

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-45-10

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL #1329,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND ORDER
CROOK COUNTY ROAD DEPARTMENT,	)	
	)	
Respondent.	)	
_____	)	

This Board heard oral argument on June 29, 2012, on both parties' objections to a Recommended Order issued on May 11, 2012, by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on March 15 and 16 and July 7 and 8, 2011, in Salem, Oregon. The record closed on August 24, 2011, following receipt of the parties' post-hearing briefs.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented Complainant at the hearing. Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, represented Complainant at oral argument.

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, Bend, Oregon, represented Respondent.

On September 30, 2010, Complainant Oregon AFSCME Council 75, Local #1329 (AFSCME) filed this unfair labor practice complaint against the Crook County Road Department (County). The complaint alleges that the County wrongfully discharged Jennifer Beatty, a County employee and Union steward, without just cause and because of her Union activity. The County filed a timely Answer to the Complaint.

The issues are:

1. Did the County's discharge of Beatty on August 17, 2010, violate ORS 243.672(1)(a), (c), (d), or (g)?

2. Should the County be required to pay AFSCME a civil penalty?

### RULINGS

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

2. In the Memorandum in Aid of Oral Argument, the County alleges that on May 8, 2012, “an AFSCME council representative informed a Central Oregon public employer that the Governor had granted AFSCME the right to select the next ERB member.” (County Memorandum in Aid of Oral Argument, p. 2.) The County notes that the Recommended Order in this case was issued on May 11, 2012, and that on May 23, 2012, the Oregon Senate confirmed Weyand’s appointment to the Board.

The County states:

“Crook County officials have expressed serious concerns regarding the issuance of a decision fraught with errors and serious factual omissions within days from the time the ALJ had knowledge of Respondent’s counsel’s pending appointment as an Employment Relations Board (‘ERB’) member.” *Id.*

The County apparently asserts that knowledge the ALJ may have had concerning Weyand’s appointment to this Board caused the ALJ to be unduly biased in favor of AFSCME. The County offers no evidence to support this assertion, and we find none in the record. *See AFSCME Council 75 v. Josephine County*, Case No. UP-026-06, 234 Or App 553, 558-59, 228 P3d 673 (2010) (on appeal, a county argued that this Board “ignored its own rules and precedents” in order “to achieve its desired ideological objectives” in violation of the Due Process Clause; the Court found no evidence to support this assertion, and rejected the county’s argument, noting that “those types of unsupported attacks are inappropriate and unprofessional.”).

### FINDINGS OF FACT

1. The County is a public employer. AFSCME is a labor organization and the exclusive representative of a bargaining unit of approximately 20 Road Department employees.

2. The County and AFSCME are parties to a collective bargaining agreement in force from July 1, 2009 through June 30, 2013, with a “Reopener Amendment” in effect from July 1, 2010 through June 30, 2011.

3. Article 5 of the collective bargaining agreement provides in part that “[t]he County and the Union agree not to discriminate against any employee because of race, color, sex, age, national origin, marital status, religion, disability, union membership, or non-membership.”

4. Article 7 of the collective bargaining agreement, **DISCIPLINE AND DISCHARGE**, provides in part as follows:

“Section 1

**“The principles of progressive discipline shall normally be used except when the nature of the problem requires more serious action. An employee shall not be disciplined or discharged without cause.”**

“Section 2

**“Discipline shall normally consist of one of the following:**

**“a) Oral warning**

**“b) Written warning**

**“c) Suspension**

**“d) Discharge” (Emphasis in the original.)**

5. Article 8 of the collective bargaining agreement, **GRIEVANCE PROCEDURE**, provides in part as follows:

“Section 2 - Grievance Procedure

**“The following steps are to be followed in submitting and processing a formal grievance:**

**“Step I. The aggrieved employee or group of employees should verbally present the grievance to the Road Master within ten (10) working days of the occurrence of the problem. The Road Master shall give his/her oral reply within ten (10) working days of the date of the presentation of the grievance.**

**“Step II. If the grievance is not fully settled in Step I, it shall, in detail, be reduced to writing, dated, signed by the aggrieved employee or group of employees, and presented by the aggrieved party or group of employees to the Road Master within ten (10) working days. The Road Master shall reply in writing to the grievance within ten (10) working days of the date of the presentation of the written grievance.**

**“Step III. If the grievance is not settled in Step II, the written grievance is to be presented by the aggrieved party, along with all pertinent correspondence, records, and information, to the County Legal Counsel and County Court within ten (10) working days after the Road Master's response is given. The County Court shall set a**

**date and time and shall meet with the aggrieved employee or group of employees and Road Master. The County Court shall reply to, and the grievance in writing within ten (10) working days after the date of presentation of the written grievance.**

**“Step IV. Alleged contract violations may be processed by the Oregon Employment Relations Board.”**

**“\* \* \* \* \***

**“Section 6 - Prohibited Practices**

**“No employee can be disciplined or discriminated against in any way because of the employee’s use of the grievance procedure.” (Emphasis in the original.)**

The collective bargaining agreement does not contain a binding arbitration provision.

6. Article 18 of the collective bargaining agreement, **SAFETY**, provides in part as follows:

**“Section 2**

**“All employees shall inform the Road Master of safety concerns in the workplace, including health and safety issues. It is clearly understood that the County shall take no reprisals against employees for reporting issues to the Road Master or Safety Committee.**

**“\* \* \* \* \***

**“Section 4**

**“All Road Department Employees shall follow all safety policies and procedures as identified by OSHA, Federal Motor Carrier Regulations, Safety Committee and others approved by the Road Master. If an employee does not understand any part of a training exercise and or a safety policy, it is the sole responsibility of the employee to notify the Safety Committee and or Road Master that additional review and or training is requested. It is encouraged that all staff work together to create a safe work environment for co-workers and the public. It is also the responsibility for all employees of the Road Department to report immediately any safety concern of operations, equipment and or co workers to the Road Master and or Safety Committee.” (Emphasis in the original.)**

7. In May 2002, the County hired Jennifer Beatty as a flagger in the Road Department. She was promoted to truck driver in 2003, where she remained until her discharge. Road Master Penny Keller was Beatty's supervisor during the relevant time period. Co-workers described the personalities of Keller and Beatty as being like oil and water.

8. Beatty has an impairment in the peripheral vision in her right eye, along with other medical conditions that required her to have a commercial driver's license (CDL) "**WAIVER OF PHYSICAL DISQUALIFICATION**" (waiver) from the Oregon Department of Transportation (ODOT). During her employment with the County, the County assisted Beatty in obtaining this waiver by signing the waiver application. In 2004, one of Beatty's medical conditions resulted in a six month suspension of her CDL; her driver's license was not suspended, however. The County provided Beatty with non-driving work for that six month period, which covered the spring and summer and occurred while the County had ongoing road projects.

9. In late 2006 or early 2007, Beatty became AFSCME's Chief Steward. As part of those duties, Beatty represented employees in meetings with County managers and in grievances.

10. The County evaluated Beatty as a satisfactory or better employee in evaluations in February 2003; September 2003 (stating that Beatty's "positive attitude is a true asset to our department. You have become the leader in getting things done no matter what the task may be."); September 2004 ("Excellent" in all four Road Master's Comments); September 2005 ("Exceeds Standards"); October 2007 ("Meets Standards" and "Exceeds Standards"); August 2008 ("Meets Standards"); and October 2009 ("Meets Standards").<sup>1</sup>

11. In late 2006, after Beatty became a steward, the County placed her on unpaid leave because a medical issue again caused the suspension of her CDL. This time the suspension was for one year. The County did not initially provide Beatty with alternate work, and raised the issue of discharging her. Beatty obtained the assistance of a private attorney who argued with the County about the legality of her unpaid leave. The Union also threatened to file a grievance in November 2006. The Union and private attorney alleged that placing Beatty on unpaid leave discriminated against her based upon her disabilities and constituted retaliation for her Union activities. The County ultimately gave Beatty some work as a flagger during 2007.

