

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-2-08

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 3742,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
UMATILLA COUNTY,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

Neither party objected to a recommended order issued on November 21, 2008, by Administrative Law Judge (ALJ) Larry L. Witherell, following a hearing before ALJ Wendy L. Greenwald on June 19, 2008, in Salem, Oregon. The record closed on August 8, 2008, upon receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, Oregon AFSCME Council 75, Eugene, Oregon 97401, represented Complainant.

Douglas R. Olsen, County Counsel, Umatilla County Counsel's Office, Pendleton, Oregon 97801, represented Respondent.

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On January 16, 2008, Oregon AFSCME Council 75, Local 3742 (Union) filed an unfair labor practice complaint against Umatilla County (County), alleging that the County violated ORS 243.672(1)(a), (c), and (e). The County filed a timely answer.

The issues in this case are:

1. Did the County violate ORS 243.672(1)(a) or (c) when
  - a) during an August 21, 2007 grievance meeting, Youth Services Director Charles Logan-Belford stated he would take away on-call assignments from probation counselors;
  - b) on September 18, 2007, the County removed the probation counselors' on-call duties and compensation and reassigned detention housing authority to on-shift group worker IIs; and
  - c) on September 18, 2007, Logan-Belford threatened to lay off three employees if the Union sought reclassification and additional compensation for the group worker IIs?
2. Did the County violate ORS 243.672(1)(e) by failing to give the Union notice and an opportunity to bargain over the removal of on-call duties from probation counselors and the assignment of detention housing authority to group worker IIs?

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

#### Introduction

1. The Union, a labor organization, is the exclusive representative of a bargaining unit of all full-time and part-time County employees, excluding confidential and supervisory employees.
2. The County is a public employer within the meaning of ORS 243.650(20).
3. Jason Weyand is the Union's legal counsel and local business representative.
4. During all relevant times, the following individuals held County positions:

Ross Akey	Detention Supervisor;
James Barrow	Director of Administrative Services and Human Resources;
Charles Logan-Belford	Administrator of Youth Services;
Connie Caplinger	Director of Health and Human Services and Executive Assistant to the Board of Commissioners;
Dennis Doherty	Umatilla County Commissioner;
Bill Hansell	Umatilla County Commissioner.

5. The Union and the County were parties to a collective bargaining agreement effective July 1, 2004 through June 30, 2007. They presently are parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2010.

Probation Counselors, Group Workers, and On-Call Duty

6. The Union represents employees in the County's youth services division, which includes group workers and probation counselors.

7. Probation counselors provide formal and informal supervision of youth who are on probation. They oversee compliance with court orders; meet with parents and work with schools; assist youth and families in developing resources for rehabilitation; prepare court reports; and ensure that youth progress through the system governing criminal behaviors.

Probation counselors work with police departments and the sheriff's office regarding housing decisions for detained youth. When a youth is taken into custody, the law enforcement agency contacts the County's youth services division. A probation counselor decides whether and where the youth is to be housed (detention housing decision) by the County. Probation counselors know the families involved and the youth in custody; they are familiar with the applicable statutes; and they determine whether it is safe (for the youth, family members, and others) to detain or return the youth to the home. In 1999, the County gave group worker IIIs the same authority as probation counselors to make detention housing decisions.

8. Prior to September 18, 2007, only probation counselors, group worker IIIs, Administrator of Youth Services Logan-Belford, and Detention Supervisor Ross Akey made detention housing decisions. Prior to September 18, 2007, group worker IIs were not authorized to make detention housing decisions. Group worker IIs do not work with families; they are not familiar with a youth's home situation; and they lack training for making detention housing decisions.

9. Prior to September 18, 2007, probation counselors were required to be on-call in order to receive calls and make decisions about detention housing. The on-call counselor responded by calling the detention staff and/or the police officer involved in order to learn about the situation; determine whether it was a lodgeable offense; determine whether the youth was sought on a warrant; and determine whether there were other reasons that required the youth to be lodged in County detention facilities. As a result, the on-call probation counselor was required to be available by cell phone. If the counselor was to be unavailable, he or she arranged for another probation counselor or Logan-Belford or Akey to provide coverage. Group worker IIIs were not authorized to serve on-call duty.

10. Since 1990, probation counselors have been assigned on-call duties on a rotating schedule. Initially, on-call was for an entire week and the counselors carried pagers, remained within pager range, and responded within a specific time limit. Later, cell phones substituted for pagers and the geographic restrictions lessened.

In 1999, the director of the juvenile department changed the on-call practice. In order to limit the amount of compensatory time that counselors earned, the on-call schedules were limited to weekends, from 5:00 p.m. Friday to 8:00 a.m. Monday. Probation counselors were allowed to call Logan-Belford as back-up if they needed to go beyond their cell phone coverage or needed to turn the phone off for a period of time.

