

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-4-06

(UNFAIR LABOR PRACTICE)

LEBANON EDUCATION)	
ASSOCIATION/OEA,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
LEBANON COMMUNITY)	AND ORDER
SCHOOL DISTRICT,)	
)	
Respondent.)	
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On November 21, 2007, this Board heard oral argument on both parties' objections to a Recommended Order issued on September 10, 2007, by Administrative Law Judge (ALJ) Susan Rossiter, following a hearing before ALJ B. Carlton Grew on August 24 and 25, and October 5 and 6, 2006, in Salem, Oregon. The record closed on December 11, 2006 upon receipt of the parties' post-hearing briefs.

Barbara J. Diamond, Attorney at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent at oral argument. Steven E. Herron of the same firm represented Respondent at hearing.

On January 31, 2006, the Lebanon Education Association (Association) filed an unfair labor practice complaint against the Lebanon Community School District (District). The District filed a timely answer to the complaint on May 11, 2006. The Association filed a first amended complaint on August 9, 2006, and a second amended

complaint on August 23, 2006. The District filed an answer to the second amended complaint on September 15, 2006.

The issues are:

(1) Did District principal Peggy Blair: (a) tell Association President and bargaining unit member Kim Fandiño that Fandiño had stepped out of the chain of command and upset Blair by communicating with District School Board member Josh Wineteer instead of communicating with Blair; (b) deliver a letter to Fandiño in which Blair stated that she was considering discipline of Fandiño because of her communications with Wineteer and her subsequent communications with bargaining unit members; and (c) formally reprimand Fandiño for contacting Wineteer? If so, did these actions violate ORS 243.672(1)(a), (b), or (c)?

(2) Did District principal Ken Ray question bargaining unit member Debra McIntyre regarding her contact with a school board member and tell McIntyre that he “had to” discipline her to enable Blair to “go after Kim [Fandiño]”? If so, did these actions violate ORS 243.672(1)(a)?

(3) Do District policies regarding communication between a staff member and member of the District School Board violate ORS 243.672(1)(a) or (b)?

(4) Did District officials (a) refuse to provide any information in response to an Association November 28, 2005 request for information unless the Association paid for the District staff time, attorney fees, and copying costs incurred in producing this information, when past practice did not impose such a requirement; (b) wait until January 18, 2006, to disclose to the Association that some of the information requested did not exist; (c) offer to allow Association UniServ Consultant James Sundell to review some of the documents requested at no charge, requiring Sundell to travel from Albany to Lebanon; and (d) take these actions with the intent of discouraging the Association from pursuing a grievance on behalf of Fandiño and to retaliate against Fandiño for her exercise of rights under the Public Employee Collective Bargaining Act (PECBA)? If so, did this conduct violate ORS 243.672(1)(e)?

(5) Should the District be ordered to pay a civil penalty to the Association and to reimburse the Association for its filing fees?

(6) Is the issue of charging a labor organization for information requests a mandatory, permissive, or prohibited subject for bargaining?

(7) Did the Association waive bargaining over the subject of District charges for information requests by express contract language?

(8) Has the Association failed to exhaust a contractual grievance and arbitration procedure regarding District charges for information requests?

(9) Should the Association be ordered to pay a civil penalty to the District and reimburse the District for its filing fees?

RULINGS

1. OAR 115-010-0077(3) provides that briefs “shall not exceed 30 pages, unless expressly permitted by the Board or its agent.” The District submitted a 33-page post-hearing brief without requesting prior authorization from the ALJ to do so. On December 12, 2006, the Association moved to strike pages 31 through 33 from the District’s brief on grounds that it exceeded the limit imposed by the administrative rule. On December 18, 2006, the District moved the ALJ for retroactive consent to file a brief that exceeds 30 pages. In support of its motion, the District noted the number of charges in the Association’s complaint and the complexity of the arguments required to assert the District’s position. The ALJ granted the District’s motion.

The hearing in this matter lasted four days and the issues were numerous and complex. In these circumstances, the ALJ did not abuse her discretion by permitting the District to submit a brief three pages longer than specified in the administrative rule. See *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02, 20 PECBR 124, 127 (2002), *AWOP*, 192 Or App 672, 89 P3d 688 (2004).

2. One issue raised in the second amended complaint is whether the District unilaterally changed an established practice when it charged the Association for the costs the District incurred to produce information in response to an Association request. The District generally denied the allegation. On page 31 of its post-hearing brief, the District, for the first time, asserted a new affirmative defense of waiver. It contends that even if we assume *arguendo* that the District unilaterally changed its practices in this regard, it made the change in the fall of 2004. The District argues that as a consequence, the Association waived any right to claim the change was unlawful because it failed file a timely unfair labor practice complaint on the issue. The District had not previously raised this waiver argument in its answer or otherwise. On December 12, 2006, the Association, citing OAR 115-010-0077(3), moved to strike the affirmative defense of waiver by inaction on grounds that it was not timely pled.¹

¹The Association’s December 12 motion also asks this Board to sanction the District’s law firm for “taking positions which show contempt for this Board and for the parties who bring their disputes before it.” The Association cites two prior cases—*Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, *supplemental orders* 19 PECBR 804 and 19 PECBR 848, *on reconsideration* 19 PECBR 895 (2002),

On December 18, 2006, the District moved to “conform the pleadings to the evidence” to allow consideration of the affirmative defense of waiver by inaction. In the alternative, if we do not permit the District to amend its pleadings to assert this affirmative defense, the District asks that lines 10 through 17 be stricken from page 31 of its brief.

We will strike the District’s discussion regarding the affirmative defense of waiver by inaction contained in its post-hearing brief on page 31, lines 3 through 17. The District failed to assert the defense until the evidentiary hearing closed. OAR 115-035-0035(1) requires a respondent to specifically set forth any affirmative defenses in its answer to an unfair labor practice complaint. An opposing party may be seriously disadvantaged if a party is permitted to raise an affirmative defense after the conclusion of a hearing because the opposing party would have no opportunity to fully litigate the affirmative defense. See *McKenzie Education Association/Lane Unified Bargaining Council/OEA v. McKenzie School District*, Case No. UP-81-94, 16 PECBR 156, 157 (1995) (quoting *Glendale Education Association v. Glendale School District*, Case No. UP-114-87, 10 PECBR 763, 769 (1988)).

2. The District’s December 18, 2006 motion also asks us to strike all portions of the Association’s post-hearing brief regarding violations of ORS 243.672(1)(b) or (c). The District contended that the body of the unfair labor practice complaint, as amended, contained factual allegations that the District violated ORS 243.672(1)(a), (b), (c), and (e), but the prayer of the complaint requested relief only for violations of ORS 243.672(1)(a) and (e).

The District’s motion to strike is denied. The Association’s complaint, as amended, included extensive explanations of its factual allegations regarding District violations of ORS 243.672(1)(b) and (c). Both the completed complaint form and the text of the second amended complaint specifically cite subsections (1)(b) and (c). The District had ample notice of the specific violations of the PECBA alleged in the second amended complaint, and it was not prejudiced by the Association’s inadvertent failure to specifically recite subsections (1)(b) and (c) in the prayer of its complaint. The District fully litigated and briefed the issues under subsections (1)(b) and (c). We also note that the District raised these objections only after the conclusion of the evidentiary

aff’d, 187 Or App 92, 67 P3d 951 (2003); and *McKenzie Education Association/Lane Unified Bargaining Council/OEA v. McKenzie School District*, Case No. UP-81-94, 16 PECBR 156 (1995)—in which this Board refused to consider affirmative defenses because they were not timely pled. In both cases, the respondents were represented by an attorney from the same law firm that represents the District in these proceedings. We do not find that the District’s law firm acted contemptuously by asserting untimely affirmative defenses in three cases over the past 12 years.

hearing and the submission of post-hearing briefs. If the District believed that it was placed at a disadvantage by a lack of clarity in the Association's pleadings, it should have raised these concerns earlier in the proceedings when they could have been addressed and, if necessary, corrected.

3. All other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization and exclusive representative of a bargaining unit of licensed teaching personnel, athletic trainers, interpreters, and nurses employed by the District, a public employer.

2. A collective bargaining agreement between the parties was in effect from July 1, 2005 through June 30, 2007. Article 23, Section A of the agreement provides:

“Upon request, the Board agrees to furnish to the Association that information as required by law necessary for its functioning as exclusive bargaining representative.”

3. The Lebanon Community School District Board (Board) adopted the following policies on May 15, 1997, which provide in relevant part:

Board-Staff Communications—BG:

“The Board desires to maintain open channels of communication between itself and the staff. The basic line of communication will, however, be through the superintendent.

Staff Communications to the Board

“All formal communications or reports to the Board or any Board committee from principals, teachers or other staff members will be submitted through the superintendent. This procedure will not be construed as denying the right of any employee to address the Board about issues which are neither part of an active administrative procedure, nor disruptive to the operation of the district. Staff members are invited to Board meetings, which provide an opportunity to observe the Board's deliberations on matters of staff concern.”

Line and Staff Relations—CCB:

“The Board expects the superintendent to establish a clear understanding of working relationships in the school system with all staff.

“Lines of direct authority will be those shown on district organization charts.

“Staff will be expected to refer matters requiring administrative action to the administrator to whom they are responsible. That administrator will refer such matters to the next higher administrative authority when necessary. Additionally, all staff are expected to keep the person to whom they are immediately responsible informed of their activities by whatever means the person in charge deems appropriate.”

Building Administration—CF:

“The Board reaffirms the building principal’s rights and responsibilities for the administration of their programs and buildings within the broad scope of adopted Board policies.

“Specifically, the principal of each individual school is responsible for the development of the educational program, improvement of instruction and interpretation of the school’s program to the community. All personnel will work through and under the principal’s direction in the performance of their duties within the school.”

Relationship between the District and Association

4. Kim Fandiño has served as Association president for the past six years. She has participated in negotiations for five collective bargaining agreements and serves as Association spokesperson to the press, community, District administrators, and Board regarding matters of concern to bargaining unit members.

5. During recent years, the relationship between the Association and District Superintendent James Robinson has been contentious. Fandiño regularly sent e-mails to Robinson and Assistant Superintendent Stephen Williams about possible contract violations and other Association concerns in an attempt to resolve problems at

the earliest opportunity. At times, Fandiño used the problem-solving mechanism which is part of the contractual grievance procedure. The grievance procedure requires both parties to “discuss and problem-solve matters before entering Level 1 of the grievance process.”

6. In her role as Association president, Fandiño regularly attended Board meetings and often spoke to the Board about bargaining unit members’ concerns.

Fandiño Disciplinary Action—Background

7. In the spring of 2002, Association members told Fandiño about statements District administrators made at a job fair to prospective applicants for teaching positions in the District. According to these members, District administrators told potential applicants that they should not bother to apply for District teaching jobs unless they were men, and also promised particular positions to certain individuals even though the positions were never posted for Association bargaining unit members.

Fandiño believed that the administrators may have violated contractual provisions that require the District to consider Association members for open positions. She also worried about possible sex discrimination charges against the District. Fandiño complained to Assistant Superintendent Williams about the administrators’ remarks; Williams assured Fandiño that District administrators would never have made the comments attributed to them.