12. On June 19, 2007, the County refused for the first time to sign off on Beatty's CDL waiver request. The County sent a letter to ODOT with Beatty's application stating in part,

"We are aware that Ms. Beatty is attempting to obtain a waiver of her physical disqualifications for the operation of a commercial vehicle. Crook County elects not to sign this application.

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<sup>1</sup>At hearing, Keller was asked about her relationship with Beatty before 2008. Keller responded, "[i]t was fine. She's a great employee. She's a hard worker. She's dedicated. I have no complaints with what she does. She's, you know, willing to jump in the muddy ditches, she's willing to pick the dead maggot animals up. She's a good employee." (Keller Testimony at 71-72.)

“We do acknowledge that Ms. Beatty is an employee of Crook County and is currently assigned to the road department.”

The County did not advise Beatty that it had declined to sign the application.

13. Beatty regained her CDL status and returned to her truck driver position on December 27, 2007.

#### Stuck Snowplow Incident

14. On January 8, 2008, Beatty was driving a snowplow on Juniper Canyon Road. She decided to back up to remove additional snow from the road. Her left rear wheels went off the side of the road. Because there was a limited road shoulder, the truck pivoted and both sets of rear wheels slid down the embankment, leaving the truck at an angle to the road with the truck’s fuel tanks resting on the snow. The area where Beatty got stuck was above the Prineville reservoir. Beyond the shoulder of the road was a steep slope with small trees which led to the reservoir several hundred feet away. The slope was interrupted by an old road. County employees first attempted to pull the truck back onto the road with a road grader alone, which shifted the truck to a position more perpendicular to the road but did not free it. The grader and its carrier eventually pulled the truck back up onto the road.<sup>2</sup>

15. The County has a six member Safety Committee, comprised of bargaining unit members and County management representatives. The duties of the Safety Committee include investigating on-the-job accidents. While the focus of the Safety Committee is on evaluating whether County training, equipment, or procedures should be changed to prevent reoccurrences, the County routinely uses Safety Committee reports as a basis for discipline.

16. On January 16, 2008, the County Safety Committee issued a report<sup>3</sup> about the snowplow incident, based on interviews with Beatty and Roger Chapman. The report stated in part:

#### **“Section III: Findings**

“Jennifer backed the driver side duals off the edge of the road. She stated that she misjudging the distance from the shoulder of the road to the edge of the embankment. She also stated that it was a driver error. She assumed that there was more room than there actually was to be able to maneuver in. Jennifer should not have turn around in the middle of the corner, she should have continued on until she could find a safer location to turn around.

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<sup>2</sup>The parties dispute the angle of the truck in relation to the road, whether Beatty remained in the truck, and whether the truck was in a precarious position. We conclude, in part from the County’s contemporaneous lack of action regarding the matter, that while getting snowplows stuck was routine, this particular incident was more serious than usual, but not serious enough to warrant discipline or counseling.

<sup>3</sup>The County documents in evidence often have non-standard capitalizations and other grammatical errors. We reproduce them as written.

**“Section IV: Recommendations:**

**“Corrective actions:**

“Place carsonite reflectors along the shoulder of the road, driver shall slow down and observe mirrors more frequently. All drivers shall know and be aware of their surroundings at all times. Do not back up in a corner or unsafe area, continue on and turn around in a safer location. Also Chains were also recommended but unsure if they would have helped in this situation.

“\* \* \* \* \*

**“Section V: Review and Follow-up Actions.**

**“Correction Actions Taken:**

“Penny will discuss with [Beatty] safety when backing up.” (Emphasis in original.)

17. Juniper Canyon Road was one of the more challenging roads the County plowed. The County continued to assign Beatty to plow that road after the January 8 incident.

18. Until its July 26, 2010 letter of proposed discharge, County officials did not discipline or discuss possible discipline for this incident with Beatty.

19. On August 25, 2008, the County issued an evaluation rating Beatty as “meets standards.” The evaluation cited no deficiencies in her performance, and did not mention the snowplow incident.

**Warren Snowplow Accident Grievance**

20. On January 25, 2009, AFSCME bargaining unit member Dale Warren was involved in an accident while driving a County snowplow. The plow blade hit a cattle guard, causing the blade to separate from the truck. The truck tipped forward onto its front end and ran over the blade before falling back to an upright position and continuing forward. Warren was ejected from his seat up onto the dashboard before landing in the passenger seat, from which he braked the truck to stop.

21. On February 19, 2009, the Safety Committee issued a report regarding Warren’s snowplow accident. Bargaining unit representatives on the Safety Committee included Jerald Koops and Cass Raymond. The report was drafted, as was customary, by management representative and Safety Coordinator/Office Assistant Jodi Stills.

22. On March 30, 2009, the County sent Warren a notice of intent to take disciplinary action. Warren was accused of driving too fast for the conditions, failing to lift the plow blade when going over a cattle guard, and modifying his seat belt. The County stated that it could suspend him

for eight days based on Warren's speed and seat belt modification at the time of the January plow accident. The County included the Safety Committee report with the disciplinary materials provided to AFSCME.

23. On April 13, 2009, the County held Warren's predisciplinary hearing. Warren was represented by Beatty and an interim AFSCME Council Representative, Cecil Tibbets. Tibbets argued that the proposed discipline was too severe in light of Warren's acknowledgment of fault. During the meeting, Keller believed that Warren had agreed that a five-day suspension would be appropriate. No agreement explicitly stating that AFSCME agreed to that level of discipline was made, orally or in writing.

On April 23, 2009, Road Master Keller imposed a five-day suspension on Warren; she gave him some flexibility in how it was served.

24. The County referred to the Safety Committee report of the accident in imposing discipline on Warren. In reviewing that report, Koops and Raymond concluded that the report contained two errors. The first (minor) error was a statement that another employee had used a vehicle to push the plow off the road, when in fact Warren had done so. The second (significant) error was a statement that Warren had "showed anxiety" and become "defensive" when asked by the Safety Committee to demonstrate his actions during the accident. Koops and Raymond asked Stills to change the report to correct these issues, and Stills refused. Koops and Raymond then approached Beatty and informed her of what they believed were errors.

25. Beatty then reviewed the report with Warren. Warren agreed that the report erred in the respects listed above.

26. Beatty discussed the report's inaccuracies with Stills, who told her that the process had to originate with the Safety Committee members. Beatty also approached Keller about the issue. After checking with Oregon Occupational Safety and Health Administration (OSHA), Keller stated that the only way to correct the report was to have the members of the Safety Committee agree to reconvene to discuss and change the report by making an amendment to it. Beatty then contacted the remaining bargaining unit members of the Safety Committee, all of whom agreed that Koops and Raymond were correct. The Safety Committee ultimately reconvened and, in May 2009, amended its report to correct the identified errors.<sup>4</sup>

27. In May 2009, Tibbets left AFSCME for another position and was not immediately replaced, leaving Beatty with more responsibility to represent the bargaining unit with the County.

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<sup>4</sup>Such an amendment had never been made by the County before. However, there is no evidence in the record of any County or State directive, rule, or regulation which barred Beatty from making this request or barred the Safety Committee from acting on it. In addition, Beatty and the other Union representatives proceeded on the path laid out by Keller. The County never sought to discipline Beatty for this April and May 2009 conduct until July 26, 2010.

