

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-049-12

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF	)	
FIREFIGHTERS, LOCAL 890,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
KLAMATH COUNTY FIRE DISTRICT #1,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

On September 27, 2013, the Board heard oral argument on Complainant's and Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on July 22, 2013, after a hearing held on February 21, 2013, in Salem, Oregon. The record closed on April 12, 2013, following receipt of the parties' post-hearing briefs.

Michael J. Tedesco and Nicole L. McMillan, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Kirk S. Peterson, Attorney at Law, Bullard Law, Portland, Oregon, represented Respondent.

On September 18, 2012, the International Association of Firefighters, Local 890 (Association) filed this unfair labor practice complaint against the Klamath County Fire District #1 (District). The complaint, as amended on November 26, 2012, alleges that the District: (1) violated ORS 243.672(1)(e) by unilaterally implementing changes to meal breaks, overnight rest breaks, and travel expenses during out-of-town medical transports before exhausting its bargaining obligation; (2) violated ORS 243.672(1)(f) by refusing to proceed to interest arbitration on unresolved mandatory subjects of bargaining; and (3) violated ORS 243.672 (1)(a) and (b) by removing bargaining unit employees from the Station Design

Committee as a result of the employees' protected activities.<sup>1</sup> The District filed a timely answer to the complaint, which included a number of affirmative defenses.

The issues are:

1. On approximately May 8, 2012, did the District unilaterally change the *status quo* regarding mandatory subjects of bargaining in violation of ORS 243.672(1)(e)?

2. On approximately July 26, 2012, did the District refuse to proceed to interest arbitration over changes to the Inter-Facility Transports Standard Operating Guideline (SOG), and, if so, did that refusal violate ORS 243.672(1)(f)?

3. Did the District violate ORS 243.672(1)(a) or (b) by removing bargaining unit members from team meetings and communications related to the construction of Station 3?

4. If the District violated ORS 243.672(1)(a), (b), (e), or (f), what is the appropriate remedy?

For the reasons discussed below, we conclude that the District violated ORS 243.672(1)(e) by unilaterally implementing changes to mandatory subjects of bargaining before completing the required bargaining process, which included interest arbitration for this strike-prohibited unit. We further conclude that the District did not otherwise violate the Public Employee Collective Bargaining Act (PECBA).

#### RULINGS

The rulings of the ALJ were reviewed and are correct.

#### FINDINGS OF FACT

1. The Association is a labor organization as defined in ORS 243.650(13) and is the exclusive bargaining representative of employees working in the positions of captain, firefighter, and deputy fire marshal at the District, which is a public employer defined by ORS 243.650(20).

2. The Association and the District were parties to a collective bargaining agreement (Agreement) effective July 1, 2009 through June 30, 2012. By its terms, the Agreement remained in effect pending the negotiation of a new collective bargaining agreement.

#### Relevant Collective Bargaining Agreement Language

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<sup>1</sup>The Association also alleged that the District had unilaterally altered the staffing of transports in violation of ORS 243.672(1)(e). This claim was withdrawn at hearing.

3. Article 5.1 of the parties' Agreement sets out the District's management rights, which include "the authority and right to determine the mission, purposes, objectives and policies of the District; to determine the facilities, methods, means, and number of personnel required for the conduct of District programs, operations and divisions; to direct, deploy and utilize the workforce; \* \* \*." Article 5.2 provides that the enumeration of the rights in Article 5.1 does not exclude other management rights not specifically listed, and that the rights and responsibilities of the District not specifically modified by the parties' Agreement remain the function of the District.

4. Article 40.2 provides that the parties have waived the right to negotiate "any matter raised in negotiations over this Agreement, subject to all other provisions of this Article." Under Article 40.3, the parties recognize the Agreement as the "entire existing Agreement between the parties. This does not, however, waive the right of the [Association] to bargain unilateral changes of mandatory subjects."

Changes to the Inter-Facility Transports Standard Operating Guideline (SOG)

5. Since 2000, the District has provided medical transportation to and from the local hospital and out-of-town medical facilities. The District primarily transports patients to and from hospitals located in Medford and Bend, but occasionally transports are made to Portland, Hermiston, and Sacramento.

6. In June 2005, the parties negotiated a Memo of Understanding (2005 MOU) addressing work hours and meal and rest periods. Under meal periods, the MOU provides that "[t]wenty-four hour shift personnel shall have meal periods of one hour during each work shift. Meal periods shall be scheduled at or about 12:00 and 17:00 daily. Personnel will be required to respond on emergency calls and make up their meal period as soon as feasible."

7. In December 2006, the District adopted the Inter-Facility Transports Standard Operating Guideline (2006 SOG). The 2006 SOG provided for the on-duty battalion chief (BC or supervisor) to notify the duty chief if staffing went below 17. Regarding meals and overnight rest breaks, the 2006 SOG provided that:

"[a]ll lodging and meal breaks will be coordinated with the on-duty B.C. in accordance with the existing MOU. A breakfast meal break is allowed when the transport itself crosses the breakfast meal time or any of the personnel assigned are working past their scheduled duty time off of 07:00. (More than 24 hours continuous or hold-over overtime). Any expenses will follow applicable SOGs and Policies."

8. Two on-duty employees are generally used for transports. The District often operates below minimum staffing levels during a transport. In the past, the District occasionally called in off-duty employees to work during the transport.

9. Under the 2006 SOG, employees generally did not take overnight rest breaks on trips to Medford, but were allowed to do so on trips to Bend. At times, the supervisor and employee agreed in advance that employees would stay overnight and the supervisor made the lodging arrangements. Other times, employees contacted their supervisor if they did not feel that they could safely drive back to Klamath Falls after a long transport and told their supervisor where they planned to stay. Supervisors generally authorized the rest break as requested, although sometimes the supervisor asked the employees to take their rest break in a different town. There is no evidence that a supervisor ever told employees on a transport that they could not have an overnight rest break.

10. Under the 2006 SOG, employees did not need to call a supervisor for permission to take a meal break around regular lunch and dinner meal times, but could just stop and eat at a restaurant along the route back to Klamath Falls after dropping off the patient. Employees generally called before stopping for meals outside of regular meal times. There is no evidence that a supervisor ever told employees that they could not take a meal break or told them where they had to eat. Employees were allowed to spend \$30.00 per day on meals during transport.

