EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-08-09

(UNFAIR LABOR PRACTICE)

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,	)	
Complainant,	)	CONSENT ORDER
v.	)	
GRANT COUNTY,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on May 19 and 20, and June 9 and 10, 2009, in Salem, Oregon. The record closed on July 29, 2009, following receipt of the parties' post-hearing briefs. Subsequent to the issuance of the recommended order on January 12, 2009, the parties agreed to enter into this consent order, subject to the approval of the Board. They also agreed to waive further hearing on the merits before the Board, the right to judicial review of the order, and the right to pursue reimbursement of representation cost under OAR 115-035-0055.

The parties stipulate to the entry of the facts, rulings, and conclusions of law set forth below.

Steven Goldberg and Jonathan K. Donehower, Attorneys at Law, Portland, Oregon, represented Complainant.

Trent T. Whitford, Attorney at Law, Whitford Law Offices LLC, Salem, Oregon, represented Respondent.

On February 4, 2009, the International Union of Operating Engineers, Local 701(Union) filed an unfair labor practice (ULP) complaint against Grant County (County). The complaint, as amended on April 6, 2009, and May 19, 2009, alleges that the County committed a number of actions in violation of ORS 243.672(1)(a), (b), (c), and (d). The County filed a timely answer.

The issues presented for hearing are: [1]

1) Did the County violate ORS 243.672(1)(a) or (1)(b) by:

A) Changing work schedules on September 22, October 10, and December 1, 2008;

B) Notifying employees of layoff on October 13, 2008;

C) Issuing a written warning to Terry Brandsma on November 13, 2008;

D) Issuing warning notices to Phil Gagnon and Susan Horn on December 9, 2008;

E) Harassing and threatening Union Business Manager Rod Osgood on December 10, 2008;

F) Making derogatory or insulting comments to bargaining unit employees, including Brandsma, Horn, Ledgerwood, Gagnon, Lissman, and Brown, during the time period October 2008 through March 2009;

G) Making negative or derogatory comments about the Union or its representatives to bargaining unit employees, including Ledgerwood, Gagnon, Hickerson, and Horn, during the time period October 2008 through February 2009;

H) Laying off employees on January 14, 2009;

I) Closing the Department during the week of the ULP hearing; or

J) Paying witnesses who appeared at the hearing for the County in a different manner than the witnesses subpoenaed by the Union

[1]Issues I and J and Issue 4 were not included in the original notice of hearing, but arose out of the Union's amendment of its complaint at hearing. In addition, the Union argued in its brief that the County's March 24, 2009 layoffs were an adverse action in response to employees' exercise of protected activity in violation of ORS 243.672(1)(a). However, this claim was neither included as an allegation in the second amended complaint filed on May 19, 2009, nor identified as an issue at hearing. Therefore, we do not address whether the March 24 layoffs violated ORS 243.672(1)(a).

2) Did the County violate ORS 243.672(1)(b) as a result of the Road Foreman's interaction with employees on October 16, 2008, in regard to the shift change grievance?

3) Did the County's failure to allow Susan Horn to operate a snowplow during the winter of 2008 violate ORS 243.672(1)(c)?

4) Did the County violate ORS 243.672 (1)(d) by paying witnesses who appeared at the hearing for the County in a different manner than the witnesses subpoenaed by the Union?

STIPULATED RULINGS

1. At the beginning of the hearing, the Union moved to amend its complaint, pursuant to OAR 115-035-0010(2), to include new allegations related to events which occurred the week prior to the hearing regarding (1) the County's decision to close the Department during the hearing, and (2) an alleged disparity in payment between Union and County witnesses. The amended complaint also added a claim for a civil penalty. The County opposed the motion because of its timing. The County also objected that the basis for the amendment was speculative because the employees in question had not yet been paid. The ALJ properly granted the motion. The allegations in question are related to the matters already before the ALJ and did not greatly expand the evidence at the hearing. *Wy'East Education Association/East County Bargaining Council/Oregon Education Association v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 671 (2008), *appeal pending*. In addition, the County was not prejudiced because the ALJ granted the County the opportunity to request additional time to supplement the record to address the new allegations.

2. The other rulings of the ALJ were reviewed and are correct.

STIPULATED FINDINGS OF FACT

1. The Union is a labor organization and the exclusive bargaining representative of "all full-time employees employed by the Grant County Road Department, excluding office and clerical employees, elected officials, department heads, supervisors, temporary-seasonal and part-time employees and confidential employees." (Exh. J-1.) Ronald Osgood is the Union's business representative assigned to the Road Department (Department) unit. Terry Brandsma has been the Union steward at the Department for the past 20 years.[2]

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[2]We do not credit the County's argument that Brandsma was no longer recognized by the County as a union steward after July 2009 because of the new contract requirement that stewards be elected. Since it was the County who asked the Union to wait to elect stewards until after employees had an opportunity to join the Union, we find it unlikely that the County believed the Union would operate with no steward until such an election was held. In addition, both Nodine's reference to Brandsma's inability to assist the employees during the rock crusher grievance meeting and Hensley's comment about employees lining up behind Brandsma indicate that Department managers continued to perceive that Brandsma was the Union steward.

2. The operations of the County, a public employer, are overseen by an elected County Court. The Court consist of two commissioners and a judge, who is also the chair. In January 2007, Mark Webb became the County Court Judge. Webb is responsible for overseeing the operations of the Department. The Department maintains approximately 492 miles of roads and 33 bridges.

3. Roadmaster Mark Hensley has managed the Department since 2003. Hensley previously worked at the Department as the road foreman from 2001 to 2003 and as a mechanic during the 1990s. The current road foreman, Larry Nodine, has supervised the Department's road crew since 2004. Prior to that, Nodine worked at the Department as an equipment operator for 14 years. Other Department supervisory staff include Maintenance Supervisor Doug Davis, who supervises the mechanics, and Office Manager Kathy Gillam, who supervises the Department's clerical/receptionist employee, Diane Browning.

4. The parties' contract provides for four classifications of employees: equipment operator, traffic control, road inspector, and mechanic. The four classifications are paid the same wage rate. During the time relevant to this complaint, the following bargaining unit employees worked at the Department as road equipment operators: Neale Ledgerwood (16 years), Terry Brandsma (20 years), Phil Gagnon (24 years), Alan Hickerson (25 years), Henry Lissman (23 years), Harvey Blackwell, Marv Rynearson, and Kelly Brown. Department employees Mark Immoos and Ed Negus worked as mechanics. In addition, Susan Horn (6 years) was a Department employee in the bargaining unit whose duties fell within several classifications. Horn was responsible for road signage, bridge and culvert inspections, traffic control (flagging), and safety information and training. Horn's original duties were limited to traffic control. In July 2007, inspections and safety work were added to her assignment after another employee retired.

Background

5. Since at least 1985, the Department has been primarily funded through federal timber harvest receipts. At that time, because approximately 60 percent of the County's land was federally owned and did not produce tax revenues, the federal government decided to provide timber receipts to fund Department operations which supported the logging of federal lands. Between 1985 and 1996, the County's federal funding averaged $7.5 million per year. Beginning in 1996-97, logging in the County reduced significantly. By 2000, the County's federal timber revenues were approximately $300,000 per year. In 2000, the federal government passed a County Payments Plan to help counties that were historically dependant on timber revenues to transition to another revenue source. Under this plan, the County received approximately $6.4 million per year from 2000 to 2006. In 2007, after the program was extended for one year, the County received approximately $6.2 million in timber revenues. In 2008, the federal government approved a four-year extension, under which the County will receive a decreasing percentage of timber revenue payments each year through 2011. The County has been told that after 2011, there will be no timber revenues.

