EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-21

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
MARION COUNTY,	)	AND ORDER
	)	
Respondent.	)	
	)	

Jared Franz, Staff Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Brian Kernan, Senior Assistant Legal Counsel, Marion County, Salem, Oregon, represented Respondent.

On September 3, 2021, SEIU Local 503, OPEU (Union) filed an unfair labor practice complaint against Marion County (County). The complaint alleges that Marion County violated ORS 243.672(1)(e) by failing to bargain in good faith with the Union over the County's change in July 2021 to the temporary telework policy it adopted at the outset of the COVID-19 pandemic. The Union requested that this Board expedite the complaint under OAR 115-035-0060. The County opposed that request. On September 13, 2021, the Board issued a letter ruling expediting the case.

On September 14, 2021, we issued a notice of expedited hearing and prehearing order setting the hearing for October 11 and 12, 2021. The County filed a timely answer to the complaint on September 24, 2021. The parties filed prehearing briefs on October 5, 2021.

This Board conducted a hearing on October 11 and 12, 2021, by video conference. The parties made oral closing arguments on October 12, at which point the record closed.

As stated by the Board in the notice of expedited hearing and prehearing order, the issue presented in this case is: Did Respondent Marion County violate ORS 243.672(1)(e) by refusing to bargain in good faith with Complainant SEIU Local 503, OPEU regarding a change in telecommuting for SEIU-represented employees?

For the following reasons, we conclude that the County violated ORS 243.672(1)(e) when it unilaterally revoked the Temporary Telework Policy in July 2021.

RULINGS

Neither party pursued any objections to the Board's rulings.

FINDINGS OF FACT

The Parties

1. Complainant SEIU Local 503, OPEU (Union) is a labor organization within the meaning of ORS 243.650(13). The Marion County Employees Association Local 294 (MCEA) is an administrative subdivision of the Union that represents approximately 1,000 regular and temporary employees of Marion County.

2. Respondent Marion County (County) is a public emp1oyer within the meaning of ORS 243.650(20). The County employs approximately 1,740 regular and temporary employees.

3. Latricia Straw is the President of MCEA. Shawna Schaeffer is employed by the Union as a Public Services Field Coordinator. Schaeffer provides representation services to employees in the MCEA bargaining unit.

4. The Board of Commissioners (BOC) consists of three elected commissioners who establish policy for Marion County generally. The BOC also establishes employment-related policy for employees of the County, including the terms of the personnel rules that apply to County employees. During the relevant period, Jan Fritz was the Chief Administrative Officer for the County, Colleen Coons-Chaffins was the Business Services Director, Bruce Armstrong was the County Counsel, and Michelle Shelton was the Chief Human Resources Officer.

The Parties' Initial Collective Bargaining Related to the 2020-2022 Collective Bargaining Agreement

5. The Union and the County have been parties to a series of collective bargaining agreements over several decades. The current collective bargaining agreement between the parties is effective from July 1, 2020 to June 30, 2022 (CBA).

6. The parties began negotiations regarding the CBA in December 2019. The parties held bargaining sessions on December 18, 2019, February 13, 2020, and February 25, 2020. Neither party made proposals directly related to pandemic safety, telecommuting, or remote work options during these first three bargaining sessions.

The Emergence of the COVID-19 Pandemic and the County's Response

7. On March 8, 2020, Governor Kate Brown declared a State of Emergency pursuant to her authority under ORS 401.165 in response to the pandemic arising from the 2019 novel coronavirus, which causes a disease now known as COVID-19.

8. On March 12, 2020, the parties held a fourth bargaining session. In the March 12, 2020, bargaining session, the Union proposed that the parties enter a letter of agreement related to COVID-19. The Union gave the County a draft letter of agreement, which states that the purpose of the agreement was "to address work restrictions and pay provisions for employees who have been or may have been exposed to the novel coronavirus." The agreement included proposed terms related to safety equipment, a waiver of limits on vacation accrual and vacation cash-out, a temporary moratorium of discipline for sick time or leave without pay, paid administrative leave, access to leave banks, and required notice to the Union in the event an employee was exposed to the novel coronavirus. In addition, the agreement included the following proposed provision related to teleworking:

> "For the period March 1, 2020 through at least June 30, 2020 or a date mutually determined, employee telework requests will be presumed to be acceptable unless denied within seventy-two hours of the request. For this period, the only criteria an employer may use as basis to deny a telework or telecommute request will be whether the position is suitable for telecommuting or telework. Denied requests can be appealed to the Chief Human Resources Officer."

9. After March 12, 2020, the parties conducted bargaining by virtual means because of concerns related to the rise of COVID-19 cases throughout Oregon.

10. County Chief Administrative Officer Jan Fritz signed a "Board Session Agenda Review Form" regarding a possible amendment to the Marion County personnel rules. The form lists an agenda planning date of March 12, 2020. The form states, in part, "Marion County seeks to maintain essential services in order to meet its critical business needs while also maintaining a focus on the health and safety of its employees."

11. On March 16, 2020, at a special meeting, the BOC declared a State of Emergency under ORS 401.309 in response to COVID-19.[1]

12. On March 16, 2020 at 5:05 p.m., Keith Quick, the Union's Bargaining Coordinator, followed up via email with two of the County's bargaining representatives, Colleen Coons-Chaffins and County Counsel Bruce Armstrong, about the Union's proposed COVID-19 letter of agreement. Quick attached to the email a letter of agreement entered by the State of Oregon and SEIU Local 503 related to COVID-19. Quick wrote, "The state has agreed to the attached LOA. We gave you a proposal last week. We need to address this ASAP. Every day the news gets more dire and Marion County workers can't wait any longer. Can we expect a response from you in the next 24 hours?"

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[1]ORS 401.309 provides that the governing body of a city or county may declare, by ordinance or resolution, "that a state of emergency exists within the city or county." ORS 401.309(1). That ordinance or resolution may "establish procedures to prepare for and carry out any activity to prevent, minimize, respond to or recover from any emergency[,]" ORS 401.309(2), designate the emergency management agency charged with carrying out emergency duties or functions, ORS 401.309(3), and order mandatory evacuations, ORS 401.309(4). The statute also provides that nothing in ORS 401.309 "shall be construed to affect or diminish the powers of the Governor during a state of emergency declared under ORS 401.165. The provisions of ORS 401.165 to 401.236 supersede the provisions of an ordinance or resolution authorized by this section when the Governor declares a state of emergency within any area in which such an ordinance or resolution applies." ORS 401.309(5).

13. On March 18, 2020, the BOC approved an ordinance amending the Marion County Personnel Rules by adopting a temporary policy regarding telecommuting (Temporary Telework Policy). The ordinance recognized that "the health, safety and well being of Marion County employees is essential to the County continuing to carry out its essential functions[,]" and "some county work may be performed through telecommuting[.]" The Temporary Telework Policy acknowledged that County "employees are at the forefront" of the County's concern as it worked "to adapt quickly to this emerging public health threat and navigate new business practices in order to continue to serve our community to the best of our abilities." The policy outlines the prerequisites for and conditions relating to teleworking and includes a provision that an employee's supervisor or department head may discontinue the employee's teleworking arrangement with 24 hours' notice.