11. Under the 2006 SOG, the District provided a credit card to employees on transports for such expenses as meals, lodging, repairs, and other incidentals. Before a transport, employees obtained the credit card from the BC. In late 2011, the District cancelled the card after a firefighter failed to immediately return the District credit card to the BC at the end of a transport, fearing that it was lost. In January 2012, the Association filed a grievance that sought reinstatement of the credit card or, in the alternative, proposed that the District provide employees with cash before all transports at an identified per diem rate.<sup>2</sup>

12. On January 18, District Operations Chief John Spradley notified Association President Shane Malone that the District would reinstate the credit card for use during transports and intended to revise the 2006 SOG to include the per diem meal rates proposed in the grievance. On February 1, Malone demanded to bargain over changes to the 2006 SOG.

13. On February 15, Fire Chief Jim Wenzel provided Malone with the District's proposed changes to the 2006 SOG and agreed that the District would bargain over mandatory changes or impacts pursuant to ORS 243.698. As part of the SOG changes, the District proposed to require employees to obtain express permission for lodging arrangements, overnight stays, and meals on transports to Medford or Bend occurring after the hospital cafeteria had closed; authorize the supervisor to deny a meal break for employees on transports to Medford or Bend if crews were below minimum standards; require employees to seek permission to stop for meals at locations other than the hospital cafeteria; and provide for specific rates and hours for meal reimbursements. The proposed meal reimbursements included breakfast - \$7.00 (left station before 7:00 a.m. and returned after 9:00 a.m.); lunch - \$11.00 (left station before 12:00 p.m. and returned after 1:00 p.m.); and dinner - \$23.00 (left station before 5:00 p.m. and returned after 6:00 p.m.).

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<sup>2</sup>Unless otherwise specified, all subsequent events occurred in 2012.

14. The parties held several bargaining sessions, exchanged proposals, and bargained over the District's proposed changes.<sup>3</sup> On April 2, the Association proposed an MOU, which provided for meals to be reimbursed at the federal General Services Administration (GSA) per diem rates for the city in which the employee was eating breakfast (employees leaving duty station before 7:30 a.m. who are off duty before 7:00 a.m.); lunch (employees who have not had their lunch break before transport and will not return to their duty station by 12:30 p.m.); dinner (employees who have not had their dinner break before transport and will not return to their duty station by 5:30 p.m.); and other meals (employees sent on transports after 7:00 p.m.). The proposed MOU also provided that travel to a meal break location should not exceed 20 minutes; such travel should be in the general direction of the return trip; and employees could, but were not required to, eat in the hospital cafeteria.

15. On April 26, the District first proposed a letter of clarification and later an MOU that provided for meal reimbursements to be based on the GSA per diem rates for the city in which the employee was eating and that the meal times would be those established in the new SOG and the 2005 MOU. The District also proposed to modify its original changes to the 2006 SOG by removing the language on meal rates and times and inserting the meal period language from the 2005 MOU. The District made a similar proposal on May 1.

16. By letter dated May 8, Chief Wenzel notified President Malone that the District was implementing its final bargaining proposal pursuant to ORS 243.698(4). The relevant section in the 2012 SOG, which includes the changes implemented by the District, provides:

"7.1. The inter-facility transport crew will be provided a Fire District No. 1 credit card to cover authorized incidental meal, lodging, or repair expenses. The credit card must be checked out, and on return, checked back in with the BC. Any employee making a purchase on the provided Fire District No. 1 credit card must hand in the associated receipts when the credit card is checked back in.

"7.2. All lodging arrangements and overnight stays will be allowed only with express verbal permission from the BC.

"7.3 Personnel performing inter-facility transports to Medford and Bend are authorized to purchase meals at the receiving hospital's cafeteria. If the cafeteria is not serving food, it is not considered a normal meal time and the meal break must be preauthorized by the Battalion Chief.

"7.3.1. Meals shall be limited up to the GSA per diem rates for the city they are eating in.

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<sup>3</sup>The Association does not allege that the District failed to bargain in good faith during the 90-day expedited bargaining period.

“7.3.2. Twenty-four hour shift personnel shall have meal periods of one hour during each work shift. Meal periods shall be scheduled at or about 12:00 and 17:00 daily. Personnel will be required to respond on emergency calls and makeup their meal period as soon as feasible.

“7.4. For trips to Medford and Bend the BC may deny meal break if crews are below minimum staffing levels.

“7.5. Stopping for meals at a location other than the hospital cafeteria will only be allowed after receiving permission from the BC, and in these instances the meal rates above still apply. In these instances a restaurant must be chosen based on convenient location and quick service.”

17. On June 13, the Association filed a petition with this Board to initiate binding arbitration over the District’s changes to the 2006 SOG. This Board initiated interest arbitration on June 18. On June 21, the District requested that this Board terminate the interest arbitration process on the basis that all of the changes made were to permissive bargaining subjects and the Association’s request for interest arbitration was untimely. On July 13, this Board denied the District’s request and appointed an interest arbitrator. On July 19, the arbitrator provided the parties with available dates for an interest arbitration hearing, and on July 26, the Association responded with available dates. On that same day, the District suggested to the Association that the parties wait to set an arbitration date until this Board ruled on a Declaratory Ruling request that the District intended to make in the near future. The record contains no further evidence on subsequent communications or actions by the parties in attempting to set up an arbitration date.

#### Station Design Committee

18. In 2009 or 2010, the District was awarded a federal grant to rebuild Station 3. The District’s proposed plan was to demolish Station 1 after rebuilding Station 3 and relocate personnel from Station 1 to Station 3. In September 2010, prior Association President Carl Gurske notified Chief Wenzel that the Association was demanding to bargain over the impending station changes. The Association was concerned that the relocation of personnel would increase response time to an incident, which could impact on-the-job safety. Chief Wenzel responded that the bargaining demand was premature because its operational plan was not final.

