

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-47-09

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL)	
EMPLOYEES LOCAL 189,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF PORTLAND,)	
)	
Respondent.)	

On November 9, 2011, this Board heard oral argument on both parties' objections to a Recommended Order issued on August 31, 2011, by Administrative Law Judge (ALJ) B. Carlton Grew after a hearing held on March 2 and 3 and April 30, 2010, in Portland, Oregon. The record closed on July 21, 2010, with the submission of the parties' post-hearing briefs.

Elizabeth A. Joffe, Attorney at Law, McKanna, Bishop, Joffe & Arms, LLP, Portland, Oregon represented Complainant.

Stephanie M. Harper, Deputy City Attorney, City Attorney's Office, City of Portland, Portland, Oregon, represented Respondent.

On September 30, 2009, the American Federation of State, County and Municipal Employees Local 189 (Union) filed this Complaint alleging that the City of Portland (City) engaged in unfair labor practices by eliminating the Police Bureau Information and Referral (I&R) Unit and transferring its work to lower-paid and non-bargaining unit employees without bargaining. Respondent filed its timely Answer on January 27, 2010, and an Amended Answer on June 14, 2010.

The issues in this case are:

1. Did the City make a unilateral change in mandatory subjects of bargaining by eliminating the I&R Unit and transferring its work to lower-paid bargaining unit employees without bargaining with the Union about these decisions or their effects? If so, did this conduct violate ORS 243.672(1)(e) and (f)?¹
2. Did the City fail to provide information in response to Union requests? If so, did this conduct violate ORS 243.672(1)(e)?
3. If the City violated the Public Employee Collective Bargaining Act (PECBA), what remedy is appropriate, and should the City be ordered to pay a civil penalty?

RULINGS

1. On April 30, 2010, the City filed a motion to quash a subpoena issued to Sandra Johnson, a Police Bureau supervisor of Police Desk Clerks, on the grounds that the subpoena failed to include “a showing of general relevance and reasonable scope of the testimony” and therefore violated OAR 115-010-0055. While OAR 115-010-0055(1) requires a “showing of general relevance and reasonable scope of the testimony of a witness/records or documents,” if this Board is asked to issue the subpoena, OAR 115-010-0055(2) provides that “[s]ubpoenas may be issued by attorneys of record in the manner and form prescribed by ORS 183.440.” ORS 183.440(1) provides that “[a] party entitled to have witnesses on behalf of the party may have subpoenas issued by an attorney of record of the party, subscribed by the signature of the attorney.” The ALJ properly denied the motion.

2. On March 3, 2010, at hearing, the City moved for leave to amend its answer to respond to testimony at hearing that the City failed to respond to a February 23, 2009 letter from the Union’s James Hester to the City’s Keith Moore. The ALJ acted properly within his discretion in granting the motion, and the City filed the Amended Answer on June 14, 2010.

¹In its Complaint, the Union alleged that the City also transferred work to *non-bargaining unit employees*. The Union abandons this theory in its post-hearing brief, and we do not consider it. “*That the transfer of work in this case was to other bargaining unit employees* versus an outside contractor, another bargaining unit, or volunteers only strengthens Local 189’s [the Union’s] position because moving the work to a significantly lower paid classification had an even more significant and adverse effect on bargaining unit members.” (Union post-hearing brief at 27-8) (emphasis added).

3. At hearing, the Union sought to present documentary evidence, Exhibit C-53, regarding the number of calls handled by bargaining unit Police Desk Clerks (PDCs) from April 22 through April 28, 2010. The City objected on the grounds that the Union had not submitted this exhibit prior to hearing, or placed it on its exhibit list. The Union argued that the exhibit was a rebuttal exhibit submitted to address the City's claim that the calls handled by the PDCs had not significantly increased in number or complexity. The ALJ admitted Exhibit C-53 at hearing, while stating that he could revisit the issue in his Recommended Order. In that order, the ALJ properly reversed his decision, deciding not to admit the document. The Union should not have been surprised that the City would claim at hearing that the workload of the PDCs had not significantly increased as a result of the closing of the I&R Unit; the City consistently stated that position from the time the closure was announced.

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

FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Portland Police Bureau (Police Bureau or Bureau) is a bureau of the City. The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of City employees.

2. The Union is one of eight labor organizations that comprise the District Council of Trade Unions (DCTU), through which the Union and the other seven unions have negotiated a series of collective bargaining agreements with the City. The term of the agreement in effect at the time of the events at issue was July 1, 2006 to June 30, 2010.

3. The agreement contains a Management Rights clause that states: "[t]he City shall exercise sole responsibility for management of the City and direction of its work force, except as expressly limited by the terms of this agreement." The agreement also contains a Layoff/Recall provision, which sets out the procedure for layoff and recall.

4. The Union represents a number of civilian job classifications within the Police Bureau, including Police Desk Clerks (PDCs), Information & Referral (I&R) Specialists, Police Records Specialists (PRSs), and other administrative and support staff.

The Police Information and Referral Unit

5. The Police Bureau I&R Unit existed from at least 1993 until no later than October 28, 2009. During 2009, the I&R Unit was staffed by five I&R Specialists, three

on the day shift and two who worked from 7:00 p.m. to midnight. Two of the five positions were funded through a federal grant.

6. I&R Unit employees answered telephone calls, internally from police officers and other City employees and externally from the public, regarding a wide variety of issues. Approximately 96 percent of the calls were routed to Unit employees through an automated attendant on the City non-emergency phone number, 503-823-3333. The other four percent of the calls came in on the I&R Unit's direct line, 503-823-4636.

7. Prior to the changes at issue in this case, the automated attendant gave callers to 503-823-3333 two options: (1) if they needed general information or wanted to file a police report, the caller could select the I&R Unit; (2) if the situation required a police officer at the caller's location, the caller could select 911 emergency dispatch in the City's Bureau of Emergency Communications (BOEC). BOEC's call dispatchers are in a different, strike-prohibited bargaining unit.

8. The I&R Unit handled 98,858 calls in fiscal year 2007-2008. In fiscal year 2008-2009, the Unit handled 81,098 calls over the 11 months prior to June 12, 2009. At that pace, the Unit would have handled 88,471 calls over a year, approximately 10 percent less than the previous year. Because of the reduction in workload, I&R Specialists also provided some administrative support to the Bureau Detectives Division.

9. According to the job description, the I&R Specialist position was to "provide community-policing support by telephone to enable maintenance of more officers on the street."