14. The Temporary Telework Policy concludes as follows:

> "REVIEW: This temporary policy shall be attached as an addendum to the Marion County Personnel Rules and reviewed by human resources and the chief administrative officer at least every 14 days and updated or revoked as necessary. This temporary policy allowing telework is only in effect during the time period covered by the COVID-19 Emergency Declaration issued by the Board of Commissioners."

15. The policy includes a COVID-19 telecommuting agreement, which an eligible, approved employee was required to sign. That agreement included the following agreement: "I agree to comply with the conditions [in the agreement] and understand this agreement is temporary due to the COVID-19 pandemic and may be rescinded at any time."

16. On March 18, 2020, County Counsel Bruce Armstrong sent an email to Keith Quick transmitting a copy of the Temporary Telework Policy that the BOC had approved that day. The County did not provide a copy of the policy to the Union before its adoption.

17. On March 19, 2020, Quick responded to Armstrong's email. Quick wrote that although the Union appreciated the County's temporary telecommuting policy, "our team doesn't think the new policy covers all the issues we raised in our proposed LOA." Quick attached a counterproposal. Quick also described why the County's operations were, in the Union's view, like the services provided by the State of Oregon (which had already agreed to a COVID-19-related letter of agreement with the Union), and asked Armstrong for a response from the County to the Union's proposal by March 20. Quick also relayed concerns that County employees had about working in person during the pandemic and asked whether the County had a plan to limit public access to Marion County worksites.

18. On March 20, 2020, Armstrong replied to Quick's email. Armstrong explained that he had reviewed the letter of agreement the Union proposed the day before and found "that the vast majority of approaches and employee options proposed in that LOA are currently achievable under the Marion County policies now in effect." Armstrong noted that "[w]hile we need to ensure that certain county functions and services are carried out for our community, we want to do what we can to keep our employees safe, and to slow the progress of the COVID-19 virus."

19. On March 21, 2020, the BOC adopted an order closing County offices to the public and directing non-essential employees to stay home.

20. On March 23, 2020, Governor Brown issued Executive Order No. 20-12, which strongly encouraged local governments to facilitate telework and work-at-home by employees.

21. On March 24, 2020, Quick replied to Armstrong's March 20 email. Quick wrote that he interpreted Armstrong's response as communicating that the County was "not interested in an LOA right now." Quick suggested than an alternative to a letter of agreement would be a "side agreement like an LOA that will help provide more clarity and protections for County workers and the public." Quick also forwarded to Armstrong an email MCEA President Latricia Straw had sent to Fritz, emphasizing the Union's desire to cooperate with the County during the COVID-19 pandemic and asking numerous questions about the effect of the pandemic on leave, training, personal protective equipment, discipline, and similar topics.

22. On March 25, 2020, the BOC approved COVID-19 Social Distancing Polices in response to COVID-19.

23. On March 25, 2020, the BOC adopted an order directing County department heads to direct their employees to work in one of the following ways: telework, including work-from-home, alternative schedules, or on site in a manner consistent with County COVID-19 Social Distancing Polices.

24. The same day, March 25, 2020, Armstrong replied to Quick's March 24 email. Armstrong outlined multiple steps the County was taking to adhere to the Governor's executive orders and the guidance from the Oregon Health Authority and the Centers for Disease Control and Prevention (CDC). Armstrong noted that "[t]hese steps also achieve the vast majority of approaches proposed in the LOA." Armstrong also forwarded answers to the questions posed by Straw to Fritz.

25. Also on March 25, 2020, in a separate email thread, Quick wrote to Armstrong and noted that the two of them had talked during the previous week about limiting the scope of bargaining and "trying to reach a settlement as quickly as possible." Quick informed Armstrong that the Union wanted to focus "on three areas for limited scope negotiations"—cost of living adjustments, health care, and the COVID-19 letter of agreement.

26. On March 26, 2020, Armstrong replied that he would respond to the substance of Quick's email at a later time and asked whether the Union would agree to cancel the bargaining session scheduled for March 31. On March 27, Quick replied that the Union would agree to cancel "as long as the County is intending to move things forward with a response to my email by 3/31 at the latest."

27. On April 1, 2020, Armstrong responded to Quick's email. Armstrong conveyed a one-time package proposal and communicated the condition that if the parties could not "resolve this quickly, we will return to bargaining through the normal process" and "at the parties' prior positions." Armstrong offered, on behalf of the County, a two percent cost of living adjustment for each year of the two-year contract term and increases of $50 to health insurance premiums (for a monthly contribution of $1,546 for calendar year 2021 and $1,596 for calendar year 2022). Armstrong also responded to various language changes that the Union had proposed. With respect to the Union's desire for a COVID-19 letter of agreement, Armstrong wrote:

> "Finally, management and MCEA have shared a fair amount of communication with regard to MCEA's desire for letters of agreement relating to the current pandemic situation. However, it is important to note that for purposes of this discussion, we are negotiating an MCEA collective bargaining agreement that will take effect on July 1, 2020. It is safe to say that no person can reliably anticipate the circumstances that our community, county or state will be facing three months from now. Management seeks to resolve CBA negotiations promptly and this package is made with that goal in mind. We will not be including discussions of letters of agreement relating to the COVID-19 pandemic as part of the quick resolution of this matter."

28. On April 3, 2020, the County implemented the Temporary Telework Policy by adding the addendum to the Marion County Personnel Rules.

29. Eligible County employees could telecommute, and did so, pursuant to the Temporary Telework Policy beginning on April 3, 2020. Some County employees worked in-person at County facilities throughout the pandemic, including, for example, some employees in the Board of Commissioners' office, the County Counsel's office, the sheriff's office, and the health department.

30. On April 10, 2020, after the Union surveyed bargaining unit members, Quick responded to the County's April 1 package proposal. Quick explained that "given the current crisis" the Union accepted the County's package proposal.

31. On April 14, 2020, both parties initialed their tentative agreement to a redlined collective bargaining agreement incorporating the terms of the County's package proposal. The CBA agreed to by the parties does not contain language related to telecommuting.

32. On June 24, 2020, the Oregon Health Authority (OHA) issued administrative rules requiring masking in response to COVID-19. That day, the County issued FAQs to all County employees regarding the mask mandate.

33. On November 18, 2020, the BOC adopted a COVID-19 Physical Distancing and Infection Notification Policy and Procedure.

34. The County held COVID-19 vaccination clinics for eligible County employees in January, February, March, April, and May 2021.

35. On March 17, 2021, the County adopted a COVID-19 Infection Control Plan, in compliance with Oregon OSHA's temporary rule for COVID-19 (OAR 437-001-0744).

