

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-3-04

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 503, )  
OREGON PUBLIC EMPLOYEES UNION, )

Complainant, )

v. )

STATE OF OREGON, )  
JUDICIAL DEPARTMENT, )

Respondent. )

RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This Board heard oral argument on November 17, 2004, on Respondent's objections to a proposed order issued by Administrative Law Judge (ALJ) B. Carlton Grew on September 3, 2004, following a hearing on April 13, 2004, in Coquille, Oregon. The hearing closed on May 6, 2004, upon receipt of the parties' post-hearing briefs

Elizabeth Baker, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant

Linda J. Kessel, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

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Service Employees International Union, Local 503, Oregon Public Employees Union (SEIU or Union), filed an unfair labor practice complaint on January 13, 2004, alleging that the State of Oregon, Judicial Department (Department), violated ORS 243.672(1)(a) by ordering employees not to discuss Union-related matters

during work time, while allowing the discussion of other nonwork-related topics during that same time. On March 8, 2004, the Department timely filed its answer, in which it admitted and denied certain allegations and raised affirmative defenses. A hearing was held on April 13, 2004, at which the parties presented testimony and other evidence.

The issues are:

1. Did the Department prohibit employees from discussing Union representation during work time, while allowing nonwork-related conversations on other subjects, in violation of ORS 243.672(1)(a)?

2. Should the Department be required to pay a civil penalty to the Union, and reimburse the Union's filing fee?

We conclude that the Department violated ORS 243.672(1)(a) when Department managers (1) directed a bargaining unit employee not to discuss Union issues in conversations "in the office," when those conversations routinely included nonwork-related and personal subjects; and (2) directed the employee not to have planned, systematic conversations with other employees on Union issues on work time when other work-time conversations routinely included nonwork-related and personal subjects. We do not award a civil penalty.

Having the full record before it, this Board makes the following:

### RULINGS

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

### FINDINGS OF FACT

1. SEIU is a labor organization which, during the relevant time period, sought to become the exclusive representative of a bargaining unit of approximately 1400 employees employed by the Department, a public employer.

2. The Department is headed by the Chief Justice of the Oregon Supreme Court, Wallace Carson, and his subordinate, State Court Administrator Kingsley Click. Gary Martin, the director of the Department's Personnel Division, reports to Click.

3. Each county's court system is headed by a presiding judge, who has some independence from Carson, Click, and Martin regarding how their particular

workplace is administered. Each county's circuit court has a trial court administrator, who reports to the presiding judge. Richard L. Barron is the presiding judge of Coos County; Edward Jones is the Coos County trial court administrator.

4. The Department's written statewide employment policies do not address employee discussions of Union matters during the work day.

5. The Department does not generally regulate the content of nonwork-related or personal conversations between employees which take place on work time, so long as they are lawful, brief, and do not interfere with their work. Personnel Director Martin believes that Department employees may talk about Union issues on work time in the same fashion as other personal subjects.

6. Trial Court Administrator Jones does not generally prohibit employees from discussing Union issues on work time, if other personal conversations would be permitted during that time. Jones was, at one time, a deputy sheriff and president of the Coos County Association of Deputy Sheriffs.

7. The Coos County courthouse includes two floors of office space and courtrooms. Three judges and approximately 27 regular Department employees work out of offices or cubicles in the courthouse. Approximately 18 staff work on the first floor, and approximately 9 staff work on the second floor.

8. In the summer of 2003, SEIU began a drive to represent employees of the Department in Coos County and throughout the state.

9. Andy Levin is in the group of employees SEIU sought to represent. He works for the Department as a release assistance officer in the Coos County Courthouse. He was one of the supporters of the SEIU effort. Levin has worked for the Department in Coos County for 21 years. Levin's office was on the second floor of the courthouse, but Levin's job took him onto both floors and into almost every work area. He was accustomed to engaging in social conversation with court staff he visited. Levin reports to Jones.

10. Once the organizing drive began, Levin took an active role in urging his fellow employees to attend Union meetings during his travels through the courthouse. Levin testified as follows:

“\* \* \* I went down there specifically when I was going down there for some other purpose, whether it was to deliver a file or to look up a case or pick up my mail because my

mailbox is located in that office also, and I did specifically think in my mind that it was an opportunity to mention to people that, that there was a union meeting that evening and that I hope they could attend that meeting and I did that multiple times during the day, went to different people that I happen to see at their desk reminding them of the meeting, and asking them to come. \* \* \*

11. Levin generally did not interrupt employees who were talking with other employees or the public. He did speak with employees while they were doing routine tasks or data entry. In connection with his Union reminders, Levin would stop at offices he did not normally visit as part of his job, such as the accounting office.