6. The Department's annual total revenues from 2006 through 2009 were: 2006-07 - $10,272,081; 2007-08 - $12,968,835; and 2008-09 - $6,907,827. The Department's proposed revenues for 2009-10 are $24,873,174. This includes a one-time transportation grant of $3,249,760 and $13,227,557 in cash on hand. Cash on hand in prior years had ranged between $2.8 and $3.8 million.

7. Since federal revenues began to decrease in the mid-1990s, the County's goal has been to build a large enough principal in its reserve fund to allow the Department to operate on the interest from that fund. Between 2002 and 2008, the fund has grown from $27 million to $50 million. Due to the recent downturn in the economy, the fund has not continued to grow as originally expected. The County currently projects that interest at a five percent return on the $50 million reserve fund would generate approximately $2.5 million in annual revenues.

8. Current annual Department operating expenses are approximately $3 million. The Department's proposed personnel services operating budget for 2009-10 includes funding for nine equipment operators and two mechanics. In 2007-08 and 2008-09, the County budgeted approximately $75,000 for snow plowing contracts. In 2009-10, the County budgeted $180,000 for snow plowing contracts.

9. During the 1990s, there were between 25 to 30 people employed at the Department. Around that time, a decrease in timber harvests resulted in a decreased need for maintenance on many County roads. At some point after this, the County also closed its rock crushing operation. As a result, by 2004 the number of Department employees had been reduced to approximately 19. After that, other positions were eliminated through attrition and two management positions were abolished. Due to concerns about the decreasing timber revenues, the Department laid off three mechanics and one equipment operator in 2007.[3] Although the federal revenues were extended later in 2007, the Department determined it had been able to maintain roads adequately with the reduced number of employees. During this time, the road miles maintained by the County have not significantly changed.

10. In the past, the County had maintained its roads at a higher than usual level. For example, some of the County's gravel roads were maintained so well they could be driven at 50 miles per hour, while a normal gravel road is driven at 25 to 30 miles per hour. On January 6, 2005, Hensley notified the County budget committee that due to a proposed budget decrease in the 2005-06 budget, the Department's objective was to "start reducing the operational expense of our department and still provide above average services to the people of Grant County." (Exh. R-1.) However, around the time of the 2007 layoffs, the Department began to reevaluate its actual maintenance needs and how those needs might be addressed differently based on available funding.

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[3]There is conflicting testimony regarding whether these layoffs occurred in 2006 or 2007. Since it is not critical to our decision to resolve this conflict, we will refer to them as the 2007 layoffs.

11. In the last several years, Judge Webb has worked with Department managers to explore and implement more efficient methods for performing Department work. The County's current focus is for the Department to maintain roads at an adequate level through scheduled maintenance. One efficiency implemented by the Department is a decision to maintain plowing for snow removal, but to cut back on sanding. The Department also changed its practice of grading a road six times a year to twice per year and has implemented less expensive dust abatement procedures. In addition, the Department decided to conduct its grading operations with a two-employee unit rather than the three-employee unit it had used in the past. The Department has recently consulted with the Forest Service and other cities and counties about additional efficiencies to help it to determine the cheapest way to maintain its roads.

Collective Bargaining Agreement

12. The parties' current collective bargaining agreement is effective from July 1, 2008 through June 30, 2011.

13. The parties' prior agreements did not include a fair-share provision and employees who wanted to become Union members were required to provide a signed request to the County to have Union dues deducted from their pay. Under these prior agreements, a little over half of the bargaining unit employees were Union members.

14. During the negotiations for the 2008-11 agreement, the Union proposed adding a fair-share provision. Judge Webb, who was on the County's bargaining team, agreed to include a fair-share provision if the Union would agree that Union stewards would be elected by the Union members. Webb told the Union that fair-share employees would then have more incentive to become members. Webb also asked that the Union wait for two months after the contract was signed to elect stewards so more employees would have time to understand the benefit of becoming a Union member and, consequently, be part of the election. The Union agreed to the County's proposal and it was incorporated into the 2008-11 agreement.

15. Effective July 1, 2008, the County automatically deducted the amount identified by the Union as dues/fair share from the salaries of all bargaining unit employees. Most bargaining unit employees decided to join the Union. After this, the County was no longer notified by the Union whether an employee was a Union member. Hensley and Nodine were generally aware of which employees were Union members based on discussions among employees. Webb did not know which employees were Union members.

September 22 Meeting

16. Prior to September 2008, the Department had operated in a very informal manner. Typically when issues arose, managers would talk directly with the employee. In the five previous years, the Union had filed only a few grievances. Prior to September 2008, Roadmaster Hensley sometimes made derogatory comments about Union Representative Osgood, such as calling Osgood a weasel. Hensley made such comments

in the main office and sometimes bargaining unit employees, such as Horn or Hickerson, were present. It was no secret that Hensley did not like Osgood. In addition, employees and managers sometimes used profanity during their discussions.

17. Sometime during the summer of 2008, Webb and the other County Court members received a number of complaints about the Department's road crew. The complaints were focused on incidents in which it appeared that employees either were not working or were standing around watching other employees work. While the County Court members were aware that Hensley and Nodine had received such complaints in the past, complaints about the road crew had not usually been made directly to the Court. As a result, the Court questioned Hensley regarding the road crew's performance.

18. A short time prior to September 22, 2008, the road crew was assigned to crack seal the Sixty-Two Road. Horn and another flagger went with the crew, and the other flagger forgot to bring his signs. Upon arriving at the work site, the crew became aware that the signs were missing, contacted the office, and asked Hensley to bring out the signs. The crew considered working without both sets of signs, but after a water truck went through very quickly in the other lane, the crew decided to wait. Hensley did not realize that the crew was unable to work without the signs, and so did not leave the office immediately. It took Hensley approximately an hour to drive to the job site. When Hensley got to the job site at approximately 10:15 a.m., he became upset that the crew had not done any work. When Hensley returned to the office he told Office Manager Gillam that "they had to find some way to shock them back to reality, that they felt like that they just were not performing like they should and they needed to do something to shock them back into, you know, what they're supposed to be doing" and that he couldn't believe "that there hadn't been a wheel turned."[4] (Tr. 210.) Prior to September, Hensley's and Nodine's work performance complaints generally focused on the work of individual employees. Beginning in September 2009, they started to complain more about the work of the crew in general.

19. Because of the number of complaints and some recent issues with the crew, Hensley decided to seek improvement in the road crew's performance. Rather than addressing specific complaints or issues formally, Hensley decided to do something similar to a "time-card tune up." This referred to Hensley's practice of reminding the crew every six months to be more accurate on their time cards. Hensley asked Webb to accompany him to a meeting with the crew on September 22 for this purpose.

20. On September 21, 2008, Brandsma and a road crew were working on the Sixty-Three Road. Nodine was also present. The crew decided it would not be able to complete another work cycle prior to the end of the shift and stopped work to pack up approximately 20 minutes before they needed to return to the shop. Nodine became

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[4]Although Browning testified that she overheard this conversation around the time of the October 13 notice of layoff, we credit Gillam's testimony that Hensley made the comment that day after he returned from taking the signs to the flagger. Gillam had a clear recollection of the conversation, while Browning did not clearly recall when many of the events and comments she testified to occurred.

upset that Brandsma had the crew stop work so early and told the crew he thought they could have worked longer.

21. On September 22, 2008, Hensley, Nodine, and Webb met with most of the bargaining unit employees near the end of the shift. Hensley stated that he had concerns about the work being performed and that he felt the employees had poor attitudes and needed to improve their work. Hensley also said that employees were not working as hard as they could, were quitting a little early, needed to be more creative, and that when the crew wanted to, it could do an exceptional job. Some employees asked Hensley to identify specific concerns or problems. Hensley stated that he did not want to get into specifics because that was not the purpose of the meeting. Lissman became upset and said that he could not do any better. Lissman spoke for a period of time about all of the things he did right or more than right. Lissman and Hensley got into a heated discussion about this and both appeared to be getting angry. Hensley was very agitated, talked fast, and his face became red. At this point, Horn, Immoos, and Negus said that they thought the crew could do better and could always improve. However, Hensley did not respond to them because he was focused on Lissman. Hensley was disgusted that some employees didn't believe there was room for improvement.