Frustrated by Williams’ failure to take her concerns seriously and worried about the District’s possible liability for improper employment practices, Fandiño contacted each Board member individually and explained what the administrators told applicants at the job fair. Two or three of the Board members were interested in and receptive to Fandiño’s concerns; no Board member told Fandiño that she should not have contacted him or her.

8. On May 30, 2002, Williams sent Fandiño a memorandum with a copy of the “Board-Staff Communications” policy attached. The memorandum stated:

“It has come to our attention that you recently contacted board members individually to discuss an issue with interviewing and/or hiring practices. As you know, you and I and others have had several discussions concerning the following of District policy by administrators, so I know you would want to be sure that your actions were in keeping with policy as well.

“I am enclosing Board Policy BG for your review. You will note that the opening two sentences state, ‘The Board desires to maintain open channels of communication between itself and the staff. The basic line of communication will, however, be through the superintendent. Under Staff Communications to the Board, you can see the expectation that any formal communications to the Board is [*sic*] to be submitted through the superintendent. This would not preclude addressing the Board in session, but otherwise that is the requirement. I hope you can see from the administration’s perspective that it is not appropriate to have issues such as this one come back from Board members rather than being addressed directly with the superintendent or his designee(s).

“I know that you as LEA President may often have issues to discuss with the administration on behalf of other teachers. In fact, I believe the Labor-Management meetings are one method set up specifically for that purpose.

“In the future, we will expect that this Board policy is followed. Please feel free to contact me or the superintendent if you wish to discuss this further.”

9. At the beginning of the 2004-05 school year, at the request of a number of bargaining unit members who were upset with Robinson’s leadership, Fandiño polled bargaining unit members concerning their opinion of Robinson. Two votes were conducted among bargaining unit members: in one vote, the overwhelming majority expressed disapproval of Robinson; in the second vote, the overwhelming majority expressed no confidence in Robinson.

10. Fandiño planned to release the results of the votes to the local media. She contacted Robinson and the Board members and offered to discuss the results with them before she released the results to the media. Robinson and the Board declined to meet with or talk to Fandiño.

11. In an October 14, 2004 article, the *Lebanon Express*, a newspaper that covers the community served by the District, noted teachers’ objections to Robinson. The article quoted Fandiño who, speaking as Association president, described the problem as one of “top-down, authoritative, divide-and-conquer style of leadership that comes from the district office.”

12. Fandiño made a number of requests to meet with the Board to discuss problems with Robinson. The Board refused to meet in executive session with Fandiño and other Association leaders, and also refused Fandiño's invitation to attend an Association meeting. Eventually, the Board agreed to send an individual member to each school to discuss teacher concerns. Teachers and administrators were required to attend the meeting in their building. Consequently, Fandiño believed that the meetings were an unsatisfactory forum for open discussion with the Board members because teachers were reluctant to talk freely in front of their supervisors.

13. In January 2005, the Association placed an advertisement in the *Albany Democrat-Herald*, a local newspaper, urging the District not to renew Robinson's contract.

14. In 2003, the District received a grant from the Oregon Small Schools Initiative to develop a program of smaller learning communities at the high school level. Beginning with the 2004-05 school year, the District implemented a program of four autonomous academies in the District high school. Each academy had its own particular subject matter focus, a separate teaching staff, and its own principal. Except for a few classes, such as band or journalism that were designated as all-access classes and open to any student, students were permitted to take classes only within their own academies.

15. Although most teachers initially supported the academies, many eventually concluded that the academy system negatively affected staffing and working conditions. Permitting students to take classes only within their own academies resulted in disparate class sizes among the academies in certain subjects, and students could not be transferred among the academies to adjust class sizes. Teachers worried about layoffs if their classes became too small. Before the academy system was implemented, the District high school had one principal and three vice-principals. The academy system used four different principals, one for each academy. The principals were responsible for evaluating high school teachers within their academy; teachers feared this would lead to inequity and unfairness in teacher evaluations because different principals had different expectations and standards. Teachers were also troubled by the additional cost of the extra principals.

16. Parents, as well as teachers, became concerned about the restriction prohibiting students from taking courses outside of their academies. In some cases, the student's academy might not offer a course that was needed to meet college entrance requirements or that the student wanted to take.

17. In response to teacher and parent concerns, Fandiño surveyed teachers about crossover scheduling, a system that would allow a student to take classes in another academy. An Association survey of high school teachers found that

approximately 88 percent of those responding to the survey “Strongly Agree” or “Agree” with the sentence: “I would like kids be able to take some classes out of house.” District administrators opposed crossover scheduling, however, and wanted the academies to remain as autonomous as possible.

18. In addition to problems with the academies, many high school teachers were concerned about the administration’s failure to effectively and consistently enforce student disciplinary standards. A particular problem involved skateboards. Board policy prohibited the use of skateboards on school property and required staff to confiscate the skateboard of any student who brought one to school. Nevertheless, some administrators tolerated student use of skateboards at school and allowed students to keep skateboards in their lockers. In a memorandum dated October 14, 2004, Fandiño told the principals of the four high school academies that teachers had complained about failure to enforce the Board policy concerning skateboards and asked administrators to begin enforcing the policy.

19. In spring 2005, the community elected two new school board members, Chris Fisher and Josh Wineteer. Fisher and Wineteer seemed more responsive to the concerns of the Association than other board members. Fisher, Wineteer, and incumbent Board member Rick Alexander invited Fandiño to meet with them individually or in groups of two Board members to provide them with information about District operations and programs and to tell them about teacher concerns. Fandiño and the Board members met often in spring of 2005, and less frequently in the summer and fall of 2005. All three Board members encouraged Fandiño to contact them if she ever needed or wanted to talk to them.

20. At the first two Board meetings of the school year—on September 6 and September 26, 2005—District parents, patrons, and students spoke in opposition to the restrictions on high school students taking classes outside of their academies. Fandiño participated in the discussion and criticized the administrators’ offer of Internet classes to students who could not take the classes they wanted in their academies.

At the September 26 Board meeting, Wineteer made a motion to allow each student to take one class outside of the student’s academy if space was available in the class, and to allow a student to take an additional class outside of the student’s academy if the student obtained permission from the teachers and counselors of all academies involved. Wineteer’s motion specified that these changes would be implemented during the second trimester of the school year, in November 2005. The motion passed by a vote of four to one; only Board member Sherrie Sprenger voted against it.

21. On September 27, 2005, Peggy Blair, the principal of the Social Systems academy where Fandiño taught, met with administrators, counselors, the registrar, and the school change counselor to plan for implementation of the Board's decision to allow students to take courses outside of their academies. Blair and the others at the meeting were uncertain about the intent and meaning of the Board's motion. They believed that the Board intended to count any all-access class a student was already taking as one of the two classes that could be taken outside of the student's academy. The administrator of one of the academies, Mark Finch, offered to contact Board member Sprenger for clarification of the Board's motion. Blair sent an e-mail to Superintendent Robinson about the meeting which stated in relevant part:

"In light of that meeting we have two items for you:

"1. A clarifying question which must be answered before we can proceed with our course of action

"2. FYI on our timelines. (see attachment)

"Clarifying question: Do we 'count' all-access courses that students already have on their schedules as one or both of the 'cross-over' courses OR will students be allowed 'two cross over courses' IN ADDITION to the all-access courses they have already registered for in 2005-06?

"We need clarification on this issue prior to communicating with our academy staff, parents, and students. We have discussed various sides to and ramifications of this issue and would like direction from you on how to proceed. Mr. Finch is willing to call Sherri Sprenger for clarification of the board's stance on this issue if you would like us to communicate with the Board prior to implementing the schedule change process. Thanks."

22. On September 28, 2005, the registrar showed Fandiño a copy of Blair's September 27 e-mail, and told Fandiño what happened at the meeting. Based on what the registrar told her, Fandiño thought the administrators would change student schedules in an attempt to fill up classes so that no openings would be available for students who wanted to take classes outside of their own academies. Fandiño also believed that Blair was misinterpreting the Board's motion. Fandiño, unlike Blair, thought the Board's motion permitted a student to take two classes outside of the student's academy in addition to any all-access classes the student was already taking. Fandiño was concerned that administrators might consult with Sprenger for clarification of the Board's motion. Since Sprenger was the only Board member to vote against the

motion regarding crossover classes, Fandiño did not think Sprenger could accurately describe the intent of the Board's motion.

23. Fandiño called Board member Wineteer and told him about her conversation with the registrar and about Blair's e-mail. Wineteer told Fandiño that the intent of his motion was to allow each student to take two crossover classes in addition to any all-access classes the student was already taking. He asked Fandiño to send him an e-mail summarizing their conversation.

Fandiño then asked Wineteer if he would answer questions about the motion and allow Fandiño to send his response to the teaching staff. Wineteer agreed to do so.

24. On September 28, 2005, at 7:38 a.m., Fandiño sent Wineteer the following e-mail:

"Josh,

"Here is info to help you answer my next email.

"1. Counselors should not just fill up student schedules to have no opens and create the illusion of full classes. (Students will want to get out of the class they were 'put in' and there will be no where [*sic*] to go.)

"2. The current holes should be discussed with kids in terms of what they can now do to work with the schedules of all academies to fill the holes with something that the students will enjoy while working within the parameters you have set.

"3. All access classes were part of the creation of the current problem and are mutually exclusive of your motion. (in other words, all access don't count in the two classes per trimester limit.

"Below please read the email that was sent to a very exclusive group of people with the intent of getting a secret answer that they can implement on students. Why are they calling Sherrie Sprenger (the dissenting vote) on something you did?

"Please help."

Fandiño attached a copy of Blair's September 27, 2005 e-mail to Robinson in her e-mail to Wineteer.

25. Also on September 28, 2005, at 7:57 a.m., Fandiño sent Wineteer the following e-mail:

"Josh,

"I would appreciate it if you could describe your thoughts as related to the implementation of your motion Monday night. There have been some questions from students and teachers and I would like to get the answers from the source.

"Thank you,

"Kim"

26. Some time after her 7:57 a.m. e-mail to Wineteer, Fandiño drafted a statement about Wineteer's motion at the September 26 Board meeting. The statement provided, in pertinent part:

"The intent of my motion Monday night was to create flexibility for students.

"First part of the motion: One class or period per trimester students will have the opportunity to move between academies (outside there [*sic*] own academy) without the need for approval as long as space is available in the class they wish to attend. In addition to this I made it clear the students would maintain the schedule they already have (this issues [*sic*] was brought forth by Peggy Blair * * *

"Second part of motion: One class or period per trimester students will have the opportunity to move between academies (outside there [*sic*] own academy) with the approval of; [*sic*] the teachers affected from both academies, the councilors from both academies, and space again must be available in the class they wish to attend. * * *"

Fandiño e-mailed this statement to Wineteer with the notation: “[L]et me know if this will work and send me back a reply, then I will send it out to all.”²

27. Fandiño did not wait for Wineteer to reply to her e-mail. At 9:14 a.m. on September 28, 2005, she sent all high school staff and administrators the clarification of the Board’s September 26 motion that she had drafted for Wineteer. Fandiño prefaced the statement attributed to Wineteer with this explanation: “In case you are interested in Josh’s explanation of his motion Monday night.”