36. Since the beginning of the COVID-19 pandemic, the County has implemented a variety of safety measures in its facilities at various times. Those safety measures include supplying employees with equipment and materials (such as respirators, masks, hand sanitizer, and bottled water); installing plexiglass barriers; manufacturing and installing hand sanitizer stands; implementing measures to attempt to improve ventilation (such as changing filters more frequently and increasing outside air flow); using electrostatic sanitizer sprayers to sanitize buildings and vehicles; and wiping down high-touch points.

The County's Rescission of the Temporary Telework Policy

37. At some time before June 10, 2021, the BOC learned that Governor Brown intended to lift the remaining restrictions imposed by the Governor's executive orders on June 30, 2021.

38. On June 10, 2021, the BOC sent an email to all County employees indicating that the County intended to rescind the Temporary Telework Policy and that County employees would be expected to return to on-site work by July 19, 2021. The BOC's email explained that each department was evaluating how best to manage the transition, and that employees "will hear more from your department head or manager about how this transition will take place in your department. We are committed to safety, health, and wellness and will continue enhanced cleaning, ventilation optimization and other COVID-19 protocols for the time being." The BOC also noted that if there was sufficient interest among employees, additional employee COVID-19 vaccine clinics would be scheduled.

39. The County did not notify the Union before the BOC sent the emailed announcement to all employees on June 10, 2021, and no bargaining occurred before June 10, 2021, about the cessation of teleworking and the return of County employees to in-person work.

40. On June 10, 2021, Chief Human Resources Officer Michelle Shelton sent an email to all County employees attaching FAQs regarding the County's rescission of the Temporary Telework Policy. Those FAQs included the following:

> **"Why are we calling all employees back to in-office work as of July 19th?**
> "As vaccinations rates continue to rise, we anticipate the Oregon state of emergency will conclude in the coming weeks.
>
> "* * * * *
>
> **"What if I am currently dealing with a serious medical condition and I need to work from home?**
> "Working from home will no longer be an option as of July 19th. Please contact your HR Business Partner and/or Leave Administrator to discuss leave options."
>
> "* * * * *
>
> **"If I am quarantined due to COVID exposure, or a positive COVID Test, can I work from home?**
> "No. You should follow normal department call-in procedures and take appropriate leave available to you in accordance with county Personnel Rules and labor agreements."

41. The Union received notice of the County's intended rescission of the Temporary Telework Policy when it received these June 10 emails.

42. As of June 10, 2021, the CDC still classified the risk of community transmission of COVID-19 in Marion County as "substantial."

43. On June 23, 2021, Shawna Schaeffer, the Union's Public Services Field Coordinator, emailed Shelton a demand that the County bargain with the Union, pursuant to ORS 243.698, over the decision and the impact of requiring workers to return to the physical workplace from telecommuting. Schaeffer requested dates that the County was available to bargain, and wrote, "The Union was notified on June 10, 2021 and for the purposes of the expedited bargaining process we'd like to use this date for our ninety day timeline for negotiations."

44. On June 25, 2021, Governor Kate Brown issued Executive Order No. 21-15, rescinding all remaining COVID-19 restrictions, effective June 30, 2021, or when the state crossed the threshold of 70 percent first-dose vaccinations for those 18 or older, whichever was earlier. The Executive Order states that, as of June 25, 2021, 2,760 Oregonians had died due to COVID-19 related illnesses. The Executive Order states:

> "Although we should all take pride in our collective efforts, we must remember that Covid-19 is still a worldwide threat, as communities, states, and nations with low vaccination rates continue to see outbreaks. We must remain vigilant. Covid-19 remains a significant threat in Oregon, especially to those who are unvaccinated. New, more contagious variants continue to spread, both around the world and here at home. As of this week, approximately 33% of eligible Oregonians age 12+ have not received any vaccination. When you look at the entire population in Oregon, approximately 42% of all Oregonians—including children who are not yet eligible for vaccination—remain unvaccinated. While widespread vaccination among the eligible population has dramatically reduced the spread of Covid-19 and provided protection to some of our most vulnerable Oregonians, Covid-19 is likely to be present in our lives for months to come."

45. On June 30, 2021, the BOC adopted an order ending the County's COVID-19 State of Emergency and rescinding all County policies and temporary rules adopted as part of the County's COVID-19 response. On June 30, 2021, 59.3 percent of Marion County residents at least 18 years old had been fully vaccinated, and 61.7 percent of that population had received one dose.

46. By June 30, 2021, the CDC had reduced the risk of community transmission of COVID-19 in Marion County from "substantial" to "moderate."

47. On July 2, 2021, Shelton replied to Schaeffer's June 23, 2021, email. Shelton explained that the BOC enacted the temporary telework policy in response to the COVID-19 pandemic and, "on June 30, 2021, the commissioners officially rescinded the temporary policy. As such, we do not consider this policy, that was implemented in April of 2020, a mandatory subject of bargaining."

48. On July 7, 2021, Union President Straw sent an email to the BOC requesting a listening session via videoconference regarding the process for returning to in-person work. The email requested a response by July 13, 2021. In the email, Straw outlined concerns raised by employees related to the required return to in-person work.

49. On July 9, 2021, Schaeffer emailed Shelton. Schaeffer wrote that the Union disagreed that the cessation of telecommuting was not a mandatory subject of bargaining. Schaeffer explained that employees returning to in-person work "under the current circumstances impacts health and safety, which is a mandatory subject matter." Schaeffer asked the County to provide dates that it was available to begin bargaining with the Union and stated that the Union would file an unfair labor practice complaint if the County refused to bargain.

50. On July 13, 2021, Shelton responded by email. Shelton wrote that employee health, safety, and wellness was a top priority of the County. Shelton wrote that the County was willing to "learn more about and discuss any specific health and safety concerns the union has," and offered three possible meeting times.

51. On July 15, 2021, Schaeffer responded to Shelton by email agreeing to meet on July 22. Schaeffer wrote that, although the Union was aware that things were returning to "the new normal," the Union's view was that impact bargaining was required because of the cessation of telecommuting.

52. On July 19, 2021, the County employees who had been teleworking returned to on-site work, except for those employees granted telework as a reasonable accommodation for a disabling condition and those who continued teleworking due to work or space constraints.

53. On July 19, 2021, the day that employees returned to in-person work, only 63 percent of Marion County residents 18 or older had received at least one dose of a COVID-19 vaccine, and only 60.5 percent of that population had completed the vaccine series.

54. On July 20, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "moderate" to "substantial."

55. On July 22, 2021, the parties met to discuss the return to in-person work. At that meeting, the Union conveyed the concerns of bargaining unit members, including the safety concerns of immunocompromised employees and parents of children too young to be vaccinated. Schaeffer stated at the meeting that the Union had submitted a demand to bargain and the Union wanted the parties to be cognizant of the bargaining deadline.

56. On July 25, 2021, Schaeffer emailed County Human Resources Specialist Angelique Voltin requesting additional dates that the County's representatives were available to meet.

57. On July 28, 2021, Voltin responded to Schaeffer via email with proposed dates. The Union selected August 9, 2021, to meet again with the County's representatives.