As the meeting progressed, the crew continued to ask for specifics on what they could do to improve. At one point, Nodine asked Brandsma if he felt that the employees had left the job site too early the previous day. Brandsma explained the cycle of the job on which they had been working and stated that at some point the crew needed to decide if it would finish in time if it started the cycle again. Nodine did not respond, but based on Nodine's body language, Horn believed he did not agree with Brandsma. At this point, Hensley was no longer talking, but sitting opening and closing the blade of his pocket knife, which was his habit. Finally Horn brought up the incident in which the crew had forgotten to bring the signs for flagging and asked Hensley if this was an example of something they needed to do better. Hensley replied yes, but continued to be frustrated that the whole group would not agree to improve its performance. Hensley finally said something like "that is a bunch of shit, there is not a one of you sons of bitches here that will go out and get another job tomorrow. Well I will." (Tr. 142-43.)

22. At the end of the September 22 meeting, Webb told Horn and Brandsma that he agreed that the crew should not flag without the signs. They also talked about the Department work schedule and Webb stated that he could see there were times when a four-day/ten-hour schedule (4/10 schedule) made sense because the employees had to drive so far to the work site. Webb also told them he understood why Brandsma's crew needed to stop work early, since Webb made that kind of decision sometimes when he was fencing. When Horn left the meeting, she felt that Webb supported the road crew and that the work schedule would not change. After the meeting, Horn told Nodine that she thought the meeting had been handled wrong and that the issues should have been resolved before they got to this level.

23. On September 23, 2008, Brandsma telephoned Osgood and told him what had occurred at the meeting the prior day.

Change to Five-Day/Eight-Hour Schedule

24. Article V of the parties' agreement provides that the County has the right "[t]o assign shifts, workdays, hours of work and work locations as the County may determine, except where modified by a specific provision of this Agreement." (Exh. J-1 at 6.) Article X, Hours of Work, establishes a normal workweek of five eight-hour days or four ten-hour days and provides that

> "[t]he County may change an employee's regular work schedule for emergency or business necessity purposes, as determined by the County. Whenever possible, employees shall be notified at least seven (7) calendar days in advance of any changes in the commencement of cancellation of the employee's regular work schedule, provided, however, that the parties agree and understand that employees may be called out to work a regular eight (8) or ten (10) hour shift at any time due to emergency conditions such as floods, snow removal and the like. The regular hours of each workday shall be consecutive except for interruptions for meals and rest periods." (*Id.* at 12.)

25. Prior to 2001-02, bargaining unit employees worked a 4/10 schedule during daylight savings time and a five-day/eight-hour schedule (5/8 schedule) during the rest of the year. In 2001-02, at the request of some employees, the Department changed to a 4/10 schedule for the entire year. At the time, other employees were not happy with this change. Under the 4/10 schedule, employees worked Monday through Thursday, from 6:30 a.m. to 5:00 p.m.

26. After Webb took office in 2007, he began talking with Hensley about the Department changing to a 5/8 schedule. At that time, the only other department on a 4/10 schedule was Public Health. Webb believed that having departments on different schedules affected inter-departmental relationships. Soon after Webb took office, employees at the Mental Health Department requested a 4/10 schedule. Webb approved the request contingent on the employees showing that the 4/10 schedule was cost effective and resulted in increased productivity. After Webb found no correlation between productivity and the 4/10 schedule, Webb directed the Public Health Department to return to a 5/8 schedule. Webb also would have required the Mental Health Department to return to a 5/8 schedule, but that department's work was contracted out.

27. During 2008, Webb continued to discuss his concerns about the 4/10 schedule with Hensley. Webb recognized that there were times when a 10-hour day worked better for the Department, but he believed that the need for a longer day on specific projects could be accomplished through overtime. By early- to mid-September, 2008, Webb and Hensley had decided to move Department employees to a 5/8 schedule. They did not immediately notify employees about their decision because they knew it would not be popular.

28. On September 24, 2008, Gagnon was running a grader on the Sixty-Four Road when Nodine stopped him and asked if they were talking to each other. Gagnon

told him yes, but that Nodine better calm down or he would have a stroke. Nodine told him "if the guy * * * had an A card, we could send him back to the union hall but he has a C card." (Tr. 904.) Gagnon wasn't sure who Nodine was talking about until Nodine said "he stood there for an hour-and-a-half with his hands in his pocket." (*Id.*) Gagnon then realized that Nodine was talking about Brandsma. Gagnon told Nodine that it was his fault the crew stopped early because he was the one who had to figure out how long it would take to drive the 54 miles back to the shop, pick up the signs, and fuel the equipment. Nodine then said "until we take care of our problem, we're going to be on five-eights." (Tr. 905.) Gagnon believed that the problem Nodine was referring to was Brandsma. Gagnon understood that Nodine did not set the 5/8 schedule.

29. Around this time, Gillam also heard Nodine state that Brandsma is "lazy, he's not - - he doesn't like to do manual labor and that he will stand and watch before helping, and that he is kind of a pig and his vehicle that he drives or whatever looks like pigsty."[5] (Tr. 228.)

30. On September 24, Hensley notified employees that effective October 6, the current 4/10 schedule would be replaced with a 5/8 schedule. Under the 5/8 schedule, employees would work Monday through Friday from 8:00 a.m. to 4:30 p.m.

31. The bargaining unit employees were very upset by the change to a 5/8 schedule and felt they were being disciplined or punished for their behavior during the September 22 meeting. Some employees were concerned about the schedule's impact on their Friday activities. For example, Hickerson was concerned about how he could continue to drive the elderly and others to appointments in Bend on Fridays using the City Transportation District van. After the schedule change, Hickerson was allowed to drive the van using leave. Other employees were concerned about how their children would be supervised or taken to doctor appointments since area schools operated on a four-day week. After the schedule change, employees had to use sick leave to do this. Many employees also did not believe the Department would operate as well on a 5/8 schedule because the additional workday would increase the time needed to travel to work sites and decrease the time available to work on a job. Several employees contacted Osgood about the new schedule, but the Union did not file a grievance because the Department had given the contractually-required seven-day notice.

Rock Crushing Contract

32. On September 9, 2008, the County requested bids for a contractor to crush rock for the County's use. The bids were opened on September 24 and Hensley recommended a contractor to the County Court on October 1. That contractor entered into a performance bond for the County work that day and notified Hensley that he wanted to start the job as soon as possible and work as many hours in the day as he

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[5]Although Gillam did not identify when these statements were made and was not sure if the statements were made by Hensley or Nodine, since Nodine was clearly upset with Brandsma over the incident in which employees stopped work early on September 21, we find it is likely the comments were made by him around this time.

could. Hensley directed Nodine to ask for volunteers from the road crew to work on the rock crusher project. Hensley did not think he needed a seven-day schedule change notice in this situation because it was a short-term volunteer project and he had done such projects without a notice in the past.

33. On approximately October 7, Hensley and Osgood talked about the rock crusher contract and Osgood asked Hensley to notify the Union as soon as he knew what the schedule would be.

34. Prior to October 7, Nodine had given employees general information about the rock-crusher contract. The morning of October 7, Nodine told Ledgerwood, Gagnon, and Hickerson that the County had a verbal agreement on the rock crusher contract, the contractor wanted to start work the following Monday, and the contractor wanted to work from daylight to dark. Nodine told them that the employees who did the work would need to cover the entire day. Ledgerwood, Gagnon, and Hickerson volunteered to cover the work. Gagnon and Hickerson decided to work a long shift and Ledgerwood opted to work a late shift. They did not contact the Union regarding their new schedules because they did not have a problem with the short-term schedule change and did not understand that the Union believed a seven-day notice was required under the parties' agreement in this type of situation.