28. On May 6, 2009, Beatty filed a grievance over Warren's five-day suspension. On May 13, Keller denied the grievance at step one, and stated that AFSCME had acted in bad faith in filing the grievance because the County had already reduced Warren's discipline from the proposed eight days.

29. On May 26, 2009, Beatty moved the Warren grievance to step two. On June 10, 2009, Keller responded to this grievance step. In denying the grievance, Keller repeated that AFSCME had acted in bad faith in filing the grievance, and increased Warren's suspension from five days to eight days. In her letter, Keller stated in part:

*"I have carefully considered your request to remove the discipline suspension of five (5) days based on your statement, 'Discipline without just cause. Not having clear instruction before hand. Employee did not believe he was violating instructions. None of the documents instructed particularly about to not put a clip on a seat belt. Requesting that suspension be dropped completely. That everything to do with the suspension too be removed from Mr. Warren File.' Filed and presented by Jennifer Beatty, Steward.*

"This request is denied and modified back to the original eight (8) days for the following reasons:

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"I reduced the original eight (8) days without pay to five (5) days of which could be split between two pay periods if you so desire in good faith. You are also requesting that the suspension be dropped completely which, is not in keeping with your first request presented by Mr. Cecil Tibbitts.

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"It is of great concern that you fail to understand the Laws of Oregon pertaining to driving privileges. The course in which you have taken is not in keeping with your first request. This does not represent a good faith effort on your behalf, nor does it represent the essential safety work ethic that is required by this department. For this reason I am re-establishing the measure of discipline at eight days of suspension without pay. This, again, may be split between two pay periods with prior permission from me."

30. On July 9, 2009, Beatty contacted Keller to argue that her reimposition of the original eight days of suspension was unlawful retaliation against Warren and AFSCME. On July 27, 2009, Keller responded as follows:

"I appreciate your communications concerning Article 8, Section 6. I am sure that the

reinstatement of the original eight-day suspension without pay identified in the NOTICE OF INTENT TO TAKE DISCIPLINARY ACTION dated March 30, 2009, has caused some concern and confusion in response to your other grievance requests.

“At our first meeting on April 13, 2009, you requested a reduced disciplinary action. Mr. Bruce Bischof specifically inquired as to what you would recommend. Mr. Cecil Tibbett’s, requested that we provide a proposed reduction. The proposed reduction provided on April 23, 2009, set a three day (3) reduction in addition to allowing you to split this between two pay periods of your choice for the remaining five days.

“In return, on May 7, 2009, you did not acknowledge the proposed reduction, which was at your request, nor did you provide a counter offer in keeping with the dialogue of the April 13 meeting. Rather, you are now requesting complete dismissal, which is not in keeping with your previous request. This too created concern and confusion on management’s behalf.

“At no time during the April 13, 2009 meeting, was a complete dismissal and/or removal of all documents requested or even discussed.

“I responded to your May 7, 2009 statement on May 13, 2009, I again offered the reduction of three days under the same conditions as noted on the April 23, 2009 letter. On May 27, 2009, you again responded with no acknowledgment of the dialog from the April 13, 2009 discussions. This was a clear message that your representation from the April 13, 2009 meeting was not in good faith and your posture has taken a complete change of direction for resolution and accountability for this incident.

“Your responses do not allow management any choice other than to return to the original proposed discipline. Therefore, the grievance dated July 9 2009, is denied.”

31. In early November 2009, after exhausting its remedies under the collective bargaining agreement, AFSCME filed an unfair labor practice, Case No. UP-059-09, which was ultimately resolved by settlement (after Warren had another truck incident and other issues) and withdrawn. Prior to the withdrawal of UP-059-09, AFSCME submitted a witness list to the County which included Beatty.

32. Keller believed that Beatty was inducing the other members of the AFSCME bargaining unit to pursue disagreements with the County instead of letting them drop or reaching agreement. Keller expressed this opinion to Beatty some time after January 2008, when Beatty had regained her CDL and returned to her truck driver status.

33. Until its July 26, 2010 letter of proposed termination, County officials did not discipline or discuss possible discipline for the Safety Committee incident with Beatty. The County did not mention the incident in Beatty’s performance evaluation of October 2009.

## Houston Lake Road Accident

34. On November 30, 2009, at approximately 7:45 a.m., Beatty was driving a fully loaded County dump truck weighing about 25 tons away from the County landfill towards Houston Lake Road. The weather was clear with bright sunshine, but the roads were icy. Houston Lake Road passed over a hill approximately 200 to 300 yards to the west. Beatty stopped at the stop sign and then began to turn left and east onto Houston Lake Road.<sup>5</sup> As she did so, a car on Houston Lake Road crested the hill. The driver of the car applied the brakes and the car slipped on the icy road, went off the road and sideswiped a fence, narrowly avoided a Juniper tree and returned to the shoulder of the road past Beatty's vehicle. The car contained a woman, small child, and infant. At the scene, there appeared to be no physical injury to the car's passengers, who declined any treatment, and no structural injury to the car, which was driven from the scene.

35. Beatty first saw the car, which was light in color and approaching from the opposite direction of the sun, either during her turn or just after her turn was completed.

36. A County Recruit Deputy reported to the scene of the accident. She interviewed Beatty and the driver of the car at the scene, and later interviewed other witnesses. A Recruit Deputy is a probationary position, and the Deputy had little prior actual experience investigating accidents.

37. The Deputy did not issue a citation. In her report, the Deputy stated that the reason for not issuing the citation was as follows:

"Due to the information I received on scene and due to the conclusion of my interviews with the witnesses of the occurrence, case is inconclusive, as to the chain of events that occurred at the time of the crash." (Emphasis omitted.)

38. The investigating Deputy was supervised by Russ Wright, Operations Commander of the County Sheriff's Office overseeing the office's Patrol and Investigations Division.

39. Wright viewed the accident scene himself, because it involved a County vehicle. He also asked the Deputy to interview other witnesses who either were not present at the scene when she was or of whom she was unaware, which the Deputy did.

After the Deputy concluded her investigation, she discussed it with Wright. The Deputy was not sure what happened, because of conflicting statements she had received. Wright told the Deputy she had discretion to decide whether to issue a citation.

40. Wright believed the preponderance of the evidence showed that the dump truck had failed to yield the right of way to the car, and the car had the right of way on the roadway. Wright knew that the road was slippery at the time of the accident, and that the roadway was unobstructed.

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<sup>5</sup>Given the size of the truck and its full load, we infer that the truck's progress from the dead stop to the westbound lane was slow.

The uncontradicted evidence indicated to Wright that the car was going approximately 45 miles per hour, which would mean it would take considerable time to get from the top of the hill to the intersection. Wright concluded that the dump truck driver failed to see the car. Because the car was gray, Wright thought it might have blended in and been difficult to see.

41. The non-involved witness to the accident was Donnie George, an employee of the Crook County Landfill. According to the police report, George had the following conversation with the investigating Deputy:

“George stated he was traveling westbound on Houston Lake Road heading to the landfill and when he approached the intersection of Houston Lake Road and landfill entrance, he saw that Beatty was stopped at the intersection with her turn signal on to turn left to head east. I asked George if he saw the silver car and he stated he did see the car coming as it was just peaking over the hill on the westside side of the entrance to the landfill. He stated that is when Beatty started to make her turn.

“I asked George when was the first time that he saw the car coming. When Beatty pulled out onto Houston Lake Road he stated he saw the car cresting over the top, coming down the little hill, when Beatty started to attempt her turn pulling out from landfill entrance.

“I once again confirmed with George that the first time he saw the silver car coming eastbound towards them was at the same time when Beatty was pulling out from the landfill entrance and into the intersection and he stated yes. George then continued to tell me that when he saw the car veer for the very first time was when Beatty’s truck was partially in the westbound lane in the middle of the turn.