12. Several court employees were opposed to the Union organizing effort or uncomfortable talking about it. Lena Schultz, an employee in the accounting office, and Amie Waddington, an employee in the civil clerk area, complained to Department managers about repeated contacts by Union supporters, including Levin.

13. Schultz complained to Jones in an e-mail dated December 16, 2003. She stated the following:

“Ed, I am beginning to feel harassed by court employees that want a union here. They have a right to feel as they do and I also have a right to feel the way I do. It states in our OJD policy that they are not to do this on court time.<sup>[1]</sup> I have been approached several times during court time, once just a few minutes ago and quite frankly I am tired of being bothered by them and being looked down upon because I don't share their views on a union. It would be nice if a memo went out reminding people this is not to go on during court time. I am not the only one who feels this way there [*sic*] are others that feel the same way and are tired of being harassed.”

14. Waddington complained verbally to her supervisor, Jeff Reentz, who reported the complaint to Jones. At hearing, Waddington explained her complaint as follows:

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<sup>1</sup>Neither party submitted such an OJD (Oregon Judicial Department) policy into evidence

“\* \* \* One time specifically I was in the hallway \* \* \* and [Levin] asked me if I was going to the union meeting that night and I said no, my daughter had a doctor’s appointment and he said, well, you always have some kind of excuse and I had told him, well, you know, you better stop saying that or I’m going to start taking this personally and he said to me, well, good, then maybe you will step up to the plate.

“Q. How did you feel when he said that?”

“A. I was angry. I went directly to my supervisor [Reentz] after that conversation and asked that please, you know, can you send out a general memo, something, you know, restricting all this union talk to break time or lunch time, I was getting -- I felt it was turn [*sic*] into harassment.”

15. After receiving the two complaints, Jones asked Reentz to get more information from Waddington and Schultz; Reentz reported back to Jones that Levin was the employee they were concerned about.

16. Julie Nidever is the supervisor of the nine employees in the Criminal/Juvenile Section, an open area with back-to-back desks separated by panels. Between December 12 and 16, Jones told Nidever about the complaints, without identifying the employees. Jones expressed his belief that Levin had sparked the complaints. Jones asked Nidever whether she had received any complaints. Nidever told Jones that she had not. Nidever had previously seen and heard Levin talking about the Union with employees in her section.

17. A Union organizing meeting was scheduled for the evening of December 16, 2003. That morning, Levin spoke with some employees in the Criminal/Juvenile Section.<sup>2</sup> He asked Corena Johnson to attend; Johnson said she could not, and Levin urged her to change her plans.

18. On the afternoon of December 16, Levin was again in the Criminal/Juvenile Section, talking to employees individually and in groups, reminding

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<sup>2</sup>Levin frequently passed by these employees because his mailbox was nearby.

them about the meeting that evening and asking if they were coming.<sup>3</sup> Johnson told Levin that she had changed her plans and would attend. Levin eventually talked with Denise Thurman, whose desk was adjacent to Nidever's. Levin tried to persuade Thurman to attend the evening meeting after Thurman had said she was unable to attend. The conversation ended when Thurman stood up and left her desk.

19. Nidever stood up and walked over to Levin, saying "Andy, Andy, Andy, you can't talk about that in the office." Levin reacted angrily, saying, "I most certainly can talk about the union." Levin and Nidever argued briefly; Nidever said, "[W]ell, I guess your opinion of that is different than the judicial department's opinion." Levin left the office.

20. Nidever spoke to Levin because (1) she believed Thurman had left her desk to avoid him;<sup>4</sup> (2) Jones had told her some employees had complained about contacts with Union supporters, particularly Levin; (3) Nidever believed Levin was violating Department rules by discussing Union issues during work time; and (4) Nidever believed that some employees were uncomfortable expressing their negative views about the Union campaign.<sup>5</sup> At hearing, Nidever explained as follows:

"\* \* \* I felt like at that point also, since two people had complained, I had a responsibility not to allow him to be offensive or harassing in any way if I felt like people were perceiving it that way because I know some people are perfectly fine telling people, bug off, don't talk to me any more, and other people assume, you know, just by their not participating that, you know, they don't want that kind of, you know, they don't want to participate and since they haven't, they don't want people bugging them any more or they're not comfortable saying just back off."