35. On October 8, the County Court entered into a contract with the contractor to perform the rock crushing work. On Monday, October 13, Gagnon and Hickerson reported for work at 5:00 a.m. and Ledgerwood began work at 11:00 a.m.[6] On October 13, the contractor decided that it was still too dark at 5:00 a.m. to start work, so Nodine told the employees to begin their shift on October 14 at 6:00 a.m.

36. On October 13, Osgood notified Hensley that he would be filing a grievance over the County's failure to give a seven-day notice of the rock crusher contract schedule change.

<u>October Temporary Layoff Notice</u>

37. Article XVI, Section 5, of the parties' agreement provides:

> "Temporary layoffs, emergency shutdowns, interruptions in normal work schedules because of weather conditions, breakdowns, shortages, lack of work or other conditions which are not reasonably expected to exceed ten (10) regular work days will be made in accordance with the operating needs of the department considering the employee's qualifications, skills and ability to do the remaining work.

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[6]Nodine testified that he told the employees the day and time to report on October 7. Osgood testified that Nodine told the employees on October 10. We credit Nodine's testimony because he was present at the meeting with the employees, while Osgood was not. However, whether the employees were told on October 7 or 10 is not critical to our decision.

"Should the layoff exceed ten (10) days, reduction in the number of employees shall be made in terms of the Road Department based on the relative skill, ability and qualification of the remaining employees, and in cases where these factors are equal, based on employee's seniority." (Exh. J-1 at 27.)

38. In early October, Webb and Hensley discussed the possibility of implementing a temporary layoff based on their belief that the Department's scheduled road maintenance was "caught up." (Tr. 608.) In addition, they were considering looking at contracting out some of the Department's work. In the past, the Department had not had temporary layoffs when employees were caught up, but kept employees working. For example, in the last several years, employees had worked on projects related to the construction of the Department's new facility during such times. Other times, the Department "typically made work for their employees when there wasn't work that actually needed to be done." (Tr. 611.) However, since Webb and Hensley had decided to shift the Department's focus to maintaining "the road system in a way that was adequate to public use," they decided "to stop making work as we did in the past just to keep people employed." (*Id.*)

39. At some point prior to October 13, Hensley and Webb decided to go forward with the temporary layoff. The County Legal Counsel then prepared the layoff notice, which Hensley signed.

40. On October 13, 2008, Hensley posted the notice that there would be a temporary layoff effective the week of October 20.[7] The notice stated "[w]e have been disappointed by the quality and efficiency of the work performed by the road crew. We plan to resume work the week of October 27th, but we will use the temporary lay-off to determine whether we want to begin subcontracting some or all of the work performed by the road crew." (Exh. C-1.) A copy of the notice was also sent to the Union, who received it on October 14.

Rock Crusher Schedule Grievance

41. On October 15, 2008, Osgood filed a grievance over the County's failure to give Ledgerwood, Gagnon, and Hickerson a seven-day schedule change notice for their work on the rock crusher project. Osgood later amended the grievance to include the County's failure to give a seven-day notice of the change in the starting time from 5:00 a.m. to 6:00 a.m. on the second day of the project.

42. After receiving the grievance, Hensley told Nodine to meet with the employees to see if the grievance could be resolved. Hensley showed Nodine Article VII

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[7]The Union argued that the County notified employees about the layoff on October 14, which was the day after Osgood told Hensley he intended to file a grievance. However, the evidence showed that the County notified the employees on October 13, although the copy of the notice mailed to the Union did not arrive until October 14.

in the parties' contract and told him that he was entitled to meet with the employees during the first step of the contract grievance procedure.

43. Article VII of the parties' agreement establishes the grievance process. Step 1 of the grievance process states that "[t]he employee or Union representative shall present the grievance, in writing, to the employee's immediate supervisor within seven (7) business days of its occurrence * * * The supervisor and employee shall then attempt to adjust the matter within seven (7) business days from the date the grievance is received." (Exh. J-1 at 8.) Step 2 of the grievance procedure provides that "[i]f a grievance has not been settled between the affected employee and his supervisor, it shall be presented to the Road Master by the Union representative within seven (7) business days." (*Id.*)

44. On October 16, Nodine met with Ledgerwood, Gagnon, and Hickerson to discuss and explore options to resolve the rock crusher schedule grievance. The employees did not know that the grievance had been filed until Nodine gave them a copy of the grievance form. The employees indicated they were not sure what the grievance meant. Nodine told them that since Brandsma was gone, he and Gagnon, who had both been involved in grievances before, would try to help them through it. The Union had previously filed a grievance on Nodine's behalf when he had been a represented employee and had helped him keep his job.

When the employees told Nodine that they didn't know a grievance had been filed or why it was filed, Nodine stated that maybe they were not supposed to know why the grievance had been filed because "it could be that we're just pawns for the union." (Tr. 410.) When discussing his own grievance, Nodine stated that it had not been fun for him to get up on the stand or to get his name smeared in the press. Hickerson believed this meant that he would get his name in the paper if they pursued the grievance. Nodine asked if there was a way to resolve it. Ledgerwood proposed that the grievance could be resolved if employees went back to the 4/10 schedule. Nodine suggested that all three employees write this on the grievance form, which they did. After meeting with the employees, Nodine returned these grievance forms to Hensley.

45. Not long after the rock crusher schedule grievance was filed, Hensley, Davis, and Gillam were talking in Gillam's office.[8] During their conversation, Hensley commented about the difficulty of working with the Union's contract restrictions and stated that the seven-day notice requirement made it very hard to manage the Department business when the Department was being told it could not do the work that needed to be done the way it had always done it. After this, Hensley's derogatory comments about Osgood increased. For example, at one point, Hickerson heard Hensley call Osgood a "two-face lying little prick." (Tr. 403.)

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[8]Browning testified that she overheard Hensley's comments sometime between September 22 and October 13. Hensley, who admitted he made this statement, testified that it occurred after the rock crusher schedule grievance was filed. We find that Hensley is more likely correct because Browning's recollection of when events occurred was not clear and there is no evidence of an incident prior to the filing of the grievance that would have motivated Hensley to make these comments.

46. Within a week of filing the rock crusher schedule grievance, Osgood talked with Hensley and Nodine about the crew, the 5/8 schedule, and the grievance. At some point in the conversation, Osgood said that he could make all of the problems go away if Hensley put the employees back on a 4/10 schedule. Hensley replied "in other words, you're going to blackmail us." (Tr. 387.) They continued the discussion without resolution until Osgood finally said "fuck it, let's fight." (Tr. 388.)

Rescission of Temporary Layoff

47. The employees had a strong negative reaction to the temporary layoff. In an October 16 letter to Hensley, an attorney representing the Union notified the County that the Union believed that the temporary layoff violated the parties' agreement.

48. Webb was surprised by the employees' reaction, since such layoffs were provided for in the parties' contract. Webb and Hensley decided that because their actions had apparently been misunderstood, it might be better to reconsider their decision. On October 17, 2008, Hensley notified employees that there would be no layoff. That same day, an attorney representing the County sent a letter to the Union's attorney, stating that the County disagreed that the temporary layoff violated the parties' agreement, but that it had rescinded the layoff.

49. On October 30, an article in the *Blue Mountain Eagle* reported that Hensley, who was being encouraged by some of the community to not quit his job, stated that he was tired of dealing with workers who say they don't have to do this or that. The article stated further that after Hensley was encouraged to return to work with a better perspective, he stated that he had wanted to give the crew a week off for the same reason, to get a better perspective.