“Due to the conflict of information, I confirmed with George one more time that he saw the silver car cresting over the top of the hill when Beatty had started to attempt her turn coming out of landfill entrance onto houston lake road. George again said, ‘yes.’ At that time I concluded my interview over the phone with George.” (Emphasis omitted.)

42. Because the car in question appeared from Beatty’s right, and because Beatty has a right eye impairment, the County decided to put Beatty on paid administrative leave while her right eye was examined.

43. County Road Department employee Koops, whose truck reached the scene moments after the accident, told the Safety Committee that “[o]nce the frost was gone there were not skid marks.” Koops also told the Safety Committee that he “has pulled up to the stop sign before at the landfill and looked and never seen no one and started to go, and just happened to look again and there was a car that he did not see the first time because it was behind the mirror on the truck.”

44. We find that Beatty did not see the oncoming car, and that the oncoming driver was driving too fast for the conditions (frost on the road). In other words, the record in this case indicates

that both drivers share a portion of fault for the incident. (Even if Beatty's truck had just moved into the westbound lane when the car crested the hill, it appears from the road conditions that the car would have been in danger of hitting the truck from behind.)

45. On January 12, 2010, the County placed Beatty on paid non-disciplinary administrative leave pending its receipt of a fitness for duty examination of her. Keller drove Beatty from the worksite to a medical facility for the first two of three visits. At the first location, no one was available to give an eye exam. At the second location, Beatty was given a standard eye exam. On January 14, Beatty was given a more comprehensive test, the Humphrey Full Vision Screen Test. The physician's report was not received by the County until January 21, and the initial report from the examining physician failed to specifically refer to Beatty's right eye. The final report was received after January 25, 2010.

46. On February 8, 2010, County officials notified the Oregon Department of Motor Vehicles (DMV) of the accident and asked that they review the situation. The County's letter stated in part:

"Ms. Beatty stated to the County Road Master on two occasions on the date of the incident that she 'didn't see the car' coming from the right.

"Ms. Beatty has a CDL with an Oregon medical waiver. The medical waiver describes Ms. Beatty's condition as: \* \* \* & Vision Impairment-Right Eye.

"Based upon the above described incident, the County obtained a medical examination of Ms. Beatty at the Bend Memorial Clinic (which the County uses for occupational medical issues). This examination resulted in a doctor's report. The first report did not make reference to Ms. Beatty's right eye vision and so a follow-up request for additional information was submitted. Copies of both reports are submitted with this letter for your information. Ms. Beatty's right eye was established to be 'best corrected visual acuity of 20/400 Snellen acuity...'"

"Crook County wants to make sure that Ms. Beatty continues to enjoy your department's approval of her CDL and Oregon medical waiver. Dr. Arvidson's report makes it clear that Ms. Beatty would not be eligible for an 'unrestricted licensure under federal guidelines in her right eye.' He goes on to write: 'Per the medical exemption/waiver clause in Oregon State statutes, Ms. Beatty can be issued a Commercial Drivers Licensed provided she secures a Waiver of Physical Disqualification for Visual Impairment in the right eye for intrastate driving.' (capitalization provided by Dr. Arvidson.). The waiver we have in Ms. Beatty's file indicates that it will last for two years 'subject to periodic review as may be found necessary.'

"Based upon the incident and facts described above, will you please let me know:

- “1. If the waiver issued by the CDL Medical Waiver Program continues in full force and effect?
- “2. Does your department intend to take any action to address the circumstances as set forth above?

“The County is eager to get Ms. Beatty back to work if the answers to the above are yes and no respectively, but considers the circumstances of the incident warrant the County’s greatest care in assuring safety for our workers and the public.”

The County did not notify Beatty of this letter at the time it was sent.

47. On February 26, 2010, DMV responded, stating that Beatty’s waiver “continues in full force and effect” because the medical information demonstrated that Beatty’s vision continued to meet the medical waiver guidelines for her vision waiver. DMV also stated that it would “require Ms. Beatty to provide additional information about the incident. It is unknown at this time what, if any, additional action DMV will take. DMV will contact Ms. Beatty with any additional requirements and resulting actions.” (DMV did contact Beatty about the accident, but took no steps to suspend or revoke her waiver.)

48. In March 2010, the County restored Beatty to working status.

49. Until its July 26, 2010 letter of proposed discharge, County officials did not discipline or discuss possible discipline for the Houston Lake Road accident with Beatty.

### Diesel Spill

50. County dump trucks often haul asphalt for County projects. The asphalt sticks to the truck beds and is difficult to remove. The traditional method for easing removal of asphalt was to use a small amount of diesel fuel as a “release agent,” that is, to make the truck bed slimy so the asphalt does not stick. However, diesel fuel is a pollutant and can also impair the firmness of asphalt that mixes with it. As a result, the County purchased several bottles of a non-polluting release agent. County employees did not believe that this release agent was always as effective as diesel fuel, and at least some of them understood that the new release agent was primarily for dump truck tailgates.

51. As a result, County truck drivers continued to use diesel fuel as a truck bed release agent on some occasions. They obtained the fuel from the Road Department facility where they refueled their trucks.<sup>6</sup> Beatty and other County truck drivers knew that the non-polluting release agent was preferred by the County, but apparently the practice of using diesel fuel continued

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<sup>6</sup>It appears that County employees who used diesel as a release agent in their truck beds did not generally do so by spraying excessive amounts of fuel out of the pressurized refueling hoses, because there is no evidence that spills like those caused by Chapman and Koops had occurred before.

nevertheless. This was in part because the County continued to prefer the use of diesel fuel as a release agent for other machinery that came into contact with asphalt, such as asphalt blades, rollers, and tackers.

52. On June 3, 2010, Beatty, Koops, and Chapman used diesel fuel as a release agent while hauling asphalt in County dump trucks. Chapman used three gallons, and the excess spilled out of the bed of his truck into the road as he drove away. Koops used more than a gallon, and the excess spilled on the pavement and cement adjacent to the pumps. Beatty used a gallon and then dumped her excess, mixed with a small amount of gravel, into a "reject pile" where County workers dumped small amounts of oil, asphalt, gravel, and other industrial trash.<sup>7</sup>

53. According to the June 17, 2010 County Safety Committee report, the following events occurred:

"Penny Keller was notified of the spill at approximately 1:30 pm. Penny Keller took photos and Clay Rhoden started the clean up process. Penny contacted Jim Rice and informed him that she wanted to know who used diesel in their truck beds and for those individuals to meet in her office at 4:00 pm. At approximately 2:00 pm Jim Rice had asked the crew that was on his job site if they used diesel in their trucks and that they needed to be in Penny's office at 4:00pm. This included Roger and Jerald. For those that were not on his job they were asked that afternoon when they returned to the yard. This included Jennifer. The three of them all stated that they were not aware that diesel was not to be used as a release agent and that they were unaware of other options of release agents. Employees also used it because that is the way they have either seen people do it or that is what they have done in the past. Jennifer stated that ODOT did not say anything to her regarding the usage of diesel, until she spoke with an ODOT employee that evening after work. She stated that he informed her that it was not a problem to use diesel that is what was used before soaps.

"At 4:00 pm Jennifer, Roger and Jerald were informed that the usage of diesel is an unacceptable practice. Penny also spoke with the Jim Rice, Blade and Roller operators as well to let them know that diesel is not to be used and to pass the information on to all staff."

54. All three employees received some type of oral admonishment regarding their use of the diesel fuel as a release agent. These oral admonishments were not the type of oral warning usually given as a first level of discipline under the collective bargaining agreement. An oral warning given as the first level of discipline is typically written, signed by the employee and supervisor, and placed in the employee's file. The County's documentary evidence of the admonishments administered to the employees involved in the diesel spill were not signed by employees or the supervisor. Koops believed he was not disciplined.