11. On July 19, 2004, Logan-Belford issued a clarification to the on-call practice. The memorandum informed the probation counselors that

“[w]hen you are on-call you are to always be available by phone. Recently there have been some situations in which I have received a call notifying me that detention staff had attempted to contact the on-call staff but were unable to get in contact. Please remember to let detention know when you are not going to be at home, providing them with a number that you can be reached if other than the cell phone. If for some reason you are going to be in an area where there is not cell phone service or involved in an activity in which you can't have the cell phone on, you can call me and I will cover for you during that time, again letting detention know that I will be the contact.”

12. On March 26, 2007, Logan-Belford issued the most recent on-call schedule covering the weekends from April 13 through July 23, 2007.<sup>1</sup> The March 26 memorandum also reminded the staff that “On call starts at 5:00 p.m. on Friday and ends at 8:00 a.m. on Monday, unless Monday is a Holiday in which case on call ends at 8:00 a.m. on Tuesday. Administrator is on – call as back – up to primary on – call counselor and in cases of approval to go over capacity.”

#### Article 16.5 of the Collective Bargaining Agreement

13. Under Article 16.5 of the parties’ 2004-2007 collective bargaining agreement, mental health employees received \$40.00 for weekly on-call service and \$52.00 for weekend and holiday on-call service. Probation counselors received one and one-half hours of compensatory time for each call received while they were on-call.

14. In January 2007, the County and Union began negotiations for the 2007-2010 collective bargaining agreement. The County’s negotiation team included Barrow, Caplinger, Hansell, and Collette Blakely. The Union’s negotiation team included Union Representative Jason Weyand and Probation Counselor Josh Paullus.

Both the County and the Union proposed changes concerning on-call language and Article 16.5 and ultimately agreed on new language for the 2007-2010 collective bargaining agreement. However, the parties had differing views and interpretations of the meaning and application of the new language in Article 16.5.<sup>2</sup>

The County’s proposal recognized that by 2007, the County no longer operated mental health programs, and therefore proposed to eliminate the language in Article 16.5 referencing the mental health workers. The County proposed that Article 16.5 read as follows:

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<sup>1</sup>Based on the March 26, 2007 on-call schedule, five probation counselors were employed during the time and events under consideration: C. Kenny, D. Moreno, B. Spencer, J. Williams, and J. Paullus.

<sup>2</sup>We need not evaluate the negotiation process over Article 16.5, the reasons for the different interpretations, or the validity of either party’s interpretation concerning Article 16.5. These matters are not determinative of the issues that must be addressed and resolved by this proceeding. As a result, we give summary treatment to the negotiations in relation to Article 16.5.

- “A) Employee will provide an after hours accounting for length of time, time of service and resolution or comments.
- “B) Compensatory time shall be in fifteen (15) minute increments. Phone contact and direct client contact shall be at time and one half (1 1/2).
- “C) Juvenile workers that are on-call shall receive one and one half (1.5) hours of compensatory time for each call received.”

The Union offered a counterproposal for on-call language. The Union believed that certain employees, particularly the water department employees, had not been eligible for on-call compensation under the 2004-2007 collective bargaining agreement. The Union also considered it unfair that probation counselors received compensation pay only if they were actually called for an incident. If they did not receive a call during their on-call service, they did not receive compensation. As a result, the Union wanted to change the language so counselors would receive compensation for being on-call whether or not they received a call. In addition to striking the language relating to the mental health programs, the Union initially proposed to change Article 16.5 to read as follows:

“Employees who are required to be on-call shall be compensated one hour of straight time pay for each four hours of on-call time served. An employee is on-call when specifically assigned to be available for work outside normal working hours. Criteria for determining on-call status include:

- “Restriction of employee’s movement (geographic).
- “Specified response time to work issues.
- “Limits on use of time outside of normal hours.”

The Union subsequently proposed Article 16.5 to read as follows:

“Employees who are required to be on-call shall be compensated one hour of **compensatory time at the straight time rate** for each six hours of on-call time served. An employee is on-call when specifically assigned to be available for work outside normal working hours. Criteria for determining on-call status include:

- “Restriction of employee’s movement (geographic).
- “Specified response time to work issues.
- “Limits on use of time outside of normal hours.”

At some point during negotiations, the parties discussed the on-call situation. Caplinger asked if the Union thought probation counselors fit the criteria set out in the Union's proposals. Caplinger doubted that probation counselors were subject to geographic restrictions or even met the criteria set forth in the Union's proposal. Caplinger suggested that when probation counselors went outside cell phone service, then an administrator covered the duty. Paullus disagreed and asserted that he was not able to go anywhere without cell phone service. The conversation ended and the parties moved onto other issues. The parties did not revisit the issue during subsequent negotiation sessions.