10. The "Typical Duties/Examples of Work" listed on the job description included:

- "1. Pre-screens calls for police officers and from non-emergency dispatch; answers a wide variety of questions from the community regarding police matters; provides information and explanations of Police Bureau and City policies, procedures, laws and ordinances.
- "2. Elicits information from callers to determine nature of problem and appropriate referral; provides limited advice and counsel on issues such as mental health, crises, resource services, and criminal justice system procedures.
- "3. Maintains the citizen crime reporting system; sends out crime reports to citizens; reads, codes and corrects returned reports.

- “4. Provides assistance to the City and Police Bureau during emergencies by staffing phone lines and providing emergency information; provides information to citizens during special events in the city.
- “5. Manages the graffiti and rumor control hotlines; enters, documents and reports vandalism; provides supplies and instruction to the public for clean up and prevention of vandalism.
- “6. Provides information to officers on heavy crime areas by coding crime reports and checking for compliance, as assistant to Police Records.
- “7. Researches police records’ [*sic*] using PPDS, LEDS and computer-assisted dispatch systems, and provides information or referrals as appropriate according to security guidelines.^[2]
- “8. Documents specific neighborhood issues as requested, such as traffic problems and drug houses, to provide information and assistance to police officers; interviews citizens by phone to gather information.
- “9. Maintains records, logs and statistics.”

11. The job description stated that I&R Specialists were required to “answer a high volume of calls from potentially hostile, distraught, or unbalanced people” and to have the ability to “rapidly assess critical situations involving the public; remain calm in emergencies or threatening situations; diffuse difficult situations; [and] establish and maintain effective interpersonal relationships with a diversity of others.”

12. Typically, I&R Specialists triaged calls and determined the best police or other agency response, provided detailed information to answer callers’ questions, or referred callers to other resources. The Specialists were familiar with information about the Police Bureau and other resources within and outside the City.

²I&R Unit employees handled calls from police officers and detectives in the field. They could access local, state, and national criminal information databases to obtain information for officers calling with questions or to set up case numbers and enter new information into the system. However, the number of these calls handled by I&R Specialists had declined in recent years because police officers had access to computers in their patrol vehicles and could obtain case numbers and other information on their own.

13. Most I&R Unit calls involved cold crimes or other non-emergency situations, such as vandalism, stolen property, towed or missing autos, non-emergency domestic violence, abandoned vehicles, fraud, missing persons, and harassing phone calls. Domestic violence victims called seeking help regarding whether they should request police officer contact, how to obtain civil restraining or anti-stalking orders, or what community resources existed for them. I&R Specialists sometimes dealt with crime victims in various states of distress. If the matter was an emergency, the Specialists would refer the call to BOEC 911 emergency dispatch.

14. Approximately 40 percent of all incoming calls received by the I&R Unit were resolved without any further referral to other entities.

15. Approximately 15 percent of I&R calls involved the Telephone Report Unit (TRU). When a call led an I&R Specialist to determine that a telephone police report was required, the I&R Specialist would set up a TRU case in the Computer Aided Dispatch (CAD) system and input some information about the call. A TRU police officer would later pull the information from the list of waiting calls on CAD and would contact the caller to take the report. TRU officers could, and did, set up cases and input information without the assistance of I&R Specialists.

16. Approximately three percent of I&R calls involved CAD without the involvement of the TRU. These calls required the I&R Specialist to enter information into CAD.

17. In order to properly handle a call, I&R Specialists often had to spend several minutes with callers, calming down and eliciting information from confused, distraught, or impaired people in order to identify their needs and determine where to direct them. These calls sometimes took more than half an hour.

Police Bureau Precinct Consolidation and Decision to Eliminate the I&R Unit

18. In late 2008, after receiving forecasts of declining revenue, City Mayor Sam Adams asked all City Bureau Directors to prepare 2.5 percent and 5 percent “cut packages” for the fiscal year 2009-2010. In December 2008, then-Police Chief Rosie Sizer held community forums and budget planning sessions. The I&R Unit was ranked as a lower priority by participants in those meetings. On January 21, 2009, Sizer issued a Special Bulletin to all Police Bureau employees stating that the most viable alternative for achieving these budget reductions was to consolidate the Bureau’s five precincts (North, Central, East, Southeast, and Northeast) into three precincts (Central, North, and East). This consolidation was expected to lower building costs and reduce the number of management and support positions without decreasing the number of police

officers. Most of the support positions to be eliminated were Union bargaining unit PDC and Police Administrative Support Specialist (PASS) positions.

19. Chief Sizer's January 21, 2009 Bulletin made no mention of cutting the I&R Unit. The I&R Unit had been considered for elimination in previous budget processes, but in the past City decision makers had decided to retain it.

20. City and Union officials believed that Sizer's precinct consolidation proposal was likely to be implemented. However, the plan had to move through the City budget process. City Bureaus usually submitted their proposed budgets to the City Office of Management and Finance in February. The City Council would review the Bureau proposals in March, and the Mayor would submit a proposed budget to the City Council in April. The Council would meet over the budget during May, and generally approve a final budget in June.

21. On February 5, 2009, Chief Sizer sent a memorandum to all Police Bureau managers stating that, although the precinct restructuring plan had not yet been authorized, the Bureau would create implementation teams to plan the restructuring. Sizer's memo identified Southeast Precinct Commander Keith Morse as one of those responsible for the "Personnel re-deployment" implementation team.

22. James Hester is a Representative for Oregon AFSCME Council 75 assigned to the Union and is also President of the DCTU. During February 2009, Morse contacted Hester to discuss ways to expedite the contractual bidding and bumping process that would result from the restructuring. The City wished to expedite the bidding and bumping process to obtain the restructuring's savings earlier and to coincide with the start of the next fiscal year. The Union also wanted some changes in the contractual layoff and bidding process. Hester asked Morse if any City Human Resources (HR) representatives would be involved in these discussions given that mandatory bargaining issues were involved. Morse replied that the City had identified him as the "go-to guy" for those issues.

23. On February 16, 2009, Morse e-mailed Bureau employees stating that precinct consolidation "is almost guaranteed."

24. On February 16, Morse met with Hester, other representatives of AFSCME, and some representatives of the Portland Police Association. Morse met with Hester again on February 19, and Hester gave Morse a written "supposal" addressing reassignment of Union bargaining unit members caused by the precinct reorganization.

25. On February 17, Hester met with affected bargaining unit employees.

26. On February 23, Hester sent Morse a letter, copied to several others, listing questions the Union had about the reorganization. One of the questions was: “[w]hat is the status of Information & Referral?” Hester included that question because I&R Specialists had told him that Commander John Eckhart, who headed the I&R Unit, had stated that the I&R Unit might cease to exist in its current form.

27. Neither Morse nor any other City official responded to Hester’s February 19 supposal or February 23 letter. Morse became ill during the spring of 2009, although he remained at work until August 2009. At the time of hearing, Morse was incapacitated and unable to testify. Morse did not share Hester’s “supposal” with Police Bureau HR Manager Sean Murray, although Murray was informed by Angela Oswald, a Union Vice President, that Morse had also been meeting with representatives of unions affected by the reorganization.