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<sup>7</sup>The County introduced photographic evidence of the nature and extent of the spills next to the pump and the street, but failed to prove that Beatty had caused the spills in the photographs.

55. The County Safety Committee report stated that the following corrective actions were to be taken:

“Employees were notified to discontinue the use of diesel for a release agent. Release agents and or dawn soap are made readily available to all employees. Address proper spill clean up procedures and proper disposal. There is a spill clean up area located in the sign shop. Job hazard analysis’ [JHA] that refer to asphalt or tack will be amended to include the usage release agents and or dawn soap. Release agent and or dawn soap shall be used in or on the blades, rollers, rakes, shovels when working with asphalt products. The tacker will have approved alterations made to the spray bar.”

56. In addition, the Safety Committee directed various members and other employees, including Beatty, Chapman, and Koops, to create job hazard analyses, which include standard procedures to be followed, on the following topics: “Procedures and Disposal of fuel Spills;” “Procedures and Disposal of Spills within the Maintenance shop;” “Hauling Asphalt reference that Release agents/Dawn soap is to used;” “Asphalt Patching - reference That release agents/Dawn soap is to be used;” “Asphalt Blade Patching - Reference that release agents/Dawn soap is To be used.” The Safety Committee also assigned individuals to amend job hazard analyses on the following topics: “Amend JHA for Roller – Asphalt - reference That release agents/Dawn soap is to be used;” “Amend JHA for Asphalt Raking – to reference That release agents/Dawn soap is to be used And to include shoveling;” “Amend JHA for Tacker – to reference That release agents/Dawn soap is to be used.”

57. Until its July 26, 2010 letter of proposed discharge, County officials did not discipline or discuss possible discipline for the diesel spill incident with Beatty.

#### Stuck Sweeper

58. On June 10, 2010, Beatty was driving a County broom vehicle and sweeping a road. The broom was cylindrically shaped and parallel to the truck bumper. Other bargaining unit employees drove pilot vehicles ahead and behind Beatty. The pilot vehicles radioed Beatty that the sweeper was creating an unsafe amount of dust, and that they should all stop and wait until a water truck arrived to settle the dust. Beatty pulled off the road to let cars pass, but decided to back up to broom a spot she had missed. While backing up, Beatty’s right side wheels sank into the soft cinder shoulder of the road, high-centering the vehicle broom on the edge of the asphalt. Beatty was unable to free the vehicle. Beatty called Kurt Kowalke to pull the broom back onto the pavement, but he decided that he lacked the appropriate equipment, fearing damage to the broom. The employees decided to call a tow truck to free the sweeper.

59. It was not unusual for County employees to get their vehicles stuck and need to be pulled out. It was less common to need a tow truck, at least during the non-winter months.

60. Until its July 26, 2010 letter of proposed discharge, County officials did not discipline or discuss possible discipline for this incident with Beatty.

### Beatty's Visit to the Road Department Office and Shop While Off Duty

61. Prior to the events at issue in this case, the County had an oral policy that employees were not to come onto Road Department premises when off duty. During May 2010, Road Master Keller learned that an employee had come in on a Sunday, when the Road Department facility was closed, to complete his time card. Keller instructed the employee that he was not to do so again. Shortly thereafter she raised the issue with County employees at a meeting and distributed a letter describing the policy to each Road Department employee. The County asked each employee recipient of the letter to sign an acknowledgment of receipt. All employees except Beatty signed the letter upon receipt.<sup>8</sup>

62. Beatty did not wish to simply sign the letter when it was given to her, and put it in her lunchbox for later review, where she testified it remained at the time of hearing. She did not sign and return it to the County.<sup>9</sup>

63. On Monday, June 14, 2010, while she was on vacation, Beatty visited the Road Department office during regular working hours to fill out her time card. Beatty spoke with Stills while she was at the office. On a Friday in mid-July, a regular work day for the shop mechanics, Beatty visited the Road Department shop during regular working hours to give some eggs to a co-worker while Beatty was off duty. These visits occurred in areas that were open to members of the public, although public visitors were comparatively rare. Subsequently, one other AFSCME member received an oral warning for coming onto the Road Department premises while on vacation and picking up a personal package that had been delivered to the facility.

64. Keller regarded Beatty's appearance at the shop on these two occasions as open insubordination, and it appears that this was the triggering event for the termination.

### Beatty's Discharge

65. Koops was Vice President of AFSCME Local #1329. Koops testified that he told an investigator in early 2010 that most of the crew did not want to work with Beatty, that Beatty "does talk too much" in her interactions with Keller, that Keller would have a negative reaction to Beatty coming in to represent him, and that Koops would not want Beatty to represent him. (Koops testimony at 427-28.)

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<sup>8</sup>Koops was on vacation when the letter was distributed, and was presented with the letter upon his return. Although he thought that "it was BS that they come up with a policy like this," he signed the receipt when he received the letter. (Koops testimony at 422.)

<sup>9</sup>Beatty contends that she simply forgot about the letter. While she may have forgotten about the letter, we find that Beatty remembered, or reasonably should have remembered, the letter when she visited Road Department premises on June 14 and mid-July as described below.

66. On July 26, 2010, the County gave Beatty a Notice of Proposed Disciplinary Action, proposing to discharge her effective August 9, 2010, and placing her on paid administrative leave. The notice set a pre-termination hearing for August 6, 2010. At that hearing, Beatty, her AFSCME representatives, and her private attorney presented evidence on her behalf.

67. On August 17, 2010, the County governing body, the County Court, issued a letter discharging Beatty, effective that date. The letter stated, in part:

“INCIDENT #1 - Failure to Comply with County Policy  
[June 14 and mid-July, 2010]

“Jennifer Beatty was reminded not less than *five weeks prior* to June 14, 2010, along with the rest of the Road Department employees, of the County policy that Road Department employees are not to come onto Road Department premises unless they are working. This is an important County policy and Ms. Beatty, through you, does not contest the legality of the policy or the County's right to implement it. The reminder came because the Road Master learned that a Road Department worker came in on a Sunday (non-work time) to fill out a time card. The Road Master used this incident to remind the Road Department employees of the policy. Ms. Beatty was in attendance at this meeting.

“The Road Master underscored the importance of the policy by drafting a written reminder of it and asked each employee to sign the document as written confirmation that they had received it. Every employee in the Department signed it except for Jennifer Beatty, who refused to sign it. Ms. Beatty acknowledged this fact in her lengthy conversation with Human Resources Director Michelle Blomquist. The notes you quoted from on August 6, 2010 confirm this as well. These two incidents confirm Ms. Beatty's poor judgment and inability or unwillingness to engage in acceptable conduct. Progressive discipline cannot address the repeated incidents and evidence of innate poor judgment reflected in these and the other five incidents described below.

“INCIDENT #2 — Operation of Road Department Broom  
[June 10, 2010]

“No information or other evidence was presented on August 6, 2010 to contradict the determination that Ms. Beatty continued to operate the broom under dangerous circumstances. In fact, the Incident Investigation Report relates that even after work was stopped to wait for the water truck, Ms. Beatty backed the broom up to continue to sweep. In the maneuver, Ms. Beatty caused the rear end to slip in soft gravel and, in an effort to extricate the broom from this situation, Ms. Beatty 'accelerated forward to get back onto the road the rear tires spun in the loose gravel and the rear end of the broom slid off the shoulder of the road.' A tow was necessary to get the broom back on the road.