The Union's second proposal for Article 16.5 ended up in the 2007-2010 collective bargaining agreement.

"Employees who are required to be on-call shall be compensated one hour of compensatory time at the straight time rate for each six hours of on-call time served. An employee is on-call when specifically assigned to be available for work outside normal working hours. Criteria for determining on-call status include:

- "• Restriction of employee's movement (geographic).
- "• Specified response time to work issues.
- "• Limits on use of time outside of normal hours."

The new collective bargaining agreement went into effect on July 1, 2007.

### Conditions in July 2007

15. On July 10, 2007, Akey issued a written reminder to the detention staff.

"I had a conversation with Chuck [Logan-Belford] today and there are a few issues that folks need to be reminded about.

"\* \* \* \* \*

"On-call – Please remember that Chuck is on-call from 8am Monday morning until 5pm Friday evening. From 5pm Friday evening until 8am Monday morning the on-call probation counselor assigned at the time is the contact person. No other probation counselor is to be contact [*sic*] nor is a probation counselor to be contacted when Chuck is on-call."

16. The County formalized its existing policy and procedure regarding on-call authorization for detention of youth in *Policy 1.1*, effective August 2007. This policy directive was issued after the 2007-2010 collective bargaining agreement went into effect, and after the Union filed a grievance concerning compensation for on-call duty. (See Finding of Fact 22). The policy states:

**“Policy Title: On-Call To Authorize Detention**

**“Policy Number: 1.1**

**“Effective: August 2007**

**“I. Policy**

“In compliance with ORS 419C.103(5) and ORS 419C.109, Youth Services administrator and/or probation counselor as scheduled will be on-call at all times after normal working hours, weekends and Holidays to ‘effect disposition’ on youth taken into custody by a peace officer.

**“II. Procedures**

- “• Youth Services administrator will be on - call at all times after normal working hours, weekends and Holidays either as the primary on - call contact person or as back - up to the scheduled on - call primary contact if other than administrator.
- “• Youth Services administrator will be on - call at all times to authorize going over capacity in detention.
- “• Probation counselors will be on - call as scheduled by Youth Services administrator.
- “• If probation counselor is scheduled to be on - call and he/she knows in advance that he/she will not be available to accept calls for all of or part of the scheduled time, he/she will attempt to exchange scheduled time with another probation counselor. If unable to exchange with another probation counselor, he/she will notify administrator who will cover scheduled time for probation counselor.
- “• If scheduled time is exchanged, the originally scheduled probation counselor will update the detention copy of the on - call schedule and will notify the administrator.

- “• If while on - call the probation counselor will unexpectedly be unavailable to accept calls, the probation counselor will contact detention to notify them [*sic*] of his/her unavailability at which time all calls will be answered by the administrator. When the probation counselor will again be available to accept calls, he/she will contact detention.

### “III.           **Schedule**

- “• Youth Services administrator is on - call as primary contact person Monday through Thursday after normal working hours (5:00p m.) until 8:00a m., and on all Holidays that fall on a day other than Friday or Monday.
- “• Administrator will be on - call as back up to scheduled probation counselor.
- “• Probation counselors will be scheduled to be on call starting Friday at 5:00p m. through Monday at 8:00a.m.
- “• If a Holiday falls on a Friday, probation counselor will be scheduled to begin on - call on the Thursday prior to the Holiday at 5:00p m.
- “• If a Holiday falls on a Monday, probation counselor will be scheduled to be on call until Tuesday at 8:00a m.

### “IV.           **Compensation**

- “• Probation counselor will be compensated a minimum of 2 hours compensatory time for each incident handled, noting that a single incident may require multiple phone calls.” (Bold in original.)

17. The detention staff, which includes probation counselors and group worker IIs and IIIs, hold regular staff meetings. At the staff meeting on August 16, 2007, attended by Logan-Belford, Akey began by reminding the staff that only group worker IIIs were to make detention housing decisions. If a group worker III was not working on the shift, staff was to contact Logan-Belford or the on-call probation counselor in order to secure lodging authorization. Akey then warned, “If staff other than those authorized to lodge give such authorization, this may result in disciplinary action.”

## The Grievance and Logan-Belford's Statements

18. After the 2007-2010 collective bargaining agreement went into effect on July 1, Paullus and other probation counselors continued to submit requests for compensation time based on their on-call duty and the March 26, 2007 on-call schedule. At some point in mid-July 2007, Paullus heard rumors that compensation time was being denied for on-call duty. As a result, Paullus went to the office manager and inspected his timecard. The timecard indicated that compensation time for his on-call duty had been denied by the administration.