19. The District maintained a Station Design Committee to provide input on new or rebuilt fire station designs and locations. The Committee was composed of District management personnel, including Chief Wenzel and Operations Chief Spradley, and three bargaining unit employees, including Firefighter Chad Tramp. The bargaining unit employees volunteered to be on the Committee. At a Committee meeting in early 2012, management personnel mentioned that the District was moving forward with its plan to close Station 1, rebuild Station 3, and move personnel from Station 1 to Station 3. The Committee members were reviewing station design

documents and providing input on the temporary facilities for the relocation of the existing Station 3 crews during the rebuilding.

20. After the Design Committee meeting, Firefighter Tramp told Association President Malone that he had learned that the District intended to proceed with its plan to close Station 1, rebuild Station 3, and relocate employees to Station 3.

21. On February 29, President Malone sent Chief Wenzel a letter demanding to bargain the potential closure of Station 1 and the rebuilding of and relocation to Station 3. Malone also made a broad information request for all notes and minutes from any meetings regarding Station 3. The letter stated, in part:

“This is due to recent District activities that borderline direct bargaining and the 07 October 2010 letter from the Chief. We believe the District has had ample time to determine the operations and now must sit down and bargain prior to starting the station #3 construction project.

“We must caution the District from talking to bargaining unit personnel about anything that is a mandatory subject of bargaining this will include anything that [a]ffects safety and staffing that [a]ffects safety. The District must also be careful of items currently cover[ed] by the CBA and how changes can have adverse effects on personnel other than those assigned to station #3. Any further communications with any bargaining unit personnel over these matters will be viewed as intentional undermining of the union and will be addressed accordingly without further notice.”

22. On March 2, Wenzel notified Malone that the District was willing to bargain over the mandatory effects of relocating the crews from Station 3. Wenzel invited Malone to tour the property that the District intended to use as a temporary facility on March 5. Either during the tour or in a subsequent meeting, Malone verbally warned Wenzel and Operations Chief Spradley about talking with bargaining unit employees about mandatory bargaining subjects related to the station changes.<sup>4</sup>

23. On March 29, Malone sent Wenzel another request for information related to the Association’s demand to bargain over the changes to Stations 1 and 3. Malone requested all

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<sup>4</sup>We credit the testimony of Wenzel and Spradley that Malone verbally directed them not to talk with bargaining unit employees about the mandatory aspects of the station changes in a meeting sometime after February 29. Although Malone initially testified that he did not recall this conversation, he later testified that he may have said this during the tour of the temporary building. We also credit the testimony of Wenzel and Malone that Malone did not specify that he was talking about the Design Committee employees during this conversation. Although Spradley recalled Malone referring directly to the Design Committee employees, it is more likely that Spradley just assumed Malone’s comment was directed at them because the Design Committee was involved in the discussions about the plans for the temporary building.

Station 3 grant-related information, including internal and external e-mails, application materials, application amendments and changes, and dollars expended.

24. By letter to Malone dated April 19, Wenzel confirmed that the District was willing to bargain the mandatory subjects related to the construction of Station 3, informed Malone about the District's current relocation plans, stated he would not change the deployment model from Station 1 until a third party recommendation was received based on a study of the District's standards of response coverage, and addressed the Association's "voluminous" information request stating: "the District objects to the request as overbroad, unduly burdensome, and unlikely to produce relevant information. If you disagree, please state why you believe the information is relevant and please specifically limit your request to only relevant information."

25. The parties met for bargaining on April 25. The parties' discussions were somewhat contentious. Early on, Wenzel asked Malone to show some respect in the manner he was asking his questions and Malone responded that respect can go both ways. Malone explained the Association's bargaining demand, reasserted the Association's request for information, and asked whether Station 1 would be closed. Wenzel replied that the District wanted to do a study, which it had not yet completed, about the best response locations before closing Station 1. After Malone pointed out that the grant stated that Station 1 would be closed after Station 3 was rebuilt, Wenzel said that it was up to the grant committee to decide if modifications to the original application were allowed. Malone then stated that he knew that Wenzel had said Station 1 was being closed during the Design Committee meeting. After Wenzel responded that he did not remember saying this, Malone stated that the Association had multiple witnesses.

26. During the April 25 meeting, Wenzel became frustrated after he asked Malone several times to identify what mandatory issues were impacted by station changes and Malone failed to do so. At one point, Wenzel asked Association Secretary/Treasurer Gary Denny if he could identify the Association's safety concerns and Malone directed Denny not to answer Wenzel's question. Wenzel and Malone continued with their somewhat contentious discussion. At the end of the meeting, when Malone asked about the Association's request for information, Wenzel responded that the District would get back to him but might have to start charging for the requests and staff time.

27. In a letter to Malone dated April 26, Wenzel expressed frustration that he had asked the Association three times during the April 25 meeting to identify specific mandatory impacts related to either the closure of Station 1 or the rebuilding of Station 3, and the Association had not only failed to respond but had stopped one of its bargaining team members from responding. Wenzel stated that these actions constituted bad faith bargaining and left the District unable to address the Association's concerns. Wenzel also stated that the Association's request for information was overly broad and unduly burdensome and could require weeks of full-time research and copying at a cost of thousands of dollars. Wenzel asked Malone to narrow and more specifically define his request. Wenzel concluded by stating that the District remained willing to bargain over any mandatory subjects identified by the Association.

28. On April 30, Operations Chief Spradley sent an e-mail to the Design Committee members, which stated:

“Until further notice the Fire District is removing personnel who are also members of Local 890 from our team meetings and communications in relation to the construction of Station #3.

“This is a result of the Demand to Bargain process that Local 890 has engaged Fire District No. 1 with.

“To all who have participated or provided input related to this project we have very much valued and appreciated your input. This restriction is simply being made to ensure Fire District No. 1 does not inadvertently discuss a sensitive matter related to the Demand to Bargain, or put a Local 890 member in a conflicting position.

“Once this matter is resolved; if possible, restriction on participation will be removed.”

29. On May 24, 2012, the parties entered into an MOU addressing the closing of Station 1 and rebuilding of Station 3, including the requirements for the Station 3 temporary headquarters.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The District violated ORS 243.672(1)(e) by implementing changes to mandatory bargaining subjects in the 2006 SOG before completing the bargaining process, which includes binding interest arbitration for this unit of strike-prohibited employees.

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative.” An employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change regarding a mandatory subject of bargaining while it has a duty to bargain. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*) (citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)).