“\* \* \* \* \*

“The conduct described regarding this incident reflects judgment that places Ms. Beatty and members of the public at risk. The conduct also places County-owned equipment at risk of damage. This incident is evidence that Ms. Beatty exercises poor judgment in the face of co-workers who are trying to do the job properly.

“INCIDENT #3 — Diesel Spill  
[June 3, 2010]

“Information submitted on August 6, 2010 mischaracterizes the incident. You submitted a single photo of the incident and represented that it was the only location of a spill and was located only at the fuel pump. The materials provided to you before the hearing included five photos, only one of which you submitted. The others are attached to this letter and show the extensive nature of the spill. They extended all the way from the fueling station, across the yard and well out onto Main Street. In addition, the Incident Report relates that additional diesel fuel was spilled by Ms. Beatty onto the rock pile. The truck used by Ms. Beatty on this day was assigned to provide asphalt for an ODOT project. The fact that a load was potentially contaminated by the diesel required the Road Master to call ODOT and alert them to this possibility.

“\* \* \* \* \*

“It is simply not credible that Ms. Beatty was not aware of the County's practice of not using diesel as a release agent. The other two workers involved in this incident were verbally warned by the Road Master. Ms. Beatty's conduct in this incident again displays extremely poor judgment that caused an interruption in Road Department work and created the potential for environmental pollution damage and possible involvement by DEQ.

“INCIDENT #4 — Motor Vehicle Accident at Landfill Entrance  
[November 30, 2009]

“The circumstances of this incident are extreme. It is undisputed that visibility was excellent. The sky was clear and sunny. The road was frosty. Sight distance in both directions was unobstructed. Based upon the legal speed limit on Houston Lake Road (55 mph), the stopping distance for a vehicle travelling at that rate of speed is 775 feet. The sight distance looking west from the landfill entrance is 1,158 feet. This means that the sedan had to have been at least halfway to the entrance from the crest of the hill. Despite these circumstances, Ms. Beatty pulled directly into the path of a small vehicle driven by a mother with her two small children as passengers. The truck Ms. Beatty was operating was filled with rock, making its acceleration slow as she pulled onto Houston Lake Road. Ms. Beatty's vehicle would have crushed the smaller car and caused almost certain serious, if not fatal, bodily harm to its driver

and passengers. The loaded vehicle Ms. Beatty was operating almost certainly weighed in excess of twenty three (23) tons. It is a miracle there was no collision with a catastrophic result.

“The driver of the sedan was able to successfully avoid collision by going into the ditch. A copy of a photo showing the tire tracks of the two vehicles is attached to show how close a call it was.

“Based on this incident, Ms. Beatty was placed on paid administrative leave in order to confirm that her vision situation did not contribute to the accident. After a period of time (reflecting, incidentally, Crook County's ongoing commitment to accommodate Ms. Beatty's medical conditions), it was confirmed that Ms. Beatty's medical waiver was valid and she could operate under her CDL. This also confirms that her vision limitations did not cause the accident. Eliminating vision as a cause of the accident leaves only Ms. Beatty's poor judgment in making the turn onto Houston Lake Road.

“The accident resulted in claims made against the County and a resulting substantial monetary settlement. Ms. Beatty's conduct reflects poor judgment exercised to the detriment of the County.

“INCIDENT #5 — Interference With an Incident Investigation  
[April 13, 2009]

“Crook County takes its responsibility to thoroughly, effectively and transparently conduct safety and other investigations involving accidents; especially when the accident either caused, or could have caused, physical injury. The accident which resulted in Ms. Beatty's conduct described in this incident involved a serious accident involving a Road Department snow plow. The plow was totaled and, amazingly, the driver was uninjured. An investigation by the Safety Committee ensued and a report finalized by the Committee was approved by the Road Master. Subsequent to this report, Ms. Beatty went to the Committee members to try to get them to change the report in certain details pertaining to which employee relocated what pieces of equipment at the scene of the accident prior to the arrival of additional County forces.

“It is improper for any employee to interfere with a Safety Committee investigation. The purpose of the investigation is to address safety issues and, ultimately, make the work place safer. In fact, it is probably unlawful to interfere. ORS 654.020 provides that it is unlawful for a person to:

‘interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment.’

“If such interference occurs, in addition to any liability incurred by the person interfering, the *employer* (i.e., Crook County in this instance) is subject to a civil penalty.

“On August 6, 2010 you suggested that this interference is somehow excused as an exercise of her shop steward responsibilities. Even if this suggestion were true, which we do not believe, the portion of the initial report that Ms. Beatty sought to have changed has nothing to do with the basis for which the driver of the wrecked truck was disciplined (which was the wrongful act of tinkering with and altering a piece of safety equipment).

“The conduct by Ms. Beatty again reflects extreme poor judgment and interference with important County policy.

“INCIDENT#6 — Motor Vehicle Incident / Prineville Reservoir  
[January 8, 2008]

“Despite your presentation on August 6, 2010, the Court is not persuaded that this incident did not create an extremely dangerous situation for Ms. Beatty and the County. The fact that the truck did not slide off the road and tumble down the steep slope (whether it reached the reservoir or not) is a fortunate outcome, but it could easily have gone another way. The incident, and possible tragic outcome, should never have occurred in the first place.

“County staff have confirmed the obvious fear in Ms. Beatty's voice when she radioed in her predicament. The first Road Department employee to arrive would not even attempt to extract the truck. A private company which happened to be working in the area with heavy equipment was able to pull the truck back onto the road. The truck was damaged and cost precious County resources to repair. Work time was lost.

“Your attempt to minimize this incident is not accepted by this Court. The fact that the Incident Report suggested future measures to address the risk do not take away from the fact that Ms. Beatty backed up an icy road toward a precipitous slope in bad weather conditions. Her conduct on this day reflected dangerously poor judgment.”  
(Emphasis omitted.)

68. Prior to her discharge, Beatty had never been disciplined by the County.
69. Beatty has had a clean driving record since receiving a speeding ticket in 2002.

#### Discipline of Other Road Department Employees

70. In August 1999, County Road Department employee Teresa Nolen was driving a pilot car through a work zone, and pulled over to let traffic by. She then failed to properly check her

mirrors and pulled out in front of a citizen's vehicle. The vehicles collided, causing damage to both. The County gave Nolen an oral warning.

71. In January 2010, Raymond was driving a truck and the truck overturned, causing damage to the truck. Raymond was not wearing a seat belt. The County suspended Raymond for two days.

72. Koops used diesel as a release agent on June 3, 2010, and caused one of the spills photographed by the County. Shortly before the hearing, Koops got a snow plow stuck twice, including once where a tow truck was called and paid for by the County to pull the truck out. The County did not discipline Koops.

73. Chapman used diesel as a release agent on June 3, 2010, and caused one of the spills photographed by the County. The County did not discipline Chapman.

74. Warren's snowplow incident, where he hit a cattle guard and failed to wear a seat belt, causing damage to the truck and plow, is described above. The County originally sought to impose an eight-day suspension on Warren. Warren's grievance and unfair labor practice complaint were pending when Warren knocked down two poles and severed power lines by driving under them with his County truck bed raised. The County put Warren on some type of plan of assistance, which Warren apparently failed and was then discharged.

75. In April 2006, Wade Page put a Detour Ahead sign in front of a road closed by the County to dig a trench instead of a Road Closed sign. A citizen's car ran over the trench and was damaged. The County gave Page an oral warning.

76. In August 2008, Tony Edwards backed a County pickup truck into a car belonging to a citizen. In 2005, Edwards tore the hoses off the diesel pump while using the broom vehicle at the County facility. In 2003, Edwards backed into a County dump truck. Edwards had also lost his license at some point because of a DUII. Citing the 2003 and 2005 incidents, the County gave Edwards a two-day suspension for the 2008 incident.

