

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-12

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 2376,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON,	)	CONCLUSIONS OF LAW,
DEPARTMENT OF CORRECTIONS,	)	AND ORDER
	)	
Respondent.	)	
	)	

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Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on June 11, 2013, after hearings on December 11 and 12, 2012, in Salem, Oregon.<sup>1</sup> The record closed on January 15, 2013, following receipt of the parties' post-hearing briefs.

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, Local 2376, Salem, Oregon, represented Complainant.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

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On April 25, 2012, Oregon AFSCME Council 75, Local 2376 (Union) filed this unfair labor practice complaint against the State of Oregon, Department of Corrections (Department), alleging the Department violated ORS 243.672(1)(a) and (c) following bargaining unit member

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<sup>1</sup>Respondent initially filed objections to the Recommended Order on June 25, 2013, but subsequently withdrew those objections.

Robert Hillmick's reinstatement. At the ALJ's request, an amended complaint was filed on June 28, 2012, and the Department timely answered on August 15, 2012, raising the affirmative defense of timeliness as to certain claims and requesting a civil penalty and reimbursement of filing fees.<sup>2</sup>

### RULINGS

The rulings of the ALJ have been reviewed and are correct.

### ISSUES

The issues are:

1. Did the Department's treatment of Robert Hillmick, following his reinstatement in 2012, interfere with, restrain, or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662 in violation of ORS 243.672(1)(a)?
2. Did the Department's treatment of Robert Hillmick, following his reinstatement in 2012, have the natural and probable effect of dissuading other union employees from engaging in protected rights under ORS 243.662? If so, did the Department violate ORS 243.672(1)(c)?
3. If the Department violated ORS 243.672(1)(a) or (c), should a civil penalty be imposed? If the claims against the Department are dismissed, should a civil penalty be imposed on the Union?

For the reasons stated below, we conclude that the Department did not violate ORS 243.672(1)(a) or (c), and dismiss the complaint. We also deny the Department's requests for a civil penalty and reimbursement of its filing fee.<sup>3</sup>

### FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of employees who work at correctional facilities operated by the Department, a public employer.

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<sup>2</sup>In the event that we award a civil penalty, the Department also requests representation costs in excess of \$3,500. Representation costs are not part of this order. *See* OAR 115-035-0055.

<sup>3</sup>Two Board members have been involved with Mr. Hillmick in their prior employment. Although no direct conflict of interest exists, both Board members have previously recused themselves from cases in which they had been involved. However, if we followed this process for this matter, there would not be a quorum of Board members to issue this Order. Therefore, Chair Logan and Member Weyand invoke the rule of necessity so that this matter can be completed.

2. The Union and the Department, through the Department of Administrative Services, have been parties to a series of collective bargaining agreements, the most recent of which was effective July 2011 through June 2013.

3. The Eastern Oregon Correctional Facility (EOCI) is located in Pendleton, and the Two Rivers Correctional Facility (TRCI) is located in Umatilla, Oregon.

4. Robert Hillmick is a bargaining unit member who has worked for the Department at various correctional facilities for more than 21 years. In 2000, he was promoted to correctional sergeant at TRCI and later that year, to correctional lieutenant/security threat group manager. In 2005, he was promoted to correctional counselor at EOCI, where he assisted inmates transitioning to post-prison life. He was a union steward and, as of 2008, president of Local 2376-4, which includes employees in the Security Plus unit at EOCI. In his capacity as Local President, Hillmick developed a reputation as an aggressive advocate for its members.

5. On December 29, 2010, Hillmick received a notice of dismissal from state service for multiple violations of the Department's policy regarding use of its electronic systems (telephone, e-mail, and internet). The Union filed a grievance on his behalf and ultimately requested binding arbitration pursuant to the parties' Collective Bargaining Agreement (Agreement).

6. On June 3, 2011, the Union filed an unfair labor practice complaint with this Board alleging the Department violated ORS 243.672(1)(a) as a result of Hillmick's protected union activities.<sup>4</sup>

7. In June of 2011, Hillmick contacted former coworker John Myrick, who was at that time the acting superintendent of corrections counselors at TRCI, and asked him whether he (Hillmick) would be welcomed at TRCI if a settlement was reached in his arbitration. The two men had known each other for years and Myrick replied affirmatively.

8. In August of 2011, Hillmick's supervisor at EOCI, correctional rehabilitation manager Greg Clark, was disciplined for excessive personal internet use as a result of an inquiry generated by Hillmick in his capacity as president of the local bargaining unit.

9. At the October 27 and 28, 2011 arbitration, the Department of Justice attorney representing the Department decided whom to call as witnesses. One witness was EOCI corrections counselor Ward King, with whom Hillmick had a fractious relationship. King brought an issue to Hillmick's attention regarding Superintendent Rick Coursey, and incorrectly believed that Hillmick had brought the matter to Coursey's attention when, in fact, it was discovered through the Department's search of Hillmick's e-mails to other Union officials.

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<sup>4</sup>*Oregon AFSCME Council 75, Local 2376 v. DOC, EOCI*, Case No. UP-32-11, 24 PECBR 599 (2012). On February 2, 2012, the parties entered into a consent order in which the Department admitted to violating ORS 243.672(1)(a).

