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## Panel: Higher Education Issues at Public sector Labor Boards

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# Notable Issues in Oregon Public Sector Higher Education Collective Bargaining

Presented by

Adam Rhynard, Member, Oregon Employment Relations Board

# Overview of Oregon's Public Employee Collective Bargaining Act (PECBA)

- Enacted in 1973 and modeled on the NLRA
- Applies to public employers and employees, as well as private-sector employers and employees not covered by the NLRA
  - Overall, approximately 3,000 employers and 250,000 employees
- Enforced by Employment Relations Board
  - Administrative Law Judges
  - 3-Person Board
  - Conciliation Services
- With some limited exceptions, public employees can strike.
- Card check is primary method for representation matters

# Card-Check Overview

- Card check can be used in initial representation matters and unit clarification matters
- More than 50% of employees in a proposed bargaining unit must sign authorization cards
- If a card-check petition is filed with the sufficient showing of interest, the Board certifies the petitioned-for unit, unless an employee (or group of employees) in that unit file an election petition with the Board, supported by at least 30 percent of employees in the petitioned-for unit.

# Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University (2013)

- In 1999, the Union petitioned to represent all Graduate Assistants at the University.
- Citing a 1977 ERB decision, the University objected to the petition on the ground that GAs who were teaching or performing research primarily to fulfill a degree requirement were not public employees.
- Ultimately, after a consent election agreement, the ERB certified a bargaining unit of GAs that excluded those who taught or performed research primarily to fulfill a degree requirement.
- In 2012, the Union filed this petition to add those previously-excluded GAs (767) to the existing bargaining unit (951).

# Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University (2013)

- 1977 ERB Case (University of Oregon) concluded that:
  - GAs who teach or perform research that is not required to obtain a degree perform services for a fee and are “employees” under the PECBA; and
  - GAs who teach or perform research that is required to obtain a degree are “students,” and not “employees.” The order reasoned that a traditional employer-employee relationship does not exist in that situation, even though those GAs are paid a fee for their service. The order added that the money earned from that service was not “taxable income.”

# Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University (2013)

- This 2013 OSU case overrules the 1977 U of O case and concludes that there is no meaningful difference between the two sets of GA groups.
- The Board stated that the U of O case provided little explanation and only singled out tax treatment of GA income. Here, the Board noted that the Tax Reform Act of 1986 changed the tax treatment of stipends, and that now such money is taxable income regardless of whether the research and teaching duties are a degree requirement.

# Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University (2013)

- Board reasoned that definition of “public employee” (i.e., “an employee” of a “public employer”) is extremely broad and only subject to specific legislatively-enumerated limitations
- An employee is an individual who performs services for another person or entity in return for salary or wages under the control or right to control of the employer
- Applying this definition, the Board concluded “with little difficulty” that GAs are employees (and public employees) under the PECBA
- Board rejected the University’s argument that it should follow NLRB precedent in this case
  - \*Note—because the PECBA is modeled on the NLRA, the ERB often looks to precedent under the NLRA.



# Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University (2013)

- The Board also rejected the University’s separate “community-of-interests” argument)
- The Board has the authority to determine “*an* appropriate unit” and has the discretion to determine how much weight to give to each community-of-interest factor (which includes similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision)
- Here, both groups of GAs are largely similar with respect to the community-of-interest factors, and any differences are insufficient to make the proposed unit inappropriate for bargaining.

# Western Oregon University Federation of Teachers, Local 2278, AFT v. Oregon University System, Western Oregon University (2009)

- Unit clarification petition seeking to add instructors and coordinators in the Intensive English Program (IEP) to existing faculty bargaining unit
- University objected to the petition on the ground that the petitioned-for employees do not hold an “academic rank” and are not “considered to be faculty,” making them ineligible to be in the existing faculty unit
- University also argued that IEP positions do not share a sufficient community of interest with current bargaining unit employees

# Western Oregon University Federation of Teachers, Local 2278, AFT v. Oregon University System, Western Oregon University (2009)

- The Board concluded that it would be appropriate to include the IEP coordinators and instructors in the existing faculty bargaining unit, subject to a self-determination election
- Board has historically divided employees who work in higher education into two separate units: one for “professional” or “academic” employees and one for “classified” or “non-academic” employees.
- Adding IEP positions to the existing faculty unit is consistent with that precedent

# Western Oregon University Federation of Teachers, Local 2278, AFT v. Oregon University System, Western Oregon University (2009)

- Other community-of-interest factors support inclusion of IEP positions:
  - IEP positions and bargaining unit faculty perform essentially the same teaching duties, especially with respect to non-tenure faculty
  - No interchange or transfer of duties between IEP and other faculty, but also little interchange in bargaining unit employees in different disciplines
  - Bargaining unit faculty and IEP positions have similar access to University facilities and equipment
  - Bargaining unit faculty and IEP positions have same benefits and paid leave
  - Bargaining unit faculty and IEP positions are scheduled to work based on academic year, although IEP positions generally have more structured work hours