50. Prior to the fall of 2008, Horn had a good relationship with Nodine and Hensley and felt like they were friends who shared similar ideas and beliefs. They had daily open discussions and Hensley and Nodine did not get upset when Horn voiced her opinion. Beginning in the fall of 2008, Horn's confidence that Hensley and Nodine were fair and acted on her behalf began to change. At one point, Horn told Nodine and Hensley that she did not support their decision to change to a 5/8 schedule. Horn also told them other things she felt they were doing wrong and that her support for the Union was rising. Even after this, Horn continued to have open discussions with Nodine and Hensley and they listened to Horn's opinion.

51. Sometimes when employees returned from working on the road, Nodine would ask them to do projects in the shop until it was time to clock out. At some point during the fall of 2008, Nodine asked Brandsma to wax a trackhoe. Brandsma did not believe Nodine was punishing him by asking him to do this, but he had waxed the same trackhoe before and believed it had not even gone out on the road. Brandsma did not recall that any other employee had been asked to wax the trackhoe.

Winter Snow Schedule

52. Article X, Hours of Work, of the parties' agreement provides:

"Section 2. Seasonal Work Schedule The County needs to provide citizens of Grant County seven days a week services during seasonally variable times of each year. Therefore, employees may be regularly scheduled outside the normal workweek to facilitate business necessity. In assigning these seasonal schedules that include Saturdays and Sundays, qualified employee volunteers will be solicited. In selecting the qualified employee volunteers to perform the services, highest to lowest seniority will be utilized within job classification and portal assignment. If an insufficient number of qualified employees volunteer for these seasonal work assignments; reverse seniority will be used to make the assignments to qualified employees within job classification and portal assignment. As used herein "qualified employee" means one who has the necessary qualifications, skills and ability to perform the work being assigned. Employees being assigned regular schedules involving performance on Saturday and Sunday will receive premium pay for hours worked on the days of Saturday and Sunday. Premium pay identified in Exhibit A will be paid in addition to the regular rate of pay but will not be used for the purpose of calculating overtime." (Exh. J-1 at 12.)

53. The Department provides winter snow removal seven days a week. The regular winter snow schedule for most employees is a 4/10 schedule, Monday through Thursday. Some employees either volunteered or were regularly assigned to work Fridays and weekends. In recent years, employees had not volunteered to work weekends, so the least senior employees had been assigned the weekend schedule. Under the prior winter snow schedules, employees had some discretion to adjust their daily schedule to meet the snow removal needs of their particular route. Several employees started work regularly between 3:00 a.m. and 4:00 a.m. Employees were also called out to address snow emergencies outside of their regularly assigned hours.

54. For the 2008-09 snow season, Hensley and Nodine developed a snow schedule covering the period November 30, 2008, through March 2009. Since the Department had changed to a 5/8 schedule in September, Hensley and Nodine constructed a schedule that was based on employees working eight hours a day, five days per week. They determined the hours of the daily schedule in order to cover the Department's snow removal priorities, including mail routes, school bus schedules and routes, public safety, and commercial traffic. These priorities required snow removal both in the early morning hours and the early afternoon. They also decided to assign all mechanics and road crew employees to work either Saturday or Sunday, so no employee was required to work the entire weekend. They did this in part because in the past, some employees had suggested to Hensley that all employees rotate through the weekends. Webb and Hensley believed that if an employee only worked one weekend day, they were not required to assign schedules based on seniority.

55. On November 12, 2008, Hensley reviewed the proposed snow schedule with the County Court, after which he posted it for employees.[9] Under the new schedule, Hickerson, Brandsma, Ledgerwood, and Immoos worked Sunday through Thursday from 4:00 a.m. to 12:30 p.m.; Horn worked Monday through Friday from 8:00 a.m. to

4:30 p.m.; and Gagnon, Negus, Lissman, and Rynearson worked Tuesday through Saturday from 8:30 a.m. to 5:00 p.m. Blackwell and Brown were assigned to the Long Creek station to work Monday through Friday from 6:00 a.m. to 2:30 p.m. After the schedule was posted, Ledgerwood and Gagnon were allowed to trade their assignments. Hensley also told employees that they could make some adjustments to their hours to meet the specific needs on their route.

56. The Union filed a grievance over the 2008-09 snow schedule. In addition, some employees believed that the schedule would not be effective because 4:00 a.m. was too early to begin plowing school bus routes.

Decision Not to Assign Horn to Snow Removal

57. Article V of the parties' agreement provides that except to the extent modified by the parties' agreement, the County retains the right to "[t]o direct and supervise all operations, functions and policies of the Road Department in which the employees in the bargaining unit are employed," and "[t]o assign and to distribute work and work duties." (Exh. J-1 at 5.)

58. After the layoff of the four employees in 2007, the County Court and Hensley were concerned about the Department's ability to meet its snow removal needs. Webb and another commissioner volunteered to operate a snow plow, if needed. Horn had previously asked to expand her duties by operating equipment, although she had told Hensley she did not want to operate equipment on a regular basis. Hensley and Webb decided to let her operate a snow plow attached to a small pickup truck. Hensley had expressed some concerns to Webb about Horn's ability to operate the snow equipment, so he provided Horn with training, riding with her one day and having another employee do the same another day. Snow plow training like this had not been provided to other employees. Hensley raised no concerns with Horn about her ability to plow snow during the 2007-08 snow season.

59. During the fall of 2008, Webb and Hensley discussed whether Horn would be assigned to plow snow. Hensley told Webb he was concerned that Horn might not be able to handle all of the situations she might face. Webb decided that Horn should not plow snow because he was concerned about the County's liability, it was not clear they would need Horn to plow snow, and snow plowing was not part of her job description.

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[9]The Union asserts that the snow schedule was not posted until December 1. However, it is more than likely that Hensley posted it on November 13, since Hensley's recollection that he posted it after the Commissioner's meeting, which are always held on Wednesdays, was clear. Regardless, while the timing of the posting may be relevant to the parties' contract rights, it is not critical to our decision.

At the time he made the decision, Webb did not know that Horn was a Union member or that she had been expressing support for the Union. At this time, when Gillam asked Hensley why Horn would not be driving the snow plow, he told her that Horn did not understand the mechanics of the plow. At the beginning of the snow season, Hensley told Horn that she would not be driving a snow plow that year.

Brandsma's Written Warning

60. Article V of the parties' agreement provides that except to the extent limited by other terms of the agreement, the County has the right "[t]o discipline, suspend, demote or discharge an employee, so long as such action is not arbitrary, in bad faith or without just cause." (Exh. J-1 at 6.) Under Article IX, Discipline and Discharge, the County has the right to "discharge, discipline, suspend or demote an employee for just cause * * *." (*Id.* at 11.) Article IX also includes a reference to written warnings, which states "[w]henever a written warning is issued an employee, a copy of that warning notice shall be provided to the employee. Copies of a warning notice will be placed in the employee's personnel file, with or without the employee's approval." (*Id.*)

61. On November 6, 2008, in the process of checking on the grading crew, Nodine followed a 12-mile trail of oil, at the end of which he found Brandsma and his grader. Brandsma had added oil to the grader before using it. Brandsma told Nodine that the oil cap was missing and left to obtain more oil. While Brandsma was gone, Nodine found the cap, which Brandsma replaced when he returned. The oil cap on the grader is an expanding rubber plug. When the plug is inserted into the tube leading to the oil tank, the handle is then twisted in a manner that expands the plug into the tube. Once the plug expands, it is very difficult to remove. Nodine believed that Brandsma had failed to secure the oil cap and, on his return to the shop, spoke with Hensley about the incident.