Nevertheless, the incident soured their relationship and the two men did not trust each other. King made comments that were critical of Hillmick in the latter's Bureau of Labor and Industries (BOLI) proceeding and at the arbitration. Also testifying at the arbitration was Hillmick's supervisor, Greg Clark, and EOCI's assistant superintendent of correctional rehabilitation Brigitte Amsberry. All three provided negative testimony regarding Hillmick.

10. On or about December 6, 2011, Clark moved his office to the fourth floor of F Building Appendage, the same building where Hillmick previously worked, as did corrections counselor Alice DeJongh. Clark's administrative assistant, Yesenia Rangel, moved from the fourth to the third floor.

11. On December 18, 2011, Arbitrator Edward M. Clay issued his award, ordering Hillmick reinstated to his old position with back pay and expungement of the termination from his personnel records. Legal counsel for the Department and Union negotiated Hillmick's return date for January 9, 2012, which, after factoring in weekends, holidays, vacations, and furloughs, was approximately nine working days after receipt of the award.

12. On December 21, EOCI's Director of Human Resources, Martin Imhoff, called a meeting of Department managers and HR personnel to discuss implementation of the arbitration award.

13. On January 5 and 6, 2012, Imhoff and Amsberry exchanged e-mails with Union counsel and various HR and Internet Technology Services section managers to reactivate Hillmick's telephone number, e-mail account, payroll, security access, badge, orientation information, scheduling, back pay, and miscellaneous paperwork, but not all of the arrangements were completed by Hillmick's return.<sup>5</sup>

14. On January 6, Union counsel contacted the Department of Justice attorney regarding the public posting of Hillmick's arbitration award on the Department's internal server, called the U-drive. The Department's employee and labor relations section in Salem typically distributes and posts all labor arbitration awards on the internal server, which is available to managers and HR personnel, but there was a link to the folder accessible to anyone in the Department who knew where to look. Some Department employees accessed the U-drive folder, read the award, and mentioned it to Hillmick. When Union counsel brought this to the Department's attention, Imhoff promptly restricted access to authorized managers only.

15. On January 6, an e-mail was sent to all employees in the section notifying them of Hillmick's return date. That e-mail included EOCI's internal notification form with a checklist for letters, photos, photo identification, and Department procedures necessary to make that happen.

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<sup>5</sup>Unless indicated otherwise, all remaining dates occurred in 2012.

## The Events of January 9

16. At 7:48 a.m., Imhoff sent an e-mail to Amsberry and other managers regarding his meeting that morning with the Union's local president, Annette Skillman, in which they discussed Hillmick's return. The e-mail provided a 13-point summary of topics discussed that included arrangements already completed and those needing further action.

17. At 7:58 a.m., Skillman sent an e-mail to Imhoff that mentioned paperwork ready for Hillmick's signature and return to Amsberry, including three key chits (identifying the user and allowing access to the facility), the code of ethics, and forms for user authorization, family relationship, emergency contact information, race/ethnicity, criminal history, and DMV records.

18. At 8:00 a.m., Hillmick reported to Amsberry's office, at which Clark was present. The atmosphere was strained and Hillmick declined to sit down. Amsberry and Clark proceeded to brief Hillmick on some new procedures, refresher courses, caseload, and other assignments, during which time Clark ate a banana.<sup>6</sup> The meeting lasted approximately 15 minutes.

19. At 9:38 a.m., Imhoff sent an e-mail to Kim Brockamp, assistant director of HR, and Daryl Borello, the Department's chief employee relations administrator. The e-mail raised the possibility of easing tension and enhancing Hillmick's successful return to work by transferring Clark and Amsberry to TRCI and having two managers at that facility, David Pedro and John Myrick, transfer to EOCI. The idea was later dropped when it was learned that the two TRCI employees were acting managers and did not share the same rank as Clark and Amsberry.

20. Hillmick's new office was on the fourth floor of the building in which he previously worked. The office was comparable to his former one, but his new office did not have the odd configuration and support beam running through the middle of it, which meant he had more usable space. His former office was on the third floor, but during his year-long absence, it had been converted into a storage/break room with built-in cupboards, appliances, a copier, and other office equipment, and was no longer available. Clark had hired three new counselors while Hillmick was gone, and the remaining third floor offices were all occupied.

21. When Hillmick found his new office, he learned the keys he had been authorized by Clark to check out did not fit the lock. He contacted the tool and key sergeant, Levi Patterson, who made a new set. Patterson explained in an e-mail to Hillmick in August that Rangel had occupied Hillmick's former office, that he was given her set of keys, one of which opened Clark's office, and that he had been instructed to re-key Hillmick's and the other counselor's key rings to prevent access to Clark's office due to the confidential files kept there.

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<sup>6</sup>Hillmick testified that Clark ate four bananas during the meeting, making it difficult to understand him, which he construed as a hostile act. We credit the testimony of Clark and Amsberry that Clark did not consume four bananas during the meeting and that Hillmick did not complain about being unable to understand Clark's comments. Nevertheless, after that meeting Hillmick concluded that his return to EOCI would be unsuccessful.