28. At 9:35 a.m. on September 28, 2005, Wineteer sent Fandiño the following e-mail: “I would apprecaite [*sic*] you sending my reply out to everyone.” Fandiño then sent Wineteer an e-mail in which she stated: “I immediately sent it out. Thank you for the clarification.”

29. Fandiño’s principal Blair read the e-mails that Fandiño and Wineteer exchanged on September 28. Blair was angered by what she perceived as Fandiño’s refusal to follow the chain of command by talking to a Board member instead of her about the issue of crossover classes. In addition, Blair was worried that Fandiño was trying to get Wineteer’s support for an incorrect interpretation of the Board’s actions. Blair was concerned that Fandiño’s interpretation would disrupt the plans that Blair and the counseling staff had made at their September 27 meeting.

30. On September 28, 2005, Blair met with Fandiño to discuss a matter unrelated to the issue of crossover classes. At the end of the meeting, Blair asked Fandiño what Fandiño thought the role of a principal was. Fandiño asked Blair if she was talking about her e-mails. Blair told Fandiño that she thought Fandiño had stepped out of the chain of command and undermined Blair’s authority as a principal by speaking to Wineteer instead of her about the issue of crossover classes.

Debra McIntyre Disciplinary Action—Background

31. Debra McIntyre has taught Spanish at the District high school since 1999. She has taught at the Physical Systems academy since the academy program was

²At the hearing, Fandiño testified that Wineteer wrote this statement. However, the sentence that prefaced the explanation that Wineteer supposedly wrote about the Board’s September 26 motion—“let me know if this will work and send me back a reply”—clearly indicates that Fandiño drafted a statement for Wineteer’s review and approval. Given the need for information that Wineteer expressed to Fandiño in his conversations with her on the morning of September 28, it is more likely than not that Fandiño and Wineteer agreed that Fandiño should write an explanation of the Board’s motion. It is clear from this record, however, that Wineteer agreed with the explanation that Fandiño wrote. (*See* Finding of Fact 28.)

implemented in 2004-05. She currently serves as academy leader, a position to which she was elected by the academy staff. As academy leader, she is expected to act as an assistant principal and provide a liaison between staff and administration. McIntyre is a member of the Association but has never held a position in the organization and does not regularly attend Association meetings.

32. When the academy system was instituted, McIntyre and other academy leaders were instructed to report to the Board about the progress being made with the academy system. Leaders were also encouraged to “adopt” an individual Board member and keep the Board member informed about their programs.

33. McIntyre participated in several presentations to the Board regarding the academy system. McIntyre believed that District administrators were overly positive in these presentations, and she wanted to give the Board members a more realistic view of the program that included discussion of some of the less successful aspects of the small learning communities program. Ken Ray, the principal of the Living Systems academy, told McIntyre not to highlight the negative aspects of the academy system. As a result of her difference of opinion with the administration, McIntyre did not attend one of the presentations to the Board regarding the academies.

34. Because enrollment was low in her Spanish classes for the 2005-06 school year, McIntyre was concerned that she would be required to teach outside of her area of expertise and was also worried that she could be laid off. Consequently, McIntyre supported the idea of allowing students to take classes outside of their academies.

35. McIntyre believed that Ray did not consistently enforce District discipline policy. In particular, McIntyre was concerned about a lack of enforcement of the policy prohibiting skateboards in the schools.

36. In September 2005, McIntyre talked with Wineteer about problems with a student’s scheduling difficulties. McIntyre was pleased with Wineteer’s readiness to assist her in the matter, and also pleased with Wineteer’s motion at the September 26 Board meeting to allow students to take crossover classes. On September 28, 2005, McIntyre sent Wineteer an e-mail which stated, in relevant part:

“* * * I’m pleased that you are willing to address our issues in a problem solving manner. I will continue to work on solutions to improve our school and will share them with you. I think the decision last night to allow students to go out of academies to take classes was a step in the right direction. Our charge now is to make sure that all parties involved follow through and allow kids to do so. In the past,

regardless of the decisions the board made, many at the building level chose to disregard district or board policy and do what they wanted. How do we solve that problem? I have a question. What are the consequences for violating board policy for students, for staff and for admin? Are there any consequences? Up to now I have not seen any and feel as if I am not doing my job when I allow certain things to go unaddressed. Allow me to ellaborate [*sic*]. . . Board policy states that skateboards are not permitted on campus. At Lebanon High School that policy is violated daily. Not only are skateboards tolerated and allowed on campus, but when individual teachers address the violation, they are told to back off, to lighten up, to remind the student that the policy exists, do nothing and if it happens again then to call the parents to remind them. There is never a consequence for the offending student and I am concerned that what we are teaching our kids is that they really do not have to follow the rules as stated, rather be sneaky to avoid being caught or, if caught, talk to any administrator and they will overrule the disciplinary action of the teacher. Personally I could care less whether or not kids ride skateboards to school. I do however feel strongly about following the rules and believe that consistent enforcement is the path to a successful and thriving community. Could you tell me what the consequences are for violating board policy and how to assure that all staff are following that policy? Thank you. I look forward to hearing from you.”

37. Wineteer responded to McIntyre with the following e-mail:

“It is my understanding the district has very explicit board policy on discipline, and it IS your responsibility to initiate disciplinary action to a student not following board policy. It is additionally Administrations [*sic*] responsibility to follow through on said policy and are in violation of board policy when follow through does not occur. As a result going up the chain Superintendent Jim Robinson is in violation of board policy when administrators (his direct subordinates) are not following board policy as administrators receive direct counsel from the Superintendent how to proceed with their Governance.

“If board policy is not being followed the Board MUST be made aware of these infractions and the appropriate action taken.

“I appreciate your work and continued participation in the process.”

38. McIntyre gave Fandiño a copy of her e-mail exchange with Wineteer.³

Fandiño Disciplinary Action

39. Principal Blair met with Superintendent Robinson and Assistant Superintendent Williams to discuss Fandiño’s September 28 communications with Wineteer. They agreed that Fandiño should be disciplined for her actions because they violated District policies.

40. By letter dated October 10, 2005, Blair notified Fandiño that she was considering disciplinary action against Fandiño for “failure to comply with District Policies BG, CCB, and CF (see attached) in regard to your communications with Board member Josh Wineteer and subsequent communications with LHS faculty members on Wednesday, September 28th, 2005.”

41. On October 11, 2005, Blair, Fandiño, and Association representative Nancy Bauer met to discuss the disciplinary action Blair was considering. At the meeting, Fandiño told Blair that she asked Wineteer for clarification of the Board’s September 26 motion because two teachers and a student asked her what happened at the Board meeting. Blair told Fandiño that her actions violated policy because she failed to talk to Blair, the appropriate administrator, before going to a Board member.

Fandiño responded that no policy prohibited teachers from asking a Board member questions, and that others had done so. Fandiño then showed Blair a copy of McIntyre’s September 27, 2005 e-mail to Wineteer to demonstrate that other teachers communicated with Board members.

Blair asked Fandiño if she was acting as an individual teacher or in her role as Association president when she communicated with Wineteer and sent his response to the high school staff. Fandiño responded that as union president, she was required to go to Board meetings, and that it was perfectly logical that bargaining unit members

³The record is silent as to how and when this occurred.

would ask her questions about the Board's actions. Blair told her that she should refer teachers with questions about Board meetings to the principal. Fandiño stated that she believed it was her responsibility as a leader in the school to communicate the Board's actions to bargaining unit members.

At the end of the meeting, Blair told Fandiño that she would look over her notes from the meeting before deciding on her next step.

42. By letter dated October 28, 2005, Blair issued the following written reprimand to Fandiño:

"I am issuing this written reprimand as a disciplinary action for your improper conduct in failing to adhere to District policies CCB Line and Staff Relations and CF Building Administration. These policies are attached. This reprimand is related to the following events:

"On Monday, September 26, 2005 the Lebanon Community School District Board passed a motion directing changes in the guidelines for student course enrollment for trimesters two and three of the 2005-06 school year. The next day the high school administration began the process of planning for the implementation of that directive.

"On Wednesday, September 28th, you took it upon yourself to email board member Josh Wineteer for clarification of his motion. You subsequently forwarded Mr. Wineteer's reply to your email to all LHS staff that same day.

"These actions demonstrate non-compliance with the policies cited above. Policy CCB requires staff, in part, to 'refer matters requiring administrative action to the administrator to whom they are responsible.' Policy CF requires, in part, that 'All personnel will work through and under the principal's direction in the performance of their duties within the school.' Your actions clearly compromised my actions and the actions of the other high school administrators in implementation and communication of the board's

directive and do not support a positive working relationship between administrators and staff.

“By issuing this written reprimand, I am affording you an opportunity to correct your improper conduct in the future. Should you fail to do so, you will subject yourself to further disciplinary action, up to and including dismissal.”

43. Blair talked with Robinson about the Board’s September 26, 2005 motion regarding crossover classes. Robinson told Blair that he believed her interpretation was correct—a student could take up to two classes outside of the student’s academy, and any all-access classes the student was already taking would count toward these two classes. Blair and the high school staff then took the steps necessary to implement the Board’s motion in accordance with Blair’s interpretation.

44. Since she received the October 28, 2005 reprimand, Fandiño has stopped contacting individual Board members with questions and concerns. Fandiño also tries to avoid conversations with administrators, because she is fearful that her discussions might violate applicable Board policies.

McIntyre Disciplinary Action

45. After her October 11, 2005 meeting with Fandiño, Blair gave Ray a copy of the e-mail that McIntyre sent to Wineteer. Ray concluded that McIntyre may have stepped outside of the chain of command in her communications to Wineteer.

46. On October 17, 2007, McIntyre received a voice mail message from an angry parent in which the caller used a great deal of profanity. McIntyre asked Ray to come to her classroom to listen to the message. Ray came to McIntyre’s classroom, listened to the message, and laughingly told McIntyre that it was one she wanted to keep. McIntyre told Ray that she expected him to call the parent and tell the parent that the parent could not talk to a teacher that way. Ray declined to do so, told McIntyre that nothing would come of the message, and that she should just forget about it.

Ray then told McIntyre that he believed she could be facing disciplinary action because she may have violated a Board policy when she sent an e-mail to Wineteer. McIntyre became angry, and told Ray that she had been trying to solve a problem and did not think she should be disciplined for doing so. Ray reassured McIntyre that she had nothing to worry about and implied that it was necessary for him to take action against her in order to have an approach consistent with any action taken

against Fandiño. The meeting ended at McIntyre's insistence, and Ray suggested that McIntyre contact Fandiño.

McIntyre immediately told Fandiño about her conversation with Ray.

47. On November 1, 2005, Ray met with McIntyre and a union representative to discuss potential disciplinary action. McIntyre denied that she ever violated any Board policy in her communication with Wineteer. Ray asked that McIntyre talk to him first about any concerns she may have regarding problems in the high school. McIntyre replied that she had tried to talk to Ray a number of times about matters such as student discipline, but that he never gave her a satisfactory response. McIntyre explained that she finally decided to talk to someone who would listen.