58. On August 1, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "substantial" to "high."

59. Union President Straw testified that she believed that she contracted COVID-19 in early August 2021 from being in close contact in the workplace with a County employee who subsequently reported testing positive for COVID-19. Straw obtained a COVID-19 test after contact with that employee, but because she was tested quickly, the result was inconclusive. Later, a County employee from epidemiology contacted Straw and told Straw that she was presumptively positive for

COVID-19. The employee told Straw that she was required to quarantine for two weeks and could not return to work until she had been without a fever for three days. (Because of the nature of her work, Straw did not telecommute.) Straw experienced what she believed were COVID-19 symptoms for three to four days. Ultimately, she returned to work on August 23, 2021. Straw testified that she had been vaccinated since May 2021, wore a face covering while at work, and took every other precaution. Straw believes that she experienced milder COVID-19 symptoms than she would have if she had not been vaccinated.

60. Representatives for both parties met again on August 9, 2021. At that meeting, Shelton stated that the County was there to listen. Toby Green, an organizer, stated that the Union was there to bargain. Diana Downs, a bargaining unit member and the Secretary-Treasurer of the Union, explained that she was quarantining at home, on doctor's orders, after being exposed to COVID-19 at work. Downs noted that she was able to work during quarantine, but was using her sick leave because she was not permitted to telecommute.

61. At the conclusion of the August 9, 2021, meeting, Schaeffer, who was attending the meeting virtually, shared her video screen and read a letter of agreement the Union presented. Shelton thanked the Union representatives for their time and said that the County would respond by email.

62. Also on August 9, after the parties' meeting, Schaeffer transmitted the Union's proposed letter of agreement by email to Shelton and Voltin.

63. On August 13, 2021, Governor Brown reintroduced an indoor mask mandate.

64. On August 13, 2021, Voltin emailed Schaeffer and advised that the County was proceeding with the transition from telework to in-office operations, as announced on June 10, 2021. Voltin wrote, "We appreciate our partnership with the union, but at this time, we do not feel the need to meet to discuss this further."

65. On August 13, 2021, Schaeffer replied to Voltin's email. Schaeffer wrote, "Just for clarity, the County is rejecting our proposal and refusing to bargain further on this topic?"

66. On August 16, 2021, Voltin replied to Schaeffer's email. Voltin affirmed that "the county is declining your proposal at this time." Voltin also wrote:

> "In addition, after meeting with you on two separate occasions, we have both listened to your concerns and reviewed the materials you provided regarding the time, place, and manner of work, and we do not feel that there is any more to discuss at this time. The health, safety, and wellness of our employees and the community members we serve, remain our top priority. We continue to have COVID-19 protocols in place to keep our workplace safe, to include the temporary administrative order to require masks to be worn in indoor spaces."

COVID-19 in Marion County

67. Marion County recorded 1,236 cases of COVID-19 in July 2021, up 95 percent from the previous month (when there were 633 cases of COVID-19 in Marion County). The number of

COVID-19 cases in Marion County increased to 5,001 in August 2021 and to 4,517 in September 2021. The rates of hospitalizations and deaths caused by COVID-19 also increased from June 2021 in the three following months. There were 57 people hospitalized with COVID-19 in Marion County in July 2021 (a 46 percent increase over June), 215 people hospitalized in August 2021, and 133 hospitalized in September 2021.

68. In July 2021 through September 2021, deaths from COVID-19 in Marion County also increased. In July 2021, 12 people died in Marion County from COVID-19, a 140 percent increase from June. In August 2021, 48 people died from COVID-19 in Marion County. In September 2021, 20 people died from COVID-19 in Marion County.

69. From June 10, 2021 through October 4, 2021, 67 Marion County employees contracted COVID-19. Of those cases, 9 were in the district attorney's office (although one employee was a temporary employee who was not physically in the office during this period), 16 were in the sheriff's office, 6 were in the juvenile department, 10 were in the public works department, 19 were in the health and human services department, and 3 were in the business services department. During the same June 10 through October 4 period, there were 139 COVID-19 exposures among Marion County employees.

70. From June 10, 2021 through October 1, 2021, there were 10 COVID-19 outbreaks investigated by Marion County Health and Human Services at eight Marion County worksites.[2] Outbreaks were investigated at Public Works on Silverton Road NE, Marion County Jail on Aumsville Highway SE, Health and Human Services on Center Street, Health and Human Services on Silverton Road, the District Attorney's Office on Court Street NE, the Sheriff's Transition Center on Aumsville Highway SE, and the Stepping Stones Transitional Facility. Those outbreaks involved 25 COVID-19 cases among Marion County employees. For this purpose, a case is any COVID-19 case (confirmed or presumptive) that is associated with a facility that has been identified as having ongoing COVID-19 transmission, which may include staff, clients, residents, or other individuals.

71. From June 10, 2021 through October 1, 2021, there were 21 employees in the Marion County Health and Human Services Department exposed to COVID-19 at work.

72. As of October 4, 2021, the CDC's assessment of the risk of community transmission of COVID-19 in Marion County remained "high."

73. As of October 5, 2021, 58.4 percent of people of all ages in Marion County had received at least one COVID-19 vaccine. On October 5, 2021, 64.5 percent of all Oregonians had received at least one COVID-19 vaccine. On October 5, 2021, Marion County had a lower percentage of vaccinated residents than Lincoln County (70.2%), Benton County (69.6%), Multnomah County (69.5%), Washington County (68.2%), Hood River County (68.1%), Lane County (65.4%), Deschutes County (65.1%), Clatsop County (63.6%), Clackamas County (63.6%), Tillamook County (63.5%), and Polk County (61.6%).

[2]Marion County Health and Human Services tracks outbreaks at all places of employment in Marion County. The County offered evidence at hearing of outbreaks tracked at its own facilities. Health and Human Services categorizes places of employment as "workplace settings" and congregate settings. A workplace setting is any place of employment that is not a congregate setting (which, for this purpose, is a residential setting). Health and Human Services tracks COVID-19 outbreaks in workplace settings when there are two COVID-19 cases and outbreaks in congregate settings when there is one COVID-19 case.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The County violated ORS 243.672(1)(e) when it unilaterally revoked the Temporary Telework Policy in July 2021.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." A public employer may violate its duty to bargain in good faith under ORS 243.672(1)(e) if it does not complete its bargaining obligation before making a change in the status quo concerning a subject that is mandatory for bargaining. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE II*) (absent "a sufficient affirmative defense, a union has a statutory right to insist that an employer bargain over mandatory subjects before making changes to the status quo"). When reviewing an allegation of an unlawful unilateral change, we consider (1) whether an employer made a change to the status quo; (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty to bargain. *Id*. at 177 (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 8, 20 PECBR 890, 897 (2005), *rev'd on other grounds*, 209 Or App 761, 149 P3d 319 (2006) (*AOCE I*)). Further, it is well-established that the Public Employee Collective Bargaining Act (PECBA) permits a public employer to make changes involving permissive subjects, but if such changes "also directly impact mandatory subjects over which the employer is required to bargain under the Act, then the employer must give notice of the proposed change and give the exclusive bargaining representative an opportunity to bargain over the impact of the change on mandatory subjects" before implementing the permissive change. *International Brotherhood of Electrical Workers, Local 125 v. City of Forest Grove*, Case No. C-201-75 at 6, 4 PECBR 2168, 2173 (1979). When asserted, we also consider an employer's affirmative defense of waiver: namely, a party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that a party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE II*, 353 Or at 177.