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<sup>3</sup>Nidever believed that Levin was going "desk to desk" in a planned, systematic attempt to speak with each employee in her section. We find that Levin planned to remind each section employee about the December 16 meeting, but that his reminders took place during multiple visits to the section and that the reminders and related conversations took place with employees both individually and in groups.

<sup>4</sup>Neither party called Thurman to testify at the hearing.

<sup>5</sup>Nidever was correct. Shultz testified that she "didn't respond to [Levin] one way or the other. I figured by that point in time they had tried to contact me enough, I had not been to any of the meetings, I felt no reason for them to keep asking me and trying to get me to come. Obviously I wasn't interested."

21. Later that day, Corena Johnson approached Jones about the argument between Levin and Nidever. Johnson was concerned that the Union might file an unfair labor practice complaint against Nidever personally, and that Johnson might get caught in the middle of a labor-management dispute.

22. Nidever told Jones about her interaction with Levin. Jones, in turn, spoke with Presiding Judge Barron and Director of the Department's Personnel Division Martin. Martin told Jones that he believed it was appropriate to distinguish between intermittent and occasional mutual conversation between employees and planned conversations which were more one-sided and in the nature of solicitation. Martin advised Jones as follows:

“\* \* \* I recommended he talk to Mr. Levin and assured [*sic*] him that he, Ed, respected his right to consider union organizing and to participate in that fully but in view of the apparent excessive efforts in terms of time and the complaints that had been received, to ask him to restrict that [solicitation] to non worktime.”

23. On December 17, Jones spoke to Levin. Jones told Levin that he had received two complaints about harassment by Union organizers, and then discussed Levin's December 16 interaction with Nidever as follows:

“\* \* \* I spoke specifically to [Levin] about the incident that occurred in [Nidever]'s office and how it had been portrayed to me going desk to desk and how I felt that was inappropriate, that was not a spur of the moment type of personal conversation that Andy [Levin] suggested it was, you know, it's just like I stopped by and I talk to them for a few minutes, that's fine, I said, yes, that's fine, but what I perceive from what I was told was that it was more involved than that it, it was a planned conversation, a planned stop to desk to desk to talk to people and that it was my understanding that even though [Nidever] had specifically observed that in that office, that it had occurred in other offices at other times and that that was inappropriate.”

Levin denied going “desk to desk” in his conversations with other employees. Jones did not tell Levin that he could not discuss the Union on work time. Jones did not discipline Levin.

24. After Levin's December 17 conversation with Jones, Levin continued to talk with fellow employees on work time about the Union in the same manner as he had before. Nidever was aware of those conversations and took no steps to interfere with them, because she did not perceive Levin to be going "desk to desk."

25. After Levin's December 16 argument with Nidever, some employees told Levin that they believed it was inappropriate to discuss the Union at work. Department employee Olivia Gutierrez didn't think the argument was "a big deal" but "didn't talk about [the Union] after that."

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The Department violated ORS 243.672(1)(a) when Department managers (1) directed a bargaining unit employee not to discuss union issues "in the office," when those conversations routinely included nonwork-related and personal subjects; and (2) directed the employee not to have planned, systematic conversations with other employees about Union issues on work time when other work-time conversations routinely included nonwork-related and personal subjects.

#### **Standards for decision**

Department employees "have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. It is an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees *in or because of* the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a) (emphasis added). Subsection (1)(a) identifies two separate claims, a "because of" violation and an "in the exercise of" violation. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739 (2004). The Union asserts that the Department's directives violated both prongs of (1)(a).

#### **"Because of" claim**

In *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 348 (2003), this Board discussed standards for evaluating "because of" claims as follows:

“In analyzing a subsection (1)(a) ‘because of’ claim, we focus on the reason for the employer’s conduct. If the employer acted to interfere with, restrain, or coerce employees because of the employees’ exercise of protected rights, the action is unlawful. \* \* \*”

#### “In the exercise of” claim

When analyzing subsection (1)(a) “in the exercise of” claims, we decide whether the natural and probable effect of the employer’s conduct would tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Public Employee Collective Bargaining Act (PECBA). The Union need not prove anti-union motivation, actual interference, restraint, or coercion. *ATU, Division 757 v. Tri-Met*, Case No. UP-48-97, 17 PECBR 780, 789 and n. 10 (1998) (citing *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 and 523 (1988); and *OSEA v. The Dalles School District*, Case No. UP-75-87, 11 PECBR 167, 171-72 (1989)).