22. Hillmick's office had a window and two desks (metal and wood), but no chairs. The telephone and computer were not activated, the computer monitor was smaller than the other counselors' monitors, and there were no employee manuals or office supplies. There was a near-dead potted plant in the office.<sup>7</sup>

23. Hillmick contacted Amsberry about his lack of telephone and internet connections. At 10:38 a.m., IT manager Stacey Ledbetter sent an e-mail to Hillmick and his managers stating that a new telephone number had to be assigned to his office and that she was still working on the cabling connections. The telephone was operational by 2:00 p.m., and internet access was available by 4:00 p.m. that afternoon.

24. Rangel had wiped down the desks and removed some items stored in Hillmick's office before his return. She informed him that he could select either desk and have the other one removed. He was advised that training manuals were available in hard copy or online if he needed immediate access. When he inquired about a time sheet, counselor DeJongh informed him that they now recorded their time online. Hillmick found a bookcase and arranged to have an inmate work crew bring it up to his office.

25. At 4:36 p.m., Hillmick sent an e-mail to counselor Bob Martinez at TRCI asking if he was interested in switching jobs and coming to EOCI. Martinez declined.

#### The Events of January 10

26. At 7:44 a.m., Hillmick sent an e-mail to Clark and Amsberry requesting a larger computer monitor, office supplies, and permission to bring in a small radio. Amsberry put in a request for a 22-inch monitor and confirmed with Hillmick two days later that it had been ordered. Clark directed Rangel to provide Hillmick with whatever he needed in the way of office supplies, which she provided within two days. The request for a radio had to be approved by the security captain David Heehn, who approved the request two days later.

27. At 8:33 a.m., Hillmick sent an e-mail to corrections counselor Dave Shotts at TRCI asking if Shotts was interested in switching jobs and coming to EOCI. Shotts declined, replying that he was happy at TRCI. Hillmick did not notify HR that he had contacted TRCI counselors about switching positions, but word of his efforts to transfer got out.

28. Case assignments at EOCI are based on a number of factors, which may include a counselor's experience, the inmate's release date, and the type of counseling required. At the time, counselor DeJongh carried a caseload of 500 inmates with a Low Automated Criminal Risk Score (ACRS), who require less counseling than inmates with Moderate or High ACRS.

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<sup>7</sup>Plants are watered and maintained by inmate orderlies, and the plant was removed to the facility's nursery. Although the Department produced a healthy-looking potted plant at hearing, claiming that it was the same, rejuvenated plant, it was not admitted into evidence.

29. Hillmick's caseload consisted of approximately 109 Moderate/High ACRS inmates with more than 48 months left on their sentence. He sent an e-mail to Clark and Amsberry inquiring about the size of his caseload, which was larger than he previously managed and larger than the caseload of some other counselors. It was explained that his assigned inmates typically required less counseling than those about to be released, and once inmates were 48 months from their release date, he was to transfer them to another counselor.

30. On January 11 at 2:38 p.m., Hillmick sent an e-mail to Clark and Amsberry inquiring about a counselor meeting to which he had not been invited. The next day, Clark responded that he was not excluded but was being given time to become familiar with his caseload, and that he would be added to the distribution list. Rangel testified that it was her oversight not to have added him to the distribution list on the day he returned.

31. On January 19, Hillmick informed Union counsel and Brockamp that he believed he was being retaliated against. Borello sent an e-mail to Brockamp and east side administrator Sharon Blackletter addressing the issue of Hillmick's new office, which was discussed with Superintendent Coursey and Imhoff three or four days before Hillmick's return. The e-mail states in part:

"Rick and Marty called me and stated that due to Hillmick being gone so long, they had another employee using his office (Hillmick's memo states it is being used for storage). I know they told me another employee was assigned that office because Rick expressed concern at uprooting that employee just to give Hillmick back his old office. Rick asked me what his options were and stated he had Clark an [*sic*] some vacant office space in a close but different location. With Clark supervising counselors, I interpreted that as it was another counselor area within the institution. I expressed that Rick could move the counselor in Hillmick's old office out, as an option, but that he wasn't required to do so.

"I expressed concern with assigning only Hillmick to an area where he was ONLY with Clark as it would clearly be singling Hillmick out. I did mention that it might be beneficial to have Hillmick in close proximity to Clark's office to answer questions, training and yes, to make sure Hillmick did not start stirring the pot and dividing management and staff due to his history of discipl[in]e by management and success in arbitration. Clark could keep an eye on the situation which we have predicted would/could be fairly tense. It was at that point, Rick stated he understood and actually was aware of another counselor that was willing to also move offices into this area. We spoke of that being an appropriate option as the counselors would have two primary areas of offices and Hillmick would not be singled out.

"We then went into a conversation of having that office ready for Hillmick's return. I brought up the [TG] arbitration because I had firsthand knowledge of that case. I explained that prior to [TG] returning to work we made sure her entire office was set up and ready for her and had a phone and computer equipment

completely ready. Rick mentioned that would be completed prior to Hillmick's return and mentioned they (EOCI) had received a lot (I think he said dozens) of computers recently and that the office would be complete prior to Hillmick's return.