We begin by considering whether there was a unilateral change to the status quo. The parties agree that the County's revocation in July 2021 of the Temporary Telework Policy constituted a change. The County contends, however, that the revocation was not a change to the status quo. Rather, the County contends that the status quo was "no telework." Consequently, according to the County, the return of employees in July 2021 to on-site work was only a return to the status quo, not a departure from it.

A working condition can become the status quo "by terms of an expired contract, past practice, work rule, or policy." *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00 at 9-10, 19 PECBR 656, 664-65 (2002); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007). Here, the Union contends, and we agree, that the status quo is determined by the employer's policy—in this case, the Temporary Telework Policy. The County decided to permit teleworking for certain employees at the outset of the COVID-19 pandemic, and that policy remained in effect throughout 15 months of the pandemic (until revoked by the County, in the action at issue in

this case). That policy permitting teleworking for eligible employees during the pandemic was the only teleworking policy in existence during the pandemic. It was a policy that affected almost every aspect of remote employees' working lives—including the location of their work, the means of receiving assignments, the methods of communicating with other employees and the public, the means of performing work, and similar aspects of work. That employer policy determined the status quo during the pandemic.

We understand the County to argue that we should determine the status quo based on a past practice, not employer policy. In making that argument, the County relies on a practice that preceded the COVID-19 pandemic—namely, the County's practice of not generally permitting telework. The problem with the County's argument is that the "no telework" past practice was supplanted and replaced by the County's policy permitting teleworking during the pandemic. It is that policy adopted by the County, not the preceding past practice, that establishes the status quo here. *See Teamsters Local Union No. 223 v. City of Shady Cove,* Case No. UP-3-94 at 11 and n 3, 15 PECBR 589, 599 and n 3 (1995) (recognizing that a status quo resulting from a policy is distinct from a status quo resulting from practices in the workplace); *Department of Corrections*, UP-33-06 at 8, 22 PECBR at 166 (distinguishing a status quo established by an employer policy from a status quo established by past practice).

Moreover, even if we were to rely on a practice rather than a policy to determine the status quo in this case, the record contradicts the County's assertion that, when it revoked the Temporary Telework Policy in July 2021, it merely returned employees to the status quo. That is so because the practice relied on by the County—no teleworking—existed only *before* the pandemic. However, when the County returned employees to in-person work in July 2021, those employees returned to in-person work during an ongoing pandemic and just as the COVID-19 Delta variant was causing a surge in cases, hospitalizations, and deaths. In fact, that Delta surge occurred while the Union and the County were meeting about the end of the temporary policy. The parties' representatives met on July 22, 2021, and August 9, 2021. Between those meetings, on August 1, 2021, the CDC upgraded the risk of community transmission of COVID-19 in Marion County from "substantial" to "high." The record is abundantly clear that COVID-19 cases and hospitalizations in Marion County began surging in July 2021 and remained elevated in August and September 2021. These facts contradict the County's assertion that it merely returned employees to a status quo of "no teleworking"—because that ostensible status quo existed only *before* the COVID-19 pandemic. In other words, the County did not have a practice of "no teleworking" *during* a pandemic caused by the global spread of a dangerous virus.

The County also argues that the Temporary Telework Policy cannot establish the status quo because the policy was temporary and expressly stated that the County could revoke it at any time. The Board has previously concluded that an employer policy that can be changed at any time can nonetheless determine the status quo. *See City of Shady Cove*, UP-3-94 at 11, 15 PECBR at 599 (personnel manual constituted status quo for new bargaining unit, even though it was not a contract and could be changed at any time). We adhere to that precedent in this case. Although the employer policy in this case was, by its terms, temporary, we conclude that it nonetheless established the status quo. It was in place *for 15 months* during an emergency. Telecommuting touched almost every aspect of remote employees' daily working lives. Whatever else may be said about whether an expressly temporary policy can establish a status quo in other, more routine situations, here, the policy dramatically affected remote employees' working lives for 15 months. Although there is no bright line

on when a temporary emergency-related change becomes the status quo, 15 months is more than sufficient to establish that the Temporary Telework Policy here became the status quo, such that the County was required to bargain a change to that policy.

Next, we turn to whether the change concerns a mandatory subject of bargaining. The Union contends that the subject of the change concerns a safety issue that has a direct and substantial effect on the on-the-job safety of public employees and is therefore a mandatory subject pursuant to ORS 243.650(7)(h). The County responds that the revocation of the Temporary Telework Policy concerned only workplace location, not safety. The County also argues that, even if the revocation of the policy did involve safety, the Union raises only "generalized concerns" about COVID-19, not a safety issue that has a direct and substantial effect on employees' on-the-job safety. For the following reasons, we agree with the Union.

To begin, we must determine the subject of the disputed change. The County contends that the actual subject of the Temporary Telework Policy was not a safety issue, but workplace location. When a proposal or change includes multiple bargaining subjects, we determine the "core feature" of the proposal or change that "defines and ultimately shapes the scope of" the proposal. *See Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020); *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, No. UP-023-20 at 28 (2020). Further, the subject of a proposal or change is a "safety issue" "if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees." *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 734, 308 P3d 230 (2013).

Here, the Temporary Telework Policy is reasonably understood, on its face, to directly address a matter related to on-the-job safety of employees—namely, COVID-19 exposure and transmission in the workplace.[3] The Temporary Telework Policy expressly states, "The purpose of this temporary policy is to recognize that the novel coronavirus, also known as COVID-19, has impacted Marion County locally," and County "employees are at the forefront of [the County's] concern as we work to adapt quickly to this emerging public health threat." Further, the policy states, "Marion County is adhering to the recommendations of the Centers for Disease Control and the Oregon Health Authority regarding preventative measures, including social distancing, quarantines, and curtailment of non-essential county functions. * * * Marion County's priority is to maintain essential services and critical business needs * * * while allowing for work location flexibility when work can be performed remotely." The policy provides, "Employees who wish to work at some place other than the primary workplace on specified days shall complete the COVID-19 Telecommuting Agreement." Thus, we