62. Hensley spoke with Brandsma about the incident. Brandsma told Hensley that he had secured the oil cap, but it had popped out due to pressure. Hensley then checked past vehicle incident reports and found no report of problems with the oil cap on the grader Brandsma had used. During Hensley's investigation into the incident, Blackwood told Hensley that the oil plug had once fallen out of the same grader when he had used it in the past. When Hensley questioned Blackwood, Blackwood admitted that the cap might have fallen out because he didn't tighten it enough and that the cap had not ever fallen out again. Blackwood had not been disciplined when the oil plug fell out.

63. In the past, Hensley would have handled this type of incident very informally. However, Webb, who had become more involved in overseeing the Department, was concerned that issues had not always been communicated to employees consistently in the past. Webb had encouraged Hensley to take a more formal approach when issues occurred by putting them in writing and communicating expectations to employees. Hensley had also come to believe that he had not been successful in addressing issues informally.

64. Hensley discussed the oil cap incident with Webb and they decided to issue Brandsma a written warning. They did not believe that a written warning constituted discipline under the contract. On November 13, 2008, Hensley issued a written warning notice to Brandsma, which stated:

> "Due to your actions on Thursday, November 6, and the resulting concerns regarding compliance with our standards for employees, we conducted a review. During this process, you were given an opportunity to explain your actions and address these concerns.
>
> "Our review led to the following conclusions:
>
> 1. You were careless in the performance of your duties;
>
> 2. You failed to operate County equipment in a safe and responsible manner; and,
>
> 3. Your actions violated our standards for professionalism.
>
> "All of our employees are expected and required to conduct themselves and perform their duties in an appropriate professional manner at all times. Professionalism includes being courteous and respectful in all work-related interactions, consistently performing your duties in a diligent manner and operating County equipment in a safe and responsible manner at all times.
>
> "* * * * *
>
> "As an experienced Operator, you are familiar with our equipment and with our standards for employees. You are required to operate County equipment in a safe and responsible manner at all times. Operating the grader after failing to properly secure the oil cap violated this standard and constituted carelessness in the performance of your duties. Your actions created an unnecessary risk of damage to costly equipment and did not reflect the level of professionalism required of an Operator with your experience.
>
> "Your misconduct warrants disciplinary action. The Collective Bargaining Agreement governing your employment provides for discipline, demotion, suspension or discharge, without prior warning, for unsatisfactory work performance and violation of County standards. In determining an appropriate response to your actions, however, I have considered your overall record. Despite prior instances of failing to operate County equipment in a safe and responsible manner, you are experienced and have the ability to make a positive contribution to the work of this department. As a result, I have decided to take a corrective approach, by clarifying what will be expected from you in the future and providing a

further opportunity for you to demonstrate compliance with our standards for employment.

"You are to be respectful and courteous in all work-related interactions. You are to operate County equipment safely and responsibly at all times. You are to be consistently diligent and professional in the performance of your duties.

"Failure to meet these requirements will subject you to disciplinary action, up to and including termination of your employment.

"If you do not understand this Written Warning Notice, or if you are uncertain about what is expected from you at any time, please contact me immediately. Your continued employment is in jeopardy. It is your responsibility to take the steps necessary to avoid disciplinary action." (Exh. C-11.)

65. Sometime after Brandsma received the warning, Ledgerwood told Brandsma that in 2005 or 2006 the oil cap had come off the same grader when he was operating it. Ledgerwood told Brandsma that after he reported the problem to the shop, the cap did not come off again, and he had not been disciplined.

66. The Union filed a grievance over Brandsma's warning.

67. At some unidentified time after September 2008, Gillam and Hensley were talking about the Union and Hensley told her he couldn't believe "all those people just followed – just got right behind Terry Brandsma and joined the union * * *." (Tr. 204.) Sometime after the Union had filed one of its grievances, Horn heard Hensley refer to the Union by stating that "they're just a bunch of crooks, they're morally – or legally right but morally wrong." (Tr. 160.) A couple of times when talking with Horn, Nodine referred to Osgood as "your little Rod Osgood." (Tr. 160.)

Outside Employment Requests

68. The parties' agreement allows employees to engage in outside employment with the County's written consent. In the past, these requests had been handled informally, with Hensley verbally authorizing such requests. However, in approximately December 2008, after Webb directed the Department to operate more formally, the Department developed written authorization forms for outside employment.

69. On December 5, 2008, Nodine approved an outside employment request allowing Brown to coach some weekdays, evenings, and most Fridays and Saturdays, as long as it did not interfere with his work.

70. After the 5/8 schedule had been implemented, Hickerson told Nodine that he planned to continue driving to Bend on Fridays unless Nodine told him it was no longer permitted. On January 7, 2009, Hickerson submitted a written outside

employment request to continue as a van driver on Fridays. Nodine approved the form by signing it, but failed to check the approved box. Hensley also signed and approved the request, but failed to check the approved box. Hickerson, who was not aware that the approved box remained unchecked, assumed that his request had been granted.

Daily Equipment Report Issue

71. Road crew employees are required to fill out daily equipment reports at the beginning and end of each shift. On approximately December 7, 2008, Nodine checked the daily equipment report box at the beginning of the shift and determined that Brandsma's and Hickerson's reports were not there. Nodine became upset with Brandsma because he had previously been required to remind Brandsma to fill out and sign the report. When Nodine asked Brandsma whether he had filled out his daily equipment report, Brandsma told him that he had placed it in the appropriate slot. Nodine responded that if the report was in the box, then "a freaken mouse must have eaten it," and told Brandsma to fill out another report. Nodine then told Hickerson that his report was also missing and directed Hickerson to fill out another report. Nodine did not act upset with Hickerson, as he had with Brandsma. Hickerson also told Nodine that he had filled out a report. Lissman or Hickerson then told Nodine that Maintenance Supervisor Davis had picked up the reports. When Nodine checked with Davis the next day, Davis told Nodine that he had removed Brandsma's and Hickerson's reports from the box.

Warnings for Riding Double

72. In the past, Department employees and managers, including Hensley, occasionally operated a forklift with another employee riding on it. This practice was referred to as riding double. On November 17, Hensley observed Horn and a coworker riding double on a forklift. He was concerned and mentioned it to Davis. Davis responded that he had observed the same thing a day or two earlier.

73. Hensley asked Horn, as the safety officer, to research whether the practice of riding double violated safety rules and to provide him the forklift training materials. Hensley told Horn that he felt uncomfortable asking her to do this since she was one of the employees who had been observed riding double. Horn provided Hensley with the information he requested, which showed that riding double violated both Department safety rules and training.

74. Hensley met individually with Horn, Gagnon, Lissman, and Hickerson about the riding-double incidents. Horn admitted that she had been riding double. During these meetings, Hensley told Horn and other employees that he would be issuing a verbal warning.

75. On December 9, 2008, Hensley issued written warning notices to Horn, Gagnon, Lissman, and Hickerson for riding double on a forklift. The County had not notified employees that the prior practice of riding double was no longer acceptable

before it issued the warnings. Hensley also issued a warning to Hickerson for attaching a trailer hitch to a ball that was too small.