In analyzing a complaint alleging a unilateral change, this Board considers: (1) whether an employer made a change to the *status quo*; (2) whether the change concerned “employment relations” (*i.e.*, a mandatory subject of bargaining); and (3) whether the employer exhausted its duty to bargain. *AOCE*, 353 Or at 177. When asserted, we also consider any affirmative defense. *Id.*; see also *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we do not apply these steps mechanically

and may proceed to a particular step if it would dispose of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012).

The parties do not dispute that the employer changed the *status quo* in May 2012, when the District implemented its final bargaining proposal on the SOG changes. Moreover, although at hearing the parties disputed whether the SOG changes involved mandatory or permissive subjects of bargaining, neither party objected to those portions of the ALJ's Recommended Order concluding that some of the changes involved mandatory subjects of bargaining.<sup>5</sup> Under ORS 243.766(3) and (7), this Board shall conduct proceedings on complaints of unfair labor practices and take such actions "as it deems necessary" regarding those proceedings and shall "[a]dopt rules relative to the exercise of [our] powers and authority and to govern the proceedings before [us] in accordance with ORS chapter 183." Consistent with that statutory mandate, this Board long ago adopted rules stating that parties have "14 days from the date of service of a Recommended Order to file specific written objections with the Board." OAR 115-010-0090; OAR 115-035-0050(2). If a party does not file such specific written objections within the 14-day period, we may, "in the absence of good cause shown, invalidate any such objections as being untimely" and may "disregard" any such objections "in making a final determination in the case." OAR 115-010-0090.<sup>6</sup> Consistent with our rules and the discretion afforded to this Board, we adopt (and will not disturb) the ALJ's conclusions regarding the mandatory/permissive nature of the SOG changes, as no objections regarding those conclusions have been preserved.<sup>7</sup> See OAR 115-010-0090; OAR 115-015-035-0050(2); *Jackson County Sheriff's Employees' Association v. Jackson County Sheriff's Department*, Case No. UP-023-11, 25 PECBR 449, 459 (2013) (neither party objected to a portion of the ALJ's conclusions on a subsection (1)(e) claim, and we considered any objections to that issue waived); see also *Fred Meyer Stores v. Godfrey*, 218 Or App 496, 504, 180 P3d 98 (2008) (Under ORS 183.482(8)(b), an agency has the authority to establish its own rules regarding preservation of issues, and the circumstances that suffice to constitute adequate preservation are within the

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<sup>5</sup>We note that our rules provide for a procedure "to reduce the time required for a determination of whether a contract proposal is a mandatory, permissive or prohibited subject of bargaining," OAR 115-035-0060(1), as well as a procedure for other unfair labor practice complaints that warrant expedited consideration, OAR 115-035-0068. Neither party invoked those procedures in this matter.

<sup>6</sup>Neither party asserts that the "good-cause" proviso has been satisfied—indeed, neither party has argued that the ALJ's conclusions on the mandatory/permissive nature of the SOG changes are incorrect.

<sup>7</sup>Member Weyand disagrees that the permissive/mandatory status of the subjects at issue in the 2006 SOG should be resolved by the application of a preservation standard based on the parties' failure to object to the relevant portions of the ALJ's Recommended Order. Rather, he would independently conclude that the subjects at issue between the parties were mandatory for bargaining.

province of the agency creating the standards, so long as those standards do not exceed the grant of authority from the legislature to the agency).<sup>8</sup>

With that in mind, we turn to the remaining and dispositive issue—whether the District exhausted its duty to bargain. According to the District, because the disputed bargaining was subject to the expedited process of ORS 243.698, it had exhausted its duty to bargain after bargaining for 90 days.<sup>9</sup> The District further contends that because ORS 243.698 makes no distinction between a *strike-permitted* unit and a *strike-prohibited* unit, it was allowed to implement its proposed changes after bargaining for 90 days, with one caveat. The District concedes that it may not unilaterally implement proposed changes on a strike-prohibited unit if, after bargaining for 90 days pursuant to ORS 243.698, a strike-prohibited unit petitions for binding interest arbitration over unresolved mandatory subjects of bargaining *before* the District implements its proposed changes. Thus, according to the District, in enacting ORS 243.698, the legislature intended to create a “first-to-act” statutory scheme in which the party that acts first (following the 90 days of bargaining) controls the mechanism by which expedited bargaining disputes are resolved.

The Association disagrees, asserting that ORS 243.698 maintains the distinction throughout the PECBA regarding the dispute resolution process for strike-permitted and strike-prohibited employees. That distinction prohibits a public employer from unilaterally implementing its final bargaining proposal with respect to a strike-prohibited unit after the requisite bargaining period, and instead requires the unresolved issues to be submitted to binding interest arbitration at the request of either party. We agree with the Association.

The objective of statutory interpretation is to “pursue the intention of the legislature if possible.” *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009); *see also* ORS 174.020(1)(a) (“[i]n the construction of a statute, a court shall pursue the intention of the legislature if possible.”). In interpreting statutes, the first step in determining the legislature’s intent is to examine the statutory text and context. *Gaines*, 346 Or at 171. Context includes other provisions of the same and related statutes. *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 720-21, 308 P3d 230 (2013). Thus, “[w]hen we examine the text of the statute, we always do so in context, which includes, among other things, other provisions of the statute of which the disputed provision is a part.” *Hale v. Klemp*, 220 Or App 27, 32, 184 P3d 1185 (2008); *see also Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004) (“[o]rdinarily, \* \* \* text should not be read in isolation but must be considered in context.”)

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<sup>8</sup>Likewise, the District did not object to the portion of the Recommended Order finding that the parties’ dispute regarding changes to meal reimbursements remained “unresolved” at the time of the District’s unilateral change. Consequently, we do not disturb that conclusion. *See* OAR 115-010-0090; OAR 115-035-0050(2).

<sup>9</sup>The Association has not disputed the District’s assertion that it engaged in at least 90 days of bargaining as required under ORS 243.698.

(internal quotation marks omitted).<sup>10</sup> We construe statutes to give effect to all relevant provisions and not in a way that would render some provisions surplusage. *English v. Multnomah County*, 229 Or App 15, 32, 209 P3d 831, *adhered to in part on recons*, 230 Or App 125, 213 P3d 1265 (2009); *see also* ORS 174.010.