19. Digna Moreno, another probation counselor, also heard rumors that the County was denying on-call compensation. Moreno inspected her timecard, which also indicated that her on-call compensation time had been denied by the administration.

20. Paullus and Moreno informed Union representative Weyand that the County had denied compensation for their on-call duty.

21. Weyand then had a personal conversation with Logan-Belford during which the on-call issue was raised. Weyand and Logan-Belford were in fairly regular contact. During the conversation about the denial of on-call compensation, Weyand told Logan-Belford the Union would have to grieve the denial because the Union did not agree with the County's interpretation. Logan-Belford responded that if the Union pursued the grievance and won, the County would take away on-call for the probation counselors. At the time, Weyand considered the comment to be idle bluster.<sup>3</sup>

22. On July 31, 2007, Weyand notified Logan-Belford by e-mail that the Union was filing a grievance over the County's denial of compensation for on-call duty.

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<sup>3</sup>While Weyand's testimony is a characterization of Logan-Belford's statement, we nevertheless find that Logan-Belford made the statement and that it conveyed such an intent. No evidence credibly disputes Weyand's version of events. Logan-Belford testified that he did not remember when he had conversations with Weyand. He testified, "We had several conversations about the language of the -- it was primarily e-mails back and forth to each other about the language that was in the contract," but he did not recall "discussions with [Weyand] regarding various issues that had arisen in Youth Services." He tried to minimize his conversations with Weyand as "informal discussions with each other as we were at the racquetball, \* \* \* he would often ask me questions about how things were going, and again, I always thought, you know, we're in a locker room having these discussions, that they were just informal discussions."

“This is notice that the Union is grieving the denial of on-call pay and call back pay for Josh Paullus and other employees in your department under the new Contract. This grievance is also a group grievance and is intended to cover all employees in your department that have been or will be in the near future denied on-call pay and call back pay. \* \* \* I would like to fast track this issue and get to arbitration, because it appears that this issue has been run up the flag pole and we are unlikely to get a change in the County’s interpretation of the language.”

23. Article 13.1 of the collective bargaining agreement provides that disputes concerning the application, interpretation, or enforcement of the agreement shall be resolved by the grievance procedure. In Step 1, the Union or an employee has 10 working days to bring the dispute to the appropriate supervisor. If the dispute remains unresolved, then in Step 2 the Union may present the grievance before the County commissioners. If the dispute still remains unresolved, Step 3 provides that the union may request arbitration.

24. In early August, probation counselor Moreno and Logan-Belford had a conversation about on-call duty. Logan-Belford told Moreno to read the contract language, and that the probation counselors did not meet the new requirements for on-call compensation. Logan-Belford then said if this was going to be a big deal, he would take away on-call duties from the probation counselors.

25. On August 21, 2008, the parties held a Step 1 grievance meeting. Weyand, Paullus, and Moreno represented the Union, and Logan-Belford and Caplinger represented the County.

At the meeting, the Union representatives presented documents relating to the on-call policies and explained why the on-call provisions applied to the probation counselors. Caplinger stated that the Union knew that changes in the new contract would impact the probation counselors. Weyand disputed that contention. The meeting became somewhat heated. Weyand responded that it was foolish to assume the Union would agree to something that was going to take compensation away from its members. Weyand claimed the County was exercising “gotcha” bargaining. Caplinger asked Weyand if he remembered discussing restrictions during negotiations. Weyand responded that the new language was to protect other groups and that the new language was not intended to affect the juvenile services on-call personnel.

From the tenor of the meeting, Weyand believed that the County representatives would not reconsider their decision and that the Union would have to take the grievance

to Step 2. As a result, Weyand stated, “well, let’s get this taken care of, let’s wrap this meeting up and get this case to the commissioners for the step 2 hearing and that way we can move it on to arbitration.” Logan-Belford then stated that if the Union won the grievance, the County would take away on-call pay.<sup>4</sup>

26. On August 21, 2007, either at the meeting or immediately thereafter, Logan-Belford provided Weyand with the County’s written response to the grievance in which the grievance was denied: “Youth Services employee’s [*sic*] when on-call would not be entitled to receive the compensatory time as outlined in section 16.5 of the contract since they would not by the criteria be considered on-call under this contract language.”

27. On August 24, 2007, Weyand notified the Umatilla County Board of County Commissioners “that the Step 1 response to the above referenced grievance was not satisfactory, and the Union is advancing the grievance to Step 2.”