48. On December 1, 2005, Ray sent the following letter to McIntyre:

"This letter is to serve as a follow-up from our meeting on November 1, 2005. With regard to the question of your violation of District Policies BG, CCB, and CF, it is my position that there will be no formal complaint filed against you on this matter nor will there be a letter of reprimand placed in your personnel file.

"In the future, if issues arise that you feel warrant discussion, please begin the lines of communication with me personally. In an effort to better serve our academy and Lebanon High School as a whole, I would appreciate your support in this matter."

Association Requests for Information Prior to November 2005

49. James Sundell is a UniServ Consultant for the Oregon Education Association. His duties include advising and representing the Lebanon Education Association in negotiations and grievances.

50. When Sundell first began working with the Association in September 2001, he asked the District for a copy of the personnel file of a teacher whom Sundell was representing in a grievance arbitration. Assistant Superintendent Williams gave Sundell a copy of the requested file, which was quite voluminous, and told Sundell that the District did not charge the Association for copies.

51. Between 2001 and September 2005, Sundell and other Association representatives regularly asked the District for copies of materials relevant to Association collective bargaining matters or grievances. If the documents requested were voluminous

and if he had time available, Sundell would make arrangements to review the documents at the District office in order to determine what portions he needed. Except for three instances where the Association paid \$20 or less for copying costs, the materials requested by Sundell and other Association representatives were provided free of charge to the Association.

52. By letter dated October 13, 2004, Sundell asked the District for copies of a large number of documents relevant to the Association's representation of teachers who were suffering from health problems believed to be caused by faulty heating, ventilation, and cooling systems in some of the District schools. Citing a policy that permitted the District to charge members of the public the actual expense of copying requested records, Williams billed Sundell \$200 for the cost of copying the documents that Sundell had requested.

Sundell objected to the District's charges for copies in an e-mail dated November 22, 2004. Sundell told Williams that the District's attempt to charge the Association for information was "a unilateral change in our relationship," made without prior notice to the Association.

In his response to Sundell, Williams explained that he did not feel it was "reasonable to expect that this amount of information which took considerable time and effort for employees to collect for you will be provided for free." Williams told Sundell that if he did not want to pay the cost of copying the material he had requested, he could inspect the material at the District office. Sundell reviewed the documents that he had requested and never paid for any copies of these documents.

53. On September 2, 2005, the District billed Sundell \$19.40 for copies of information he had requested concerning the small schools initiative grant. In a letter to Williams dated September 20, 2005, Sundell objected to the charge, noting that the collective bargaining agreement did not mention charging the Association for information provided to it as exclusive bargaining representative. Sundell stated that the District had never charged the Association for information provided in the past, and told Williams that he believed that "the District is unilaterally changing the bargaining relationship with the Association by issuing this statement for copying charges." On behalf of the Association, Sundell offered "to collaboratively explore the common interests of the District and the Association regarding the potential costs associated with the District's obligation to provide information necessary for the Association to function as the exclusive bargaining representative."

54. In a letter dated November 7, 2005 to Williams, Sundell requested information from the District "to determine if there is merit in advancing a grievance on behalf of Kim Fandiño who received discipline on November 2, 2005, in the form of a

Letter of Reprimand from her Principal, Peggy Blair.” In his letter, Sundell requested the following documents:

- “□ A copy of all documents in Kim Fandiño’s personnel file
- “□ A copy of all documents contained in any working files maintained by the District regarding Kim Fandiño.
- “□ A copy of any warnings, directives or discipline given to Lebanon School District Employees regarding District Board Policies CCB-Line and Staff Relations and CF-Building Administration.
- “□ A copy of any documents relied upon or considered in reaching the decision to impose the reprimand of Ms. Fandiño.
- “□ A copy of any letters of reprimand issued to LEA Bargaining Unit members from 2000 to the present (names may be deleted)
- “□ A copy of minutes and tape recordings from all Lebanon School Board meetings including executive sessions in which Kim Fandiño has been mentioned by name or has addressed the Board.
- “□ A copy of any and all e-mail exchanged between Peggy Blair, Ken Ray, Jim Robinson, Ken Woody and Steve Williams mentioning or concerning Kim Fandiño from May 1, 2002 to the present.
- “□ A copy of any and all e-mail received from Kim Fandiño by Peggy Blair, Ken Ray, Jim Robinson, Ken Woody and Steve Williams from May 1, 2002 to the present.
- “□ A copy of any and all letters of complaints, or concerns received by the District from patrons concerning the Oregon Small Schools Initiative implementation at the Lebanon High School from September 2004 to the present.
- “□ A copy of any and all notes taken by Peggy Blair, Leann Raze, Mark Finch or Ken Ray as a result of or during meetings with Jim Robinson on September 27, 2005.”

Sundell instructed Williams to provide him with the above information by November 16, 2005. At the end of his letter, Sundell described Fandiño’s potential

grievance as a “special situation” and asked that Williams agree to waive the problem-solving mechanism in the contract grievance procedure if a grievance was filed. Included with Sundell’s letter was a form signed by Fandiño in which she authorized Sundell to represent her in all employment matters concerning the Lebanon School District, and authorized Sundell and anyone under his direction to read and copy documents about her in files maintained by the District.

55. Sundell did not receive a response from Williams, so on November 23, 2005, he wrote Williams to “follow up” on his previous request for information regarding the potential Fandiño grievance. Sundell asked that Williams contact him as soon as the information requested was available; he warned that if the District did not respond to his information request within 14 days, the Association “will seek legal advice on filing an Unfair Labor Practice against the District.”

56. In a letter dated November 28, 2005, Williams responded to Sundell. Williams’s letter stated in relevant part:

“I am in receipt of your letter of November 7 requesting certain documents and information relative to the recent disciplinary action against Kim Fandino [*sic*].

“You have asked for some information which will take an extensive amount of time and effort to obtain, review, and provide, such as email back from 2002 and copies of board minutes and executive sessions in which Ms Fandino [*sic*] is mentioned or participates. In other cases you have asked for information which you can readily review (Ms. Fandino’s [*sic*] personnel file). You mention at the end of your letter that you realize this is an unusual request, but feel it is a special situation. Although the District does not agree that this is a special situation, it may be helpful for us to discuss the request first to determine if it can be narrowed or simplified. If you wish me to proceed without discussion, I would want your written assurance in advance that the LEA/OEA will be responsible for the staff time, attorney costs (review to determine exempt or non-exempt status) and copying costs associated with this request, which could be substantial.”

Williams also told Sundell he was unwilling to forgo the problem-solving stage of the grievance procedure. Although Williams believed that it would be costly for the District to obtain some of the information that Sundell wanted, he never investigated the

amount of staff time it would take to get the requested materials and did not know how much it would cost the District to compile the materials Sundell had asked for.

57. By letter dated December 6, 2005, Sundell refused to provide Williams with written assurance that the Association would pay for staff time, attorney fees, and copying costs involved in compiling and producing the information he had requested. Sundell quoted the provisions of Section A, Article 23—Association Rights—from the collective bargaining agreement and noted that there was no mention of cost associated with the District’s obligation to provide the Association with the information needed to fulfill its duty as exclusive representative. Sundell concluded his letter as follows:

“* * * I believe the District is attempting to unilaterally change the bargaining relationship with the Association by conditioning the filling of this information request upon assurance of payment for the associated costs of this request.

“The District has a legal obligation to provide information necessary for the Association to function as the exclusive bargaining representative. A fee for providing this information would be viewed as a violation of the contract as well as a unilateral change in working conditions. If the District chooses not to comply with the contract and the law the LEA/OEA will be seeking legal counsel to remedy this situation.

“Please provide the information that is readily available as soon as possible. If there are requested items that the District feels are particularly burdensome please call, we may be able to identify a solution to those issues.”

58. Sundell received no response to his December 6, 2005 letter and none of the information he had requested. He wrote the District again on December 16, 2006 “to follow up on the request for information needed by the Association to determine if there is merit in advancing a grievance on behalf of Kim Fandiño who received discipline on November 2, 2005.” Sundell told the District that if he did not receive the “available information” by January 13, 2006, “the Association will initiate proper legal action to obtain this information in a timely manner.”

59. Sundell went on vacation in the latter part of December 2005. On December 19, 2005, Williams sent Sundell an e-mail, which stated in relevant part:

"I am in receipt of your December 6 letter regarding the Kim Fandino [*sic*] records request. I called your office this morning to see if we could discuss the requested items. Your secretary Linda told me you were on vacation but would probably be checking email. I don't want to disturb you on your vacation, but Linda thought it would be okay since you checked email. I would like to talk with you about the various requested items, particularly a few, as you discussed in your letter. If you would like to do that this week, I will be here through Thursday, Dec. 22, then off until Jan. 2. If not, that's fine, we can talk in early January."

60. Sundell received Williams' e-mail, but was unable to call him before Williams left for vacation. Sundell sent Williams an e-mail in which he said he would talk with Williams in January.

61. On January 18, 2006, Williams sent the following e-mail to Sundell:

"In response, let me take each item of your request:

"1. Documents in Kim's personnel file.

"Yes, we certainly have that available. You can inspect that with her permission at any time. Please make an appointment with my office. If you want a full copy, I would expect payment as per our administrative regulation.

"2. Copy of working files on Kim.

"Same as above. If you wish to inspect, please let me know and I will have the file ready. The only working file would be at LHS. If you want a copy, I would expect payment as per our administrative regulation.

"3. Copy of any warning, etc. to LCSD employees regarding policies CCB and CF.

"None that I am aware of.

"4. Copy of documents relied upon in reaching decision to reprimand Kim.

"To my knowledge, only the email sent by Kim to Josh Wineteer and Josh's answer subsequently forwarded to LHS staff by Kim on Sept. 28, 2005. That is available for inspection or as a copy.

"5. Copy of any letters of reprimand issued to LEA members from 2000 to present.

"Any disciplinary actions (including letters of reprimand) would be maintained in the individual's personnel file, not as a separate cumulative file. Searching all unit members files for any such letters will take staff time, thus cost, which I could estimate for you.

"6. Copy of minutes and tape recordings from Board meetings/exec. sessions mentioning or containing Kim.

"Your request does not indicate dates so I will assume all meetings since she was hired. You can inspect all those Board minutes and listen to all those tape recordings. We have them available for your review. Please make an appointment with Kathy Schurr in the Supt. Office. If you wish copies of minutes and/or tapes, or expect a search of those records for Kim's name only (which will take staff time to review) we will expect payment.

"7. and 8. Copy of all email exchanged between or received from Kim by Peggy, Ken R, Jim R, Ken W, Steve W.

"This search process will take staff time, including time to review the applicable emails to determine whether any (or portions of any) would be exempt from public disclosure. Again, we would expect payment for the time involved.

"9. Copies of letters of complaint from patrons regarding OSSI implementation.

"I have checked on this with high school administrators, Jim R., Steve K., and Brenda B. I have two such letters, which are available for your inspection or copy.

"10. Copy of any notes taken at a Sept. 27 meeting between high school administrators and Jim R.

"I have checked with all of them. No one took any notes.

"In summary, some of your requests can be fairly easily met, some not. You have previously made it clear that you did not intend to provide payment for the staff time and/or copy costs as detailed above. Until that issue is resolved, I can offer you only inspection of the aforementioned documents.