28. During April and May 2009, Murray met with Union President Carol Stahlke and Union Vice President Oswald, to discuss issues relating to the precinct restructuring and resulting layoffs. The parties discussed the possibility that the I&R Unit would be eliminated and the staff transfers and bumping that would result from that elimination. Stahlke and Oswald did not discuss these meetings with Hester, and although they had been copied on Hester’s “supposal” letter, did not discuss Hester’s “supposal” with Murray.³

29. On May 1, 2009, Chief Sizer issued a memorandum to all Police Bureau employees stating that the City Council had authorized the Bureau to move forward with the precinct consolidation. The memo first listed the positions that would be eliminated as part of the consolidation, which did not include any I&R Specialist positions. Sizer’s memorandum also stated that, subject to City Council approval, the Mayor’s proposed budget would eliminate three I&R positions while retaining the two grant-funded positions.

30. On May 6, a unit member sent the vacationing Hester Sizer’s May 1 memorandum. On May 7, after communicating with Shannon Callahan, City Commissioner Dan Saltzman’s liaison to the Bureau, through voice mail, Hester e-mailed Sizer and Callahan. Hester expressed surprise at the Chief’s May 1 memorandum, stated that he had never received responses to his February letters, and expressed concern about Union representatives being shut out of the process. Neither Sizer nor Callahan responded to Hester’s May 7 e-mail. Hester also contacted Bureau

³AFSCME bylaws provided that the Local Union President had no authority to enter into binding agreements on behalf of the Union; only the Council Representative (Hester) had that authority.

HR Manager Murray and City Labor Relations Manager Steve Herron and met with them on May 11, 2009. Hester gave Herron a copy of his February 19 “supposal” at this meeting. Herron did not know that then-Chief Sizer had given Morse a lead role in the restructuring process.

Union Demand to Bargain

31. On May 14, Hester faxed Herron to make a formal demand to bargain the impacts of the precinct reorganization and to bargain the decision and the impacts of the I&R Unit elimination. Regarding the I&R Unit, Hester stated:

“In addition, I have learned in the past week, the City of Portland is contemplating the transfer of bargaining unit work performed by our Police Information & Referral Specialist to either BOEC, PPA represented work units or other DCTU [*sic*] represented work units. AFSCME Local 189 believes this would violate the contract and/or the Public Employee Collective Bargaining Act (PECBA). To the extent such a move would not be prohibited, the Union is hereby demanding to bargain over the decision and the impact of this proposed action.”

Hester wanted to know what would happen to the work performed by the I&R Unit because he knew that the services provided by this unit would still be needed.

32. On May 15, Hester met with Herron and other City and Union representatives. Herron provided Hester with updated charts regarding the precinct reorganization’s effect on personnel. The charts showed that the reorganization would eliminate six PDC positions—reducing the total from 23 to 17. The City proposed a small change to Hester’s February 19 “supposal” regarding the bumping procedure. City representatives did not provide any additional information about the I&R Unit. Later that afternoon, Hester informed Herron that the City’s modification to the Union’s February 19 “supposal” was acceptable to the Union.

33. On May 22, 2009, Commander Eckhart wrote Sizer recommending that the I&R Unit be eliminated. Eckhart stated that, after elimination of the Unit, “an average of 83 calls daily * * * would then be dispersed among the various precincts and divisions in addition to what they currently answer.”⁴ The letter estimated that each

⁴The Union maintains that Commander Eckhart’s May 22, 2009 memorandum dramatically under-reported the percentage of I&R callers to whom the Specialists provided information, and mischaracterized the nature of their duties. The Union argues that even if
(continued...)

precinct would receive 10 to 20 additional calls per day. Eckhart's letter was based on an analysis of I&R Unit calls performed by Joann Elsner, a Police Bureau Administrative Supervisor II. Elsner's analysis understated the amount of work done by I&R Specialists. This was in part because Elsner focused on the ultimate disposition of the calls rather than the process for determining that ultimate disposition.

34. Eckhart's May 22 memorandum stated in part:

"The Police Bureau Information and Referral Unit (I&R) was created at a time when the public had less easy access to information. Information is now more readily available to the public via the Internet. The call load for I&R has continued a significant decline for the last 8 years. Most of the calls to I&R are originating from calls being transferred to I&R by other city personnel. It is believed that the majority of their calls come from the automated attendant linked to the 911 center. However, we know that we also get calls from in-house (officers checking court), precinct desk clerks, City I & R and also from their published I&R number.

"I&R currently only provide information to 23% of the callers, 74% of the calls to I&R are currently transferred to other city numbers while 3% of the calls are transferred to non city numbers. A more detailed list of options on the automated attendant would prevent citizens from being transferred it [*sic*] I&R only to be transferred to yet another city number to get their question answered. Additional information on the Police Bureaus [*sic*] web page would also be helpful in directing citizens to the correct number in the first place or answer their questions without requiring any call to the city.

"Prior to the elimination of I&R the automated attendant phone line will be expanded to provide more accurate information to citizens to minimize or eliminate the need to have the I&R unit act as a transfer point for callers. Referral to an updated police web page containing most of the

⁴(...continued)

Commander Eckhart's faulty data is accepted, the number of calls to the three new precincts would be more than 20 per day. The Union notes that data on which Commander Eckhart relied shows that the I&R Unit received 81,098 calls in the 11 months preceding its closure; when these calls are divided by 11 months, and then by 30 days, the result is 246 calls per day. Dividing these 246 calls among the three precincts results in 82 calls per precinct per day. The Union contends that better directions on the website and more efficient direction of calls is unlikely to substantially reduce this number. (Union Post-Hearing Brief, p. 30.)

commonly requested information[.] [sic] The web page is accessible from most cellular phones today so citizens can quickly retrieve the information they are calling the city for.

“If you look at the statistics below for this year that do not get transferred to BOEC, TRU, outside the Bureau, or already transferred to the precincts, the monthly average is 1,736 calls. These are calls where I&R gives out information such as curfew laws, traffic accidents rules, travel directions, and a variety of police information. This translates to an average of 83 calls daily that would then be dispersed among the various precincts and divisions in addition to what they currently answer. In most cases, the increase will probably not be noticed 1-2 calls. In the precincts, they may have an increased call load of 10-20 calls, many of which the precincts had already taken and transferred to I&R in the first place.”

35. The City Council took a preliminary vote on the City budget in late May. During this time period, the City Council discussed creating a new “311” information section at BOEC to handle some types of calls then handled by the I&R Unit, but those discussions did not go very far and did not address whether the I&R Specialists would be moved into that section.