77. The County's records of employees involved or injured in an incident from 2005 through 2010 identified five incidents for Beatty; four incidents for Gordon Chandler, Chapman, and Raymond; three incidents for Edwards, Dennis Gormley, Richard Kludt, Koops, and Warren; and two or less incidents for the remaining Road Department employees, including Kowalke and Nolen with one, and Keller and Stills with zero.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County discharged Road Department employee and AFSCME Chief Steward Jennifer Beatty on August 17, 2010, without just cause and in violation of ORS 243.672(1)(g).

## Standards for decision

ORS 243.672(1)(g) provides that it is an unfair labor practice for a public employer or its designated representative to “[v]iolate the provisions of any written contract with respect to employment relations.” The collective bargaining agreement at issue here states:

“The principles of progressive discipline shall normally be used except when the nature of the problem requires more serious action. An employee shall not be disciplined or discharged without cause.” (Finding of Fact 4.)

The parties agree that this provision requires that the County discipline only with just cause, as that term is generally understood in cases under the Public Employee Collective Bargaining Act (PECBA).

When we analyze a contractual just cause provision under subsection (1)(g), we begin by determining if the employee actually did what the employee was disciplined for. *Oregon Education Association v. Willamette Education Service District*, Case No. UP-8-07, 22 PECBR 585, 609 (2008) (citing *Wy’East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 140 (2007)). Unless the parties provide differently in their contract, we then apply a “reasonable employer” standard to decide if the employer had just cause for the disciplinary action. *Oregon School Employees Association v. North Marion School District No. 15*, Case No. UP-60-09, 24 PECBR 661, 689 (2012). The reasonable employer test is an objective one; when we apply it, we determine whether a fictional reasonable employer would have taken the same action under similar circumstances. *Id.* at 690.

Although there is no single definition of a reasonable employer, a reasonable employer generally disciplines employees in good faith and for cause, imposes sanctions proportionate to the offense, considers the employee’s length of service and record in determining sanctions, and applies principles of progressive discipline unless the offense is gross. *Bellish v. State of Oregon, Department of Human Service, Seniors and People with Disabilities*, Case No. MA-23-03 (2004) (citing cases). A reasonable employer also enforces reasonable rules, gives employees fair notice that violations of these rules may result in discipline, and imposes discipline in a timely manner. *Oregon Trail School District*, 22 PECBR at 140. In addition, a reasonable employer warns an employee about proposed discipline, makes a fair investigation before imposing discipline, gives an employee an opportunity to refute the charges, and bases any disciplinary action on substantial evidence. *Id.*

Here, the County discharged Beatty for her conduct in six incidents that occurred between January 8, 2008 and mid-July 2010. Two of those involved alleged negligence in driving County snowplows or brooms, one involved conventional vehicular negligence (the November 30, 2009 Houston Lake Road accident), two involved alleged failure to follow work rules (regarding diesel fuel use and presence at the Road Department facility), and one involved Beatty’s conduct representing a bargaining unit employee regarding proposed discipline. We apply the reasonable employer standard to analyze the County’s discharge of Beatty.

The County's reliance on three incidents that occurred prior to January 1, 2010, as a basis for Beatty's discharge was not reasonable. Not only are the incidents remote in time from the discharge, but the County did not impose discipline of any kind for any of the incidents prior to the July 26, 2010 proposed discharge. Consequently, the County acted unreasonably by failing to timely notify Beatty that her conduct in these three incidents was unacceptable.

After considering the circumstances of the incidents that occurred after January 2010—getting the broom vehicle stuck and allegedly violating County rules by using diesel fuel as a release agent and visiting the Road Department facility during off-duty hours—we conclude that the County's decision to discharge Beatty was unreasonable.

In regard to the June 10, 2010 incident involving a broom sweeper vehicle, Beatty's decision to back up to fix a missed spot without the assistance of pilot cars and the water truck appears ill-advised. There is no evidence, however, that Beatty caused significant dust or other risks by moving the vehicle, or that the vehicle was damaged by Beatty's actions. In addition, it was not unusual for Road Department employees to get their vehicles stuck, as Beatty did with the broom sweeper, and require the assistance of a tow truck.

The County did not establish that Beatty was aware that the County did not want employees to use diesel fuel as a release agent. (Finding of Fact 53.) Consequently, the County's actions in disciplining her for her June 3 use of diesel fuel as a release agent were not those of a reasonable employer. Beatty's June 14 and mid-July 2010 off-duty visits to the Road Department facility, however, constituted violations of County policies that Beatty was aware (or should have been aware) of. In May 2010, Road Master Keller reminded Road Department employees that County policy prohibited them from entering Road Department facilities when off-duty, and gave each employee a letter describing the policy. Although Beatty did not sign and return the letter, as she was asked to do, she clearly knew about the policy.<sup>10</sup>

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<sup>10</sup>AFSCME defends Beatty's conduct in visiting Road Department facilities during off-duty hours, arguing that the areas were open to members of the public and that the rule "conflicts with Mrs. Beatty's legal rights as a citizen to access public property." (AFSCME post-hearing brief at 19.) We rejected a similar argument in *Federation of Oregon Parole and Probation Officers v. Washington County*, Case No. UP-70-99, 19 PECBR 411 (1999). In that case, the county adopted a policy prohibiting employees from carrying firearms while on duty, and prohibiting them from carrying firearms on county property while off duty. We rejected the union's contention that the policy violated state firearms statutes, which prohibited a county from enacting restrictions on the rights of persons licensed to carry concealed weapons. We concluded that:

"As an employer \* \* \* the County retains the right to address its unique concerns with its employees' possession of firearms. The legislature did not intend to interfere with the County's authority, in its administrative capacity, to adopt policies governing its employees' conduct. The policy's regulation of firearms possession in this limited context is an exercise of the County's authority over a matter of County concern and does not violate State law." *Id.* at 420.

(continued...)

While we agree that Beatty's conduct involving the broom sweeper and her violations of County policy merited discipline, we disagree that discharge was an appropriate penalty. The record shows that County employees who engaged in the same conduct as Beatty received discipline far less severe than discharge. Five County employees who were involved in incidents in which citizens' and Road Department vehicles were damaged received either oral warnings or suspensions. (Findings of Fact 72, 73, 76, 77 and 78.) A County employee who visited a Road Department facility during his off-duty hours was told not to do it again. Thus, the discipline that the County imposed on Beatty was far harsher than that imposed on other employees who engaged in the same type of misconduct.

The County argues, however, that discharge was necessary because Beatty engaged in gross misconduct that made lesser or progressive discipline inappropriate:

"Prior to terminating Beatty, Crook County officials conferred with insurance carriers, risk managers, County counsel, independent attorneys, and Road Department managers and supervisors, all of which concluded Beatty was unsafe to drive heavy trucks and equipment on public roadways. Those 'incidents' in great part were caused by poor judgment which does not lend itself to progressive discipline in the expectation that good judgment will follow." (County Memorandum in Aid of Oral Argument, p. 3.)

The County's argument is neither credible nor well taken, because the County never sought to discipline Beatty at the relevant time for her "poor judgment" in operating trucks and other equipment. If the County actually believed that Beatty could not safely drive County vehicles, it had an obligation to discipline her when the first accidents occurred in 2008 and 2009. The County did not do so, however. As discussed above, a reasonable employer administers discipline in a timely manner

The issue before us, then, is what level of discipline is appropriate for Beatty's involvement in the broom sweeper incident and her violation of County policy visiting Road Department facilities during off-duty hours. We conclude that it is appropriate to orally reprimand Beatty for the broom sweeper incident and reprimand her in writing for visits to Road Department facilities during off-duty hours.