“Perhaps to assist in narrowing down the items, it seems to me that we could take care of requests #1, #2, #4, and #9 fairly easily through your inspection. Then, if you wanted copies, we could provide (at cost). As stated, there are no documents related to requests #3 and #10. That leaves requests #5, #6, #7, #8, which will take staff time to search and/or prepare. If you want me to pursue that, I will create a cost estimate, which will need to be approved by you before we proceed.

“Sorry this is lengthy, but your request is complex and I thought this was the best way to explain the situation for each area and move toward resolution. Let me know how you would like to proceed. Perhaps we could discuss it tomorrow night (Jan. 19) if we get a chance during the mediation session. Thank you.”

62. On January 19, 2006, Sundell responded to Williams with the following e-mail:

“Thanks for your response. The Association is in the process of seeking a legal remedy for this issue. I believe I enclosed an information release form from Kim Fandiño authorizing the release of information to myself or another representative of the Oregon Education Association. The current collective bargaining agreement specified in Article 23 - Association Rights remained unchanged through the last negotiations. ‘A. ***Information: Upon request, the Board agrees to furnish to the Association that information as required by law necessary for its functioning as exclusive bargaining representative.***’ This means just what it says, no cost is specified, therefore it is without cost to the Association.” (Emphasis and bold in original.)

63. Sundell never received any of the documents he had originally requested in November 2005. During the period November 2005 through January 2006, Sundell was very busy and did not believe he had the time to inspect any documents at the District office.

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)(a) when it disciplined Kim Fandiño because she contacted Board Member Wineteer and then sent copies of her e-mail communications with Wineteer to bargaining unit members.

The facts concerning Fandiño's discipline are undisputed. At the beginning of the 2004-05 school year, the District implemented a program that divided the high school into four independent learning academies and assigned each student to one of the academies. Opposition to certain aspects of this program developed among Association bargaining unit members. In particular, many teachers disliked the restriction that, with few exceptions, students could take classes only in their own academies. At the urging of teachers and parents, the District Board passed a motion to increase the number of classes students could take outside of their academies. Bargaining unit member and Association President Kim Fandiño became upset when she concluded that her supervisor, Principal Blair, incorrectly interpreted the Board's motion in a manner that did not fully implement the Board's intent. Fandiño contacted Josh Wineteer, the Board member who made the motion, and obtained his permission to send an e-mail to all high school staff that expressed Wineteer's interpretation of his motion. Blair then reprimanded Fandiño in writing for violating Board policies that require teachers to submit all formal communications to the Board through the District superintendent, and require teachers to work under the direction of the building principal in performing their duties. Accordingly, the record is clear, and the parties do not dispute, that the District's only reason for disciplining Fandiño was her September 27 e-mails to Board Member Wineteer and members of the Association bargaining unit.

The Association contends the District's discipline of Fandiño violates ORS 243.672(1)(a). That statute makes it an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of" the protected rights to form, join, and participate in the activities of a labor organization for the purpose of representation and collective bargaining.

Subsection (1)(a) contains two separate violations. It prohibits employer actions that interfere with, restrain or coerce employees "because of" their exercise of protected rights; and it prohibits employer actions that interfere with, restrain or coerce employees "in the exercise" of protected rights. *Lane County Public Works Association v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 603 (2004). The Association alleges the District's discipline of Fandiño violated both prongs of subsection (1)(a).

“Because Of” Claim

The “because of” portion of ORS 243.672(1)(a) prohibits a public employer from basing its actions on an employee’s protected union activity. A complainant does not need to show that the employer acted with hostility or anti-union animus. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168 (2007) (*appeal pending*). A complainant needs to show only that “the employer was motivated by the protected right to take the disputed action.” *Amalgamated Transit Union v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 788 n 8 (1998) (emphasis in original). The emphasis is on the reason for the employer’s action. *Portland Association of Teachers and Poole v. Multnomah School District No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).

We typically begin our analysis by examining the record to determine the reason the employer acted. See *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004) (describing the analytical framework under subsection (1)(a)). Here, however, the parties agree on the reason for the discipline. We therefore move to the next step in the analysis where we determine whether the reasons are lawful. *Id.* Thus, we address whether Fandiño’s communications with a Board member constitute activity protected under the PECBA.

Slawson and IAFF, Local #1817 v. Jackson County Rural Fire Protection District, Case No. UP-6-86, 9 PECBR 8921 (1986) concerned adverse action against Slawson, a firefighter who acted as spokesperson for the firefighters’ labor organization. The fire district board invited Slawson to make a presentation to them regarding the Fair Labor Standards Act (FLSA) and its applicability to district employees. The fire chief subsequently denied Slawson a promotion. Among the reasons the chief cited for denying Slawson the promotion was Slawson’s failure to follow the chain of command when he communicated directly with the fire district board regarding the FLSA. We concluded that basing the decision regarding Slawson’s promotion in part on Slawson’s FLSA presentation to the fire district board constituted “unlawful discriminatory reasons” and violated section (1)(a). 9 PECBR at 8937.

Here, as in *Slawson*, Board members, administrators, and bargaining unit members recognized Fandiño as the spokesperson for the Association; she regularly attended and spoke at Board meetings, and individual Board members sought her out as a source of information regarding District programs and operations. Fandiño was acting as the Association spokesperson, and not as an individual, when she questioned Wineteer about the motion he made at the September 26 Board meeting. Fandiño’s request for permission to send out Wineteer’s clarification to all the teachers indicates that she was speaking as Association president, and Wineteer readily assented to this request. We conclude that Fandiño engaged in the type of communication we found

protected in *Slawson* when she sent Wineteer an e-mail asking for clarification of the motion he made at the September 26 board meeting. Accordingly, the District disciplined Fandiño for engaging in protected activity when it reprimanded her for communicating with Wineteer.

We also conclude that Fandiño exercised protected rights on September 28, 2005, when she sent bargaining unit members a copy of Wineteer's explanation of his motion. The requirement that students take classes only within their own academies had both actual and potential effects on teachers' working conditions, including class size, evaluation, and job security. Fandiño was acting in her role as leader of the Association when she communicated a Board member's position on a topic that impacted the bargaining unit members she was obligated to represent in employment relations matters. As we explained in *Sandy Education Association and Davey v. Sandy Union High School District*, Case No. UP-42-87, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988):

“* * * One of the underlying purposes of the Public Employe Collective Bargaining Act (PECBA) is to encourage ‘practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions * * *.’ ORS 243.646(3). That purpose can be attained only when employes are free to discuss with other unit members and union representatives any matter arising out of the employment relationship.”

Fandiño's communication to bargaining unit members was activity protected under the PECBA. The District violated ORS 243.672(1)(a) when it reprimanded Fandiño for engaging in that activity.

The District contends, however, that even if Fandiño's e-mail to Wineteer and her forwarding of his explanation to bargaining unit members were PECBA-protected activities, her actions so seriously disrupted District operations that the District was justified in disciplining her. In support of its position, the District cites *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No UP-32-02, 20 PECBR 444, 458 (2003). There, we concluded that an employer has the right to discipline (and investigate possible discipline of) employees for serious proven misconduct that occurs in the course of otherwise protected activity.

The record contains no evidence that Fandiño's communications with Wineteer and bargaining unit members adversely affected District operations. To the contrary, Blair was able to implement necessary scheduling changes that were consistent with her understanding of the Board's motion.

The District has a legitimate interest in maintaining the authority of the administrators who are appointed to manage District programs and in preferring that employees follow an appropriate chain of command in dealing with their workplace concerns. However, the District's right to supervise its staff does not excuse its obligations under the PECBA. In *Thyfault and OEA v. Pendleton School District #16*, Case No. UP-101-90, 13 PECBR 275, *adhered to on reconsideration*, 13 PECBR 380 (1991), *AWOP*, 116 Or App 675, 843 P2d 514 (1992), *rev den*, 316 Or 529, 854 P2d 940 (1993), we acknowledged that enforcement of PECBA rights can adversely affect a school district's duties to patrons, staff, and students. In *Thyfault*, a school district began investigating a teacher who allegedly engaged in a number of acts of misconduct that included administering corporal punishment to students and instructing subordinates to lie about incidents of corporal punishment. We found that the school district violated subsection (1)(a) when it forbade the teacher from discussing these misconduct charges with parents, staff, and students. We noted that a school district had a "paramount interest" in protecting potential witnesses to legal proceedings involving the teacher, and that the school district had "ample reason" to believe that the teacher might attempt to interfere in the investigation. Nonetheless, we asked and answered the following question: "Can the best of school board motives, such as those demonstrated here, operate to defeat 'guaranteed' employe rights granted under ORS 243.662? The answer is no." *Thyfault*, 13 PECBR at 282-83.

The fact that the District believed Fandiño violated a District policy is not dispositive. We must examine the policy to determine whether it infringes on rights guaranteed by the PECBA. In *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96, 16 PECBR 868 (1996), we recognized that "[f]ree and frank conversations regarding work-related concerns are an essential part of the peaceful dispute resolution process that the PECBA is designed to promote." 16 PECBR at 875. There, a teacher, acting in her capacity as union representative, spoke to a new teacher about work-related issues, and in the process made negative comments about several staff members. The employer reprimanded the teacher for violating a policy that requires positive communications among teachers. This Board concluded that the teacher's comments constituted protected activity even though they violated an employer policy that prohibited such comments. Accordingly, we held that the reprimand violated subsection (1)(a).

Thus, the District's channels policy may generally further a legitimate District interest—the need to effectively manage its operations through a well-defined supervisory structure. Here, however, that interest conflicts with the PECBA-protected rights of bargaining unit members. Under our cases, such a conflict does not provide a reason to deny employees their PECBA rights. Accordingly, we find that the District's actions in disciplining Fandiño for exchanging e-mails with Wineteer, and for sending

copies of her e-mail exchange with Wineteer to bargaining unit members, violated the “because of” portion of ORS 243.672(1)(a).

“In the Exercise” Claim

We turn to the “in the exercise” portion of ORS 243.672(1)(a). Under this provision, the District’s motive is irrelevant. Instead, we examine the consequences of its actions. If these actions, viewed objectively, would naturally and probably deter a reasonable employee from engaging in protected activity, the employer violates the “in the exercise” portion of subsection (1)(a). *Portland Association of Teachers and Poole*, 171 Or App at 624. There are two types of “in the exercise” violations. First, an employer that violates the “because of” portion of subsection (1)(a) also commits a derivative violation of the “in the exercise” portion. Second, an employer may also independently violate the “in the exercise” portion, typically by coercive or threatening statements. *State Teachers Education Association v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003)

The District committed a derivative “in the exercise” violation. We have already concluded that the District violated the “because of” portion of subsection (1)(a). A “because of” violation will almost always restrain, coerce, or interfere with the exercise of protected rights. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 (1986). Here, Fandiño received a reprimand for engaging in protected activity. A reasonable employee would thereafter refrain from this activity in order to avoid such consequences, and perhaps progressively harsher consequences. In addition, any reasonable bargaining unit member who saw what happened to Fandiño would naturally and probably be deterred from engaging in similar protected activity in light of the consequences.

We opt not to address the question of whether the City additionally committed an independent violation of the “in the exercise” portion of subsection (1)(a). We have already found two violations of subsection (1)(a)—one under each prong—and it would add nothing to the remedy to find a third.