28. The content of the Union’s grievance form states:

“The County violated Article 16.5 by failing to pay Josh Paullus, Digna Moreno and all other probation counselors on-call pay. The Contract states: ‘An employee is on-call when specifically assigned to be available for work outside normal working hours.’ Attached, you will find a schedule of which employee is assigned to be on-call on which dates. In addition, you will find a memo from Mr. Belford outlining the

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<sup>4</sup>We credit Weyand’s and Moreno’s testimony and find that Logan-Belford threatened to take away on-call compensation if the Union pursued the grievance. Caplinger testified that the August 21 meeting was “tense.” Yet she could not “recall” any threat being made by Logan-Belford. Logan-Belford, however, did not consider the meeting as tense: “I don’t have any memory of the meeting, having any tone other than its usual.” He denied making a statement that if the grievance was pushed forward he would take away on-call from the counselors. When asked, “Did you say anything that might have sounded like that,” he answered, “I did mention that there were options and the options were that we could stop the current practice of on-call or we could talk about other options of compensation since they did not meet the contract language.” When asked, “Do you recall later on in the conversation making any type of a statement that if you go forward, we’re going to take away on-call pay,” Logan-Belford initially answered, “Again, I mentioned, I believe, a few times in that conversation that that was an option.” However, it was necessary for the County’s counsel to follow up: “And when you say an option, an option for what?” Logan-Belford answered: “That an option would be to take the on-call away [*due*] to them [*sic*] not meeting the criteria of the currently negotiated contract language and then there was the other option to talk about other ways that we could work on compensating the probation counselors for being on-call.”

responsibilities of staff who are on call and an 'On-call Procedures' memo also distributed to employees. Note that all of these documents specifically state that employees are 'on-call.' These staff have received on-call pay for years under the previous contracts and it was well established with the County that this was part of the job requirements for probation counselors.

"The Step 1 grievance was denied because the County is asserting that the probations [*sic*] counselors do not meet the three additional criteria added to the Contract in recent negotiations (restriction of employee's movement, specified response time, and limits on use of time outside of normal work hours). Those criteria were added to clarify that employees could be on-call even if their supervisors did not label their work status as 'on-call.' The purposes of this language expand [*sic*] the on-call language to cover all employees not just those in Youth Services. The idea that the Union proposed this language with the intent or the understanding that it would eliminate on-call pay for the only group of employees regularly assigned on-call duty is ridiculous.

"\* \* \* \* \*

"Adjustment required:

"The County should compensate all Probation Counselors for all time spent on-call per Article 16.5 and do so as long as they are required to perform on-call duties."

29. On September 18, 2007, James Barrow, director of administrative and human resources, telephoned Weyand and stated he was granting the grievance. Barrow confirmed the decision by letter.

"[A]fter review of the collective bargaining agreement and the materials submitted by AFSCME and Management pertaining to the definition of 'On Call', the County has determined that the subject grievance should be granted and the H&HS and Youth Services Management decisions in July and August that denied comp time for weekend 'on-call' duties should be reversed. Comp time will be credited for the grievant and other affected employees as provided in Article 16.5."

## Logan-Belford's Response, the Adverse Action, and Unilateral Change

30. On September 18, 2007, immediately after talking with Barrow, Weyand sent an e-mail to employees Paullus and Moreno, informing them that they had won the grievance and "that they should be seeing some back pay in their checks in the near future and that basically the issue was resolved."<sup>5</sup>

31. On September 18, 2007, within an hour after the e-mail to Moreno and Paullus, Moreno informed Weyand that Logan-Belford had taken on-call duties away from probation counselors. Logan-Belford went to the detention facility and announced that the probation counselors would no longer need the on-call schedule.

32. On September 18, 2007, shortly after noon, Logan-Belford distributed a memorandum to all the probation counselors and group workers announcing that on-call duty was taken away from the probation counselors and that group worker IIs are now authorized to make detention housing decisions. The memorandum states:

"As of September 18, 2007, probation counselors will no longer be on-call to authorize detention for youth.

"As of September 18, 2007, in addition to Group Worker III's [*sic*], Group Worker II's [*sic*] are given authority to authorize detention of youth if a Group Worker III is not working the scheduled shift.

"The Administrator, Charles Logan-Belford will continue as has been the practice to be available by home phone or cell phone to authorize detention if the facility is at capacity and the authorization would take the facility over capacity, and/or when a Group Worker II or III is not working the scheduled shift.

"The Detention Supervisor, Ross Akey will be available by home phone or cell phone as back-up to the Administrator at all times to authorize detention which would result in the facility going over capacity or a Group Worker II or III is not working the scheduled shift.

"This overrides any previous policy and procedure or memos regarding on-call."

