

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-042-11

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT
)	CONCLUSIONS OF LAW,
)	AND ORDER
STATE OF OREGON, ACTING)	
THROUGH THE DEPARTMENT OF)	
ADMINISTRATIVE SERVICES,)	
OREGON UNIVERSITY SYSTEM,)	
OREGON STATE UNIVERSITY, AND)	
WESTERN OREGON UNIVERSITY,)	
)	
Respondents.)	
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This matter was submitted directly to the Board after Complainant, SEIU Local 503, OPEU (SEIU), and Respondent, State of Oregon, Department of Administrative Services (State or DAS), and Respondents Oregon University System (OUS), Oregon State University (OSU), and Western Oregon University (WOU) (collectively, OUS or the Universities), agreed to waive a hearing and agreed to stipulated facts, exhibits, and issues. The record closed on December 17, 2012, following receipt of the parties' briefs.

Marc Stefan, Supervising Attorney, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Tessa Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent DAS.

Jeffrey Chicoine, Attorney at Law, Miller Nash, LLP, Portland, Oregon, represented Respondent OUS.

SEIU filed this unfair labor practice complaint alleging that DAS and the Universities violated ORS 243.671(1)(a) and (e) as a result of certain actions taken by DAS and the Universities during negotiations for successor bargaining agreements. DAS and the Universities timely answered the complaint.

As described below, after the parties submitted briefs in this matter, we issued a decision in a companion case concerning essentially the same disputed issues. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525 (2013) (*AEE*). We subsequently granted the respondent's (DAS's) request for reconsideration and oral argument in *AEE*. On July 15, 2013, we afforded the parties in this matter the opportunity to submit additional briefing and provide oral argument regarding the application of our initial decision in *AEE* to this case. All of the parties declined to submit additional briefing or participate in oral argument.¹

The stipulated issues are:

1. Did DAS's and OUS's June 29, 2011 directive/guidelines concerning use of the employers' e-mail systems after the expiration of the contract constitute a unilateral change to "employment relations" within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining? If so, did they violate the duty to bargain in good faith in violation of ORS 243.672(1)(e)?

2. Effective July 1, 2011, did DAS issue a directive applied by state agencies covered by the DAS-SEIU agreement or applied by universities covered by the OUS-SEIU agreement, regarding the use of employer e-mail systems, that interfered with, restrained, or coerced employees in the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

3. If DAS or OUS violated ORS 243.672(1)(a) or (e), what is the appropriate remedy?

For the reasons set forth below, and those set forth in the companion *AEE* case, we conclude that: (1) DAS and OUS violated ORS 243.672(1)(e) by unilaterally deciding to change the use of their e-mail systems by prohibiting employees and SEIU representatives from using the e-mail system to communicate about union business; and (2) DAS violated ORS 243.672(1)(a) when it issued a directive prohibiting the use of employer e-mail systems for union-related communications, which was then applied by the state agencies covered by the DAS-SEIU agreement and by universities covered by the OUS-SEIU agreement. As a remedy, DAS and OUS are ordered to cease and desist from engaging in that unlawful conduct.

¹We issue our reconsideration decision in *AEE* this same day (*Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, ___ PECBR ___ (Order on Reconsideration) (September 19, 2013)).

FINDINGS OF FACT

We adopt the following findings of fact from the parties' stipulated facts and exhibits.

1. SEIU is a labor organization as defined in ORS 243.650(13) and represents certain state employees in various agencies of the State, including OUS, OSU, and WOU.

2. DAS is the exclusive bargaining representative for the State agencies other than OUS and its constituent universities. The State, OUS, and OUS's constituent universities, including OSU and WOU, are each public employers as defined by ORS 243.650(20).

SEIU and DAS

3. SEIU and DAS were parties to a collective bargaining agreement effective through June 30, 2011.

4. Although engaged in bargaining, SEIU and DAS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

5. During bargaining with SEIU on June 1, 2011, the DAS chief spokesperson Gail Parnell advised SEIU Executive Director Heather Conroy that the State was not going to extend the contract beyond its expiration date.