36. On May 30, 2009, Hester sent a second demand to bargain to Herron “over the impacts and decision of the Portland Police Bureau reorganization.” That letter also reiterated Hester’s requests for more information about what was happening to the I&R Unit:

“In addition, in the May 14th letter, the Union clearly requested notification from the City and Police Bureau outlining the employers’ intent as it related to the Police Information & Referral Unit – specifically where that work was being moved.

“Steve, to date AFSCME Local 189 has not received a response from the City or Police Bureau regarding this matter.

“The Union is once again requesting this information. Please be advised the Union is prepared to file an unfair labor practice for employers failure and/or refusal to provide this information in a timely manner.”

37. On June 4, 2009, Herron responded to Hester in two separate letters, one regarding precinct restructuring and the other regarding the I&R Unit. In the restructuring letter, Herron confirmed the parties’ May 15 agreement regarding the affected positions and the modified bumping procedure.

38. Herron's June 4 letter regarding the I&R Unit stated that it was "formal notice under ORS 243.698 of the elimination of the Information & Referral Unit * * *." The letter stated that all of the City-funded I&R positions would be eliminated, and that the two grant-funded positions would be re-dedicated to fund two new PASS positions supporting detectives. The I&R Specialists would be included in the overall bumping process which was to become effective July 1, 2008. Herron stated that the City had no obligation to bargain over the decision or the impacts of the elimination of the I&R Unit, but invited the Union to specify in writing what impacts the Union was demanding to bargain. Herron sent a copy of Eckhart's May 22 memo along with the letter.

39. On June 9, 2009, HR Manager Murray sent an e-mail to all Police Bureau employees confirming that the I&R Unit "will be eliminated."

40. On June 10, 2009, Herron sent Hester another letter correcting some information from the June 4, 2009 letter, and revising the layoff and bumping order accordingly.

41. The parties agreed that Wednesday, June 10, 2009, would be the start of the 90-day expedited bargaining period under ORS 243.698(2). Ninety days from June 10 was Tuesday, September 8, 2009.

Disposition of I&R Unit Work

42. On May 29, 2009, the City removed the phone number for the I&R Unit from the "Contact Us" section of the City's website.

43. On June 12, without notice to I&R Unit employees, Union-represented precinct PDCs, or the Union itself, the City removed the I&R Unit option from the non-emergency 3333 line attendant menu. As a result, most of these calls now went to the precincts.⁵

44. The revised telephone menu also directed callers to the Police Bureau's website, which listed the precinct telephone numbers. The Bureau's website was modified so that a caller could more easily find precinct phone numbers. Because 95 to 97 percent of the calls came to the I&R Unit through the 3333 line, calls to the I&R Unit effectively ceased on June 12, and the Police Bureau assigned I&R Specialists to other duties they previously had not performed. The City did not, however, abolish the Unit itself at this time.

⁵The City did not give the PDCs notice that the calls were coming, or make any effort to monitor the effect of the changes.

45. As a result of changes to the call menu, the number and complexity of calls received by the precinct PDCs substantially increased.⁶ The increase in calls was initially inexplicable to them. The PDCs could tell most of these new calls were coming in on the 823-3333 non-emergency line because their phones have caller ID.

46. The PDCs also started receiving a higher number of calls transferred from the main City information and referral unit which had also received some of the re-routed Police Bureau I&R calls.

47. Sandra Johnson is an Administrative Supervisor who supervises PDCs at the Central Precinct. She noticed an increase in the phone calls the PDCs handled when the auto-attendant phone menu changed, and all the PDCs she supervised expressed concerns to her about the situation. Johnson investigated the situation herself by calling the non-emergency 3333 line and confirming that the precincts were now listed on the phone menu. Johnson also answered calls for a period to verify the quantity and quality of calls. She reported to Elsner that the volume and character of the calls had changed and that the PDCs were inundated with calls.

48. The PRSs also noticed about a 25 percent increase in the number of calls as well as a change in the types of calls they received after the non-emergency line was re-routed from the I&R Unit. They also started receiving more complicated and time consuming calls concerning matters such as restraining orders. Some calls came to PRSs via the City I&R Unit, which was also experiencing an increase in calls they did not know how to handle.⁷

⁶One PDC credibly testified that, prior to the change, she spent about half of her work time on phone calls, whereas after the change it was 80 percent or more, and that her phone panel became lit like a Christmas tree because of the calls holding. Many of the calls were more complicated than previously, involving evictions, restraining orders, and custody issues. One PDC described being too exhausted at the end of the day to cook dinner. Another PDC, who trained new PDCs, testified that her trainees were calling her upset about their inability to handle the calls, and that she was getting calls she was unable to handle for the first time in her 13 years on the job.

⁷According to their job description, most of the duties of Police Record Specialists involve Bureau records or communications with other Bureau employees. However, the PRS job description also includes the following: "7. Provides a variety of customer services in person and via telephone to internal and external users. Deals with angry/hostile/upset persons who have had their vehicle towed or stolen; determines proof of liability insurance and proof of ownership of vehicles and issues or denies releases accordingly. Verifies identity and information, reviews criminal history information with subjects and takes initial requests for challenges to record (continued...)"

The change in quantity and complexity of calls the PDCs received after the phone menu was changed on June 12 was significant and represented a significant change in the PDCs' duties. The increase in call volume and complexity continued up to the time of the hearing.

The City never directed the PDCs to handle these calls in a truncated manner.

49. According to the PDC job description, the PDC positions are entry level positions, with employees proceeding to the Police Records track or the Police Administrative Support track as they advance. The job description states that "[t]he entry level of this class typically provides a variety of support to officers on the street and in a precinct by accessing and providing information as needed, and provides reception services for the precinct."

The "Typical Duties/Examples of Work" for the PDCs are:

- "1. Provides reception services; answers and directs phone calls; greets and directs the public; controls access to the precinct or Justice Center building.
- "2. Provides a variety of information, explanations and directions to the public; responds to inquiries; receives and refers complaints.
- "3. Monitors and uses police radios to receive and transmit information; monitors security cameras; monitors office equipment to distribute incoming reports.
- "4. Accesses PPDS, LEDS, computer-aided dispatch and other databases to provide information to officers and the public as appropriate.
- "5. Provides warrant checks for officers, other security agencies and people wanted for crimes who turn themselves in to the precinct; calls officers into precinct as needed to make arrests or take reports.

⁷(...continued)

information; releases information as appropriate. Delay subjects known to have warrants or forged documents until officer can be dispatched to make arrest."

- “6. Provides a variety of office support functions, such as sorting and routing mail and messages; duplicating materials; monitoring and ordering supplies.
- “7. Maintains files, records and logs; maintains equipment inventories.
- “8. Performs related duties as assigned.”

