At the Board hearing, the city conceded that at least some of the changes in the adopted budget were changes to the status quo relating to operations that were mandatory subjects of bargaining. The union complained to the Board, contending that ORS 243.698 required the city to notify the union in writing of the anticipated changes, that the failure to send the notice constituted a failure or refusal to bargain over the changes, and that the city continued to commit an unfair labor practice by implementing the operational changes without negotiating. In its answer, the city admitted that it had implemented the operational changes but denied that it was required to bargain over the effects of those changes. As an affirmative defense, the city asserted that the union was estopped from or had waived its right to challenge the changes by agreeing to them during the budget negotiations.

The Board Finds Collective Bargaining. The Board rejected the union's complaint. Although in oral argument before the Board, both the union and the city explicitly rejected the suggestion that the budget negotiations constituted collective bargaining, the Board concluded that, as a matter of law, "the back-and-forth of multiple negotiations with the Union's president and City" during the budget process, in which each party had yielded in its initial position, constituted collective bargaining that resulted in an agreement on how to implement the budget cuts. The Board concluded that the city had thereby exhausted its duty to bargain. In the alternative, the Board concluded that having had notice of the proposed changes, the union waived its right to dispute them by failing to demand to bargain over them within a reasonable time after the union had notice of the changes, as required by ORS 243.698.

Argument Before the Court of Appeals.[1] On appeal, the union's primary contention to the court was that the Board erred in concluding that budget discussions in which its president participated with the mayor's office on behalf of the union constituted collective bargaining. It argued that budget negotiations, in which unions often participate, are political, not contractual, negotiations, and that a union's agreement to a bargain as to the budget does not constitute or waive collective bargaining as to operational changes necessitated by a negotiated budget that relate to mandatory subjects of bargaining. To support that contention, the union cited ORS 243.650(4), which defines "collective bargaining" as "the performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining." That definition, the union asserted, implies an inten- tion by the parties to engage in collective bargaining. The union cited the evidence that none of the parties to the budget discussions considered that they were engaged in collective bargaining.

The Court observed that, at the arbitration hearing before the Board, the city's counsel explicitly denied that the budget negotiations constituted collective bargaining, explaining that collective bargaining on behalf of the city is conducted by the city's Bureau

[1]All quoted text is excerpted from either the Board's or the court's decision.

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of Human Resources. The union further noted that the parties' CBA controlled the circumstances under which mid-contract term bargaining could occur and explicitly provided that agreements made in mid-contract are not binding on either party unless approved in writing by the union president and the director of the Bureau of Human Resources.

Though, before the Board, the city denied that the budget discussions constituted collective bargaining, on appeal, it argued that they had: the budget negotiations met the statutory definition of collective bargaining, because they constituted discussions in good faith concerning employment relations and that, upon arriving at a verbal agreement, the city "exhausted its duty to bargain over the changes." But the city devoted most of its argument to supporting the Board's conclusion that the union waived its right to dispute the changes resulting from the budget reduction by failing to demand to bargain over them.

The Court Reverses the Board. The court disagreed with the Board's conclusion that the budget negotiations satisfied the statutory requirements for collective bargaining and resulted in an enforceable agreement. It reasoned:

> "the statutory definition of "collective bargaining" encompasses a deliberate intention of the parties to "confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining." Here, the record is undisputed that the parties were engaged in budget discussions. They did not consider themselves to be engaged in collective bargaining over employment relations. The individuals who would ordinarily sit at the bargaining table to negotiate with respect to employment relations were not even present."

Additionally, it noted that the parties' CBA required that any side agreements to the collective bargaining agreement were not binding unless reduced to writing and signed by the union's president and the head of the city's Bureau of Human Resources. (The union had drafted an agreement that did not get signed). Thus, the court concluded that the Board erred in concluding that the parties had reached a binding agreement and that the city had thereby satisfied its duty to bargain before implementing the operational changes in the 2013 budget.

The Court Remands the Case Back to the Board. The court next addressed the Board's alternative rationale that the union had waived its right to bargain the changes. It observed that waiver requires an intentional relinquishment of a known right. In labor, case law states that a party may waive its right to bargain through clear and unmistakable language in a contract, bargaining history, or the party's action or inaction.

The Board's decision stated that the City had established its affirmative defense of waiver. The court pointed out however that while the City argued that the union had waived its right to bargain the changes by having affirmatively agreed to them during the budget negotiations, the Board ruled that the waiver occurred when the union, over a long period of time both before and after the passage of the budget, failed to deliver a formal demand to bargain the impact of the changes the budget forced on mandatory subjects; this theory of waiver the City did not argue.

The court, observing that those two theories of waiver are factually quite different, wrote: ". . . in light of the fact that the city never asserted the affirmative defense of waiver by inaction, it cannot be said to have established it. We conclude, therefore, that ERB erred in basing its determination on waiver by inaction." However, observing also the Board's

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comment "that those other legal theories might also lead us to the same conclusion (dismissal of the claim)," the court coupled with its reversal its order that the case be remanded to the Board for reconsideration of its analysis of the city's waiver theory.

Yet to Come: To date, a reconsideration hearing at the Board has yet to be scheduled. In light of the court's reversal, reconsideration will require the Board to rule that the budget negotiations did *not* constitute collective bargaining and therefore that the city did not exhaust its duty to bargain. The reconsideration of whatever waiver argument the City then makes must be in that context.