Before analyzing the text of ORS 243.698, it is useful to understand the context of related statutory provisions, including those governing the “traditional” bargaining process and the distinction between “strike-permitted” and “strike-prohibited” employees. Broadly speaking, the PECBA bargaining process is a series of carefully structured steps designed to help the parties identify and narrow their disputes. It begins with table bargaining and then moves to mediation, final offers, cooling off, and for strike-permitted employees, self help. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District Of Oregon*, Case Nos. UP-42/50-12, 25 PECBR 640, 658 (2013), *appeal pending* (quoting *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamamin v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007)). For strike-prohibited employees, the PECBA bargaining process is largely similar, but “includes a final step of binding interest arbitration, rather than self help.” *Federation of Oregon Parole And Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12, 25 PECBR 629, 635 (2013) (citing ORS 243.742).<sup>11</sup> “Although the final dispute resolution procedures of the PECBA bargaining process are different for strike-permitted and strike-prohibited employees, both procedures share the same goal, which is the signing of a collective bargaining agreement negotiated in good faith between public employers and the exclusive representatives of their employees.” *Multnomah County*, 25 PECBR at 635 n 2.

ORS 243.698 was added to the PECBA in 1975 by way of SB 750. *See* Or Laws 1995, ch 286, § 13.<sup>12</sup> ORS 243.698 provides for an expedited process that applies to certain

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<sup>10</sup>We may also consider any applicable legislative history proffered by the parties, along with any pertinent legislative history that we independently have examined. *Gaines*, 346 Or at 171-72, 177-78. Here, neither party has proffered any such history, nor have we independently examined any. For a summary of “[t]he process used to achieve consensus” on Senate Bill (SB) 750, see “Henry Drummonds, *A Case Study of the Ex Ante Veto Negotiations Process: The Derfler–Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 32 Will L Rev 69 (1996).” *Jefferson County v. OPEU*, 174 Or App 12, 24 n 6, 23 P3d 401 (2001).

<sup>11</sup>The steps of the traditional “bargaining process for strike-prohibited bargaining units are set out in ORS 243.712 and ORS 243.736 through 243.756.” *Multnomah County*, 25 PECBR at 634. “Unless changed by agreement of the parties, they must table bargain for 150 days, and, if necessary, proceed through mediation, impasse, and the submission of Final Offers to the mediator and LBOs to the interest arbitrator.” *Id.*

<sup>12</sup>ORS 243.698 was a small part of a much larger change in the PECBA. For a discussion on the scope of those changes from both management and labor perspectives, *see* Abernathy, John, Henry H. Drummonds, Paul B. Gamson, Nancy J. Hungerford, Andrea L. Hungerford, Howell L. Lankford, Randy Leonard, Lon Mills, Kathryn T. Whalen, and Tim Williams, *After SB 750: Implications of the 1995 Reform of Oregon’s Public Employee Collective Bargaining Act*, LERC Monograph Series No. 14 (1996).

negotiations during the term of an agreement. *Laborers' International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-027-12, 25 PECBR 810, 825 (2013) (quoting *In the Matter of the Joint Petition for Declaratory Ruling Filed by Medford School District 549C and Oregon School Employees Association Chapter 15*, Case No. DR-2-04, 20 PECBR 721, 724 (2004)). Specifically, the expedited process of ORS 243.698 applies only in "special circumstances," such as a proposed mid-term change that "concern[s] a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement." *City of Portland*, 25 PECBR at 825; *Medford School District 549C*, 20 PECBR at 727; accord *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699, 703 (1996); see also OAR 115-040-0000(2)(a). In all other circumstances, the "traditional" (*i.e.*, not expedited) process set forth in ORS 243.712 through ORS 243.756 governs bargaining dispute resolution.

With that context in mind, we turn to the text of ORS 243.698, which provides, in relevant parts:

"(1) When the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement and the exclusive representative demands to bargain, the bargaining may not, without the consent of both parties and provided the parties have negotiated in good faith, continue past 90 calendar days after the date the notification specified in subsection (2) of this section is received.

"\* \* \* \* \*

"(4) The expedited bargaining process shall cease 90 calendar days after the written notice described in subsection (2) of this section is sent, and the employer may implement the proposed changes without further obligations to bargain. At any time during the 90-day period, the parties jointly may agree to mediation, but that mediation shall not continue past the 90-day period from the date the notification specified in subsection (2) of this section is sent. Neither party may seek binding arbitration during the 90-day period."

In short, ORS 243.698 provides an expedited process for mid-term bargaining and corresponding dispute resolution procedures for the parties should they reach impasse. Specifically, rather than the 150 days of table bargaining required under the traditional bargaining process, the expedited process of ORS 243.698 requires only 90 days of such bargaining. Moreover, ORS 243.698 does not require a mediation period (although parties may jointly request mediation as part of the 90-day bargaining period) or a cooling-off period.

The statute does not expressly reference "strike-prohibited" or "strike-permitted" employees. It does, however, reference both a unilateral employer implementation (the traditional self-help "weapon" for an employer with respect to strike-permitted employees), as

well as binding arbitration (the traditional final stage of a bargaining dispute involving strike-prohibited employees).

The statute also does not expressly state that it intended to provide a different final dispute resolution process for strike-permitted and strike-prohibited employees than that provided elsewhere in the PECBA. The District, however, asks us to conclude exactly that—namely, that the 1995 statutory addition of ORS 243.698 sets forth a different final dispute resolution process for strike-prohibited employees (other than binding arbitration) when the expedited bargaining process applies.<sup>13</sup> As explained above and below, the District asserts that the legislature intended to create a “first-to-act” statutory scheme, in which, after bargaining for 90 days, either party may initiate binding interest arbitration when the dispute concerns a strike-prohibited unit. If it is a labor organization, however, that initiates binding arbitration, it may only invoke that process if the employer has not effectively “beaten it to the punch” by already implementing a final proposal.