76. Horn's written warning, which was essentially the same as the other warnings, stated in part:

> "Due to your recent actions and the resulting concerns regarding your compliance with our employment standards, we conducted an investigation. During this process, you were given an opportunity to explain your actions and address these concerns.
>
> "Our review led to the following conclusions:
>
> 1. You have engaged in careless and unsafe workplace behavior;
>
> 2. You disregarded your training and violated established safety rules; and,
>
> 3. Your actions violated our standards for professionalism.
>
> "All of our employees are expected and required to conduct themselves and perform their duties in an appropriate professional manner at all times. Professionalism includes being courteous and respectful in all work-related interactions, and consistently performing your duties in a diligent safe and responsible manner.
>
> "On Thursday, November 17, you rode on a forklift while it was being operated by a co-worker.
>
> "As an experienced Operator, you are familiar with our standards for employees. As a professional you are expected and required to perform your duties in a safe and responsible manner at all times.
>
> "Riding a forklift being operated by a co-worker is unsafe, contrary to the training you have been provided and a violation of safe workplace procedures. Your actions created an unnecessary risk of injury and failed to reflect the professionalism required of an Operator with your training and experience. You admitted your actions, but offered no explanation for your behavior.
>
> "You have engaged in misconduct which warrants disciplinary action. The Collective Bargaining Agreement governing your employment provides for discipline, demotion, suspension or discharge, without prior warning, for unsatisfactory work performance, for carrying unauthorized passengers and for violation of County standards. In determining an appropriate response to your actions, however, I have considered your overall record.

You are an experienced employee with the ability to make a positive contribution to the work of this department. You also cooperated fully with our investigation. As a result, instead of disciplinary action, I have decided to take a corrective approach, by clarifying what will be expected from you in the future and providing a further opportunity for you to demonstrate compliance with our standards for employment.

"You are to be respectful and courteous in all work-related interactions. You are to be consistently diligent and professional in the performance of your duties. You are to operate County equipment in a safe and responsible manner at all times. Your work is to positively reflect your experience and training. You are to comply with safety procedures, workrules and management directives on an ongoing basis.

"Failure to meet these requirements will subject you to disciplinary action, up to and including termination of your employment.

"If you do not understand this Written Warning Notice, or if you are uncertain about what is expected from you at any time, please contact me immediately. Your continued employment may be in jeopardy. It is your responsibility to take the steps necessary to avoid disciplinary action." (Exh. C-7.)

77. The Union filed a grievance over the riding-double warnings. On December 10, 2009, Union Representative Osgood arrived at the Department to meet with Hickerson about the grievance. When Osgood and Hickerson entered the main office, Osgood went over to greet Nodine and Hensley. Hensley had his small pocket knife in his hand and was flipping the blade open and closed. Osgood asked Hensley about the knife and Hensley responded "maybe I could cut you with it" or "I might use it to cut you." (Tr. 264.) At this point, Hensley suggested that Hickerson would help him. Osgood responded that Hickerson would help by defending him, and Osgood and Hickerson then left to talk about the grievances. Osgood believed that Hensley had threatened him, but Hickerson and Browning, who observed the interaction, believed that Hensley had just made a very inappropriate joke.

78. After Hickerson and Osgood met, they returned to the office to talk with Hensley and Nodine about the grievance. Hickerson told them he would take full responsibility for the trailer hitch incident, but that he had not been operating a forklift on the day referred to in the warning. Osgood told Hensley that the riding-double warning needed to be thrown out. Hensley stated he wanted to keep the warning in Hickerson's file and asked if they could write on the warning that Hickerson was riding a different vehicle that day. Osgood said no and stated if Hensley couldn't see what type of equipment was being ridden, he might not know who was riding the equipment either. The discussion continued and became heated. At one point, Nodine asked "how about if we just write fuck you Rod Osgood on it." (Tr. 45.) Osgood did not respond to Nodine's comment. Nodine had used this term previously and similar words in his communications with employees. It was also not uncommon for the crew to use such

language. Osgood had dealt with such language before at the Department and had used it himself. However, Osgood believed that Nodine's comment was stronger than usual and was a personal attack. They continued to discuss the grievance and by the end of the meeting Osgood felt that it would likely be resolved.

79. By a letter to Judge Webb dated December 12, 2009, Union business manager and financial secretary Mark Holliday recounted Hensley's and Nodine's actions on December 10, objected to the behavior as threatening and unprofessional, raised concerns about employees working in a hostile work environment, and demanded that Webb discipline Hensley and Nodine.

80. On December 18, 2008, Hensley notified Lissman that he had decided to remove the December 9 double-riding warning from Lissman's file because the date of the incident in the warning was incorrect and the warning had not been issued for a disciplinary purpose, but only to clarify future expectations.

81. After receiving Holliday's letter, Webb spoke to Nodine and Hensley about the issues Holliday had raised. Webb told them that they needed to act more professionally, clean up their language, and set an example for employees. By letter dated December 23, Webb responded to Holliday's letter stating that Hensley was known to open and close his knife and if he had done so in Osgood's presence, it was not Hensley's intention to threaten Osgood; that Nodine's comments had been inappropriate under the circumstances, but were clearly not meant to be taken seriously; and that he had asked Hensley and Nodine to be more sensitive in Osgood's presence in the future. Webb stated further:

> "Motivated in part by comments Mr. Osgood made some months ago to the effect we needed to better manage and supervise the road crew, we are working to improve the professionalism of the Road Department and the services provided to the residents of Grant County. This effort extends to the department's management team, as well as our employees. As part of this process we are clarifying expectations for employees, as the need arises. Scheduling our work and clarifying expectations for employees does not create a hostile working environment." (Exh. C-5 at 2.)

<u>Horn's Office Move</u>

82. Horn's office, in which she stored her safety equipment and files, was originally located next to the break room in the road crew building. Horn either worked on jobs with the crew or worked in her office. Sometime prior to January 2009, Hensley talked with Nodine, Horn, and Webb about moving Nodine, who worked out of the main office, into Horn's office and moving Horn into the main office. Hensley thought it made sense for Nodine to have an office near the crew and for Horn, who worked with training and safety files, to work in the main office. No one objected to Hensley's plan, so in January 2009, Horn moved into the main office and Nodine moved into Horn's old office. At the time of the move, Hensley told Horn that he intended to give her new job duties. Horn continued to clock in and out in the road crew building, but worked in the

main office the rest of the day. Hensley did not assign new duties to Horn. Sometime after the move, Horn came to believe that Hensley had intentionally moved her into the main office to isolate her from the rest of the crew.[10]

Scotty Creek Road Snow Removal Contract

83. Article V of the parties' agreement provides that except to the extent limited by other terms of the agreement, the County has the right "[t]o conduct or subcontract work as determined by the County at its sole discretion upon no less that [*sic*] ten (10) calendar days notification to the Union prior to the date of the anticipated subcontract." (Exh. J-1 at 5.)

84. In December 2009, the snow plow crew was having trouble keeping up with plowing the main route that led to Scotty Creek Road. Hensley was discussing this with one of the residents, who was concerned about not being able to get hay to his cattle. The resident asked Hensley if he ever considered having someone plow Scotty Creek Road. Hensley said the County would pay $55 per hour for a man and truck to do it and asked if the resident was interested. After the resident expressed interest, Hensley checked with the other residents on the road and obtained approval from the County Court to enter into an arrangement for the resident to plow Scotty Creek Road. The resident worked for approximately 20-25 hours during the winter at a cost to the County of approximately $600.00. The County did not notify the Union prior to entering into the Scotty Creek Road contract.

85. The Department has contracted out snow plowing in the Granite area in conjunction with Baker County for a number of years.

January Temporary Layoff

86. In early- to mid-January 2009, the weather became unseasonably warm, around 50-55 degrees, and there was no need for snow removal. During the snow season, since most Department equipment is converted for use in snow removal, it is difficult to use the equipment for other road work. In past years, the road crew had been assigned other duties when snow removal was not needed, such as cleaning equipment, working on trucks, checking roads for rocks, moving rocks off roads, and trimming brush. However, in the past, the warm temperatures rarely lasted very long. As the warm temperature continued, Webb talked with Hensley and Nodine about the lack of work for the snow equipment operators and decided to implement a temporary layoff. The County had not previously instituted a temporary layoff for this reason.