Upon the Board's eventual new decision, either or both parties may appeal it – again – to the Court of Appeals and from there, even to the Oregon Supreme Court. It is not out of the question that the court's ruling that the budget negotiations did not qualify as collective bargaining may, eventually, be reviewed and decided once and for all at the Supreme Court. If it is appealed again this case, which remains undecided after six and a half years, could continue undecided for years more. Relevant to that analysis, on remand the Board will consider the parties' agreements and past bargaining practices.

The Takeaway: As this case proves, understanding what union communications do and do not constitute collective bargaining is fundamental to a stable relationship. At least for the time being, the Board's expansive view of what communications constitute collective bargaining, which was in effect for four years until February, is now significantly cut back. Unless the Supreme Court one day reverses or modifies the new rule, then to be counted as collective bargaining, communications between unions and public employers must reflect "a deliberate intention of the parties to confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining."

LGPI advises that, for your organization to have confidence about whether negotiations with your unions constitutes collective bargaining, you should specifically discuss with your union representatives whether negotiations you need to have on mandatory subjects are intended by them as such. The agreement you arrive at on that question should be confirmed in writing. Be sure to observe written agreements relevant to this that are already in place that may impact the determination of this question. Last, but not least, use the Technical Assistance benefit of your LGPI membership to ask LGPI for guidance, advice or advocacy. Email us at asklgpi@lgpi.org or call me at (541) 359-9417.

How the Court of Appeals Decision Itself May be Vulnerable to Reversal. A key question the court's decision failed to address concerns the enforceability of agreements negotiated outside of collective bargaining. If, as the Board found, a verbal agreement was formed between the union and the city – but it was negotiated, as the court decided, outside of the regulated realm of collective bargaining, then in the event of a breach of that agreement, under what substantive law and before what judicial body may the aggrieved party seek a remedy? If the Supreme Court eventually hears an appeal of the Court of Appeals' decision, the rule that it fashioned, like the Board's before it, will also be vulnerable to reversal. Four or more of its seven Justices could easily conclude that the union president and the city's budget liaison understood very well that they "deliberately intended" to negotiate about mandatory subjects of bargaining. (The union to prevent layoffs, the city to cut the Bureau's budget in ways that would not provoke a grievance or Board complaint). If so, they could rule that the definition of "collective bargaining", being more concerned with substance than form, should recognize that it occurs in contexts other than through teams at a bargaining table.

Consumer Price Index

Base period: 1982-84 = 100, not seasonally adjusted

These figures are reported by the Bureau of Labor Statistics. You can hear the current figures anytime by calling (202) 691-6994.

CPI-U is the newer index, reflecting the buying habits of all urban households.

CPI-W is the revision of the "old CPI," reflecting the buying habits of urban wage earners and clerical workers.

West – Size Class B/C is the CPI based on cities with populations of less than 2,500,000 in 13 Western states.

Pacific—Size Class B/C is a division of the West Region including cities CA, OR, WA, AK and HI

All information and archives are online at www.bls.gov/cpi

CPI-U

	U.S. City Average		West – Size Class B/C		Pacific Size Class B/C	
	2020	2019	2020	2019	2020	2019
Jan.	2.5%	1.6%	2.8%	2.5%	2.6%	2.9%
Feb.	2.3%	1.5%	2.9%	2.3%	2.8%	2.6%
March	1.5%	1.9%	2.5%	2.3%	2.2%	2.6%
April	0.3%	2.0%	1.5%	2.7%	0.9%	3.1%
May	0.1%	1.8%	0.5%	2.8%	0.6%	3.1%
June		1.6%		2.6%		2.8%
July		1.8%		2.6%		2.7%
Aug.		1.7%		2.5%		2.5%
Sept.		1.7%		2.3%		2.5%
Oct.		1.8%		2.5%		2.6%
Nov.		2.1%		2.5%		2.7%
Dec.		2.3%		2.8%		2.6%

CPI-W

	U.S. City Average		West – Size Class B/C		Pacific Size Class B/C	
	2020	2019	2020	2019	2020	2019
Jan.	2.5%	1.3%	2.6%	2.4%	2.7%	2.7%
Feb.	2.3%	1.3%	2.8%	2.1%	2.9%	2.5%
March	1.5%	1.8%	2.5%	2.1%	2.3%	2.5%
April	0.1%	1.9%	1.3%	2.6%	0.9%	3.1%
May	-0.1%	1.7%	0.2%	2.7%	0.5%	3.0%
June		1.4%		2.5%		2.7%
July		1.7%		2.4%		2.6%
Aug.		1.5%		2.3%		2.3%
Sept.		1.5%		2.1%		2.5%
Oct.		1.6%		2.3%		2.7%
Nov.		1.9%		2.3%		2.6%
Dec.		2.3%		2.6%		2.6%

1201 Court St. NE, #200
Salem, OR 97301

No-Cost Technical Assistance!

As one of your LGPI member benefits, you have access to no-cost technical assistance. Any of your unrepresented management staff can take advantage of this valuable service. If you have a question, need clarification, or want advice before you take action, don't hesitate to call or email LGPI; our human resources and labor relations experts will provide quality assistance at no charge. Questions that can be answered within about an hour – including any necessary research time – qualify for this great benefit.

For example, no-cost technical assistance can be used for help with:

- Questions about FLSA, FMLA, OFLA, labor relations, hiring, job classification, employment policy, etc.
- Grievance and discipline/discharge assessment
- Finding available resources about specific topics
- Organized information about how local governments handle specific issues
- Sample position descriptions

LCOG Working Together FOR OUR COMMUNITY

Lane Council of Governments Oregon