3. The District violated ORS 243.672(1)(b) when it disciplined Fandiño for contacting Board Member Wineteer and for sending communications with Wineteer to bargaining unit members.

A public employer violates ORS 243.672(1)(b) when it dominates, interferes with, or assists in the formation, existence, or administration of a labor organization. Labor organizations are the direct beneficiary of subsection (1)(b); to prove a violation, a complaining union must prove that the employer’s actions impeded or

impaired the labor organization in performing its duties as exclusive representative. *Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 780, 789 (1989).

Here, the District disciplined Fandiño solely because of communications she made in her capacity as Association president and spokesperson. The discipline has actually interfered with Fandiño's ability to perform her duties as president of and spokesperson for the bargaining unit she represents—Fandiño is now understandably hesitant and fearful of speaking to Board members and bargaining unit members about Association matters. The District's discipline of Fandiño deprived the Association of a president capable of performing the full range of her duties on behalf of the Association and its members. For these reasons, we conclude that the District violated subsection (1)(b) when it disciplined Fandiño for communicating with a Board member and for circulating a statement approved by the Board member to bargaining unit members.

4. This Board does not reach the issue of whether the District violated ORS 243.672(1)(c) when it disciplined Fandiño.

Because we have found that the District violated ORS 243.672(1)(a) and (b) when it disciplined Fandiño, it is not necessary to consider if these same actions also violated ORS 243.672(1)(c). Even if we were to find a subsection (1)(c) violation, it would add nothing to the remedy. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 101 (2007), *appeal pending* (citing cases).

5. Principal Ray's discussion with bargaining unit member McIntyre about an e-mail she sent to Board Member Wineteer did not violate ORS 243.672(1)(a).

Bargaining unit member Debra McIntyre sent an e-mail to school Board member Wineteer about the enforcement of student discipline policies concerning skateboards on campus. The Association alleges that Principal Ray's October 17, 2005 discussion with McIntyre about that e-mail interfered with, restrained, or coerced McIntyre "in" or "because of" the exercise of rights guaranteed by ORS 243.672(1)(a). Ray's comments indicated that McIntyre's e-mail may have violated the District's communications policy and that McIntyre may be disciplined in order to be consistent with actions the District might take against Fandiño.

The "because of" prong of subsection (1)(a) applies when an employer takes action because an employee engaged in protected activity. The exercise of protected activity is thus a necessary element in a "because of" claim. Here, the actions that resulted in Ray's discussion with McIntyre—the e-mail McIntyre sent to Wineteer—did not constitute an exercise of protected activity. McIntyre is an

Association member, but unlike Fandiño, she holds no position in the organization, does not attend meetings, and does not act as an Association spokesperson. When McIntyre sent an e-mail to Wineteer about lax enforcement of rules prohibiting skateboards in the high school, she acted out of a strictly personal concern; nothing in the record suggests that McIntyre was speaking for, or had authority to speak for, anyone other than herself. *See McLoughlin Education Association v. McLoughlin Union High School District*, Case No. C-212-82, 7 PECBR 5998, 6005 (1983) (a teacher’s remarks to a school board were not protected activity because the teacher spoke as an individual and not as a representative of the labor organization). Because McIntyre did not engage in protected activity, it follows that Ray’s discussion with McIntyre did not occur “because of” McIntyre’s protected activity.

For similar reasons, Ray’s remarks to McIntyre on October 17 did not violate the “in” prong of subsection (1)(a). The “in” prong prohibits employer actions that would likely deter a reasonable employee from engaging in protected activity. As described above, Ray’s remarks did not concern protected activity, so the remarks would not be likely to deter McIntyre from engaging in protected activity. Ray’s remarks did not violate the “in” prong of subsection (1)(a).

Ray’s discussion with McIntyre on October 11 violated neither the “because of” nor the “in” prong of ORS 243.672(1)(a). We will dismiss these allegations

6. District policies BG “Board-Staff Communications” and CCB “Line and Staff Relations” violate ORS 243.672(1)(a) on their face.

Among the rights protected by the PECBA is the right to participate in the activities of a labor organization. Employer policies that limit employees’ discussion of union-related matters in the workplace may violate ORS 243.672(1)(a) if they interfere with, restrain, or coerce employees in the exercise of their PECBA rights. “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.” *SEIU Local 503, OPEU v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864, 872 (2005) (citing *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146, 152 (1999)).

The Association alleges that three District policies—BG “Board-Staff Communications,” CCB “Line and Staff Relations,” and CF “Building

Administration”—violate (1)(a) on their face because they unlawfully restrict bargaining unit members’ communications about labor relations matters in the workplace.⁴

In *IAFF, Local 1817 v. Jackson County Fire District No. 3*, Case No UP-64-90, 12 PECBR 656 (1990), we considered policies requiring an employee to obtain prior authorization from a supervisor before discussing certain topics. There, a fire chief reprimanded a firefighter for contacting another fire district regarding union representation of employees. The fire chief based the reprimand on the firefighter’s failure to follow a fire district policy that prohibited employees from contacting another fire district except through “regular channels or by authorization of the Fire Chief.” 12 PECBR at 660. We deemed it “axiomatic that an employer cannot lawfully condition employees’ exercise of protected rights on its own prior authorization.” Consequently, we held that the fire district violated the “in” prong of subsection (1)(a) when it disciplined a firefighter for failing to comply with the policy requiring the chief’s authorization to speak to employees in another fire district. *Id.* at 665.

Applying these standards, we conclude that two Board policies—BG “Board-Staff Communications” and CCB “Line and Staff Relations”—constitute an unlawful interference “in” the employees’ exercise of protected rights. Policy BG requires that all “formal communications” to the Board must be “submitted through the superintendent.” Policy CCB directs a bargaining unit member “to refer matters requiring administrative action to the administrator to whom they are responsible. That administrator will refer such matters to the next higher administrative authority when necessary.” Read together, these policies prohibit bargaining unit members from discussing many of their workplace concerns with anyone other than the District superintendent or their supervising administrator.

The natural and probable effect of policies BG and CCB is to restrain bargaining unit members “in the exercise” of protected rights. We begin with the observation that most employees feel compelled to comply with employer policies, whether through duty, loyalty, or fear of punishment. The policies at issue here prohibit bargaining unit members from engaging in collective activities protected by the PECBA. Under the policies, for example, an Association representative cannot talk to fellow teachers in order to investigate a potential grievance, cannot try to resolve a grievance by discussing it with an administrator other than the one to whom the investigating teacher is responsible, and cannot appear on behalf of the union at a Board meeting to discuss employment relations matters with the Board members. As we observed in *Roseburg Education Association v. Douglas County School District*, 16 PECBR at 875, “[f]ree and frank conversations regarding work-related concerns are an essential part of the

⁴All three policies are set forth in Finding of Fact 3

peaceful dispute resolution process that the PECBA is designed to promote.” For these reasons, we conclude that District policies BG and CCB are so broad that they unduly restrict the PECBA-protected rights of bargaining unit members and thereby violate the “in” prong of subsection (1)(a).

The parties dispute the proper remedy for the two policies that violate subsection (1)(a). The Association urges us to declare the policies invalid. The District argues that we should leave the policies in place and deal only with particular applications of the policies that violate the law.

The District notes, and we agree, that there are some legitimate applications of its policies that do not interfere with protected union activity. According to the District, the existence of any lawful application prevents us from declaring the policies facially invalid and striking them in their entirety. The District asserts that federal cases hold similar channels policies to be valid on their face even if they may violate the First Amendment in a particular application. *E.g., Anderson v. Central Point School District No. 6*, 554 F Supp 600 (D. Or. 1982), *aff’d in part*, 746 F2d 505 (9th Cir 1984). The District asks us to adopt the same reasoning.⁵

We need not decide whether the District correctly assesses the holdings in the federal cases it cites. We have a well-developed analysis for determining whether an employer action interferes with employees in the exercise of their PECBA-protected rights, and the District has offered no persuasive reason for departing from it. The test for evaluating an alleged violation of the “in the exercise” prong of subsection (1)(a) is “whether the natural and probable effect of the employer’s conduct would tend to interfere with employees’ exercise of protected rights.” *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). Here, for the reasons described above, the District’s policies have a natural and probable tendency to interfere with PECBA-protected speech. They therefore violate subsection (1)(a).

To be clear, our concern here is not with the application of the policies—we do not expect that the District will ignore our order and continue to apply the policies to punish employees who have already engaged in protected activity. Rather, our concern is that the mere existence of the policies may dissuade employees from engaging in protected activities in the first place. At oral argument, the District conceded that its administrators read the policies reasonably when they applied those policies to discipline Kim Fandiño for engaging in protected activities. Other employees in the District might

⁵A policy that passes constitutional muster does not for that reason alone necessarily comply with statutory requirements. A statute can provide more protection than the Constitution requires, but not less. We can enforce subsection (1)(a) even if it provides more protection for union-related speech than the Constitution.

also reasonably read the policies to prohibit certain union activity, and they would be chilled from engaging in those activities. Because of that chilling effect, the policies are unlawful on their face.⁶

In regard to District policy CF, we do not find that it violates (1)(a) on its face. The policy establishes a school principal's authority to manage affairs in the principal's building. The policy directs all personnel to "work through and under the principal's direction in the performance of their duties within the school," but does not place restraints on bargaining unit members' activities other than their assigned responsibilities. Accordingly, the policy appears, on its face, to address only the principals' authority to supervise teachers in their work and does not prohibit Association activities.

7. The Association was not required to exhaust the parties' collectively bargained grievance procedure before pursuing a claim under ORS 243.672(1)(e).

The Association's complaint alleges that the District violated ORS 243.672(1)(e) when it unilaterally changed its long-standing practice of providing information to the Association at no charge. The District asserts this claim must be dismissed because the Association failed to exhaust its remedies under the contract grievance procedure.

A party is required to exhaust any applicable grievance procedure before litigating an alleged violation of a collective bargaining agreement under ORS 243.672(1)(g). *West Linn Education Association v. West Linn School District*, Case No. C-151-77, 3 PECBR 1864 (1978). In general, however, this exhaustion doctrine applies only to alleged violations of subsection (1)(g). *Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-12-02, 20 PECBR 274, 279 (2003). More specifically, "exhaustion is not required when the complainant is alleging a unilateral change in violation of (1)(e)." *Southwestern Oregon Community College Classified Federation v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 663 (1993). The Association does not allege that the District's actions violated subsection (1)(g), and it is not required to exhaust contract remedies before litigating its unilateral change allegation under subsection (1)(e).

8. The District violated ORS 243.672(1)(e) when it unilaterally changed its practice in regard to charging the Association for requested information.

⁶If the District believes its channels policies serve a legitimate purpose in other contexts, it can amend the policies to give the employees clear and explicit notice that PECBA-protected activities are not prohibited.

In general, a public employer violates its duty to bargain in good faith under ORS 243.672(1)(e) if it makes a unilateral (*i.e.*, unbargained) change in the *status quo* concerning a subject that is mandatory for bargaining. The Association contends that the District unlawfully changed the *status quo* when it charged the Association for the cost of producing documents the Association requested concerning the District's disciplinary action against Fandiño. The District denies it made any such change; it also argues, in the alternative, that even if it made a change, it was permitted to do so because its duty to provide information to the Association concerns a permissive or prohibited subject for bargaining.