The “**Required Knowledge, Skills and Abilities**” for the position include the ability to “communicate effectively; * * * rapidly assess critical situations involving the public; remain calm in emergencies or threatening situations; [and] learn rules, regulations and procedures related to police support * * *.”

50. PDCs are paid approximately 25 to 30 percent less than I&R Specialists. The PDC pay scale range for 2006-2007 was \$12.20 to \$16.87 per hour, compared to the Police I&R Specialist range of \$17.48 to \$22.49. Those rates were increased in accordance with the Consumer Price Index for Urban Wage Earners and Clerical workers, but no less than two percent and no more than five percent, effective July 1, 2007, and July 1, 2008.

Union/City Bargaining

51. On June 11, 2009, Elizabeth Joffe, counsel for the Union, faxed and mailed a response to Herron’s June 4 letter about the elimination of the I&R Unit. Joffe repeated the Union’s demand to bargain over both the decision and the impacts of that change. In that letter, Joffe requested the following information:

“What will happen to the work that has been performed by the five bargaining unit members in the I & R Unit?

- “a. Will some or all of that work be transferred to other existing positions in the City? If so, to which specific positions?
- “b. Will there be any newly created positions to handle some or all of that work? If so, what classifications will they be and in what work unit?
- “c. Will any of this work be assigned to outside contractors? If so, to whom?”

Joffe also stated that Eckhart's May 22 memorandum "seems to suggest that, because of decreased workload and changes to the automated attendant * * * any transferred I&R work to precincts or other bureaus will be minimal. We question that conclusion and need to investigate it." Joffe also requested the underlying data upon which Eckhart's memo was based.⁸

52. On June 16, 2009, Hester, Joffe, and Stahlke met with Herron, Murray, and Deputy City Attorney Stephanie Harper. At that meeting, Herron stated that none of the I&R Unit work would be assigned to newly created positions, to outside contractors, or to positions otherwise outside the bargaining unit (such as BOEC). Herron stated that some of the work would no longer exist because of improvements to the Bureau's website and automated attendant phone line, and that the remaining work would go to the PDCs.

53. On June 18, 2009, the City Council formally acted to adopt its budget for fiscal year 2009-2010. The adopted budget included an explanation of the elimination of the I&R Unit, specifically noting that "I&R phone responsibilities will be transferred elsewhere; requests for public safety-related information will now be handled by the Bureau of Emergency Communications, the City-County I&R program operated by the Office of Neighborhood Involvement, and precinct desk clerks." The budget reduced the funds to the Police Bureau by approximately \$3.8 million from the prior budget.

54. On June 19, Hester e-mailed a bargaining proposal to Herron, Harper, Callahan, and Saltzman. Hester's proposal addressed both the precinct reorganization and the I&R Unit elimination, and "significant impact and increased work load on the bargaining unit specifically the Police Desk Clerks." The proposal included the modified bidding procedure and other provisions aimed at the impacts of the precinct consolidation. Most of the items in the proposal were based on Hester's February "supposal" and the parties' May modifications to it.

55. Hester's proposal increased wages of certain Bureau classifications to compensate the PDCs for the workload changes resulting from the I&R closure. The proposed wage increases were based on a 2008 Union class compensation study which concluded that several administrative support classifications were paid significantly below market wages. The cost of the proposal was \$1.5 million. Hester asked to meet as soon as possible to explain the proposal and bargain over it. The proposal would change the wages of seven of the 18 Union bargaining unit classifications and approximately 76

⁸The record shows that Hester discussed call data he had received from the City at the September 4 bargaining session; the record is not clear as to when the City provided Hester with this particular data.

percent of the unit employees in the Police Bureau. The City plan that the Union responded to reduced the Police Bureau budget by approximately \$3.8 million, cutting \$300,000 to \$400,000 through eliminating the I&R Unit, and cutting \$2.1 million through precinct reorganization, including the elimination of 33 positions.

56. On June 19, 2009, Harper wrote to Joffe requesting the data to which the Union had referred in the June 16 meeting demonstrating the I&R Unit's workload. Harper explained that she was requesting the data "because our information is that any workload impact on the precinct police desk clerks is *de minimis*" and if so, no impact bargaining was required.

57. On June 22, Joffe responded to Harper, disputing the claim that the workload impact on the PDCs was *de minimis*. Joffe stated that, not only did the reorganization require PDCs to perform I&R work, but the precinct consolidation resulted in 15 percent fewer PDCs.⁹ Joffe also argued that the City was obligated to bargain over the decision as well as the impacts of the I&R Unit closure prior to implementation of that change. Joffe encouraged the City to quickly respond to Hester's June 19 proposal and request to schedule bargaining.

58. On that same day, June 22, Hester also left a voicemail message for and e-mailed Herron seeking to schedule bargaining dates.

59. On June 23, Harper responded to Joffe, stating that Herron did not receive Hester's June 19 e-mail until June 22. Harper's letter also sought clarification about whether the Union believed the City could go ahead and implement before bargaining was complete. Later that day, Joffe responded to Harper, arguing that the City must bargain prior to implementation of the reorganization and the I&R Unit closure.

60. During the evening of June 24, Harper and Herron replied to Joffe and Hester. The letters stated that the City was implementing the reorganization using the collective bargaining agreement's layoff and bumping procedure rather than the modified terms the parties had worked out, but would defer I&R Unit closure while the parties bargained. Herron's letter offered bargaining times on June 25 and 26.

61. On June 25, Hester responded to Herron. Hester stated that Herron's "late and short notice and brevity of the proposed bargaining time" indicated a "disingenuous attitude towards" the Union members. Joffe responded to Harper the same day, disputing that the City had the right to go ahead with the restructuring and echoing

⁹The Union also asserts that PDC workload increased because the consolidation did not reduce the number of police officers, just the number of PDCs and precincts.

Hester's concerns about the limited bargaining times Herron had suggested. Herron e-mailed Hester later that day, stating that the times he suggested were not disingenuous.

62. On June 26, after coordinating with the Union bargaining team, Hester suggested some options to meet for bargaining the following week. The parties met for their first session on July 2, 2009.

63. At the July 2 bargaining session, Hester argued that the work formerly performed by the I&R Unit had been transferred to the PDCs, justifying an increase in their wages, and that increases for other classifications were needed to maintain the wage relationship of the classifications. Hester argued that the PDC position was originally a "meet and greet" job, but that their current work was much more complicated and the workload was getting "higher and higher." Hester stated that the I&R phone calls had already been rerouted, and that the workload increase was already affecting the PDCs. Bargaining team member and PDC Mary Prottzman told City negotiators that she had previously worked as a call-taker at BOEC, and she found the PDC work now to be similarly stressful.