“When I hung up the telephone with Rick and Marty I was under the impression that Hillmick's old office was being used by an EMPLOYEE and that Hillmick would return to a complete and prepared office, in another location but in an area with Clark and at least one other counselor. I did not see this arrangement as retaliatory or singling Hillmick out in any way. It prevented expense and time loss in moving other employees only because Hillmick was returning and it would not negatively affect morale by moving employee offices just because Hillmick was coming back. Doing so, I thought might cause Hillmick more complications due to animosity amongst the counselors affected. I did not agree to displacing him if his old office was being used as storage (that was never mentioned). I advised against giving him an office where he was singled out and my advice was to have whatever office they were assigning to him prepared and ready for his return. I did advise Rick that he was not obligated to place Hillmick back in his old office if that was not operationally feasible.” (Emphasis in original.)

32. On January 20, in response to Hillmick's complaint of retaliation, HR managers approached Hillmick about the possibility of transferring to TRCI. At that point, it was clear to everyone that Hillmick's return to work was not going well and it was thought this might be an appropriate solution. Hillmick was receptive, and negotiations began between the Union and Department.

33. On January 20, Hillmick was leaving his office for the day when he encountered King walking through the facility's compound. The two men had a heated exchange, which Hillmick immediately reported to Imhoff and later filed a complaint against King addressed to Brockamp, Union counsel, and other managers. It states in part:

“Mr. King approached me and was trying to start a conversation with me like we were old friends. I ignored him to begin with and just looked away, then he started walking with me and I politely told him that we had nothing to say to each other. At that point Mr. King pretty much lost his cool and got very agitated and hostile, leaning his face toward mine saying, that's fine, you want to be that way, I can be that way too, and things to that [e]ffect as I continued walking toward the door home. While he was leaning into me, putting his shoulder against mine, I just kept walking and then he got in front of me and in a very hostile manner, said, 'Any time, any time!' He was challenging me to a fist fight. I just kept walking and watching to make sure that he was not going to make a physical move toward me as he left. I was trying to mind my own business and just go home when all this occurred, but was not allowed to do that.”

34. Imhoff immediately reported the incident to Amsberry and suggested they review the surveillance video of the area the two men were walking in. Imhoff wrote up the incident in his own report, which states in part:

“Ward King turned so that the two of them were facing while walking. Mr. King was off the front of Mr. Hillmick’s left shoulder and said ‘I was trying to offer you an olive branch, but you want to be that way, fine, I can be that way too.’ Mr. King said this more than once, or similar words, as he kept walking very closely, in Mr. Hillmick’s physical space such that Mr. Hillmick thought he might be physically confronted. Mr. King said ‘Any time, any time,’ as if challenging Mr. Hillmick to a fight.”

35. Immediately after the incident, King went to Amsberry's office. His January 23 report of the incident states that he asked Hillmick how it felt to be back, and that Hillmick responded with an expletive. King also wrote that he walked in front of Hillmick and turned, and when he did so, his lunch box hit Hillmick on his side. The report goes on to state:

“I am aware that my reply could have been taken as threatening, as I was very frustrated at Mr. Hillmick’s continued negative attitude towards me and others.

“I have learned that in the future, I will only speak to Mr. Hillmick in a professional tone, and only converse in the event that our duties as correctional counselors warrant communication.”

King received a letter of correction as a result of Hillmick’s complaint.

36. Imhoff and Amsberry reviewed the security video of the two men walking, but determined that it was inconclusive as to whether King behaved aggressively towards Hillmick.

37. On February 9, the alarm on Clark’s new office radio went off while he was out and another counselor let Hillmick in to turn it off. Hillmick brought the incident to Clark’s attention, but the radio alarm went off the next day for 45 minutes because Hillmick did not have a key to that office. Clark is available via cell phone, but Hillmick did not contact him. Hillmick reported the incidents to Coursey, who replied that Clark would no longer use the radio, that no counselors were supposed to have keys to Clark’s office, and that those keys would be removed immediately.

38. On February 17, the parties signed an agreement for Hillmick to transfer to TRCI at the same pay and classification, and for counselor Shotts to transfer to EOIC. There were no agreements about providing a state car or paying for Hillmick’s commuting costs or expenses. The agreement, which was signed by Hillmick, AFSCME’s business agent Tim Woolery, and Brockamp, states:

## “AGREEMENT

“Rob Hillmick voluntarily accepts a transfer from his current counselor position at Eastern Oregon Correctional Institution (EOCI) to a counselor position at Two Rivers Correctional Institution (TRCI).

“Rob Hillmick’s compensation will remain at \$5,772, Step 8, of the Correctional Counselor classification and will not be impacted by his voluntary transfer to TRCI. Future step increases or COLA’s will be issued according to the AFSCME Security Plus Collective Bargaining Agreement. DOC will not pay any additional compensation to Mr. Hillmick as a result of his transfer.

“Upon the last signature of this agreement, DOC will make arrangements with Mr. Hillmick as to when he should report to his TRCI Counselor Position.”