In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies).

We begin by identifying the *status quo*. The *status quo* can be established by an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 665, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *on reconsideration* 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). The Association relies on the parties' past practice. The record establishes that in the past, the District generally provided information to the Association free of charge. The three exceptions to this general practice are all instances where the Association paid less than \$20 for copying costs. We conclude that the mutual, long-standing, and consistent practice of the parties is to provide information for free or for a nominal copying charge. This practice establishes the *status quo*. See *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005) (discussing factors for establishing a past practice as the *status quo*).

— Here, the District changed the *status quo*. The Superintendent refused to provide the requested information unless the Association gave written assurance in advance that it would reimburse the District for the staff time, attorney fees, and copying costs incurred in compiling and producing it. This demand exceeds the prior practice of charging at most a nominal amount to cover copying costs, and the District never before collected reimbursement for staff time or attorney fees. See *Lincoln County Education Association v. Lincoln County School District*, 19 PECBR at 665 (a union's acceptance of minor changes in the past does not waive the right to bargain over major changes of far greater magnitude).

We next determine whether the District's change in the *status quo* regarding charges for information concerns a mandatory, permissive, or prohibited subject for bargaining. ORS 243.650(7)(a) lists the subjects considered "[e]mployment relations" that are mandatory for bargaining: "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." Subjects identified in subsections (7)(b), (d), (e), and (f) are defined as permissive. Under subsection (7)(c), this Board must use a balancing test to determine the status of subjects the statute does not specifically designate as permissive or mandatory. Under the balancing test, a subject is permissive if the impact of the subject on management's prerogatives is greater than the impact on employees' conditions of employment. *In the Matter of the Petition for Declaratory Ruling Filed Jointly by Oregon AFSCME Council 75, Local 3351, Oregon Association of Justice Attorneys and State of Oregon, Department of Justice*, Case No. DR-3-00, 19 PECBR 40, 45 (2001). A subject prohibited for negotiations is one "that violates, or is contrary to, a statute or constitutional provision." *SEIU Local 503, OPEU v. State of Oregon, Department of Administrative Services*, Case No. UP-12-01, 19 PECBR 325, 332 (2001), *aff'd*, 183 Or App 594, 54 P3d 1043 (2002).

We reject the District's contention that providing information to the Association for free or for a nominal charge concerns a prohibited subject for bargaining. When an employer provides a benefit to the union, we must determine whether the benefit constitutes lawful cooperation with the union, or unlawful assistance to the union which is prohibited under ORS 243.672(1)(b). In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 861 (1993), *AWOP*, 133 Or App 602, 892 P2d 1030, *rev den*, 321 or 268, 895 P2d 1362 (1995), we considered a union proposal that would require the employer to provide paid time to an Association officer to conduct Association meetings. We noted this Board's prior holding that a proposal to give employees paid leave time to conduct union business was not a prohibited subject for bargaining if it concerned matters directly related to the collective bargaining relationship between the exclusive representative and employer. We found that application of this rule "resulted in holdings that proposals relating to local union activities constitute lawful cooperation, not unlawful assistance." 14 PECBR at 860 (citing *Eugene Education Association v. Eugene School District*, Case No. C-93-79, 5 PECBR 3004 (1980)). On this basis, we concluded that a proposal for paid time for an association officer to conduct association meetings was central to the relationship between the local association and school district and was not a prohibited subject for bargaining. We then balanced the effects the proposal had on management's rights against its effects on the association to determine whether the proposal was mandatory or permissive. We determined that on balance, the proposal had a greater impact on the employees and their union, and we therefore concluded the proposal concerned a mandatory subject for bargaining. *AOCE v. State of Oregon, Department of Corrections*, 14 PECBR at 861. We have also held other similar contractual

provisions to be mandatory, such as paying employees their wages for time they spent in negotiations during their regular work hours. *AFSCME, Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536 (1989).

We apply those principles here. The mutual obligation of the parties to provide the other with relevant information fulfills the statutory policy to facilitate effective collective bargaining. Without essential information, the bargaining process cannot function properly. A local association needs certain information from a school district in order to fulfill its duty to fairly represent its members in negotiating and enforcing a collective bargaining agreement. We conclude that an employer's duty to provide this necessary information, and the cost of producing it, are subjects that directly concern the rights of a local union and involve lawful cooperation between a labor organization and an employer, and not unlawful assistance. Consequently, an employer's obligation to provide information to a union for free or for a nominal copying charge does not concern a subject that is prohibited for bargaining.

We further conclude that providing information to a labor organization at little or no charge concerns a mandatory subject for bargaining. A union is typically financed by dues and fair share payments from bargaining unit members. When the expenses of a union are lower, as when an employer does not charge the union for information, the dues and fair share payments of bargaining unit members are lower. "[D]irect or indirect monetary benefits" to employees are mandatory for bargaining. ORS 243.650(7)(a). Lower dues and fair share payments constitute a direct or indirect monetary benefit to employees, and the cost of providing information therefore concerns a mandatory subject for bargaining.⁷ The District has thus changed the *status quo* concerning a mandatory subject for bargaining, and it did not offer to bargain with the Association before the change.⁸

⁷We see little difference between the cost of providing necessary information and other subjects we have found mandatory. *E.g., Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832, 861 (1993), *AWOP*, 133 Or App 602, 892 P2d 1030, *rev den*, 321 or 268, 895 P2d 1362 (1995) (proposal for employer-paid time for union officer to conduct union meetings is mandatory); *AFSCME, Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536 (1989) (paying employee wages for time spent in negotiations during regular work hours is mandatory); *South Lane Education Association v. South Lane School District No. 45J*, Case No. C-280, 1 PECBR 459, 473-74 (1975) (proposals which assist the union in its duty of fair representation are mandatory, including proposals to use school facilities and equipment for union business and for paid release time for union officers).

⁸In a unilateral change situation, the employer's obligation to bargain usually does not attach unless the union first demands to bargain. Here, however, the District presented the Association with a *fait accompli*. The Association did not need to demand bargaining because the

We turn next to the District's affirmative defense of waiver. In its answer, the District points to language in the parties' collective bargaining agreement which provides that "[u]pon request, the [School] Board agrees to furnish to the Association that information as required by law necessary for its functioning as exclusive bargaining representative." According to the District, this contract language "constitutes a clear and unmistakable waiver of the Association's right to demand to bargain over District charging of costs for provision or [sic] information during the term of the parties' collective bargaining agreement." (Answer to Second Amended Complaint, paragraph 16.)

Over the years, this Board has struggled with the interplay between the collective bargaining agreement and the unilateral change doctrine. Two recent Court of Appeals decisions have helped clarify. This is our first opportunity to synthesize the cases. We begin with a brief historical overview of the cases to help put the issue in perspective.

The earlier cases are recounted in greater detail in *Oregon School Employees Association v. Bandon School District #54*, Case Nos. UP-26/44-00, 19 PECBR 609, 621-23 (2002). The first case of note is *Corvallis School District 509J v. Oregon School Employees Association*, Case No. C-82-82, 6 PECBR 5409 (1982). There, the employer alleged that the union refused to bargain over certain employer proposals. The union defended on grounds that the employer waived its right to bargain the proposals at issue because it failed to include the issues on a reopener list as specified in the collective bargaining agreement. The Board reviewed policy considerations and "settled" NLRB law, and concluded that any waiver of the right to bargain must be in "clear and unmistakable language." *Id.* at 5412.

Several years later, we used a different analytical approach to a similar issue. In *AFSCME, Council 75 v. Umatilla County*, Case No. C-183-82, 8 PECBR 6559a (1984), the union alleged the employer unilaterally changed its practice regarding layoffs and work hours. The employer asserted the matters were covered by the collective bargaining agreement and it therefore had no further obligation to bargain. We agreed with the employer. The contract contained provisions dealing with layoffs, maintenance of working conditions, work hours, and a "zipper" clause. We concluded that these provisions demonstrated that the employer had fulfilled its bargaining obligation on the issues in dispute.

District had already made the unilateral change. *Teamsters Union Local No. 57 v. City of Brookings*, Case No. UP-141-93, 16 PECBR 267, 274 (1995).

On reconsideration, 8 PECBR 6767 (1985), we clarified that in a unilateral change case, we are concerned only with the amount of bargaining that occurred but not with the substance of the bargain struck. We stated that in a unilateral change case, it is not appropriate for us to interpret contract terms; whether a contract term authorizes or prohibits a particular action is irrelevant under subsection (1)(e). All that matters is whether sufficient bargaining occurred. 8 PECBR at 6771. As a consequence, “we will consider the parties’ contract and other documentary and testimonial evidence to show only 1) the *extent* to which bargaining occurred over the subject employment condition and 2) whether the union *waived* its right to bargain, by agreement or otherwise.” 8 PECBR at 6770 (emphasis in original).

In *Oregon School Employees Association v. Astoria School District*, Case No. UP-52-91, 13 PECBR 474 (1992), we further refined the *Umatilla County* “bargained to completion” defense. We held that an employer fulfills its bargaining obligation when the parties’ agreement contains language that is “specifically relevant” to the issue in dispute. *Id.* at 480. We applied the “specifically relevant” standard in a number of subsequent cases.⁹ Confusingly, however, in the same time frame, we also applied the “clear and unmistakable” standard to an employer’s claim that the parties’ contract waived the union’s right to bargain and permitted it to make unilateral changes. *Service Employees International Union, Local #49 v. Pacific Communities Hospital*, Case No. UP-92-91, 13 PECBR 753 (1992).

In *Bandon School District*, 19 PECBR 609, we recognized that our cases had developed two parallel approaches to analyzing unilateral change cases where the employer raises the contract language as a defense. We held that we would no longer apply the “specifically relevant” analysis and would instead use a “clear and unmistakable” waiver approach. The waiver analysis is clearer, applies well-established principles with a large body of case law to look to for guidance, and keeps the focus properly on the notion that parties must bargain over mandatory subjects during the life of the agreement unless there is a showing of waiver. 19 PECBR at 624.

The next significant case is *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, *supplemental orders* 19 PECBR 804 and 19 PECBR 848, *on reconsideration* 19 PECBR 895 (2002), *aff’d*, 187 Or App 92, 67 P3d 951 (2003). There, the District unilaterally increased student contact time (the amount of time teachers must spend with students each day), a mandatory subject for bargaining. Among other defenses, the District asserted that even though student contact time was not directly addressed in the parties’ contract, there was language “specifically

⁹*E.g.*, *OSEA v. Klamath County School District*, Case No. UP-18-92, 14 PECBR 1 (1992); and *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26 (1999).

relevant” to the subject, and it had therefore met its bargaining obligation. We rejected this defense and the District appealed.