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<sup>5</sup>Since on-call assignments provided for compensatory time, rather than actual monetary compensation, Weyand's declaration was a technical misstatement

33. On or shortly after September 18, 2007, the group worker IIs were assigned to make detention housing decisions. Authority to make detention housing decisions had previously been limited to group worker IIIs (while on regular duty) and probation counselors (while on regular duty or on-call duty).

34. The County did not give the Union any notice of its intent to change the policies and practices and terminate on-call duties for probation counselors and assign detention housing decisions to group worker IIs, as set out in Logan-Belford's September 18, 2007 memorandum.

35. The youth services division holds regular staff meetings attended by employees and supervisors. At the staff meetings, the employees and supervisors discuss situations involving the youth, events going on in the County, changes in budgets or policies, how the department is operating, and general information. The information and policies contained in Logan-Belford's September 18 memorandum were not announced or discussed at any staff meeting.

36. Shortly after September 18, 2007, two group worker IIs, one of whom was Chris Bodewig, individually contacted Weyand. Bodewig and the other group worker IIs expressed concern that since the County had assigned responsibility for the housing decisions to the group worker IIs, they were performing additional duties without any additional compensation.

37. After talking to Bodewig and the other group worker IIs, Weyand contacted County Commissioners Bill Hansell and Dennis Doherty. Hansell and Doherty suggested that Weyand discuss the problem with Logan-Belford.

38. Weyand then talked with Logan-Belford about the removal of on-call duties from probation counselors and about reclassification of group worker IIs. Weyand stated that he and the employees believed that Logan-Belford removed on-call in retaliation for the grievance, but that Weyand nevertheless wanted to find a way to resolve the problem and restore on-call to the counselors. Weyand reminded Logan-Belford that he (Logan-Belford) had previously said he would take on-call away if the Union won the grievance. Logan-Belford responded, "I did warn you about that."

39. Weyand informed Logan-Belford that group worker IIs were doing more of the group worker III's work without any additional compensation. Weyand said there were several reasons to reclassify the group worker II employees, that they should "reclassify at least one person on each shift to a group worker III because of this change in the on-call procedures as well as other issues that were going on." At this point, Logan-

Belford stated, “well, if you do that, if you push it and you’re successful, we’ll just lay off three people.” Weyand was now no longer interested in talking further with Logan-Belford and the conversation ended. Fearing further adverse consequences for the employees, Weyand was not willing to pursue reclassification efforts for the group worker IIs.

40. The County did not consider changing the responsibilities and duties of the group worker IIs until late July or early August 2007, after the Union filed the grievance requesting compensation for probation counselors’ on-call duty.

41. In July 2007, unrelated to the unfair labor practice allegations, Logan-Belford initiated conversations with Weyand about Logan-Belford’s desire to reclassify the group worker IIIs into an enhanced lead worker position; to create two new control room technician positions; and to convert one of the probation counselors to a management position. Logan-Belford requested the Union’s assistance in securing support for the changes from the County commissioners. Logan-Belford provided the Union with proposed position descriptions for converting probation counselors to managers and for changing the group worker III position descriptions.

All of these proposed actions would have had a financial impact. During this time period, because of financial conditions, the County was under a hiring freeze. During the conversations, Weyand asked how Logan-Belford could afford to pay for these changes. Logan-Belford stated that he had more than enough money if he could get by the commissioners and he asked for the Union’s support.

On August 2, 2007, Weyand wrote to Logan-Belford in response to Logan-Belford’s request for support. In the letter, Weyand explained, “We hope to work with you during this process to ensure that any changes are in the best interests of the County, the employees and the Department. Overall, employees are very supportive of the ends you are trying to achieve with the proposed changes. As usual, the devil lies in the details, and we have some concerns and some alternative suggestions that would garner the Union’s support.”

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County violated ORS 243.672(1)(a) when it threatened to take away probation counselors’ on-call duties.

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to interfere with, restrain, or coerce an employee either “because of” or “in the exercise” of rights protected under the Public Employee Collective Bargaining Act (PECBA).

To determine whether an employer violated the “because of” prong of subsection (1)(a), we examine the reasons the employer took the disputed action. If the employer acted “because of” an employee’s exercise of PECBA rights, we will find the employer’s actions unlawful. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212 (2007), *motion for rehearing and reconsideration denied*, 22 PECBR 298 (2008).

To determine whether an employer violated the “in the exercise” prong of subsection (1)(a), we look at the effect of the employer’s actions. If the natural and probable effect of the employer’s conduct, when viewed objectively, is to deter employees from exercising their PECBA-guaranteed rights, we will conclude that the employer violated the “in the exercise” prong of subsection (1)(a). *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). There are two types of “in the exercise” violations. One derives from the “because of” violation. “A ‘because of’ violation will almost always restrain, coerce, or interfere with the exercise of protected rights.” *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354 (2008). The other occurs when an employer’s conduct independently violates the “in the exercise” prong, usually by making coercive or threatening remarks. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168 (2007), *appeal pending*.