Herron responded that the wage proposal was beyond the scope of the I&R closure and stated that the City would not reverse the decision to close the I&R Unit.

64. On July 15, Union attorney Cathy Highet, covering for a vacationing Joffe, sent Harper a letter objecting to the City's implementation of the I&R Unit elimination by taking the I&R Unit off the 3333 call menu prior to completing bargaining. Highet urged the City to stop implementation or face an unfair labor practice complaint and request for civil penalty. Harper acknowledged Highet's letter and stated she would provide a substantive response later, but ultimately did not do so because of her workload and her assumption that the parties would address those issues in bargaining. The City did not cease implementing the transfer of the I&R Unit work.

65. On July 16, the parties met again to bargain. They again discussed the Union's original bargaining proposal. The Union provided cost information, stating that the impact of the proposed increases for PDCs would be \$99,000. Hester again argued that the elimination of the I&R Unit had significantly increased the PDCs' workload, exacerbating the previously underpaid status of the position. Hester questioned whether PDCs were earning a livable wage within the City of Portland. Herron responded that the cost of the Union's proposal was too high, that the City was bargaining only about the elimination of the I&R Unit, and that the City would not agree to comparable increases of the wages of classifications other than the PDCs.

66. After caucusing with the City team, Herron stated that the City needed more time to develop a counter-offer. Hester suggested meeting for three or four hours on July 27 or 28 or the first week of August. Hester also asked Herron to present a counter-offer prior to the next bargaining session, given the time that had already passed in the 90-day process and the anxiety members were already experiencing. The City did not do so.

67. On August 12, the parties again met to bargain. The City provided its first proposal. The City's proposal did not address the issues of increased PDC workload or increased PDC salaries. The City proposal addressed only the subjects the parties had previously discussed, such as the layoff, recall, and transfer rights for displaced bargaining unit members.

68. During the August 12 meeting, Herron told Union negotiators that the City would neither accept nor make any counter-offer to the Union's proposal regarding wage increases. Herron disputed the claims of Union bargaining team members Dernbach and Prottzman that the I&R Unit had already been eliminated, because the positions were still there, while not disputing that the two grant-funded positions had already been physically moved to the Detective Division and assigned duties there. Herron rejected the Union's proposal regarding targeted severance, and refused to counter-offer on that issue unless the Union revised its initial offer.

69. On August 19, the parties again met for bargaining. The Union presented a revised proposal to the City, changing three provisions, including reducing severance pay from one month to one week of salary for every year employed.

70. On September 4, the parties again met for bargaining. The City provided a new proposal that included a targeted retirement package for one of the I&R Specialists and a new provision about job share positions. Herron stated that the City would not make any counter-offer to the wage increase provisions of the Union's proposal. Union team member Prottzman expressed frustration that the central issue in the bargaining, wage increases for workload increases, was not being addressed. Other Union team members explained that the work is now being given to PDCs who are paid significantly lower wages than the I&R Specialists. Hester provided Herron with a copy of the call data the Union had received from the City and explained that, while there had been a slight decline in calls each year, the I&R Unit still handled nearly 100,000 calls per year.

71. On September 10, the parties met for their final bargaining session. Hester asked Herron if he had reviewed the call data they provided him in the last session. Herron responded that he had looked at it "some but not enough." Hester asked Herron

for a counter-offer on at least the portion of the wage proposal relating to PDCs, and Herron responded that the impact on the PDCs was nominal. The Union again disputed this point; a Union negotiator who was a PRS explained the increase in workload.

72. After their September 10 bargaining session, Hester wrote Herron and stated that the City had not bargained in good faith because the City still had not responded to the Union's requests for basic information about exactly where the I&R work was being transferred and because the City refused to engage in any meaningful discussion about the economic proposals relating to the City's effective pay reduction for transferring work previously performed by significantly higher paid I&R Specialists to low-paid PDCs and PRSs.

73. On September 24, Herron responded to Hester's September 10 letter and denied that the City had bargained in bad faith. Herron also stated that the City would send layoff notices to affected I&R Unit employees on September 28, and that the I&R Unit would be eliminated effective October 28. Herron explained that a recent report regarding call traffic volume was attached to his letter, but Hester did not receive it.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City made a unilateral change in mandatory subjects of bargaining by failing to bargain the impacts of the elimination of the I&R Unit with the Union before implementation in violation of ORS 243.672(1)(e) and (f).

A public employer generally violates its duty to bargain in good faith under ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a subject that is mandatory for bargaining. To determine if an employer made an unlawful unilateral change, we first identify the *status quo* and then decide if the employer changed it. If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). While an employer need not bargain a decision to change a permissive subject, it must bargain the impacts of its decision on a mandatory subject before implementing the change. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, *recons*, 20 PECBR 388 (2003); *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01, 19 PECBR 925, 930 (2002), *aff'd*, 194 Or App 531, 95 P3d 1160 (2004). If we conclude that the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised. *Lebanon Community School District*, 22 PECBR at 337.

The Union contends that the City made an unlawful unilateral change when it eliminated the I&R Unit and shifted the work performed by I&R specialists to PDCs and PRSs. According to the Union, the City was required to bargain both its decision to take these actions and the impacts of this decision, and the City violated subsection (1)(e) by failing to complete its bargaining obligation. We begin our analysis by determining what was the *status quo*.

The *status quo* may be established by an expired collective bargaining agreement, work rule, policy, or past practice. *Lebanon Community School District*, 22 PECBR at 360; *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65 (2002), *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 97 P3d 951 (2003). The *status quo* in this case was established by the past practice of maintaining the I&R Unit, and staffing it with bargaining unit employees who handled a large number of non-emergency calls from members of the public to the City Police Bureau.

On June 4, the City gave the Union “formal notice” that it had decided to eliminate the I&R Unit. (Finding of Fact 38.) The City then implemented its decision in three phases: (1) on June 12, the City assigned the I&R Specialists other duties and removed the I&R Unit option from the City’s non-emergency telephone menu (Finding of Fact 43); (2) on September 28, it laid off the I&R Specialists (Finding of Fact 73); and (3) on October 28, it eliminated the I&R Unit (Finding of Fact 73). These City actions constituted a change in the *status quo*. We move to the second step of our analysis and determine whether the change concerned a mandatory subject for bargaining.

An employer’s decision to reorganize the structure in which its work is performed is a permissive subject of bargaining, and the employer has no bargaining obligation regarding that decision. It must, however, bargain about any impacts of that decision on mandatory subjects of bargaining. The City Police Bureau’s decision to eliminate the I&R Unit affected the mandatory subject of layoff, including the right of a laid off employee to bump into another employee’s position. *Springfield Education Association v. Springfield School District No. 19*, Case Nos. C-144-83 and C-161-83, 7 PECBR 6357, 6373 (1984). In addition, the City’s decision to eliminate the I&R Unit affected the workload of the PDC s in local precincts.