In advancing this argument, the District relies on two provisions in ORS 243.698: (1) bargaining may not “continue past 90 calendar days” (in the absence of both parties consenting to continued bargaining); and (2) the expedited bargaining process shall cease after the 90-day bargaining period, with the employer permitted to “implement the proposed changes without further obligations to bargain.” The District acknowledges, however, that ORS 243.698(4) also states that “[n]either party may seek binding arbitration during the 90-day period,” thus limiting its authority in some circumstances to implement its proposed changes and instead submit the matter to binding arbitration.

The District seeks to reconcile the provisions allowing both employer implementation and binding arbitration with its “first-to-act” theory. Under that theory, an employer may always unilaterally implement its proposed changes after the parties have bargained for 90 days. An employer may also seek binding arbitration at that time. A labor organization may also seek binding arbitration after the parties have bargained for 90 days, but only if the employer has not *first* implemented its proposal. On the other hand, if the labor organization wins the implementation/binding arbitration “race,” then the employer may not unilaterally implement its final proposal. In other words, according to the District, ORS 243.698 sets forth a statutory scheme for a unit of strike-prohibited employees in which, once the parties have bargained for 90 days, either party may petition for binding interest arbitration or the employer may implement its

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<sup>13</sup>The District does not appear to argue that binding interest arbitration is available for strike-permitted employees if a labor organization seeks such arbitration before an employer implements its final proposal. Yet, that conclusion would appear to be the logical result of the employer’s statutory interpretation. Specifically, if the District is correct that, at the end of the 90-day period set forth in ORS 243.698, it may choose to implement its final proposed changes or seek binding arbitration regardless of whether the employees at issue are strike-permitted or strike-prohibited, it would appear that strike-permitted employees would likewise be able to avail themselves of the option to strike or seek binding arbitration at the end of the 90-day period. As set forth below, we do not believe that the legislature intended such a radical restructuring of the PECBA in enacting the expedited bargaining process of ORS 243.698.

proposed changes. The dispositive factor in each case is which happens first. Thus, if the Association here had *first* petitioned for binding interest arbitration, then the District could not have implemented its proposed changes. However, because the District *first* implemented its proposed changes, the Association was prohibited from petitioning for binding interest arbitration.

We disagree with the District’s statutory interpretation. ORS 243.698 is one section of a broad statutory scheme concerning collective bargaining rights of public employers, its employees, and labor organizations. *See* ORS 243.650 to ORS 243.782. As set forth above, the PECBA maintains several core provisions throughout, including the distinction between bargaining dispute resolutions for strike-permitted and strike-prohibited employees. The PECBA also expressly states that where, as here, “the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes.” ORS 243.742(1). “[T]o that end[,] the provisions of \* \* \* ORS 243.650 to 243.782 \* \* \* providing for compulsory arbitration, shall be liberally construed.” *Id.* We do not believe that the District’s “first-to-act” theory is consistent with that mandate or supported by the text and context of the PECBA as a whole. To the contrary, such an interpretation would undermine the legislative scheme that affords strike-prohibited employees binding arbitration as “an effective and binding procedure for the resolution of [bargaining] disputes.” *Id.* Had the legislature intended to create something as unique as the District’s statutory interpretation, something that has no other corollary in the PECBA and would be at odds with the PECBA’s carefully-designed scheme for bargaining dispute resolution, it could have done so expressly.<sup>14</sup>

Thus, when read in context, we conclude that the legislature intended ORS 243.698 to provide an expedited bargaining process for those certain mid-term changes set forth above, but to retain the fundamental framework for such a process. In other words, after bargaining for 90 calendar days under ORS 243.698, the “expedited bargaining process” ceases and a public employer of a strike-permitted unit “may implement [its] proposed changes without further obligations to bargain.” ORS 243.698(4). With respect to a strike-prohibited unit, however, “[n]either party may seek binding arbitration during the 90-day period,” but either party may initiate binding arbitration after that period. *Id.* Thus, with a strike-prohibited unit, after the parties have bargained for 90 days, “the expedited bargaining process shall cease,” and, at the initiation of either party, the final process of binding arbitration resolves any remaining dispute. Reading the statute in this manner gives effect to all of the language in ORS 243.698, in the context of the remaining provisions of the PECBA. *See* ORS 174.010 (our role in interpreting a statute is “simply to ascertain and declare what is, in terms or in substance, contained therein, not

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<sup>14</sup>Additionally, ORS 243.698 includes a “Note” that it was “added to and made a part of 243.650 to 243.782 by legislative action but was not added to any smaller series therein. *See* Preface to Oregon Revised Statutes for further explanation.” The Preface to Oregon Revised Statutes explains that such a note “mean[s] that the *placement* of the section was editorial and not by legislative action.” (Emphasis added.) This is yet an additional reason not to divorce ORS 243.698 from the rest of the PECBA, as the District’s reading of the statute would effectively do.

to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”).

Finally, although we have concluded that the legislature’s intent regarding ORS 243.698 is clear based on the text and context of the statute, and that, therefore, there is no need to resort to general maxims of statutory construction, we note that such maxims support our conclusion. *See Gaines*, 346 Or at 172 (if the legislature’s intent remains unclear after examining text, context, and legislative history, we may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty). “Among those maxims is the principle that ambiguities in statutory language should be construed in such a way as to avoid ‘an absurd result that is inconsistent with the apparent policy of the legislation as a whole.’” *State v. O’Donnell*, 192 Or App 234, 251, 85 P3d 323 (2004) (quoting *State v. Vasquez–Rubio*, 323 Or 275, 283, 917 P2d 494 (1996)). The District’s statutory interpretation would produce such a result that is inconsistent with the policies of the PECBA as a whole, which are designed, *inter alia*, to: (1) develop “harmonious and cooperative relationships between government and its employees”; (2) “alleviate various forms of strife and unrest” by public employers recognizing “the right of public employees to organize” and fully accepting “the principle and procedure of collective negotiation between public employers and public employee organizations”; (3) remove certain recognized sources of strife and unrest “by encouraging practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions, and by establishing greater equality of bargaining power between public employers and public employees”; and (4) afford an alternate, expeditious, effective and binding procedure for the resolution of labor disputes “where the right of employees to strike is by law prohibited.”<sup>15</sup> *See* ORS 243.656, 243.742. Simply put, a “first-to-act” scheme as proposed by the District frustrates, rather than accomplishes, these policies.