In July 2007, the Union grieved the County’s denial of on-call compensation for two probation counselors. The County and Union met on August 21, 2007, and discussed the grievance. When Union Representative Weyand realized that the County would not change its position, Weyand stated that the Union would take the grievance to Step 2 and to arbitration, if necessary. Director of Youth Services Logan-Belford responded that if the Union pursued the grievance and won, the County would take away on-call duty from the probation counselors.

At issue is Logan-Belford’s threat of adverse action in response to the Union’s pursuit of a grievance. The right to pursue a grievance under a collective bargaining agreement is a fundamental PECBA-protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 (1986). An employer who threatens employees with reprisals for engaging in protected activity may violate the “in the exercise” prong of subsection (1)(a). *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 7999 (1985). Therefore,

it is most appropriate to analyze the County's actions as an independent "in the exercise" violation of subsection (1)(a).

Logan-Belford's statement was a threat that the County would take away on-call duties from probation counselors if the Union pursued and won its grievance. Employees would naturally be reluctant to pursue a grievance if it could result in their loss of on-call duties and the attendant benefits. We conclude that this threat would have the natural and probable effect of discouraging bargaining unit members from pursuing grievances or engaging in similar protected activities. Accordingly, we conclude that Logan Belford's statements violated the "in the exercise" prong of subsection (1)(a) and will fashion a remedy to address this violation.

To determine whether Logan-Belford's statements also violated the "because of" prong of subsection (1)(a) would add nothing to our remedy. Therefore, we do not address this allegation here.

3. The County violated ORS 243.672(1)(a) when it removed on-call duty from the probation counselors.

Based on the County's March 26, 2007 schedule, probation counselors served on-call duty. The counselors applied for on-call compensation but the County denied it. The Union grieved the County's denial of on-call compensation. Logan-Belford told the Union that if it pursued the grievance, the County would take away on-call duties from probation counselors. The Union pursued the grievance to the next step and the County's human resource director granted the grievance. Within one hour after the grievance was granted, Logan-Belford took away on-call duties for probation counselors and assigned detention housing decisions to group worker IIs and IIIs.<sup>6</sup>

The Union alleges that the County violated both the "because of" and the "in the exercise" prongs of subsection (1)(a) when it took on-call duties away from probation counselors.

To determine whether an employer violates the "because of" prong of subsection (1)(a), we look to the reasons for the employer's conduct. If an employer takes action "because of" employees' exercise of protected rights, the employer's actions are unlawful. *Lebanon Education Association v. Lebanon Community School District*, 22 PECBR at 351. We

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<sup>6</sup>Group worker IIIs already had authority to make detention housing decisions. However, this was a new responsibility for group worker IIs. Group worker IIs would only make detention housing decisions if no group worker III was available on shift.

begin our analysis by examining the reasons for the employer's actions. We then decide if those reasons are lawful. If all the reasons are lawful, we dismiss the complaint. If all the reasons are unlawful, or the purportedly lawful reasons are only a pretext for the employer's illegal conduct, the complainant will prevail. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004).

The probation counselors engaged in protected activity when the Union pursued the on-call grievance on their behalf and prevailed. Pursuit of a grievance under a collective bargaining agreement is a PECBA-protected activity. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, 9 PECBR at 8650. The County then took adverse action against the probation counselors. We previously determined that Logan-Belford violated subsection (1)(a) when he threatened to take away on-call if the Union pursued and won its grievance. On the same day the Union won its grievance, Logan-Belford followed through on his threat and took away probation counselors' on-call duties. The County's action adversely affected probation counselor compensation by eliminating weekend on-call compensation.

In determining if there is a sufficient nexus between the protected activity and the employer's actions, we look at several criteria. One is the timing of the employer's actions. We may infer a causal connection when an employer's action closely follows in time after the employee's protected activity. Here, the County took away on-call duty within an hour after the employees won their grievance. The timing of the County's action suggests something other than legitimate reasons. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 787 (1998). In addition, we note that the record is devoid of any legitimate, non-discriminatory reason for Logan-Belford's action. We also consider Logan-Belford's prior threats. When an employer threatens to act based on protected activity and then subsequently acts to fulfill that threat, we will infer an unlawful motive. *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 183.

Here, Logan-Belford threatened to take on-call duties away from the probation counselors if they won the grievance. Then, after the employees won the grievance, he followed through on the threat. This is persuasive evidence that the County acted "because of" the protected activity.