39. In March of 2012, Hillmick and Shotts traded positions. Shotts assumed Hillmick’s caseload of Moderate/High ACRS inmates at EOCI, but carried an additional caseload comprised of inmates categorized as Security Threat Management, which can include gang members, and between 60-70 high-alert-status inmates known for violence.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Department did not violate the “because of” or the “in” the exercise of prongs of ORS 243.672(1)(a) in its dealings with Hillmick upon his reinstatement to EOCI in 2012.
3. The Department did not violate ORS 243.672(1)(c) in its dealings with Hillmick upon his reinstatement to EOCI in 2012.
4. The Department’s requests for a civil penalty and reimbursement of its filing fee are denied.

## DISCUSSION

The Union alleges the Department violated both the “because of” and the “in” prongs of ORS 243.672(1)(a), as well as subsection (1)(c), after Hillmick’s return to work at EOCI on January 9, 2012. It contends that a series of minor incidents, when viewed together, demonstrates a pattern of hostile behavior intended to punish Hillmick for engaging in protected union activities. In addition to reimbursement of filing fees, it seeks a civil penalty and an order that the Department compensate Hillmick for the additional time and gas expenses he has incurred as a result of his transfer to TRCI.

The Department argues that a team of employees had approximately nine working days from the date of the arbitration award to prepare for Hillmick’s return, including arrangements

for new telephone and internet connections, back pay, payroll, calculation of furloughs, benefits, miscellaneous forms, security identification, clearances, keys, office space, assignments, and office supplies. It points out that many of the arrangements were completed before he arrived and that the matters he complained about were resolved within a day or two of his return to work. It also argues Hillmick initiated his transfer, both before and after his return to work, by contacting three employees at TRCI about the possibility of his transferring to that facility, which undercuts his argument that he was forced to do so. Finally, it argues that the transfer agreement specifically states that the Department would not pay any additional compensation to Hillmick as a result of his voluntary move to TRCI. The Department seeks reimbursement of its filing fee and the assessment of a civil penalty.

#### Legal Standards: ORS 243.672(1)(a) Claim

Under ORS 243.672(1)(a), it is an unfair labor practice for a public employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” Protected rights under ORS 243.662 include the right to “form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

Subsection (1)(a) prohibits two types of employer actions: (1) those that interfere with, restrain, or coerce employees “because of” their exercise of protected rights under ORS 243.662; and (2) those that interfere with, restrain, or coerce employees “in” the exercise of those protected rights. *Tigard Police Officers’ Association v. City of Tigard*, Case No. UP-59-10, 24 PECBR 927, 936 (2012).

To determine if an employer violated the “because of” portion of subsection (1)(a), we examine the employer’s reasons for the disputed conduct. If the employer acted “because of” an employee’s exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer’s actions are unlawful. *International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 285, 295 (2012). We do not require that the complainant prove that the employer acted with actual anti-union animus or the subjective intent to restrain or interfere with protected rights. Instead, a complainant must show “a direct causal nexus between the protected activity and the employer’s action.” *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, n 3, 16 P3d 1189 (2000).

The focus of our analysis under the “in” prong of (1)(a) is not on the employer’s motive or reasons for acting, but on the likely consequences of the employer’s actions. If the natural and probable effect of the employer’s action is to deter employees from exercising a protected right, then the action interferes with, restrains, or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a). *Milwaukee Police Employees Association v. City of Milwaukee*, Case No. UP-52-11, 25 PECBR 263, 275-76 (2012).

An employer may violate the “in” prong in two different ways. A derivative violation occurs when an employer violates the “because of” prong of the statute. If an employer takes

unlawful action because of an employee's PECBA-protected activities, the natural and probable effect of the employer's conduct will be to chill the employee's willingness to engage in further protected activities. *Id.* An independent violation occurs when the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would tend to interfere with employees' exercise of protected rights. These violations typically arise when an employer makes threatening or coercive statements regarding union activity. *Id.* The complainant has the burden of proof. OAR 115-10-0070(5)(b).

Analysis: ORS 243.672(1)(a) Claim

To determine if an employer violated the "because of" portion of subsection (1)(a), we first examine the employer's conduct and any reasons for the disputed action. We address each of the allegations to determine whether there was a pattern of retaliatory conduct.

Hillmick was not engaged in union-related activities when he returned to EOCI on January 9, 2012. He had been gone from the Department for a year and was no longer the local president or a steward. The protected activity giving rise to the complaint allegedly occurred as a result of exercising his grievance rights under the contract, which resulted in his reinstatement.

As a preliminary matter, we note that several of the actions complained of were taken, or not taken, by bargaining unit members rather than Department supervisors or managers. Rangel testified that Clark instructed her to set up Hillmick's office and to order whatever supplies he needed. She waited until Hillmick arrived before letting him decide which of the two desks he wanted to keep, she did not order office supplies until he told her what he needed, and admitted that she forgot to add him to the distribution list for the weekly counselors' meeting on the day he returned. All of those matters were taken care of by Rangel within a day or two of Hillmick's return to work and, in the absence of any evidence that she was directed to delay taking these actions by the Department, we do not conclude that they were retaliatory.