The possible effects of the employer’s actions are insufficient to establish a violation. *Tri-Met, supra*, 17 PECBR at 789 and n. 11 (citing *OSEA v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988)). The subjective impressions of employees are not controlling. *Tri-Met, supra*, 17 PECBR at 789 and n. 12 (citing *Spray Education Association and Short v. Spray School District*, Case No. UP-91-87, 11 PECBR 201, 219-20 (1989)).

#### Employee discussion about Union issues during the work day.

When a public employer seeks to place limits on employee communication about a union or labor relations issues, the rules must be narrowly tailored and must not unduly infringe on employees’ protected rights to participate in union activities. *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146, 152 (1999).

A rule prohibiting union-related speech or distribution of union-related materials in nonwork areas or on nonwork time is presumptively invalid. This presumption may be rebutted where, for example, special circumstances make the rule necessary to maintain production or discipline and where the employer’s interest in light of the special circumstances outweighs the employees’ interest in engaging in union-related speech. *Jefferson County, supra*, and *Oregon University System (OUS) v OPEU*, Case No. UP-61-98, 19 PECBR 205, *reconsidered* 19 PECBR 431, 434 and n. 4 (2001), *reversed on other grounds* 185 Or App 506, 60 P3d 567 (2002).

A rule prohibiting union-related speech and distribution of materials in working areas or during work time is presumptively valid. This presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced. An employer may prohibit its employees from discussing nonwork-related or personal matters on work time, but it cannot permit discussions on those matters while prohibiting discussion of union matters. *OUS, supra*, 19 PECBR at 434 and n. 4 (Order on reconsideration); *See also Frazier Industrial Co. v. NLRB*, 328 NLRB 717, 163 LRRM 1024 (1999), *enforced* 213 F3d 750, 164 LRRM 2516 (2000).

We apply these rules to the circumstances before us. The Department's Coos County court staff were permitted to have informal conversations about nonwork-related or personal matters during work time, as long as the conversations did not interfere with their work. Accordingly, those court staff may engage in nondisruptive conversation about union matters during work time. They may also, absent special circumstances, discuss union matters in nonwork areas or on nonwork time.

On December 16, when Nidever observed Thurman leaving her desk after Levin's urgings to attend the Union meeting, Nidever said to Levin, "Andy, Andy, Andy, you can't talk about that in the office." She repeated the prohibition in response to Levin's "I most certainly can talk about the union." The instruction was heard by several members of the Criminal Department staff, who were members of the proposed bargaining unit.

As Schultz' e-mail reveals, some court staff already believed that conversation about the Union was prohibited in the workplace. After Nidever's comments to Levin, other employees told him that they were reluctant to talk about Union matters at work because they believed it was inappropriate to do so. On December 17, Jones told Levin that it was inappropriate for Levin to have "a planned conversation, a planned stop to desk to desk to talk to people" about Union issues.

The Department's Coos County supervisors were in a difficult position. Some employees preferred not to discuss Union issues. Those employees simply hoped that the Union supporters would "take the hint" and stop asking them to come to meetings. By doing so, these employees may have actually increased the likelihood of their being organizing targets, because they were potential voters whose positions were not identified. When Union supporters persisted in attempting to recruit these employees, the employees complained to Department managers. Nidever and Jones acted in part to respond to these complaints.

A public employer can intervene to prevent disruption of the work or actual harassment of employees. *See Lane County Peace Officers Association v. Lane County Sheriff's*

*Office*, Case No. UP-32-02, 20 PECBR 444, 464, n. 21 (2003) (“[m]isconduct that would be just cause for discipline is not insulated from discipline merely because it occurs in the setting of an otherwise protected activity”).

However, a public employer cannot lawfully shield its employees from protected organizing activity related to a union organizing drive, union election campaign, or similar effort, even if some employees consider such activity to be unwelcome. This Board has stated that “[i]t strikes this Board as self-evident that statutorily ‘guaranteed’ employee rights cannot prospectively be defeated by employer concerns over possible employee wrong-doing in the exercise of those rights.” *Jefferson County*, *supra*, 18 PECBR at 154 (quoting *Thyfault and Oregon Education Association v. Pendleton School District No. 16*, Case No. UP-101-90, 13 PECBR 275, *adhered to on reconsideration* 13 PECBR 380, 383 (1991), *AWOP* 116 Or App 675, 843 P2d 514 (1992), *revised* 316 Or 529, 854 P2d 940 (1993)).