We find that the Union's successful pursuit of the grievance was the motivating factor in the County's decision to remove on-call duties from the probation counselors. Accordingly, we conclude that the County violated the "because of" prong of subsection (1)(a).

We also conclude that the County committed a derivative violation of the “in the exercise” prong of subsection (1)(a). A “because of” violation almost always restrains, coerces, or interferes with the exercise of protected rights. *Lebanon Education Association v. Lebanon Community School District*, 22 PECBR at 351.

Having found both a “because of” and a derivative “in the exercise” violation, it is not necessary to consider whether there is an independent “in the exercise” violation. It would add nothing to the remedy.

4. The County violated ORS 243.672(1)(a) when Logan-Belford threatened to lay off employees if the group worker IIs sought reclassification and additional compensation.

On September 18, 2007, the County assigned detention housing authority to group worker IIs. Until then, the authority had been available to group worker IIIs and higher. The Union sought reclassification and additional compensation on behalf of the group worker IIs for performing this new duty and assuming this new authority. Logan-Belford responded that if the Union were successful in its pursuit of a grievance over this issue, he would lay off three employees. Based on this threat, the Union declined to pursue reclassification and compensation for the group worker IIs.

We generally analyze allegations of unlawful threats, where there is no accompanying employer action, under the “in the exercise” prong of ORS 243.672(1)(a). Although the County threatened to lay off employees if the Union pursued a grievance, it never acted on its threat. We need not apply the “because of” test when the employer does not act based on its threats. *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 604 (2004). Thus, we consider only whether the County’s actions constitute an independent violation of the “in the exercise” provision of subsection (1)(a).

When deciding an independent “in the exercise” claim, we determine whether the natural and probable effect of the employer’s conduct, viewed under the totality of the circumstances, would tend to interfere with employees’ exercise of protected rights. *Polk County Deputy Sheriff’s Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995); *Oregon Public Employees Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). We apply an objective standard. *Tigard Police Officers Association v. City of Tigard*, 8 PECBR 7999. Neither the subjective impression of employees nor the employer’s motive is relevant. *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201, 219-220 (1989). Rather, we are concerned with the probable consequences of the County’s actions.

Group worker IIs have a PECBA-protected right to seek reclassification and compensation for additional duties. Logan-Belford stated that if the employees exercised that right, he would lay off three people. Under an objective test, employees would naturally and probably forego their protected right to seek reclassification if doing so would cost three of them their jobs. Accordingly, we find that the County's threat to lay off three employees if they exercised their protected rights violated the "in the exercise" prong of subsection (1)(a).

#### Subsection (1)(c) Allegation

ORS 243.672(1)(c) makes it unlawful for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." The Union contends that the County's actions regarding the probation counselors and the group worker IIs violated subsection (1)(c). We have determined that these same actions violated subsection (1)(a). As a result, it is unnecessary to decide whether the County's conduct also violated subsection (1)(c). It would add nothing to the remedy to find a subsection (1)(c) violation. *Lebanon Education Association v. Lebanon Community School District*, 22 PECBR at 355.

#### Subsection (1)(e) Allegation

5. Because of our disposition of the other issues, we do not decide if the County violated ORS 243.672(1)(e) when it removed on-call duties from the probation counselors and increased the duties of the group worker IIs.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to refuse to bargain in good faith with the employer's exclusive representative. The employer's good faith obligation requires it to bargain before it changes a mandatory condition of employment. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89, *supplemental order*, 19 PECBR 317 (2001). The Union asserts the County violated subsection (1)(e) when it: (1) took on-call duty away from the probation counselors; and (2) assigned group worker IIs the authority to make detention housing decisions.

We need not reach these issues. To remedy the County's violations of subsection (1)(a), we will order the County to reinstate on-call duties for the probation counselors.<sup>7</sup>

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<sup>7</sup>This does not forever prohibit the County from transferring on-call duties. It may do so if it acts for legitimate, non-discriminatory reasons and only after it completes any required negotiations.

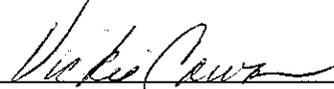
There is thus no continuing requirement to bargain. We will dismiss this portion of the complaint.

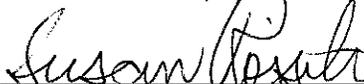
ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(a).
2. The County shall reinstate on-call duties for probation counselors and make the probation counselors whole for any and all wages, compensatory time, and benefits they would have received had the County not taken away their on-call duties.
3. The remainder of the complaint is dismissed.

DATED this 30<sup>TH</sup> day of April 2009.

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\*Paul B. Gamson, Chair

  
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Vickie Cowan, Board Member

  
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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Chair Gamson Concurring.

I concur in the result but not in all of the reasoning.

  
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Paul B. Gamson, Chair