[3]By the phrase "COVID-19 exposure and transmission in the workplace," we are referring to those risks attendant to employees working in-person in County facilities during the COVID-19 pandemic, including the risk of employees contracting COVID-19 at work and the risk of employees transmitting COVID-19 to other employees at work. For ease of readability, we refer to this subject throughout the remainder of this order as "COVID-19 exposure." We note that the County may have had other reasons, including public health-related reasons, for adopting the Temporary Telework Policy. Those reasons may have included minimizing the spread of the COVID-19 virus generally and reducing the risk that members of the public would be exposed to COVID-19 in County facilities. Those subjects, however, are not subjects within the scope of PECBA's required bargaining between public employers and labor organizations, and the core feature of the policy is addressing COVID-19 exposure.

conclude that the subject of the Temporary Telework Policy (and its revocation) is the safety issue of COVID-19 exposure.[4]

With respect to the decision to end the policy, we acknowledge that the BOC's June 10, 2021, email to all County employees refers to the cessation of telecommuting as part of the County's plan to "fully resume in-office services for our residents." Certainly, after July 19, Marion County residents were once again able to obtain in-person service from County employees. We do not second-guess any judgment by the BOC that providing in-person services to residents was preferable to providing services by teleworking employees. However, the record establishes that just as the County enacted the Temporary Telework Policy because it believed that it was necessary for employee safety, it revoked that policy when it believed that the COVID-19 concerns had diminished such that employees could safely work in Marion County facilities (with other safety measures). That revocation was a change concerning the safety issue of COVID-19 exposure. There is no evidence that the County stopped its employees from telecommuting for other reasons, such as complaints about service delivery or service quality caused by employees working remotely. On balance, on this record, we conclude that the core feature of the Temporary Telework Policy (and its revocation) was COVID-19 exposure.[5]

We next consider whether this subject was mandatory for bargaining. Pursuant to ORS 243.650(7)(h), "employment relations" for the employees at issue here expressly excludes safety issues except those "safety issues that have a direct and substantial effect on the on-the-job safety of public employees[,]" which are mandatory subjects of bargaining. Having determined that the subject of the unilateral change is the safety issue of exposure to COVID-19, we next determine whether that safety issue has "a direct and substantial effect on the on-the-job safety of public employees." *See Multnomah County Corrections*, 257 Or App at 734-35 (describing two-part inquiry to determine whether the subject of a proposal is a safety issue that is mandatory for bargaining). In this case, the Union has established, and there is no real dispute, that exposure to COVID-19 has a direct and substantial effect on the on-the-job safety of public employees. The County disputes which measures should be taken to prevent employees' exposure to COVID-19 in the workplace, but the County does not dispute that preventing workplace exposure to COVID-19 is necessary to protect employees' health and safety. Because the safety issue of exposure to COVID-19 has a direct and substantial effect on employees' on-the-job safety, it is a mandatory subject for bargaining.

The County contends that the change (elimination of employees' teleworking option) did not involve a safety issue that had a "direct and substantial" effect on employees' on-the-job safety because the County implemented other safety measures to mitigate employees' exposure to COVID-19 when

[4]PECBA requires this Board to analyze scope of bargaining issues using a subject-based approach. *See Springfield Police Association v. City of Springfield*, Case No. UP-28-96 at 7-10, 16 PECBR 712, 718-21 (1996). Under a subject-based approach, the adoption and revocation of the Temporary Telework Policy, and any modifications to that policy, are all possible proposals or changes that concern the same subject: the safety issue of COVID-19 exposure.

[5]The County also suggests that the subject of the change was the duration of the state of emergency declared by the Board of Commissioners, and that subject is prohibited for bargaining. Specifically, the County argues that only the Board of Commissioners could declare an emergency pursuant to ORS 401.309, and that the duration of such a declared emergency "is not subject to negotiation." In advancing that argument, however, the County mischaracterizes the change in dispute. The disputed change is the change to the safety issue of COVID-19 exposure, not a change to the duration of the state of emergency declared by the BOC pursuant to ORS 401.309.

working in-person. Those measures included increasing the cleaning of "high touchpoints" such as door handles in County facilities, increasing air flow in County facilities, changing air filters more frequently, providing masks and hand sanitizer, installing plexiglass in public spaces, requiring social distancing and capacity limits, and holding vaccination clinics for employees. The County contends that these enhanced safety measures—combined with the 63 percent vaccination rate in Marion County on July 19, 2021—mean that employees returning to in-person work in July 2021 did not, in fact, encounter direct and substantial risks to their on-the-job safety. The County's argument conflates the safety issue (exposure to COVID-19), with the various possible measures that can be taken to address that safety issue (*e.g.*, telecommuting, cleaning, personal protective equipment). When bargaining over the safety issue of COVID-19 exposure, the parties are free to make (or reject) proposals about how to address that issue, including but not limited to proposals about specific safety measures. PECBA does not dictate the content of such proposals, or the ultimate outcome of bargaining. PECBA requires only that the County bargain in good faith with the Union about the safety issue, rather than decide unilaterally how to address it.[6]

The County also relies on *SEIU Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UP-13-02, 20 PECBR 189 (2003). In that case, the state psychiatric hospital unilaterally discontinued the use of steel handcuffs as a means of restraining patients in order to "reduce the risk of injury to patients." *Id.*, UP-13-02 at 3, 20 PECBR at 191. The Board, without first deciding whether that change involved an employee safety issue, concluded that there was insufficient evidence to demonstrate that "the discontinuation of the use of steel handcuffs increases the risk of employee injury so as to demonstrate a direct and substantial effect on employee safety that requires bargaining." *Id*., UP-13-02 at 9, 20 PECBR at 197.[7] Here, as set forth above, we have already concluded that the change at issue did involve a safety issue—exposure to COVID-19. That exposure to COVID-19 has a direct and substantial effect on employee safety is self-evident and not disputed by the County. Moreover, the County's decisions to implement and revoke the teleworking policy both were premised on its assessment of whether teleworking was a necessary or preferred measure for protecting employees from COVID-19 exposure. That assessment of a particular safety measure (permitting teleworking)

[6]The fact that the County implemented enhanced safety measures does not excuse it from its bargaining obligations under PECBA. The purpose of collective bargaining under PECBA is to give employees a voice in determining their terms and conditions of employment. *See* ORS 243.656(3) (one purpose of PECBA is to establish "greater equality of bargaining power between public employers and public employees"). PECBA recognizes that the workplace can be improved when public employees exercise that voice. As we have often said, "pushing complicated issues through the crucible of collective bargaining often results in creative, agreeable solutions," even in difficult circumstances. *Portland Association of Teachers/OEA/NEA v. Multnomah County School District No. 1J (Operating as Portland Public Schools)*, Case No. UP-024-17 at 12, 27 PECBR 146, 157 (2017). A unilateral change by an employer is not unlawful merely because a disputed change is undesirable to employees; it is unlawful because a unilateral change "frustrates the bargaining process and conveys the message to employees that the employer can change their terms and conditions of employment without bargaining in good faith with their chosen representative." *Oregon Tech American Association of University Professors (Oregon Tech AAUP) v. Oregon Institute of Technology*, Case No. UP-023-20 at 30-31 (2020) (citing *NLRB v. Katz*, 369 US 736, 743-44, 82 S Ct 1107 (1962)).