The workload of represented employees, that is, “the general types of work to be performed by a class of employees and the amount of such work required in a defined period of time,” is a mandatory subject of bargaining. *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 137 (2002), *AWOP*, 192 Or App 672, 89 P3d 688 (2004). We explain our reasoning as follows:

“We hold that the topic of ‘workload’ is of like character to monetary benefits, hours, vacations, sick leave and grievance procedures, and that it therefore is a ‘condition of employment’ concerning which bargaining is mandatory. The amount and the type of work an employe must perform in order to earn his ‘monetary benefits’ has a pervasive effect on his working conditions. The employer, of course, has the primary interest in determining how much production must be gained from its work force. The employes, however, have the primary interest in how much of that production each individual is required to contribute. The workload required implicates other recognized ‘employment relations,’ for example, job security issues such as discipline and discharge, as well as monetary benefits. It is only possible to rationally bargain for ‘an honest day’s pay’ if one can also negotiate the boundaries and the contents of ‘an honest day’s work.’ On balance, ‘workload’ as a general subject affects working conditions more than it affects inherent management prerogatives.” *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO, LLC v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 79 (1987).

“[W]orkload when the effect on duties is insubstantial” is a permissive subject for all non-school district employees, however. ORS 243.650(7)(g).

The City contends that the transfer of I&R work resulted in no change in the work performed by the PDCs because one of the duties listed in their job descriptions was answering phone calls from members of the public. In addition, the City argues that this transfer did not significantly increase the PDCs’ and PRSs’ workload. We disagree. Contrary to the City’s assertion, the June 12 transfer of I&R work to the PDCs significantly increased both the number and complexity of calls received by PDCs and PRSs. As a result, the City’s actions increased the amount and changed the type of work performed by bargaining unit members.

Having determined that City was required to bargain about the impacts of its decision to eliminate the I&R Unit, we now determine whether the City completed its bargaining obligation. The City’s bargaining duty is defined in ORS 243.698(2), which provides that a party to a current collective bargaining agreement must engage in a 90-day bargaining process before implementing “anticipated changes that impose a duty to bargain.” We have held that the City was not required to bargain over its decision to eliminate the I&R Unit. The City was, however, required to bargain about the impacts of its decision. *City of Vale*, 20 PECBR at 358; *International Association of Fire Fighters, Local #890 v. City of Klamath Falls*, Case No. UP-43-92, 13 PECBR 810, 819 (1992); *International Association of Firefighters, Local 1308 v. City of The Dalles*, Case No. C-25-76, 2 PECBR 759, 769 (1976).

The City acknowledges it was required to bargain over the impacts of the I&R Unit closure on certain mandatory subjects, and agrees with the Union that the 90-day period began on June 10. The City implemented its decision to close the I&R Unit before it finished bargaining, however. On June 12, the City effectively eliminated the I&R Unit when it assigned I&R Specialists new duties and removed the I&R Unit as an option on the City telephone menu. As a result of these City actions, PDCs' and PRSs' workload significantly increased because they began to receive most of the calls that, in the past, went to the I&R Unit. The City's failure to bargain about this mandatory impact before implementing its decision violated subsection (1)(e).

The City contends that it lawfully completed its bargaining obligation under ORS 243.698 because it negotiated with the Union from June 10 through September 10, 2009—90 days before the September 24 layoff of the I&R specialists and more than 90 days before the October 28 elimination of the I&R Unit. Throughout negotiations, however, City officials insisted they would only bargain about certain mandatory aspects of the decision to eliminate the I&R Unit—layoff procedures and employee bumping rights. The City resolutely refused to address any matters related to the PDCs' increased workload, another impact of the City's decision on a mandatory subject of bargaining. The City's willingness to bargain some aspects of its decision to close the I&R Unit *after* it effectively implemented that decision on June 12 does not excuse its failure to bargain all mandatory impacts of the decision *before* implementation.

We turn now to the last step of our analysis in a unilateral change case and consider affirmative defenses asserted by the City. The City argues that it had no bargaining obligation because the collective bargaining agreement permitted it to eliminate the I&R Unit. In support of its argument, the City cites Article 4 (Management Rights) and Article 13 (Layoff/Recall) from the applicable collective bargaining agreement. Article 4 provides that the City has "sole responsibility for management of the City and direction of its work force, except as expressly limited by the terms of this agreement." (Finding of Fact 3.) Article 4 addresses the City's right to reorganize the Department and eliminate the I&R Unit, subjects we have noted that are permissive for bargaining. Article 13 apparently governs some aspects of the layoff of I&R employees. The City points to no contractual language authorizing it to transfer the I&R Unit's workload to PDCs, however. The City's affirmative defense, then, does not excuse its failure to bargain about the impacts of its decision to eliminate the I&R Unit before implementing it in violation of subsection (1)(e).

The City's failure to bargain about the impacts of its decision to close the I&R Unit also violated ORS 243.672(1)(f), which makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.672." The City violated subsection (1)(f) when it did not complete the required 90-day bargaining period set forth in ORS 243.698.

3. The City did not fail to provide information in response to Union requests regarding the increased workload of the PDCs, and therefore did not violate ORS 243.672(1)(e).

It is an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” ORS 243.672(1)(e). The duty to bargain includes the obligation to provide information, and the obligation to respond to an information request in a timely manner. Whether the period of time between a union’s information request and the employer’s response is reasonable depends on the totality of circumstances. These circumstances include matters such as the accessibility and the amount of data sought, the clerical time needed to obtain the information, and the workload priorities of the employer. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District*, Case No. UP-32-04, 21 PECBR 416, 429 (2006), citing *Colton School District*, 6 PECBR 5027, 5032 (1982). The union has the burden of establishing that an employer failed to promptly provide requested materials. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry*, Case No. UP-19-05, 22 PECBR 33, 42 (2007); OAR 115-035-0042(6).

The Union alleges that the City failed to promptly or completely respond to its February 23, May 14 and 30, and June 11, 2009 requests for information about what was happening to the I&R Unit. According to the Union,

“[t]he Union had a right to know whether the City intended to transfer the work to another bargaining unit, such as BOEC, or to other classifications in the unit. The Union never got a complete answer. Rather, the City seemed to claim that the work would just vaporize.” (Union post-hearing brief at 36.)

We consider the City’s responses to each of the Union’s requests to determine if they were timely and complete.