In sum, we conclude that the text and context of ORS 243.698 did not authorize the District to change the *status quo* by unilaterally implementing its final proposal. Rather, because this bargaining dispute concerned strike-prohibited employees, the District was obligated to maintain the *status quo* until the completion of the entire bargaining process (and not just the 90-day expedited bargaining process), which, for these employees, includes binding arbitration. In other words, at the time of the unilateral change, the District had not exhausted its duty to bargain by merely completing the 90 days of table bargaining set forth in ORS 243.698. Rather, as explained above, the District’s recourse (after bargaining for 90 calendar days) was to seek binding interest arbitration.<sup>16</sup> Because the District instead changed the *status quo* before exhausting its duty to bargain (*i.e.*, submitting unresolved mandatory subjects to binding arbitration), we will find that it violated ORS 243.672(1)(e).

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<sup>15</sup>The District’s interpretation also does not set forth how we would determine which party “won the race.”

<sup>16</sup>The parties may, of course, jointly agree to continue bargaining in good faith. *See* ORS 243.698(1).

3. The District did not violate ORS 243.672(1)(e) or (f) by allegedly refusing to participate in an interest arbitration proceeding.

The Association next alleges that on approximately July 26, 2012, the District violated ORS 243.672(1)(e) and (f) by “refusing to proceed to interest arbitration.” According to the Association, the District’s refusal to participate in an interest arbitration proceeding constitutes a failure to bargain in good faith under ORS 243.672(1)(e) and also violates ORS 243.672(1)(f), which makes it an unfair labor practice for an employer to “[r]efuse or fail to comply with any provision of ORS 243.650 to 243.782.”

On this record, however, we conclude that the Association has not established that the District “refused” to proceed with interest arbitration, as alleged. Specifically, the record establishes that on July 19, the arbitrator provided the parties with available dates for an interest arbitration hearing. On July 26, the Association responded with available dates. On that same day, the District suggested to the Association that the parties wait to set an arbitration date until this Board ruled on a Declaratory Ruling request that the District intended to make in the near future. The record does not establish that the Association objected to the District’s request to delay setting the arbitration date before filing this complaint. The record also does not include subsequent communications or actions by the parties attempting to set, or of the District expressly refusing to set, an arbitration date. Under these circumstances, we conclude that the Association has not established that the District refused (on or about July 26) to proceed to interest arbitration, and we will dismiss this claim.<sup>17</sup>

4. The District did not violate ORS 243.672(1)(a) or (b) by removing the three bargaining unit employees from the Station Design Committee.

The Association also alleges that the District violated ORS 243.672(1)(a) and (b) by removing bargaining unit employees from the Station Design Committee as a result of employees’ protected activities. Under ORS 243.672(1)(a), it is unlawful for a public employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights

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<sup>17</sup>In *AFSCME Local 1246 v. Fairview Training Center, Mental Health Division, State of Oregon*, Case No. C-137/143-84, 8 PECBR 8011, 8015 (1985), *aff’d*, 81 Or App 165, 724 P2d 895 (1986), the Board stated that “[a] refusal to participate fully in the [binding interest] arbitration process is a refusal to comply with provisions of the [PECBA] and therefore is a violation of ORS 243.672(1)(f) or (2)(c).” In light of our conclusion above, we need not address whether *Fairview Training Center* was correctly decided. We leave that decision for another day. We unanimously agree, however, that once this Board initiated the interest arbitration process, the Association needed no further imprimatur from this Board to proceed with the arbitration that we had already initiated. That is because our rules expressly contemplate that a party may elect (albeit at its own peril) not to participate in an interest arbitration proceeding. In such circumstances, the arbitrator is not permitted to make findings of fact or issue an order “solely on the default of a party.” OAR 115-040-0015(7)(o). Rather, the “arbitrator shall require the other party to submit such evidence as he/she may require for the making of findings of fact and [an] order.” *Id.* Thus, the option to proceed *ex parte* with the interest arbitration that we initiated was and still is an option for the Association under OAR 115-040-0015(7)(o).

guaranteed in ORS 243.662.” ORS 243.672(1)(a) includes “two distinct prohibitions: (1) restraint, interference, or coercion ‘because of’ the exercise of protected rights; and (2) restraint, interference, or coercion ‘in’ the exercise of protected rights.” *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). The Association alleges a violation of both prongs of subsection (1)(a).

To determine if an employer violated the “because of” prong of subsection (1)(a), we examine the employer’s reasons for the disputed action. *Id.* at 623. 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 n 10 (1986).

When we analyze an employer’s actions under the “in” prong of 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 commits an “in” violation. *Portland Assn. Teachers*, 171 Or App at 624. In an “in” claim, “neither motive nor the extent to which employees actually were coerced is controlling.” *Id.* A violation of the “in” prong of subsection (1)(a) may be derivative because it is presumed that an employer who violates the subsection (1)(a) “because of” prong also violates the “in” portion of the statute. *Oregon Public Employes Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). An employer’s actions may also independently violate the “in” prong, which typically occurs when the employer makes threats that are directed at protected activity. *Clackamas County Employees’ Assn. v. Clackamas County*, 243 Or App 34, 42, 259 P3d 932 (2011).

We begin our analysis of the alleged “because of” violation by examining the record to determine the reason that the District removed the employees from the Station Design Committee. This is a fact determination. *Portland Assn. Teachers*, 171 Or App at 626; *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004). Here, the parties put forward different reasons for the District’s decision. The Association alleges that the District removed the employees from the Committee because the District found out during the April 25 bargaining session that a Committee member told Association President Malone that the District intended to proceed with the station changes or because of the Association’s bargaining activities over the station changes. The District asserts that it removed the employees from the Committee in response to President Malone’s threat that the Association would take action against the District if the District had further communications with bargaining unit employees about matters related to the Station 1 and 3 changes.