6. On June 29, 2011, DAS sent a memorandum to all agency directors, human resource directors, and human resource managers, including OUS, regarding the expiration of the collective bargaining agreements between the State agencies and various unions, and the fact that the agreements would not be extended beyond their expiration dates. There was an attachment addressing guidelines for the "*status quo period*" (DAS Guidelines). The DAS Guidelines specifically enumerated what was characterized as certain "permissive subjects" that would "not be continued once the agreements expire."

7. By letter dated June 29, 2011, Parnell advised Conroy that the expired agreement would not be extended by the State. The letter also discussed *status quo* obligations and attached a copy of the DAS Guidelines.

8. Under what it terms as "permissive subjects," the DAS Guidelines list "[a]ccess to state e[-]mail system." The expired agreement with SEIU addressed the use of the State Agencies' e-mail systems by union representatives in Article 10.

9. The parties reached a tentative agreement (TA) for a successor collective bargaining agreement on July 22, 2011. Contemporaneous with the TA, the State agreed to restore e-mail access.

10. The contract between SEIU and DAS first addressed the union use of e-mail in a letter agreement to the parties' 2001-2003 contract.

11. The parties first negotiated the question of e-mail use during bargaining for the 1995-1997 agreement. As a result of a disagreement over the interpretation, the parties arbitrated the question of union access under the language as it then appeared in the contract and relevant bargaining history. The relevant provisions are outlined in the arbitration decision.

12. In the 2003-2005 SEIU-DAS agreement, the parties replaced the Letter of Agreement concerning "Union Use of E-Mail" with Article 10, section (5)(b), which detailed the purpose, restrictions, and limitations on the use of the e-mail system. Specifically, Article 10, section (5)(b) states that, with certain enumerated restrictions, "Union representatives and SEIU-represented employees may use an Agency's e-mail messaging system to communicate about Union business."

13. In the intervening period, although there have been some modifications to the language in subsections (5) and (9) of Article 10, section 5(b) of the SEIU-DAS agreement, the provision otherwise reads the same as in the 2003-2005 agreement.

14. "DAS Statewide Policy—Acceptable Use of State Information Assets" outlines the boundaries for use of the state e-mail system.

SEIU and OUS

15. SEIU and OUS were parties to a collective bargaining agreement effective through June 30, 2011.

16. The SEIU-OUS agreement applies to a bargaining unit consisting of classified employees of OUS and its constituent universities.

17. Although engaged in bargaining, SEIU and OUS did not reach agreement on a successor contract by June 30, 2011, when the existing agreement expired.

18. Jay Kenton, OUS Vice-Chancellor for Finance and Administration, served as chief spokesperson for OUS throughout the bargaining with SEIU.

19. Rich Peppers, Assistant Executive Director for SEIU, served as chief spokesperson for SEIU throughout its bargaining with OUS.

20. By letter dated July 6, 2011, Kenton sent Peppers a letter attaching the DAS Guidelines. In adopting and implementing the DAS Guidelines, OUS relied on the directives, reasoning, and advice of DAS.

21. OUS gave individual universities discretion as to how and whether to implement the provisions of the DAS Guidelines related to e-mail use for union business.

22. WOU is part of OUS and issued an undated memorandum on the subject of "Status Quo Period and Appropriate Use of E-Mail."

23. OSU is also part of OUS and issued a memorandum dated June 30, 2011, from Jacquelyn Rudolph (OSU Director of Human Resources) to "Senior Executive Administrators, Dean, Directors and Department Chairs" on the subject of "Expiration of Collective Bargaining Agreement for Classified Employees."

24. By an e-mail dated August 11, 2011, and sent to OSU manager Amy Flint, Notocha Coe, in her capacity as SEIU steward, asserted rights on behalf of SEIU-represented employees to use accrued leave time to cover time off for attending classes under Article 63 of the expired SEIU-OUS agreement. Coe was instructed that, pursuant to OSU policy, she was not to use the university e-mail system to conduct union business.