[7]As the court explained in *Multnomah County Corrections*, "In *SEIU*, the board did not expressly address the initial question, *viz*., whether the proposal involved a safety issue," because, "given its ultimate conclusion, it was not necessary for it to do so." 257 Or App at 727 n 15.

does not determine whether the safety issue itself (exposure to COVID-19) has a direct and substantial effect on employee on-the-job safety. *Oregon State Hospital*, therefore, does not aid the County here.[8]

In sum, the Temporary Telework Policy concerns a mandatory subject of bargaining: the safety issue of exposure to COVID-19. The County changed the status quo concerning that subject by revoking the Temporary Telework Policy and requiring employees to return to in-person work during the ongoing COVID-19 pandemic. The record establishes that the County decided to make that change and implemented it without bargaining in good faith with the Union: In its answer, the County admitted that it relayed its decision to revoke the Temporary Telework Policy (and require nearly all employees to resume working in-person) by sending the June 10, 2021, communication to all County employees, and that it did so without prior notice to or discussion with the Union. Further, although the County met with the Union on July 22, 2021, and August 9, 2021, it repeatedly asserted that it was merely listening to the Union's concerns and was not bargaining.[9] We conclude, therefore, that the County unilaterally changed a mandatory subject of bargaining when it decided to revoke the Temporary Telework Policy effective July 19, 2021, without bargaining with the Union, and when it implemented that decision before it bargained over the impacts of that decision on mandatory subjects that were more than de minimis. Such conduct is a per se violation of the duty to bargain under (1)(e).[10]

Next, we turn to the County's affirmative defense of waiver. A party may waive its right to bargain by (1) "clear and unmistakable" contract language, (2) a bargaining history that shows the party consciously yielded its right to bargain, or (3) the party's action or inaction. *AOCE II*, 353 Or at 177. The County contends that the Union, through its bargaining conduct in March and April 2020, consciously yielded its right to bargain about the revocation of the Temporary Telework Policy. We also understand the County to argue that the Union waived its right to bargain through clear and unmistakable language in the management rights clause of the CBA. For the reasons explained below, we do not find that the Union waived its right to bargain on either basis.

For its first affirmative defense, the County contends that the Union consciously yielded its right to bargain about the rescission of the Temporary Telework Policy through its bargaining conduct in March and April 2020. To prevail on this affirmative defense, the County must prove that the parties' bargaining history establishes that the Union consciously yielded its right to bargain over the cessation

[8]Although we do not require a labor organization to wait and prove actual harm before a safety issue must be bargained, we also note that the evidence in this case establishes that in-person work during the COVID-19 Delta variant surge has, in fact, resulted in workplace exposure to COVID-19 and increased risk to the on-the-job safety of County employees. For example, the record indicates that 67 County employees contracted COVID-19 at work from June 10, 2021 through October 4, 2021. There were 10 workplace outbreaks of COVID-19 at Marion County workplaces from June 10, 2021 through October 1, 2021. And, the Union president contracted COVID-19 from a close contact with a coworker at work during that time period.

[9]We also construe the County's answer as admitting that the County did not intend to and did not bargain with the Union at the July 22 and August 9 meetings. *See* Answer, paragraph 9(c) (County admits "that it stated in the [July 22] meeting that its objective in holding the meeting was to listen to the Union's concerns related to in-person work, and not to bargain over the rescission of the Temporary Telework Policy"); paragraph 12(a) (the County "never agreed that either the July 22, 2021 or the August 9, 2021 meeting[s] were bargaining sessions").

[10]We do not understand the County to dispute that the revocation of the Temporary Telework Policy had impacts on mandatory subjects, including, at a minimum, paid leave.

of the Temporary Telework Policy. *See Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00 at 16, 19 PECBR 609, 624 (2002); *AFSCME, Council 75, Local #1393 v. Umatilla County Board of Commissioners, Vanelsberg, Roadmaster*, Case No. C-183-82 at 4 n 2, 8 PECBR 6767, 6770 n 2 (1985) (Order on Reconsideration). "[A] party waives bargaining over a proposal, through negotiating over it without reaching agreement, only when the party has 'consciously yielded' its position and the issue has been 'fully discussed' and 'consciously explored.' *Central Linn Education Association v. Central Linn School District,* Case No. UP-7-96 at 8, 17 PECBR 194, 201 (1997)." *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-9-00 at 8, 19 PECBR 463, 470 (2001).

Here, the record shows that, although the Union repeatedly requested to bargain over COVID-19 issues, including employee safety, and made various proposals, the County never bargained with the Union over those issues; rather, the County adopted the Temporary Telework Policy unilaterally. The County argues that the Union's acceptance of the County's package proposal in April 2020, which did not include the Union's proposed letter of agreement addressing COVID-19 issues, shows that the Union consciously yielded the right to bargain over the revocation of the Temporary Telework Policy, including because the Temporary Telework Policy was, by its express terms, temporary. However, the record shows that the County expressly declined to bargain over COVID-19 issues in the context of successor bargaining and did not engage in any bargaining over the Union's proposed letter of agreement. Because the County did not actually bargain over the issue (much less bargain extensively, such that the issue was fully discussed and consciously explored), the standard for waiver by conscious yielding of the right to bargain cannot be met. *See Central Linn*, UP-7-96 at 8-9, 17 PECBR at 201-02; *Eugene*, UP-9-00 at 8-9, 19 PECBR at 470-71; *cf. Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85 at 15, 9 PECBR 8794, 8808 (1986) (finding association consciously yielded right to bargain over termination of disability insurance when, in successor bargaining, state proposed to terminate practice of employer paid disability insurance, parties "bargained extensively" over the issue, and the union did not pursue its proposal in arbitration, and thereby "objectively manifested a decision to drop its proposal and acceded to the State's position").

The County also argues that the Union waived its right to bargain about the revocation of the Temporary Telework Policy by not demanding to bargain about that policy when the County first adopted it. That argument fails for several reasons. First, a failure to demand to bargain in response to proper notice of a potential change is a "waiver by inaction," which is an affirmative defense that the County did not plead with specificity, and therefore, cannot be considered. *Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or App 395, 403, 461 P3d 1001 (2020). Second, the record shows that the Union did attempt to bargain about the Temporary Telework Policy by explaining to the County that the policy did not address all of the Union's concerns and making a counterproposal, but the County declined to bargain. Third, this Board has long held that there "is no requirement that a union demand to bargain—to avoid a waiver—when the employer has already made a unilateral change" or presented it as a *fait accompli*. *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93 at 8, 16 PECBR 267, 274 (1995) (citing *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988)). That is precisely what occurred here. The BOC adopted the Temporary Telework Policy as an addendum to the County's personnel rules on March 18, 2020, without first notifying the Union that it proposed to do so. Fourth, the Union's acceptance of one change—the adoption of the policy—does not constitute a waiver of its right to bargain over future changes regarding the same subject of bargaining, including revocation of

the policy. *See, e.g.*, *AOCE I*, UP-33-03 at 11, 20 PECBR at 900 (a union's failure to demand to bargain over past changes "does not operate as a waiver of future bargaining rights").[11]