We conclude that the District removed the employees from the Committee in response to the Association’s communications warning the District not to talk with employees about bargaining issues related to the Station 1 and 3 changes. In his February 27 letter, Malone accused the District of being involved in “borderline direct bargaining” activities with employees

regarding the changes to Station 1 and 3. He cautioned the District against talking with employees about anything related to the station changes that could be a mandatory bargaining subject and anything that affected the safety of staff, items currently covered by the parties' agreement, and changes that might adversely impact any bargaining unit employees. Malone also warned the District that the Association would take further action should District communications with employees over such matters continue to occur. In a subsequent verbal conversation with Wenzel and Spradley, Malone affirmed his concerns about discussions that the District was having with bargaining unit employees and again told the District to stop such discussions.

In the face of the Association's broad non-communication directive regarding the station changes, backed up by a warning of potential legal action, the District's assertion that it decided to remove the employees from the Design Committee in response to these communications is not only understandable, but convincing. Although the Association argues that Malone did not specifically reference the Design Committee members in his communications, Malone also neither identified the specific conversations that were the basis of his objections nor exempted the discussions with employees in the Design Committee from his directive. Malone only told Wenzel and Spradley that he objected to conversations that the District was having with employees about issues related to the changes to Station 1 and 3. Malone's demand to bargain was very broad, covering any mandatory topics related to Station 1 and 3 staffing, location, and operations. Because the Design Committee was addressing issues that could fall within this demand, the District reasonably concluded that Malone's February 29 letter and subsequent verbal direction to stop talking with employees about such matters applied to the Committee discussions. Indeed, given the Design Committee's focus, Malone's letter and verbal direction were essentially a demand to remove the bargaining unit employees from that Committee.

The Association asserts that the fact that the District removed the employees from the Design Committee only five days after a somewhat contentious April 25 bargaining session supports a conclusion that the employees were removed due to the protected activity during that meeting. A causal relationship may be "based on proximity in time between the protected activity and the employer's action, coupled with attending circumstances that suggest something other than legitimate reasons for the temporal tie." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 787 (1998). Such attending circumstances are not present in this case.

The April 25 meeting was somewhat contentious and both parties certainly voiced their frustrations throughout the meeting. Yet, there is no evidence that the District's frustrations during the meeting were directed at the protected activity relied on by the Association. The Association's own notes show that Wenzel's frustration at the meeting was directed at the Association's failure to identify the mandatory subjects to be addressed in the bargaining and the voluminous information requests. Those notes show no negative response from the District regarding Malone's comment that the Design Committee members told him that the District was closing Station 1. In addition, because the Association failed to identify the specific issues it was seeking to bargain over during the April 25 meeting, the District's decision to remove the

employees from the Design Committee after that meeting to avoid communicating with them about potential bargaining issues is believable.

We also conclude that the District's reason for removing the employees from the Design Committee was lawful. The District did not act because the parties were bargaining over the station changes, but in direct response to the Association's directive to stop communicating about matters related to its bargaining demand with bargaining unit employees. Therefore, the District did not remove the employees from the Design Committee because of protected activity in violation of the "because of" prong of ORS 243.672(1)(a).

The District also did not violate the "in" prong of subsection (1)(a) in removing the employees from the Design Committee. Because we did not find a violation of the "because of" prong, there can be no derivative violation. In addition, we generally conclude that an employer's lawful conduct, when viewed objectively, would not have the natural and probable effect of chilling employees in the exercise of their protected rights. *See Oregon School Employees Association v. Lebanon School District No. 16C*, Case No. UP-53-91, 13 PECBR 292, 299 (1991), *citing to Oregon School Employees Association v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407 n 7 (1990). Here, the natural and probable consequences of the District's lawful conduct in removing the employees from the Committee as a result of Malone's direction to stop communicating about the station changes with employees, when viewed objectively, would not tend to interfere with, restrain, or coerce employees in the exercise of their protected rights in violation of ORS 243.672(1)(a). This allegation will be dismissed.

The District also did not interfere with the existence or administration of the Association in violation of ORS 243.672(1)(b) by removing the employees from the Design Committee. Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." We have explained that subsection (1)(b) is concerned with the rights of the union itself. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008). We have concluded that the District removed the employees from the Committee in an attempt to comply with the Association President's request. Consequently, we do not conclude that such conduct interfered with the existence or administration of the Association. Therefore, the District did not violate ORS 243.672(1)(b) and we will dismiss this allegation.

### Remedy

Because we have determined that the District violated ORS 243.672(1)(e) by implementing proposed changes in employment relations, we are required to enter a cease and desist order. ORS 243.676(2)(b). We will order the District to cease and desist from failing to bargain in good faith under ORS 243.672(1)(e). We will also order affirmative relief "necessary to effectuate the purposes of [the PECBA]." ORS 243.676(2)(c). The usual remedy for a unilateral change violation, besides a cease-and-desist order, is requiring the employer to restore the *status quo* that existed before the unlawful change. *Lebanon Association of Classified Employees v. Lebanon Community School District*, Case No. UP-33-04, 21 PECBR 71, 80

(2005). We see no reason not to order the “usual remedy” in this case. Accordingly, the District is ordered to rescind its unilaterally implemented changes regarding mandatory subjects, consistent with this order.

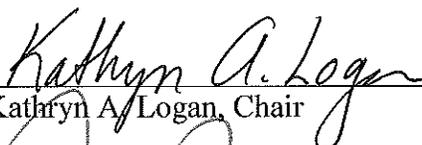
We will not order the District to post a notice of its wrongdoing. We generally order such a posting if we determine a party’s violation of the PECBA was: (1) “calculated or flagrant;” (2) part of a “continuing course of illegal conduct;” (3) committed by a significant number of the respondent’s personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative’s functioning; or (6) involved a strike, lockout, or discharge. *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, 678 P2d 738 (1984). Not all of these criteria need be satisfied to warrant posting a notice. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, 19 PECBR 684, 685 (2002). The District’s violation of the law does not satisfy the criteria for posting a notice of its wrongdoing.

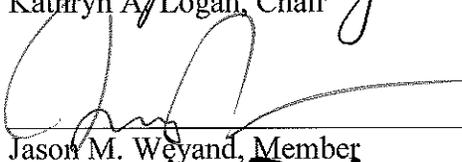
ORDER

1. The District violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* regarding mandatory subjects of bargaining. The District shall cease and desist from violating ORS 243.672(1)(e) and shall restore the *status quo ante* consistent with this order.

2. The other claims are dismissed.

DATED this 20 day of December 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.