In *Chartwells Compass Group, USA*, 342 NLRB No. 121, 176 LRRM 1081 (2004)—a case decided after the oral argument before us in this matter—the National Labor Relations Board held that an employer violated Section 8(a)(1) of the NLRA (the federal equivalent of ORS 243.672(1)(a)) when it promulgated a no solicitation rule during a union organizing campaign in order to deter employees from discussing the union. An employer representative testified that the rule would be enforced against an employee whose prounion comments caused other workers to “feel uncomfortable.” As the NLRB stated:

“\* \* \* Although an employer may lawfully discipline an employee for making prounion (or antiunion) statements that threaten fellow employees (for example, with physical harm), an employer may not lawfully discipline an employee for making prounion (or antiunion) statements that merely cause another employee to feel uncomfortable. See, *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), *enforced* 263 F.3d 345 (4th Cir. 2001). \* \* \*” 176 LRRM at 1084.

We adopt the reasoning of the NLRB as expressed above.

Public employees, not public employers, are responsible for telling union supporters that they do not wish to be approached. As with any other campaign, union supporters have the right to identify and motivate supporters and seek to persuade undecided or opposing voters.

**“Because of” claims:** We conclude that Nidever interfered with, restrained, or coerced Levin *because of* his exercise of PECBA-protected rights. Levin’s speech was protected PECBA activity; Nidever, a supervisor, told Levin that such speech was inappropriate and directed him to refrain from it; and Nidever’s statements were a direct response to Levin’s protected activity.

Nidever told Levin: “Andy, Andy, Andy, you can’t talk about that [union matters] in the office.” On its face, this directive applies to both work time and nonwork time in the office. As to nonwork time, the directive is presumptively invalid, and the employer has not identified any special circumstances to overcome the presumption of invalidity. As to work time, the directive is presumptively valid. SEIU overcame this presumption by establishing that the directive was selectively applied to discussions about Union matters, but not to other personal, nonwork-related discussions among employees. Nidever’s statements violated the “because of” branch of ORS 243.672(1)(a).

Jones’ directive that Levin avoid “a planned conversation, a planned stop to desk to desk to talk to people” regarding Union issues did not violate the *because of* branch of subsection (1)(a). A crucial element of such a claim is that the employer took the disputed action because the employee exercised a protected right. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). If the employee did not exercise a protected right, the “because of” claim must fail. Here, Levin denies that he went desk-to-desk to talk to fellow employees about the Union. The employer could not have acted “because of” Levin’s systematic desk-to-desk discussions because they did not occur.<sup>6</sup>

**“In the exercise of” claim:** We conclude that Nidever’s directive interfered with, restrained, or coerced employees *in the exercise of* PECBA-protected rights of Department employees, in violation of ORS 243.672(1)(a). As discussed earlier, these employees had a PECBA right in some circumstances to discuss the Union in the workplace. Nidever was a supervisor. The natural and probable effect of her direction, “you can’t talk about that in the office,” would be a tendency to interfere with, restrain,

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<sup>6</sup>This conclusion does not necessarily mean Jones’ comment was lawful; it means only that the comment did not violate the “because of” prong of (1)(a). If an employer acts under a mistaken belief that an employee engaged in protected activity, as appears to be the case here, such actions are more properly analyzed under the “in the exercise” prong of (1)(a). The “in the exercise” prong (unlike the “because of” prong) does not require proof that an employee has engaged in protected activity. Instead, it prohibits employer actions that would tend to chill employees from exercising their protected rights in the future.

or coerce employees in the exercise of that right. Although evidence of an actual chilling effect is not necessary to prove this claim, we note that there is such evidence.

We conclude that Jones' comments to Levin interfered with, restrained, or coerced employees *in the exercise of* PECBA-protected rights of Department employees, in violation of ORS 243.672(1)(a). The Department argues that Levin was harassing fellow employees, and was instructed to cease doing so. This assertion finds no support in the record. The Department had no rule barring planned and systematic contact between its employees. Jones did not base his remarks on allegations that Levin was talking to employees for excessive amounts of time or otherwise interfering with the Department's work. Instead, Jones' admonition was aimed at the planned nature and Union content of Levin's contacts with this fellow employee. Such an over-broad directive violates the "in the exercise" prong of (1)(a).<sup>7</sup>

We emphasize that employees' rights to conduct organizing activities in the workplace continue to be subject to reasonable employer control. An employee who spends excessive time talking with fellow employees on any nonwork-related subject on work time may be instructed to cease doing so. The same is true if the employee causes significant disruption in the workplace. That, however, did not occur here. Restricting an employee's workplace conversations about union issues because of their content and systematic nature violates section (1)(a).