Any claim based on the City’s failure to respond to the Union’s February 23 request is untimely. This unfair labor practice complaint was filed on September 30, 2009, 219 days after the Union’s February 23 request. Given their continuous involvement in the issues relating to the Police Bureau reorganization, Union officials knew, or should have known, that the City had not responded to its February 23 request prior to April 3, 2009, the 180th day before the Union filed this complaint.

ORS 243.672(3);¹⁰ *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District*, Case No. UP-17-08, 22 PECBR 577 (2008), *rev'd and rem'd*, 244 Or App 181, 260 P3d 619 (2011).

On June 4, the City responded to the Union's May 14 and May 30 requests for information about what would happen to the work of the I&R Unit. The City's response included Commander Eckhart's May 22 memorandum in which he recommended the elimination of the I&R Unit, and provided a detailed analysis of how calls traditionally handled by the I&R Unit would be handled. The City's June 4 response was timely and complete: the City provided the Union with the information it wanted within a week of the date on which the City received a formal recommendation to eliminate the I&R Unit and a detailed analysis about what would happen to the work of the I&R Unit.

In regard to the Union's June 11 request for additional information about where the work of the I&R Unit would go, City representatives met with Union representatives on June 16 to discuss these issues. Again, the City's response to the Union's request was prompt and adequate.

Thus, the City's responses to the Union's June 2009 requests for information about what would happen to the work of the I&R Unit if that Unit was eliminated were timely and complete. That these responses were plainly wrong in the opinion of Union representatives and bargaining unit members is irrelevant to our inquiry here. The answer the City gave, and the information it supplied, was in fact the information relied on by the City in closing the I&R Unit and transferring the calls as it did. City officials believed that the amount of work to be shifted to PDCs would be *de minimis*. The City advised the Union of that belief and explained the reasoning on which its conclusions were based.

Remedy

We have concluded that the City violated ORS 243.672(1)(e) and (f) when it failed to bargain about the mandatory impacts of its decision to close the I&R Unit before implementing its decision. We will order the City to cease and desist from refusing to negotiate about the mandatory impacts of its decision to eliminate the I&R Unit. We will also require that the City comply with the expedited bargaining procedure found in ORS 243.698. ORS 243.676(2)(b).

¹⁰ORS 243.672(3) provides that "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice."

Based on its view that closing the I&R Unit was a mandatory subject of bargaining, the Union asks that this Board order the restoration of the I&R Unit. We conclude that this is not an appropriate remedy. First, the decision to close the I&R Unit is a permissive subject for bargaining. The City's error was in implementing this decision prior to completing its bargaining duty. Second, it has been approximately three years since the City effectively eliminated the I&R Unit by transferring most of the Unit's duties to bargaining unit members in the Department's precincts. It would be unduly disruptive to Police Department operations to attempt to re-open the I&R Unit, reverse the transfer of work, and restore laid-off I&R Specialists to their former positions. See *AFSCME Local 189 v. City of Portland*, 24 PECBR 612, 646 (2012) (this Board declines to order the City to return to the *status quo* to remedy to the City's unlawful transfer of duties to non-bargaining unit employees; because the transfers occurred several years ago, it would be "unnecessarily disruptive to undo the transfers.").

The Union asks that this Board order the City to post a notice of its misconduct. This Board considers six factors to determine whether a party should be required to post a notice:

"This Board generally requires the posting of an official notice in situations in which 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, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984).

Not all of these factors need be satisfied to order a posting. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908 (2007); *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-82 (2007). Here, the City's unlawful actions arguably met only one of these criteria—they affected a significant portion of the Union's bargaining unit members. We conclude, however, that this is insufficient reason to order a posting.

The Union also requests that this Board order the City to pay a civil penalty. This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice if (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 Union argues that the conduct of the employer meets both criteria.

The Union asserts that the City's actions struck at core rights protected by the PECBA and that the City was specifically warned in advance that the conduct at issue violated the PECBA. In support of its position, the City cites the following cases: *Portland Fire Firefighters' Association, Local 43, IAFF v. City of Portland*, Case No. UP-14-07, 23 PECBR 43 (2009) (City violated subsection (1)(e) by failing to give notice and bargain impacts of a new return to work program for injured employees); *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752 (2008), *recons*, 22 PECBR 908 (2009) (City violated ORS 243.672(1)(a) and (b) by disciplining a union officer and steward for her communications relating to union activity and by placing her on leave); *AFSCME Local 189 v. City of Portland*, Case No. UP-13-06, 21 PECBR 858 (2007) (Consent Order) (City violated subsection (1)(e) by failing to provide a union with requested information relevant to disciplinary grievances); *Laborers' Local 483*, 21 PECBR 891 (2007) (City violated subsection (1)(e) by failing to provide a union with information relevant to a discipline grievance); *AFSCME Local 189 v. City of Portland, Bureau of Water Works*, Case No. UP-1-05, 21 PECBR 273, *ruling on motion to clarify*, 21 PECBR 495, *recons*, 21 PECBR 542 (2006) (City violated ORS 243.672(1)(g) by refusing to implement an arbitration award).

In order to show that a violation was "repetitive," a complainant typically must prove "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). The *Firefighters'* and *Laborers'* cases did not involve the same parties as this case, and we do not consider them here. The other cases do not deal with a failure to give notice or bargain, and are also not relevant. We have determined that City officials did not refuse to provide information to the Union, and that the City violated its bargaining obligations by failing to bargain about the impacts of its decision to close the I&R Unit before implementing this decision. That conduct is not sufficiently similar to the conduct at issue in the prior cases listed above to which the Union and the City were parties to constitute repetitive conduct.

The Union argues that the City's conduct was egregious because the City's actions struck at core rights protected by the PECBA, and the City was specifically warned in advance that the conduct at issue violated the PECBA, citing *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 783 (2007), and *Coos County Board of Commissioners v. Coos County District Attorney*, Case No. UP-32-01, 20 PECBR 87, 104 (2002). "Egregious" is defined

as “conspicuously bad’ and synonymous with ‘flagrant.’” *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).

We conclude that City officials refused to bargain over the impact of the transfer of I&R Unit work to the PDCs prior to implementation of the transfer of work because they believed the amount of work transferred would be *de minimis*. Under these facts, the City’s conduct was not egregious, and we will not award the Union a civil penalty.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain about the mandatory impacts of the elimination of the I&R Unit.

2. The City shall cease and desist from violating ORS 243.672(1)(f) by refusing to comply with the requirements of ORS 243.698. A new 90-day period for bargaining under ORS 243.698(2) will begin no later than 30 days from the date on which this Order is issued, unless the parties agree otherwise.

DATED this 13 day of July 2012.



Susan Rossiter, Chair

*Jason M. Weyand, Board Member



Kathryn A. Logan, 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.