Similarly, the incident with corrections counselor and fellow bargaining unit member King appeared to be based on personal animosity rather than any Department-sanctioned conduct. King believed that Hillmick had disclosed confidential information. King also had provided negative testimony against Hillmick in a BOLI proceeding and grievance arbitration. The two men did not like each other, but we find no persuasive evidence that their altercation in the EOCI compound on January 20 was instigated by the Department or directly motivated by Hillmick's union-related activities. In fact, King received a letter of correction from the Department as result of the incident.

Likewise, the telephone and internet connection work performed in Hillmick's office was done by bargaining unit personnel. The e-mails generated on January 5 and 6, as well as meetings with various managers before Hillmick's return, all indicate that a team of people were deployed to perform the telephone and internet work. On the day he returned, Hillmick complained that neither his telephone nor computer were connected. By 10:30 a.m. that morning, the IT employee charged with making those connections reported to him that his office required a new telephone number and that she was still working on the cabling connections. Hillmick's

telephone was working by 2:00 p.m. and his internet connection was operational by 4:00 p.m. that afternoon.

As we have found, the Department had approximately nine working days, including weekends, holiday, furloughs, and vacations, to prepare for Hillmick's return. The paperwork and preparatory services were ordered and assigned to various staff, and we find these short delays in finalizing arrangements were neither unreasonable nor retaliatory. The same is true of Hillmick's complaint regarding the size of his office monitor, which was smaller than other counselors' monitors. The IT section was responsible for putting the monitor in his office from available supplies, but when Hillmick requested a larger one, Amsberry placed an order for a 22-inch monitor within two days of his return to work. Based on the relatively short period of time the Department had to prepare, we do not conclude that there was a causal connection between these minor delays in completing arrangements and Hillmick's protected activities. In fact, all of Hillmick's requests were delivered, resolved, or ordered within two days of his return to work.

Hillmick was not provided a time sheet upon his return because in his absence the practice had changed, and counselor DeJongh informed him that their time was now recorded online. Likewise, the training manuals were available online and most counselors accessed them in that manner, but Hillmick was told that he could find hard copies in one of the offices if he needed them immediately. Arguably, Clark or Rangel should have explained both of those things to him when he arrived, but Clark did not instruct Rangel to withhold that information from Hillmick, and we do not conclude that the failure to inform Hillmick of those changes on his first day back amounted to a form of retaliation.

The Union argues that proof of retaliatory conduct occurred when the Department posted Hillmick's arbitration award on its internal server, where it was viewed by several employees who were aware of the link. The award contained unflattering facts about Hillmick and the Union argues that it was posted to embarrass him, but cited no policy or confidentiality agreement that prohibited the Department from posting it. The Department's longstanding practice was to post all labor arbitration awards on its internal server so that managers and HR personnel could access them. EOCI's HR director Imhoff credibly testified that he was unaware Department employees could access the server without permission, but once he learned they could, he promptly restricted their access. We find no credible evidence that the Department deviated from its standard practice when it posted the arbitration award on its internal server or intended to embarrass Hillmick by doing so. In fact, inasmuch as the award concluded that his dismissal was without just cause, it was arguably more embarrassing for the Department than Hillmick.

As a result of an inquiry from Hillmick, his supervisor, Clark, received a week's suspension for violating the Department's acceptable use policy regarding internet access, and Clark provided negative testimony about Hillmick at the latter's arbitration. They did not like each other, as indicated by Hillmick's refusal to sit down when he saw Clark in Amsberry's office on the day he returned. Hillmick's allegation that Clark ate four bananas during their initial meeting, thereby making him difficult to understand, was credibly contradicted by both

Clark and Amsberry. His allegation that Clark intentionally provided the wrong key set for his office was also not proven. In a subsequent e-mail to Hillmick from Patterson, the tool and key sergeant, it was explained that Hillmick had been given Rangel's old office and key set, which included a key to Clark's office. They were immediately changed when the mistake was discovered. All of the other counselors who had keys to Clark's office had them removed due to the confidential files stored there.

The level of tension between Hillmick and Clark was anticipated and apparently discussed by managers even before Hillmick returned. Clark and Amsberry both considered transferring to TRCI shortly after their initial meeting with Hillmick. The Union argues that Clark's rare interactions with Hillmick prove that Clark was ignoring him, but credible evidence from Clark, DeJongh, and Shotts indicate that Clark's duties frequently kept him out of the office, he was not chatty with his employees, he left them alone to do their work, and he did not interact with them unless it was necessary. Clark's aloofness, at least as it pertained to Hillmick, was both consistent with his personality and management style and typical of his treatment of all employees.

Hillmick's complaint of Clark's radio alarm going off twice while Clark was out of the office is not evidence of Department wrongdoing. Clark had the radio for two days before it went off the first time and there was no evidence he was aware the alarm had been set. When Hillmick was dissatisfied with Clark's response to his complaint, he contacted Superintendent Coursey about the matter. Coursey acted promptly and informed Hillmick that Clark would no longer use the radio in his office, and that no counselors would have keys to Clark's office.