# Western Oregon University Federation of Teachers, Local 2278, AFT v. Oregon University System, Western Oregon University (2009)

- The Board rejected the University's argument that, because IEP employees teach "non-credit, non-academic courses," they do not share a sufficient community of interest with current bargaining unit faculty
- The Board reasoned that some differences in the work of bargaining unit employees is inherent in the Board's preference for certifying the largest possible appropriate unit. Board also noted that similar (if not greater) differences exist within the current bargaining unit—e.g., librarians are part of the current bargaining unit, but do not teach.
- The Board also noted that the University had not identified another bargaining unit that would be appropriate for the IEP employees, and that, under the PECBA, those employees are entitled to be represented by a labor organization for purposes of collective bargaining

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- Unfair labor practice complaint alleging that the University violated the PECBA by announcing, two days before an Association strike vote, that the University would disable log-in credentials to University-provided email (and other electronic) accounts for any striking faculty
- The Board concluded that this announcement interfered with, restrained, or coerced employees in the exercise of protected rights under the PECBA

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- Association represents approximately 1500 full-time faculty and academic professionals at the University
- University has a single sign-on computer system known as Odin, which provides faculty and other users with access to nearly 100 systems, accounts, or programs, including the University's email system and student recordkeeping system
- The system is, effectively “all or nothing”—i.e., access can't be enabled or disabled on a system-by-system basis

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- Typically, University terminates access within 24 hours of an employee's separation date
- During unpaid leaves of absence, the University has historically not disabled Odin access
- University expects faculty to accept invitations to serve on advisory bodies or public commissions and to travel to conferences and other institutions to present lectures, lead seminars, etc.



# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- Association had scheduled a strike authorization vote for March 11, 2014 (\*Reminder—these employees have a right to strike under the PECBA)
- University had received inquiries from faculty, chairs, and others about the effects of a strike, including about access to email during a strike
- On March 9, the University distributed a FAQ, which announced that it intended to treat the physical and virtual workplace the same

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- FAQ stated that an striking employee would not be permitted to engage in any activity related to their employment, and that electronic log-in credentials for striking employees would be disabled so long as that employee remained on strike
- FAQ also stated that striking faculty would only have access to “public spaces” on the campus and specified that the following areas were not “public spaces”: academic buildings, classrooms, laboratories, private offices, and some areas of the library

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- After distribution of the FAQ, dozens of faculty expressed concern to the Association about losing access to their electronic accounts, and about 50 members contacted the Association's Executive Director and expressed reservations about striking.
- Faculty had various concerns about losing access to Odin, and this potential loss was one of the primary topics of discussion within the bargaining unit

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- The Board concluded that the University's March 9 FAQ violated that part of the PECBA that prohibits a public employer from interfering with, restraining, or coercing an employee in the exercise of rights guaranteed by the PECBA
- The Board began from the well-settled principle that the right to participate in lawful strike activity, including voting for or against a strike, is guaranteed by the PECBA.
- The question, then, under the Board's caselaw, is whether the University's statement, issued two days before the strike authorization vote, interfered with, restrained, or coerced those employees in the exercise of that protected activity

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- Under Board precedent, an employer's action violates that particular right if the natural and probable effect of that statement would be to chill employees in exercising their right to engage in the protected activity of authorizing a strike
- The Board observed that Association-represented employees were highly dependent on being able to access the Odin system for personal, professional, and hybrid "personal-professional" reasons that are typically associated with higher-education faculty
- Under these circumstances, telling employees who were about to vote on authorizing a strike that any striking employee would lose this access would naturally and probably chill those employees in exercising their statutorily-guaranteed right

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- The Board rejected the University's two primary defenses
- First, the Board disagreed that there would be no natural and probable chilling effect merely because the employees could sign up for a free, non-University email account, or use an existing non-University email account
- Second, the Board disagreed with the University's argument that the FAQ was lawful because it merely announced the intent to undertake a lawful action (i.e., disable strikers' log-in access to Odin)
- The Board did not reach the issue of whether the University could have undertaken that action, but noted that certain statements that might be lawful and reasonable under most circumstances could be unlawful due to the timing and circumstances of the statement

# Portland State University Chapter American Association of University Professors v. Portland State University (2015)

- The Board cited an earlier decision finding a PECBA violation where a public school principal made an announcement on the day of a widely publicized teacher-strike-vote meeting. That announcement directed teachers to present him with two weeks of lesson plans by the end of the following afternoon.
- The Board concluded that, although such an announcement might be lawful and reasonable under most circumstances, here it had the quality of a reprisal against teachers for exercising their right to engage in protected activity, due to the timing of the announcement
- Likewise, in this case, the Board concluded that the FAQ announcement (2 days before the strike vote) had the quality of a reprisal and was unlawful
- As a remedy, the Board ordered a cease and desist order and directed the university to post and email a notice of the violation