25. On September 14, 2011, SEIU and OUS signed a comprehensive TA for a successor agreement, at which time OUS and its constituent universities ceased restrictions on union use of the universities' e-mail systems.

26. The SEIU-OUS agreement first included provisions on union e-mail use in the 2003-2005 agreement. Those provisions permit SEIU representatives and SEIU-represented employees to "use the University's [e-mail] system for union business," subject to certain specified restrictions.

Other Stipulated Facts

27. OSU has a policy, effective 2006 to date, titled "Acceptable Use of University Computing Resources."

28. The State's Acceptable Use of State and Information Assets policy governs e-mail usage by state agencies. OUS and its constituent universities apply portions of this policy that do not contradict their own missions and that are not addressed by their own policies, including the provision on solicitations (on page 4 of the State's policy).

29. SEIU maintains a "Membership Data Base" (MDB). The MDB contains various forms of information secured from the State and OUS, pursuant to contractual and other reporting obligations and information shared by members with SEIU. That information includes, among many other things, personal and work e-mail addresses for employees that SEIU represents.

30. During the period up to and following contract expiration, SEIU actively sought to increase the number of private e-mail addresses in its MDB by asking individuals to visit its website and enter their personal e-mail addresses via a web-based form. Further, SEIU sought to expand those opportunities by urging employees that it represents to provide it with alternative contact information—efforts above and beyond its regular practice of urging employees to keep their contact information up to date with the union.

31. During negotiations with DAS and OUS for respective successor agreements to the 2009-2011 collective bargaining agreements, SEIU made substantial efforts, as it has in past contract negotiations, to communicate with its members regarding matters that it believed relevant to the ongoing negotiations. SEIU also made such efforts to receive information from its represented employees that those employees deemed relevant to the ongoing negotiations. Those efforts to communicate included e-mails sent by SEIU to members (and vice-versa) on the State and/or OUS e-mail systems, as well as personal e-mail accounts maintained by SEIU-represented employees. These communications by SEIU to its members (and from members to SEIU) using the State and/or OUS e-mail systems continued following expiration of the contract.

32. During the period following expiration of the contract, SEIU continued in its efforts to maintain communications between itself and represented workers on matters deemed relevant by each. It did so by continued efforts to use the State and OUS e-mail systems and by seeking and attempting to utilize alternative means of communications, including the SEIU website, Facebook, Twitter, and other social media. Nonetheless, SEIU communications to and from workers became more difficult and less successful due to the employers' actions at issue in this matter.

33. During the period following contract expiration, DAS did not impose any limitations or restrictions on communications between employees and SEIU through telephone or other media (e.g., telephone, inter or intra-campus or agency mail), other than the State and OUS e-mail systems.

34. The DAS Guidelines did not address employees' use of State or university e-mail systems for personal or non-work-related e-mail. Such use was subject to compliance with existing policies of DAS or particular DAS Agencies or universities of the OUS system.

CONCLUSIONS OF LAW

In the companion *AEE* case (which also includes the order on reconsideration issued this same day), we concluded that DAS violated ORS 243.672(1)(a) and (e) for conduct nearly identical to what is at issue in this matter. After we issued our initial order in *AEE*, we granted DAS's motion for reconsideration and oral argument, and afforded the parties in this case the opportunity to submit any additional briefing as to why our conclusion in *AEE* should not control the outcome here. We have also considered DAS's arguments on reconsideration in *AEE* as part of our determination in this matter. For the following reasons, we find no meaningful distinction between *AEE* and this dispute that would warrant a different outcome.

ORS 243.672(1)(e) Violation

In *AEE*, we concluded that DAS violated ORS 243.672(1)(e) because it decided to unilaterally change a mandatory subject of bargaining (use of the State’s e-mail system to conduct union-related business) during the hiatus period. Dispositive in both *AEE* and this case is whether the use of the employers’ e-mail systems after the expiration of the contract constitutes a unilateral change to “employment relations” within the meaning of ORS 243.650(7), *i.e.*, a mandatory subject of bargaining.