Hillmick questioned his caseload of 109 Moderate/High ACRS inmates because he believed that it was larger than the caseload of some other counselors. Caseloads are determined by a number of factors, including the inmate status, their release date, and the amount of counseling required. Counselor DeJongh carried a caseload of 500 inmates because they were Low ACRS and therefore required less counseling. Hillmick's caseload consisted of inmates with more than 48 months remaining on their sentence, which meant that they generally required less counseling than inmates who were preparing for release. Hillmick was instructed to turn over his inmates to another counselor once they were 48 months from their release dates, which limited his counseling obligations. We also note that his replacement at EOCL, Shotts, inherited Hillmick's caseload without difficulty, as well as an additional number of inmates categorized as Security Threat Management, which can include gang members, and between 60-70 high-alert-status inmates known for violence. Based on these findings, the Union did not prove that Hillmick's caseload was unreasonable or more burdensome than any other counselor at EOCL.

The Union further alleges that placing Hillmick's new office on the fourth floor, rather than returning him to his former third-floor office, is additional proof of retaliatory conduct. It cites HR administrator Borello's January 19 e-mail as evidence that the Department wished to curtail Hillmick's union-related activities. That memo states in part:

“I expressed concern with assigning only Hillmick to an area where he was ONLY with Clark as it would clearly be singling Hillmick out. I did mention that it might be beneficial to have Hillmick in close proximity to Clark’s office to answer questions, training and yes, to make sure Hillmick did not start stirring the pot and dividing management and staff due to his history of discipl[in]e by management and success in arbitration. Clark could keep an eye on the situation which we have predicted would/could be fairly tense. It was at that point, Rick stated he understood and actually was aware of another counselor that was willing to also move offices into this area. We spoke of that being an appropriate option as the counselors would have two primary areas of offices and Hillmick would not be singled out.” (Emphasis in original.)

The Union argues that Borello’s reference to Hillmick’s “stirring the pot and dividing management and staff due to his history of discipline by management and success in arbitration” concerned Hillmick’s former union-related activities, and was intended to either suppress Hillmick’s future union activities or discourage others from engaging in similar activity. Borello’s acknowledgment of Hillmick’s past activities, and that Hillman’s reinstatement could result in a “fairly tense” work environment, however, does not establish that the Department’s placement of Hillmick on the fourth floor interfered with, restrained, or coerced employees “because of” Hillmick’s exercise of protected rights. Rather, as previously mentioned, the third-floor office lacked space to accommodate Hillmick. Clark had hired three new counselors in the past year, and all of the third-floor offices were occupied. The Union provided no regulation or authority in the arbitration award requiring the Department to return a reinstated employee to his or her former office, especially if it had been re-purposed.

Moreover, the Union also provided no evidence that walking one floor up was tangibly different or created any hardship to Hillmick. His new office was comparable in size, had a window, and was arguably more practical than his former office because it had more useable floor space. We do not conclude that providing Hillmick with such a space would interfere with, restrain, or coerce employees.

Furthermore, Borello’s memo expressed justified concern that if Clark and Hillmick were the only employees on the fourth floor, it could give rise to a complaint that he was being “singled out.” In fact, counselor DeJongh moved to the fourth floor in part because they did not want Hillmick to feel he was being placed there alone with Clark. Borello also cited benefits in having Hillmick in close proximity to Clark for purposes of training and answering questions. In considering all of these factors, the decision to assign Hillmick a new office did not violate the “because of” prong of subsection (1)(a).

Hillmick was understandably anxious about his return to EOCI after a long absence and under these circumstances, as demonstrated by his outreach to three TRCI employees about transferring to TRCI either before or immediately after he came back to work. The fact that not all of the preparations were completed by the time Hillmick returned to work, however, does not establish retaliatory conduct. The e-mails sent and meetings held before Hillmick’s return show that personnel from the IT and HR departments, as well as several employees within the

counseling section, were involved in preparations. Hillmick's questions or requests related to office supplies, time sheets, training materials, his computer monitor, telephone and internet connections, keys, his caseload, the distribution lists, and a radio were answered, provided, or authorized within two days of his return.

As demonstrated by the December 2011 arbitration award and the February 2012 consent order, the Department had engaged in retaliatory conduct related to Hillmick's prior union-related activities. The circumstances following his return were markedly different. Of the two employees cited for retaliatory conduct, King was a fellow bargaining unit member with personal reasons for disliking Hillmick, and Clark was suspended for a week as a result of an inquiry generated by Hillmick. Personal animosity, whether valid or not, does not rise to the level of retaliation without some causal connection to protected union activities. The Department's communications and actions, both before and after his return, indicate a desire to have Hillmick succeed, and to the extent it could accommodate him, it did so. When it learned that Hillmick had contacted counselors at TRCI to explore their interest in changing jobs with him, it eventually pursued that option on his behalf and arranged for a transfer.

The Union also argues that, but for Hillmick's treatment upon his return, he would not have transferred to TRCI, which entitles him to damages in the form of travel costs totaling \$300 per month plus 1.5 hours of daily commuting time. As set forth above, however, *Hillmick*, not the Department, first inquired about transferring to TRCI, and he did so even before being reinstated at EOCL. Moreover, the parties and Hillmick signed a *voluntary* agreement regarding his transfer to TRCI, which specifically stated that "DOC will not pay any additional compensation to Mr. Hillmick as a result of his transfer." The Union's legal counsel was involved in the negotiations for the transfer, and its agent, Woolery, signed the agreement. Hillmick had assistance with negotiations regarding the terms and conditions for the transfer, and there was no evidence that the Union sought travel costs or compensation for extra commuting time.