We will order the Department to cease and desist from barring employee discussion on Union-related issues under circumstances in which employees may discuss other nonwork-related or personal subjects beyond the work at hand.

3. It is not appropriate to award a civil penalty in this case.

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<sup>7</sup>The dissent asserts that, in reaching this result, we have greatly extended existing case law in the area, and have essentially hamstrung public employers in discussing employee complaints regarding union organizing on work time with union adherents. We disagree. Our conclusion that Jones' directive violated the Act is amply supported by existing case law. We make no new law here. As the dissent concedes, Jones was not directed to stop harassing employees in the workplace. Finally, the dissent refers to the Department's past termination of an employee for violation of a no-solicitation rule. That rule referred to personal use of e-mail and is not before us in this case; indeed, the Department did not refer to it in its objections to the ALJ's proposed order.

SEIU requests that this Board order the Department to pay a civil penalty on the grounds that the conduct at issue in this case was egregious. We conclude that the Department's conduct was not egregious. The request for a civil penalty is denied.

ORDER

The Department will cease and desist from interfering with the rights of Department employees to communicate about union-related matters in the work place or on work time in the same fashion as the Department permits them to communicate about nonwork-related or personal matters.

DATED this 18<sup>th</sup> day of March 2005.

  
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Paul B. Gamson, Chair

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\*\*Rita E. Thomas, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Board Member Thomas absent on date of signing.

\*\*Board Member Thomas, concurring in part and dissenting in part:

I concur that the State violated ORS 243.672(1)(a) when a supervisor told Levin he could not talk about Union business in the office.

I do not agree that the State violated the law when Jones spoke to Levin about employees complaining that they were being harassed by Union organizers.<sup>1</sup> I therefore dissent from this portion of the majority opinion.

By finding this communication between Jones and Levin to be a violation of the PECBA, the majority essentially hamstringing an employer from discussing with an employee that there have been complaints of harassment related to Union organizing, and that the employer has policies regarding solicitation in the work place.

My significant concern with the majority order is that it grants rights that were not requested in the complaint and not proposed by the ALJ in the recommended order. The complaint does not request that Union solicitation be allowed to take place in a "desk to desk" manner during work hours. And in fact, Levin clearly knew that the policy of this Department was well set that "desk to desk" solicitation was not allowed for any reason. Levin testified repeatedly that his conduct did not include going "desk to desk." And in fact the complaint recognizes the employer's policy of no "desk to desk" solicitation when it describes what Levin was doing as follows: "as he went about his regular duties speaking with them briefly as his duties brought him by or near their desks."

The complaint denotes the nonplanned and nonsystematic approach taken by Levin. He knew what was allowed for solicitation in his work place, and that was to take opportunities in the course of work to speak to people about the Union. What was not allowed was a planned systematic organizing effort of going from desk to desk during work hours. That type of conduct in itself presumptively interferes with work.

In ordering a new broad and sweeping expansion of our law, that desk-to-desk solicitation during work hours is appropriate as long as it does not interfere

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<sup>1</sup>The un rebutted testimony of both Jones and Martin was that people can discuss things as long as it does not interfere with their work. Levin was clearly told this by Jones in the meeting. He was not told he could not talk with people about the Union, and he was not disciplined.

with work, in other words invalidating the presumption, the majority has changed Board precedent without explanation and misinterprets and exceeds NLRB precedent on the issue of work place solicitation.<sup>2</sup>

I respectfully dissent.

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<sup>2</sup>Solicitation efforts of any kind are distinguishable from normal employee conversation. Solicitation in the workplace may be managed by a policy that is presumed to be legal as long as it is applied to all in the same manner. In this case the Department had a policy that solicitation, except for employer sanctioned causes, was prohibited. Because union solicitation is a protected right, union solicitation was allowed in the same manner as other employer sanctioned causes. But the record here indicates that at least one employee had previously been terminated by this Department for soliciting for a personal cause during work hours. The majority opinion makes invalid this employer's right to properly manage solicitation in the work place during work hours.