In *AEE*, we identified the subject at issue as “the allowance of, and limitations on, the use of the State’s e-mail system by its employees and their certified representative to communicate about union business.” 25 PECBR at 537. Likewise, here the subject of the discontinued article concerns use of the employers’ e-mail systems by SEIU representatives and SEIU-represented employees to communicate about union-related business. Specifically, the discontinued SEIU-DAS article concerns the “use of an Agency’s e-mail messaging system to communicate about Union business” by SEIU representatives and SEIU-represented employees. Likewise, the discontinued SEIU-OUS article concerned “the use of the University’s [e-mail] system for union business” by SEIU representatives and SEIU-represented employees. Finally, the parties have not argued that the subject at issue here is different from that identified in *AEE*.

In *AEE*, we then determined that this subject did not fall within one of the specifically-enumerated statutory designations of mandatory or permissive. *Id.* at 537-42. Included in that determination was our conclusion that the subject had not been previously designated as permissive before June 6, 1995. *See id.* at 537-40; *see also* ORS 243.650(7)(b). We also disagreed with DAS’s assertion that that the subject had “an insubstantial or *de minimis* effect on public employee wages, hours, and other terms and conditions of employment.” *See* ORS 243.650(7)(d); *see also* 25 PECBR at 541-42.

Thus, the outcome in *AEE* ultimately was determined by the balancing test under ORS 243.650(7)(c). We explained in *AEE* that this test required us to determine if access to and use of the State’s e-mail system by the union and its represented employees to communicate about union business had a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment. 25 PECBR at 542-44. We determined that the subject had a significant impact on management’s prerogatives, including: the right to control access to and use of the State’s communications systems and its equipment; the right to protect against improper use of that system that might subject the State to liability; and the right to ensure that employees are performing work for the employer while on paid time, rather than utilizing the e-mail system excessively for non-work purposes. We also noted that there was presumably at least some cost to the State to allow such use, although the record contained no evidence concerning the amount of that cost. *Id.* at 542.

We then turned to the impact on employee wages, hours, or other terms and conditions of employment. We explained that use of the State’s e-mail system allows employees to communicate with each other and with representatives of the Association about wages, hours,

and other terms and conditions of employment. We further observed that e-mail has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler, and mail room, and that employees rely on this means of communication more and more each year to communicate with each other and their designated representative about a wide variety of employment matters, particularly in bargaining units where employees are spread across multiple agencies and worksites. *Id.* We added that the ability of employees to communicate with each other and their bargaining representative about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and other terms and conditions of employment.²

Finally, when we balanced the competing interests, we concluded that the subject of access to and limitations on the use of the State's e-mail system had a greater impact on the employees' wages, hours, and other terms and conditions of employment than on management's prerogatives. *Id.* at 542-44. Accordingly, we found the subject mandatory for bargaining.³ *Id.*⁴

The arguments by both parties in this dispute largely mirror those addressed in *AEE*; indeed arguments advanced in that case have been incorporated in those made here. We see no need to repeat our analysis in *AEE* regarding those arguments.

Moreover, we offered DAS and OUS an opportunity to provide supplemental briefing on why our analysis in *AEE* should not apply here, but they declined to submit supplemental briefing.⁵ After considering our analysis in *AEE*, the arguments advanced in this case, as well as the stipulated issues, facts, and exhibits in this case, we conclude that *AEE* controls the outcome here. In both cases, the subject at issue concerns the use of the State's e-mail system by represented employees and their representatives to communicate about union business. Moreover, DAS was a party in both proceedings. Additionally, both cases involve the same decision by DAS to unilaterally change the *status quo* regarding the subject issue. Finally, neither DAS nor OUS advanced arguments as to why the two matters are distinguishable. Under such circumstances, we conclude that there is no material difference in this matter and *AEE*, such

²In our order on reconsideration in *AEE*, also issued today, we further explain the subject's impact on public employee wages, hours, and other terms and conditions of employment, as well as the subject's impact on management's prerogatives.