For the foregoing reasons, we conclude that the Union did not meet its burden of proving that the Department violated the "because of" prong of subsection (1)(a) and we will dismiss this claim.

Because we have concluded that the Department's actions did not violate the "because of" portion of subsection (1)(a), we find no derivative "in" violation under the statute. To determine whether an employer's actions independently violated the "in" prong, we must decide if the natural and probable effect of an employer's actions, when considered objectively, would chill employees in the exercise of their PECBA-protected rights. *Portland Assn. Teachers*, 171 Or App at 623-24. Neither the employer's motive nor the employees' subjective beliefs are relevant. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004).

Hillmick's return was not mistake-free, but the evidence shows that the reasons are more attributable to the brief preparation time, his perceptions of retaliatory behavior, and pre-existing personal animosity with certain employees, rather than an orchestrated effort to retaliate against

him. Borello's e-mail acknowledged the potential for tension, but cited his previous experience with a reinstated employee as proof that it could be successful.

The totality of the circumstances indicate that both parties knew there was a problem with Hillmick's return before he ever complained of retaliatory conduct. Hillmick approached Myrick in June of 2011 to see if he would be welcomed at TRCI if a settlement was reached in his arbitration. The idea of transferring Clark and Amsberry to TRCI was proposed on Hillmick's first day back at work. On that day and the next, Hillmick contacted counselors at TRCI to see if they were interested in changing positions with him, all of which occurred before Hillmick's complaints of retaliation. Borello's e-mail discussed placing Hillmick on the fourth floor with Clark and DeJongh in part so that Clark could keep an eye on him, but equally significant was that they did not want to appear to single Hillmick out by isolating him. In addition, when it became known that Hillmick wished to transfer, the Department acted swiftly to accommodate his wishes. A violation occurs under the "in" prong of subsection (1)(a) only where such a chilling effect would be the natural and probable consequence of the employer's actions or statements. *City of Milwaukie*, 25 PECBR at 277. Under the totality of these circumstances, we do not conclude that employees would be chilled in the exercise of PECBA-protected activity by the Department's efforts to accommodate Hillmick's return to work.

Based on the foregoing, the Union did not meet its burden of proving that the Department interfered with, restrained, or coerced Union employees because of, or in the exercise of, rights guaranteed by ORS 243.662 in its dealings with Hillmick at the time of his reinstatement and we will dismiss this claim.

#### Legal Standards: ORS 243.672(1)(c) Claim

Under ORS 243.672(1)(c), it is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." We have said that, generally, "[o]ur test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the 'because of' prong of subsection (1)(a)." *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 396 (2008).

#### Analysis: ORS 243.672(1)(c) Claim

Although there was some lingering resentment against Hillmick, we do not conclude that the resentment carried over to how he was treated following his return in January 2012. Clark, Amsberry, Imhoff, and King all provided negative testimony about Hillmick at his arbitration, so it appears that their perception of Hillmick was unchanged, but the evidence demonstrates that the Department intended to implement the award and have Hillmick succeed in his return to work.

On this record, we do not conclude that the Department discouraged or otherwise chilled Hillmick or other bargaining unit members from engaging in union activities, or that the

Department acted in a manner that was inherently destructive of protected rights under ORS 243.662. Accordingly, we will dismiss the subsection (1)(c) claim.

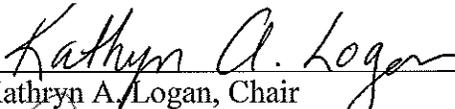
The Department's Request for a Civil Penalty and Reimbursement of Filing Fee

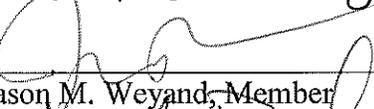
This Board may assess a civil penalty of up to \$1,000 "as a result of an unfair labor practice complaint hearing." ORS 243.676(4). As relevant here, we may do so if: (1) "[t]he complaint has been dismissed" after "find[ing] that the person named in the complaint has not engaged in or is not engaging in an unfair labor practice"; and (2) "the complaint was frivolously filed, or filed with the intent to harass the other person, or both." ORS 243.676(3), (4)(a), (b); *see also* OAR 115-035-0075. Although we dismiss the Union's complaint, we do not conclude that the complaint was frivolously filed or filed with the intent to harass the Department. We also do not conclude that the Union's complaint was "filed in bad faith," such that the Department is entitled to reimbursement of its filing fee. *See* OAR 115-35-0075(3) (the Board may order reimbursement of the filing fee to the prevailing party "in any case in which the complaint or answer is found to have been frivolous or filed in bad faith"). Accordingly, we will deny the Department's request for a civil penalty and reimbursement of its filing fee.

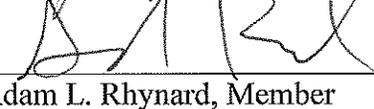
ORDER

1. The complaint is dismissed.
2. The Department's request for reimbursement of its filing fee and the imposition of a civil penalty are denied.

DATED this 8<sup>th</sup> day of August, 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.