3. The County's discharge of Beatty violated ORS 243.672(1)(a).

ORS 243.672(1)(a) makes it unlawful for a public employer to interfere with, restrain, or coerce employees "in the exercise" or "because of" the exercise of rights guaranteed by

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<sup>10</sup>(...continued)

Our reasoning in *Washington County* is directly applicable to the circumstances presented here. The policy's regulation of employees' access to County facilities is an exercise of the County's authority over a matter of County concern. Accordingly, the policy does not violate any right an employee may have as a citizen to access public property.

ORS 243.662. ORS 243.662 guarantees public employees “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.”

To determine if an employer violated the “because of” portion of subsection (1)(a), we examine the employer’s reasons for the disputed action. If the employer acted “because of” an employee’s exercise of rights protected by the PECBA, the employer actions are unlawful. *Portland Assn. Teachers v. Mult. Sch. Distr. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). In order to show a violation of the “because of” prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 and n 10 (1986).

When we analyze an employer’s actions under the “in the exercise” portion of the subsection (1)(a), we focus on the effect of the employer’s actions on the employees. If the employer’s conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer violates the “in the exercise” prong of subsection (1)(a). *Portland Assn. Teachers*, 171 Or App at 624. A violation of the “in the exercise” portion of subsection (1)(a) may be either derivative or independent. An employer that violates the “because of” prong of subsection (1)(a) also violates the “in the exercise” portion of the statute. An employer’s actions may also independently violate the “in the exercise” prong, typically when the employer makes threats that are directed at protected activity. *Clackamas County Employees’ Assn. v. Clackamas County*, 243 Or App 34, 40, 259 P3d 932 (2011).

In a case where the employer’s actions are based on lawful and unlawful motives, or mixed motives, we determine whether the employer would not have taken the disputed action but for the unlawful motive. In other words, we must decide whether the employer would have treated the employee the same way “but for” the employee’s protected activity. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007); *State Teachers Education Association v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99, 19 PECBR 228, 248 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004).

Because Beatty’s involvement with the Safety Committee was one of six incidents cited as the basis for her discharge, we must next determine whether the County would have discharged Beatty but for the Safety Committee incident. Beatty’s involvement with the Safety Committee clearly constituted protected activity. The report she wanted to correct involved a bargaining unit member that she was representing in her capacity as steward; the report had a significant impact on discipline the bargaining unit member could potentially receive. We next determine whether the County would have discharged Beatty but for her actions in regard to the Safety Committee

In the discharge letter, the County characterizes Beatty’s involvement with the Safety Committee as follows:

“It is improper for any employee to interfere with a Safety Committee investigation. The purpose of the investigation is to address safety issues and, ultimately, make the work place safer. In fact, it is probably unlawful to interfere. ORS 654.020 provides that it is unlawful for a person to:

‘interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment.’” (Finding of Fact 69.)

Contrary to the County’s assertion, the process by which Beatty amended the report was both lawful and legitimate. ORS 654.020 is inapplicable to the facts here. Beatty did not seek to “interfere” with the work of the Safety Committee. To the contrary, she sought to make sure the committee’s report accurately described the accident and the investigation into it. Beatty talked with Safety Coordinator Stills and Road Master Keller about amending the report; neither management representative objected to Beatty’s actions. Instead, Keller consulted with and followed OSHA’s recommendations to reconvene the Safety Committee, which then amended the report to correct the errors Beatty had identified.

Based on the significance the County placed on Beatty’s correction of the Safety Committee report—erroneously concluding that her actions probably involved illegal conduct that interfered with County efforts to address safety issues—we conclude that but for Beatty’s union activities in relation to the Safety Committee she would not have been discharged.

We also conclude that the County’s actions violated the “in the exercise” prong of subsection (1)(a). A violation of the “because of” portion of the statute, such as the one that occurred here, has the natural and probable effect of discouraging employees from exercising their protected rights. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354 (2008).

4. The County’s discharge of Beatty violated ORS 243.672(1)(c).

ORS 243.672(1)(c) makes it 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.” In analyzing a (1)(c) claim, it is not enough that the employer treated the employee unfairly; the unfair treatment must have been intended to discourage or encourage union membership. *AFSCME Local 2067 and Williams v. City of Salem*, Case No. UP-17-00, 19 PECBR 1, 9 (2001), citing *Schreiber v. Oregon State Penitentiary*, Case No. UP-124-92, 14 PECBR 313, 320 (1993). We have construed the word “membership” broadly to protect all types of union activity. *Oregon State Penitentiary*, 14 PECBR at 319.

We have explained that:

“Like most (1)(a) interference complaints, subsection (1)(c) discrimination charges turn on a question of causation. In a typical case, an employer violates (1)(c), as well as (1)(a), when it treats an employee disparately because of the employee’s

union activity. In such cases, a (1)(c) violation is established by the same but for causation analysis employed under (1)(a).\* \* \* [quoting] *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-13, 20 PECBR 733, 743-44 (2004) (quoting *AFSCME Council 75 and Haphey and Bondietti v. Linn County*, Case No. UP-155-87, 11 PECBR 631, 650-51 (1989)) (footnotes omitted; emphasis in original).” *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 777-78 (2004).

As we have discussed above, the County would not have discharged Beatty but for her actions in representing a bargaining unit member in a disciplinary matter. For the same reasons that we find the County violated ORS 243.672(1)(a), we conclude that the County discriminated in regard to Beatty’s employment with the intention of encouraging or discouraging membership in the union in violation of subsection (1)(c).

5. The County should be required to pay AFSCME a civil penalty.

This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice. We may do so in either of two circumstances: (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party’s conduct was “egregious.” ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). The complaint asks us to assess a civil penalty against the County because its actions were egregious.

In *East County Bargaining Council (David Douglas Education Association) v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987), this Board noted that the dictionary defines “egregious” as “conspicuously bad” and identifies “flagrant” as a synonym for “egregious.” See also *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).

We have determined that the County discharged Beatty without just cause, and that it would not have discharged her but for her Union activity. We have also held that Beatty’s conduct should be subject to less severe discipline. The County’s conduct at issue is not repetitive. The issue is whether it is egregious.

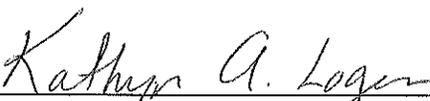
The County never disciplined Beatty for her involvement with the Safety Committee at the time it occurred and erroneously asserted that her actions were probably unlawful. In addition, the County’s decision to discharge Beatty was made over a year after she engaged in conduct the County found objectionable. We have concluded that the County’s conduct violated ORS 243.672(1)(a) and (c), violations that strike at core rights protected by the PECBA. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-3-04, 21 PECBR 179, 181 (2005) (Rep. Cost Order). For these reasons, we hold that the County’s conduct was egregious and order the County to pay AFSCME a \$1,000 civil penalty.

ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(a), (c), and (g).
2. The County shall offer Beatty reinstatement. Upon reinstatement, the County may orally reprimand Beatty for the June 10, 2010 incident involving the broom sweeper, and reprimand her in writing for her June 14 and mid-July, 2010 visits to Road Department facilities during off-duty hours.
3. The County shall make Beatty whole for all lost wages and benefits she would have received had she not been unlawfully discharged, less interim earnings, with interest at the rate of 9 percent per annum.
4. The County shall pay AFSCME a civil penalty of \$1,000; and
5. The remainder of the Complaint is dismissed.

DATED this 3 day of October, 2012.

  
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Susan Rossiter, Chair

  
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Kathryn A. Logan, Board Member

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\*Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Weyand did not participate in the deliberations and decision in this case.