³We further observed that our conclusion was consistent with federal law under the National Labor Relations Act, after which the PECBA was modeled. 25 PECBR at 543 n 9.

⁴We addressed (and rejected) one additional argument by the State—namely, that the subject should not be mandatory under the so-called “purely-contractual-rights” exception. We explained that the exception had been limited to three categories of subjects (none of which applied), and we declined to further expand the exception. *Id.* at 544-46. That same reasoning applies to this matter.

⁵We also afforded SEIU the opportunity to submit supplemental briefing addressing the applicability of *AEE* to this case. SEIU also did not submit supplemental briefing, but did state that there was no meaningful distinction between the two cases.

that a different outcome is warranted here.⁶ Accordingly, we will find that DAS and OUS violated subsection (1)(e), as alleged.

ORS 243.672(1)(a) Violation

In *AEE*, we concluded that DAS violated subsection (1)(a) by issuing a directive and guidelines that prohibited the use of the State e-mail system by state employees holding union positions and for union-related communications. 25 PECBR at 551-61. In reaching that conclusion, we explained that the directive and guidelines were facially discriminatory, in that they expressly singled out union-related communications (and use by state employees holding union positions) in violation of ORS 243.672(1)(a). *Id.*

Here, the same directive and guidelines are at issue. We have not been presented with any persuasive arguments why *AEE* should not control the outcome here.⁷ Consequently, consistent with our decision in *AEE*, we will find that DAS and OUS violated ORS 243.672(1)(a).⁸

Remedy

We turn to the remedy. Where, as here, we find that an employer violates the Public Employee Collective Bargaining Act (PECBA), we order the employer to cease and desist from engaging in such conduct. *See* ORS 243.676(2)(b).⁹ We may also “[t]ake such affirmative action * * * as necessary to effectuate the purposes of [the PECBA].” ORS 243.676(2)(c). Here, SEIU asks that we order the employers to post a notice of their violations. We order such a remedy if we determine that the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590,

⁶As previously noted, we incorporate our *AEE* reconsideration order as part of our analysis in this case.

⁷We reiterate that we provided DAS and OUS the opportunity to submit supplemental briefing on why our analysis in *AEE* should not apply here, and that DAS and OUS declined to submit such briefing.

⁸We provided additional discussion in our *AEE* reconsideration order, in response to the arguments advanced by DAS in its request for reconsideration. We incorporate that discussion as part of our conclusion in this case.

⁹Although the State contends that a “cease-and-desist” order should not be issued because it has already rescinded its unlawful conduct, a “cease-and-desist” order is *mandatory* once we “find[] that any person named in the complaint has engaged in or is engaging in any unfair labor practice charged in the complaint.” ORS 243.676(2) and 2(b).

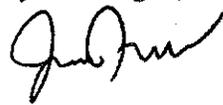
5601 (1983). Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007). As in *AEE*, after applying these factors to the present case, we do not conclude that a posting is warranted.

ORDER

1. DAS and OUS shall cease and desist from violating ORS 243.672(1)(a) and (e) as described above.

DATED this 19 day of September, 2013.

*Kathryn A. Logan, Chair



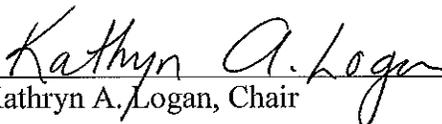
Jason M. Weyand, Member



Adam L. Rhynard, Member

*Chair Logan, Concurring in Part, Dissenting in Part:

In *AEE*, I dissented to the majority's conclusion that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State's e-mail system for Association-related communications. For the reasons stated in that order, I respectfully dissent to the majority's holding in this matter.



Kathryn A. Logan, Chair