For its second affirmative defense, the County argues that the management rights clause in the CBA constitutes a "clear and unmistakable" waiver of the Union's right to bargain about the revocation of the Temporary Telework Policy. The County relies on Article 2(D) of the CBA, which provides:

> "Except as may be specifically modified by the terms of this agreement, the county retains all rights of management in the direction of its work force. It is recognized that the responsibilities and authority of management are exclusively functions to be exercised by the county.
>
> "These rights of management shall include, but not be limited to, the following:
>
> "* * * * *
>
> "D. The management and direction of the work force including the right to determine the methods, processes and manner of performing work; the establishment of new positions and the determination of the duties and qualifications to be assigned or required; the right to hire, promote, demote, terminate, reassign, appoint and retain employees; the right to lay off for lack of work or funds; the right to abolish positions or reorganize the departments or division; the right to determine shifts, assignments and schedules of work; the right to purchase, dispose and assign equipment or supplies."

The County argues that when the BOC revoked the Temporary Telework Policy, it merely exercised the rights set forth in Article 2(D), and that the Union, by agreeing to Article 2(D), waived its right to bargain about that revocation.

We conclude that this management rights clause does not clearly and unmistakably waive the Union's right to bargain about the return of employees to in-person work during the pandemic, for the following reasons. To begin, the Board has long held that "[g]enerally worded management rights clauses * * * will ordinarily not be construed as waivers of statutory bargaining rights." *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-011-17 at 8 (2018) (quoting *Oregon School Employees Association v. South Coast Education Service District*, Case No. UP-027-16 at 19, 27 PECBR 48, 67 (2007) (internal citations omitted)). In interpreting a generally worded management rights clause, this Board has long interpreted phrases such as "inherent rights of management" or "customary functions of management" as "term[s] of art in in labor-management relations. * * * Use of [such phrases] indicates that the parties intended the management rights clause to apply only to permissive subjects for bargaining." *City of Eugene*, UP-011-17 at 9 (quoting *AOCE II*, 353 Or at 186-87 (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 16, *order on remand*, 23 PECBR 222, 237 (2009))). The management rights clause in these parties' CBA includes such generic phrases. The County does not explain why we should depart from this principle in this case, and we see no reason to do so.

[11]To hold that a union's acceptance of a change constitutes a waiver of future bargaining rights would create a perverse incentive for unions to demand bargaining and file unfair labor practice charges over all changes, rather than encourage the informal resolution of disputes.

In addition, the management rights clause in the CBA expressly provides that the County "retains all rights of management" in the direction of its workforce. As the Board explained in *City of Eugene*, the use of the word "retain" in a management rights clause bolsters the conclusion that the clause is limited to permissive subjects of bargaining because a "party cannot retain * * * something that it never had in the first place." *City of Eugene*, UP-011-17 at 9 (quoting *AOCE II*, 353 Or at 187). Applying *City of Eugene* here, we conclude that Article 2(D) can be read as limited to management retaining rights concerning permissive subjects of bargaining, and because the County's change in this case concerns a mandatory subject of bargaining, Article 2(D) does not constitute a clear and unmistakable waiver by the Association regarding the revocation of the Temporary Telework Policy.

For all these reasons, the County did not meet its burden to prove that the Union waived its right to bargain about the decision to revoke the Temporary Telework Policy or its impacts on mandatory subjects of bargaining. In its answer, the County acknowledged that it did not bargain with the Union. Consequently, we conclude that the County violated ORS 243.672(1)(e).

Having found that the County violated ORS 243.672(1)(e), we will order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. However, in this instance, the record shows that the vast majority of employees have already returned to working in-person, and a wholesale and immediate return to the status quo of teleworking may be unnecessarily disruptive for both the employer and employees. Additionally, as explained above, the COVID-19 pandemic is an unprecedented public health emergency that is unpredictable and rapidly changing. Under these circumstances, we find it appropriate and consistent with the purposes of PECBA to order the parties to bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

The Union also requests that we order physical and electronic notice posting. We generally order notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 8, 26 PECBR 254, 261 (2014). In this case, a notice posting is warranted because the County's conduct affected a significant number of bargaining unit employees. In addition to the traditional physical posting of the notice, we require an employer to electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Id*. at 9, 26 PECBR at 262. Here, the record establishes that email is the common method of communication between the County and Union-represented employees. Accordingly, we will order the County to post the notice and distribute it to bargaining unit employees by email.

Finally, the Union requests that we award a civil penalty because the County disregarded the law and the health and safety of its workers, which constitutes egregious conduct. We may award a

civil penalty when the action constituting an unfair labor practice was egregious or the party committing an unfair labor practice did so knowingly and repetitively. ORS 243.676(4)(a)(A); OAR 115-035-0075. Actions are egregious only if they were "taken in knowing disregard of the law." *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93 at 16, 15 PECBR 347, 362 (1994); *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 22 (2018). Here, although it is a close question, the record does not establish that the County's revocation of the Temporary Telework Policy was taken in knowing disregard of the law, and the County did not commit an unfair labor practice knowingly and repetitively. In reaching that conclusion, we consider the fact that the COVID-19 pandemic has presented novel and emergency circumstances, and that public employers have been required to act rapidly in response to quickly changing public health data, recommendations, and directives. Under all these circumstances, we conclude that a civil penalty is not warranted.

ORDER

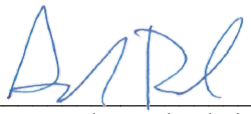
1. Marion County shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

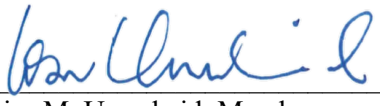
3. Marion County shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.

4. Marion County shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.

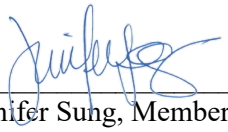
DATED: October 29, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-037-21, *SEIU Local 503, OPEU v. Marion County*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Marion County (County) committed an unfair labor practice in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective bargaining representative of its employees.

The Board concluded that the County violated the duty to bargain in good faith when it unilaterally revoked the Temporary Telework Policy without first bargaining in good faith with SEIU Local 503, OPEU.

To remedy this violation, the Board ordered the County to:

1. Cease and desist from violating ORS 243.672(1)(e).

2. Bargain with SEIU Local 503, OPEU for a 30-day period regarding a remedy for the violation, including a make-whole remedy. (If the parties are unable to agree on a remedy within that 30-day bargaining period, each party must submit its proposed remedy to the Board within 35 days of the date of the order, and the Board will order a remedy.)

3. Post this notice for 30 days in prominent places where SEIU Local 503, OPEU-represented employees are employed.

4. Distribute this notice by email to all SEIU Local 503, OPEU-represented employees within 10 days of the date of the order.

EMPLOYER

Dated_____, 2021 By: _____

Title:_____

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are likely to see it. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.