The Court of Appeals affirmed our decision. It held that this Board was not required to use the “specifically relevant language” standard we had rejected in *Bandon School District*. In a passage that would prove crucial in later decisions, however, the court noted the narrow contours of the District’s argument and its decision:

“It is not an argument about interpreting the agreement, which, the parties and ERB agree, does not include any terms dealing with contact hours. The district, in other words, does not argue that the collective bargaining agreement, correctly construed, encompasses a completed bargain over contact hours. That argument would raise a purely legal question regarding ERB’s interpretation of the agreement, which we would review for legal error. Rather, the District’s contention is that the collective bargaining agreement, because it deals with topics that are ‘relevant to’ contact time (length of in-school workday, amount of preparation time, etc.), is itself evidence that the parties reached a separate, unwritten agreement on contact time.” 187 Or App at 97-98.

The most recent decision of importance is *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890 (2005). There, the union accused the employer of unilaterally altering several working conditions, including employee days off and the start-stop times for shifts. The employer defended on grounds that the parties’ collective bargaining agreement permitted it to make the changes without further bargaining. We applied the *Bandon School District* “clear and unmistakable” waiver standard to the defense and rejected it. We noted that the language on which the employer relied was ambiguous at best and therefore did not meet the exacting “clear and unmistakable” standard.

The Court of Appeals reversed and remanded the matter to us for further consideration. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 209 Or App 761, 149 P3d 319 (2006). It observed that we applied a “clear and unmistakable” waiver standard and therefore did not construe the provisions of the parties’ labor agreement. The court held that this Board was required to interpret the contract to determine if it authorized the employer to make unilateral schedule changes. 209 Or App at 770. It instructed us to use general rules of contract construction in

making this determination. If the contract is ambiguous, we must “resolve the ambiguity by examining extrinsic evidence of the contracting parties’ intent, if such evidence is available.” *Id.*¹⁰

Thus, this Board’s cases prior to the court’s decision in *AOCE* seemed to assume that all contract defenses to unilateral change allegations presented the same question and required the same method of analysis. Although we struggled with that analysis and occasionally changed it, we tried to apply it uniformly to all contract defenses. The upshot of the recent Court of Appeals decisions, as we read them, is that there are actually two separate defenses, each with a separate analysis. The first defense asserts that the contract language permits the employer to take the specific action it did. In such cases, we must interpret the contract language to determine whether the contract does in fact authorize the action. The second defense does not assert that the contract expressly allows the action, but rather that the contract in some fashion waives the union’s right to bargain over the matter. In such cases, we will continue to apply the “clear and unmistakable” standard as articulated in *Bandon School District*.

We apply these standards to the case before us. We must first determine which type of contract defense the District is raising. The complaint asserts the District changed its long-standing practice of providing information to the Association for little or no cost. The District’s answer to the complaint asserts that the contract language “constitutes a clear and unmistakable waiver of the Association’s right to demand to bargain over District charging of costs for provision or [*sic*] information during the term of the parties’ collective bargaining agreement.” Upon questioning during oral argument, the District clarified that it is not asserting that the contract specifically permits it to charge for information.

We are thus faced with a waiver defense; the District must prove the Association clearly and unmistakably waived its statutory right to bargain. The District relies on contract language that provides: “Upon request, the [School] Board agrees to furnish to the Association that information as required by law necessary for its functioning as exclusive bargaining representative.” This language does not mention bargaining, waiver, or charges for supplying information to the Association. Whatever else this language may require, it does not clearly and unmistakably waive the Association’s statutory right to bargain over District charges for providing information.

¹⁰Remand proceedings are pending. We permitted the parties to reopen the record to present further testimony and other evidence to address the new standard established by the court.

The District has failed to prove its affirmative defense that the contract waives the Association's right to bargain. We conclude that the District violated ORS 243.672(1)(e) when it changed the *status quo* regarding charges for providing information to the Association. We will order the District to cease and desist

9. The District's response to the Association's request for information related to the disciplinary action imposed upon Fandiño violated ORS 243.672(1)(e).

The employer's obligation to bargain in good faith under ORS 243.672(1)(e) includes the duty to provide relevant information to the exclusive representative upon request if the information is of "probable or potential relevance" to a grievance or contract administration issue. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664, 672 (2004) (citing *Olney Education Association v. Olney School District II*, Case No. UP-37-95, 16 PECBR 415, 417-18 (1996), *aff'd*, 145 Or App 578, 931 P2d 804 (1997)). We use four factors in analyzing an employer's alleged failure to provide information requested by a labor organization:

"* * * (1) [T]he reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested; and (4) the history of the parties' labor-management relations. * * *" *Olney School District*, 16 PECBR at 417-18 (citing *OSEA v. Colton School District*, Case No. C-124-81, 6 PECBR 5027(1982)).

A party is not always required to provide the information in the form requested. In some cases, the responding party may ask the requester to look at the raw data and compile needed information itself. *OSEA v. Colton School District*, 6 PECBR at 5032. The reasonable time in which to provide information may be lengthened or, in extreme cases, completely excused if the parties' history includes numerous "fish-and-grieve" expeditions. *Id.*

On November 1, 2005, Association representative Sundell asked the District for information concerning a potential grievance to be filed on Fandiño's behalf. Sundell received no response to his request until November 28, 2005, when District Assistant Superintendent Williams wrote him and indicated that compiling the information requested would take a substantial amount of work to assemble. Williams asked for Sundell's "written assurance in advance" that the Association would pay the costs of staff time, attorney fees, and copying associated with his request. Sundell protested Williams' insistence that he guarantee payment for the materials he had requested.

On January 18, 2006, Williams finally provided Sundell with a specific response to each of the items he had requested. Williams told Sundell that some of the materials he requested did not exist. He also offered Sundell the opportunity to examine some of the documents requested to determine which portions of the materials were relevant to Sundell's request. If Sundell was unwilling to make such an inspection, Williams explained that Sundell would be responsible for the cost of staff time involved in reviewing the documents, determining which portions were responsive to Sundell's request, and copying these documents. Williams told Sundell that he would prepare an estimate of the costs to produce the documents Sundell wanted, and that Sundell would need to approve payment of these costs before the District would proceed.

The District's response to the Association's November 1 request for information was both unsatisfactory and untimely. Other than complaining about the costs of providing the materials Sundell wanted, the District did not specifically answer Sundell's request until January 18, 2006. On that date, Assistant Superintendent Williams told Sundell that some of the material Sundell wanted did not exist, that the District was willing to "create" an estimate of the costs involved in obtaining the documents that Sundell requested, and that Sundell would need to assure payment of these costs before the District took any further action.

We have previously held that an employer's delay of several weeks in responding to a labor organization's request for information violated subsection (1)(e), even when the materials requested were extensive and required a significant amount of employer staff time to compile. In *Oregon Public Employees Union v. State of Oregon, Executive Department*, Case No. C-64-84, 8 PECBR 7863, 7871 (1985), a union asked the employer for data concerning certain job classifications and positions that were exempt from overtime payments under the collective bargaining agreement. The materials did not exist in list form when requested, and the State had to ask 50 different agencies for lists of exempt personnel in order to respond to the union's request. The agencies had to compile a list of exempt personnel by making a position-by-position review of their employees. We found that the State acted unreasonably when it waited three months before beginning to compile the requested information and then waited an additional month before beginning to assemble information in response to a clarification sought by the labor organization.

We have also held that part of the employer's duty to provide information to a labor organization is the obligation to give the union important details about the information requested in a timely manner. See *Association of Oregon Corrections Employees v. Department of Corrections*, 20 PECBR at 674 (an employer is required to respond to a union's request for information, "and that response must include a definitive statement about the intended disposition of the request—even if the statement is simply to assert that all documents sought have been provided").

Here, the Association received even less than the union in *Oregon Public Employees Union*. The District first responded two months after the Association made its request. In its response, the District provided none of the documents sought by the Association; insisted that the Association pay the costs of producing the information it wanted without specifying what those costs would be; and told the Association, for the first time, that some of the requested materials did not exist. Accordingly, we conclude that the District's response to the Association's information request was even more unreasonable than the ones found unlawful in *Oregon Public Employees Union*, 18 PECBR 7863, and *Association of Oregon Corrections Employees*, 20 PECBR 664.

A public employer, under certain circumstances, may be justified in charging a labor organization for expenses incurred in providing requested information and in requiring that a union representative inspect raw data to decide what materials are needed. These circumstances are not present here. The District offered no evidence regarding either the difficulty in, or expense of, producing the materials sought by the Association. Having no information in the record regarding these matters, we cannot conclude that the obligation to produce the requested documents was so costly and onerous that the District was justified in asking Sundell to inspect the data and select the materials he wanted.

We conclude that the District's response to Sundell's November 1 request for information violated ORS 243.672(1)(e).

10. It is not appropriate to award a civil penalty.

Each party asks us to impose a civil penalty against the other in accordance with ORS 243.676(4) and OAR 115-035-0075(1). No penalty is warranted here. The evidence does not demonstrate that the District "repetitively" engaged in unfair labor practices or that the District's actions were "egregious." Nor is there evidence that the Association's complaint was frivolous or filed with the intent to harass.

ORDER

1. The District will cease and desist from unilaterally changing its practice of providing information to the Association for no more than nominal copying charges (less than \$20);

2. The District will cease and desist from refusing to provide the Association with the information requested in James Sundell's November 1, 2005 letter.

3. The District will cease and desist from disciplining Kim Fandiño for her September 28, 2005 e-mails to Board Member Josh Wineteer and members of the

bargaining unit. The District will rescind the letter of reprimand and remove the letter of reprimand and all documentation concerning the September 28 incident and District investigation of this incident from all files maintained by the District.

4. The District will cease and desist from prohibiting Association bargaining unit members from communicating directly to Board members and from requiring bargaining unit members to discuss work-related matters only with their immediate supervisor.

5. The District will post a copy of the attached notice and display it in every District building where Association bargaining unit members are employed.

6. The remainder of the complaint is dismissed.

DATED this 25th day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member

*Susan Rossiter, Board Member

*Board Member Rossiter is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF OREGON EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-4-06, Lebanon Education Association/OEA v. Lebanon Community School District, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that:

The Employment Relations Board has found that the following actions of the District violated the Public Employee Collective Bargaining Act (PECBA):

1. Reprimanding Association President Kim Fandiño for communicating with Board Member Josh Wineteer on September 28, 2005, and sending communications from Wineteer to bargaining unit members. This reprimand interfered with, restrained, and coerced Fandiño and others in the exercise of rights to join and participate in a labor organization as guaranteed by the PECBA. This reprimand also dominated or interfered with the formation, existence, or administration of the Association in violation of the PECBA.

2. Prohibiting employees from communicating directly with Board members and requiring employees to discuss work place concerns only with their immediate supervisors. These directives interfered with, restrained, and coerced employees in the exercise of their rights under the PECBA to form, join, and participate in the activities of a labor organization.

3. Charging the Association more than a nominal fee for information and refusing to provide information requested by the Association on November 1, 2005. This information was relevant to a potential grievance concerning the disciplinary action against Fandiño.

The Employment Relations Board has ordered the District to:

1. Cease and desist from all unlawful activities
2. Rescind Fandiño's written reprimand and remove the reprimand and all documents concerning the incident upon which the reprimand was based from all files maintained by the District.
3. Provide the Association with all information in its possession responsive to the Association's November 7, 2005 request

EMPLOYER

Dated _____, 2007

By: _____
Employer Representative

Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted in each employer facility in which bargaining unit personnel are employed for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807