87. The morning of January 14, Horn conducted a safety meeting, which Nodine and Hensley attended. During the meeting, someone asked Hensley about the status of the Department's funding. Hensley told the employees that things were looking

[10]Horn did not state when she came to believe that Hensley was attempting to isolate her. However, we find that it must have occurred sometime after the move. Otherwise, Horn, who admitted she was not afraid to raise issues with Hensley, would have likely objected to the move when she was asked about it.

better because the federal funding had been extended for four years. Hensley did not mention the possibility of a temporary layoff at the meeting.

88. Later that day, Hensley and Nodine notified the equipment operators that there would be a temporary layoff due to lack of snow. They told the crew it was unclear how long the layoff would last because it depended on the weather. Hensley told the crew to use their vacation or compensatory time as provided for in the contract. When asked, he said they could also apply for unemployment if they wanted. Horn was not subject to the temporary layoff because she did not do snow removal and had other work to do. The mechanics were not placed on temporary layoff because Davis told Hensley that there was work they needed to complete.

89. Under Article XVI, seniority governs layoff and rehiring decisions as long as the employee with the most seniority is competent and able to do the work.

90. On January 19, Hensley, Nodine, and Commissioner Boyd Britton were meeting to decide what to do about the temporary layoff since the weather was still warm. While they were meeting, another commissioner stopped by the Department and told them he had been called by a real estate agent who needed a road plowed in Long Creek. When Hensley spoke with the real estate agent by telephone, the agent stated that he had contacted Brown, who was available to plow the road. Hensley told the real estate agent to have Brown call him. When Brown called Hensley, Hensley told him to plow the road. The job took approximately two hours. Brown had less seniority than Blackwell, who was also assigned to Long Creek.

91. During the January 19 meeting, Hensley, Nodine, and Webb decided to convert some of the snow-plowing equipment back to road work use and bring employees back from the layoff under the regular 5/8 schedule. Webb and Hensley believed that under the contract, they were required to give employees a seven-day notice that they were returning to the regular schedule. They did not contact the Union to see if it would waive the notice so employees could return to work sooner.

92. On January 19, Nodine contacted the road crew and told them to return to work on January 26 on the 5/8 schedule. He told the employees that they had not been brought back sooner because of the warm weather. When Nodine spoke with Hickerson about returning to work, he told Hickerson that "we're doing a shift change and that required seven days – we had to wait seven days, according to the contract * * * it was the union's rules. It was in the contract." (Tr. 399.)

93. On Sunday, January 25, after it snowed the prior evening, Nodine called employees to come into work on an emergency basis.

<u>Osgood Site Visits</u>

94. Article IV, Section 3, of the parties' agreement provides that "Any authorized representative of the Union shall have the right to visit job sites for the purpose of administering this Agreement, provided, however, that whenever possible the Road Master shall be notified in

advance of any such visit. Union officials visiting job sites shall not interfere with the work performed by employees covered by this Agreement at any time." (Exh. J-1 at 4.)

95. Osgood usually waited to meet with employees until the end of the work shift when employees returned to the shop. Sometimes Osgood talked to employees while they were waiting to clock out or in the lunchroom on a break. Occasionally, when he needed something right away, he would go to a work site. When he did this, he would first obtain permission from the supervisor. Osgood's practice was to contact Hensley, if possible, when he came to the Department, and to not interfere with the employees' work, unless he had permission from their supervisor.

96. After spending time at the Department, Webb had the impression that Osgood came and went in the shop and job sites as he wanted and, to some extent, did this during County work time. It also appeared to Webb that Osgood did not always notify Hensley of his presence. As a result, on January 20, 2009, Webb sent an e-mail to Nelda Wilson, the Union's assistant business manager, stating:

> "It has come to my attention that Rod Osgood has spent time in the past with bargaining unit members while they were on paid county time. We respect Mr. Osgood's desire to visit with the people he represents, and how convenient it might be to meet with the members in this way at the shop. Please note, though, that this practice goes against Article IV Section 3. It also puts bargaining unit members in the precarious position of possibly violating 'just cause' in Article IX Section 1: viz., by falsifying their time card, which has happened as a result of visiting with Mr. Osgood on county time.
>
> "We want to call this to your attention, and would appreciate if the Union would stop this practice." (Exh. C-6.)

Hensley Comments

97. On February 4, 2009, the Union filed this unfair labor practice complaint (ULP).

98. The day that the County received its copy of the ULP, Hensley showed Horn the ULP, asked her to read it, and then asked her what she thought. After reading the ULP, Horn said "well, as long as you ask, why am I not driving the snow plow. And he said, well, it's because you're a girl, and I said, Mark, you can't say that, you can't tell me I can't drive a snow plow because I'm a girl. And he said, well, it's the truth."[11] (Tr. 157.)

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[11]The Union alleged in its complaint that during this conversation Hensley told Horn "that he wanted to win the war between him and the county road crew, no matter the cost." (Second Amended Complaint at 4.) However, there is no evidence in the record that this statement was made.

99. Sometime after receiving the ULP, referring to the portion of the complaint that included allegations about the September 22 meeting, Hensley stated in front of office staff that he couldn't believe he could not talk to Department employees. He told Gillam that "it was the union's fault that they couldn't do their daily managing, such as that they got something from the union saying that they couldn't talk to the employees, and then also that they couldn't have meetings * * *."[12] (Tr. 198.)

100. On February 11, 2009, the road crew was in the break room preparing to go out to their jobs for the day. They were talking about a truck with prior mechanical problems which had again broken down and needed to be transported back to the shop. One employee jokingly suggested writing the name of a local sawmill owner, whose mills were currently closed, on the broken truck. As the road crew was leaving, Ledgerwood and Gagnon heard Hensley state that the employees should not be criticizing the mill owner because "the mother fuckers may be asking him for a job." (Tr. 479.)

Posted Sign

101. During February and March 2009, Hensley took an extended leave and worked some days on a reduced schedule. At the time, he was not sure he would return. While Hensley was gone, Webb served as the acting road master, became more involved in the Department operations, spent more time at the Department, and often visited job sites. Even after Hensley returned, Webb continued to stay more involved with the Department.

102. On February 23, 2009, while Hensley was on leave, an unidentified person posted a handwritten sign on the Department's front gate fence which stated: "WANTED A FEW GOOD MEN!!" (Exh. C-8.) When Nodine arrived at work, he saw the sign but did not take it down. The crew asked Nodine what it meant and to whom it referred. One employee asked whether the sign referred to the roadmaster or the road foreman. Nodine indicated he did not know who had posted it or who it referred to. The sign remained up until Nodine took it down the next morning.

Osgood Information Request

103. It was standard Department policy to charge for the time required to process information requests and the copies of the information.

104. During the time Hensley was on leave, Osgood came to the Department and requested information from Gillam. Gillam told him she would provide him the information, but that she was unable to do it that day. Gillam then told Webb about Osgood's request, and Webb told her that she was not required to drop everything, but could take three to four days to respond. Webb also told Gillam that he wanted her to

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[12]The Union also alleged in its complaint that in January or February 2009, Hensley told Gagnon "you guys need a union, just not this union." (Second Amended Complaint at 5.) However, there is no evidence in the record that this statement was made.

provide him a copy of the information that she gave Osgood, and that she should not do the Union any favors, such as not charging for copies or time. Webb also tried to help Gillam understand what information was a public record, so she would know what information she could provide.

105. Around this time, Gillam also told Webb that while Hensley was on his extended vacation, Osgood had not been contacting management to let them know when he came to the Department to talk with employees. Webb told Gillam that the next time Osgood came when Hensley wasn't there, she should tell Osgood he needed to speak to Webb before coming on the Department premises. Webb did not tell Gillam he did not intend this to apply when Osgood came to the Department to make a public records' request.

106. On March 6, 2009, when Osgood went to the Department to request copies of some documents, Gillam told Osgood that he would need to get permission from Webb to come onto the Department premises. After Osgood was unable to reach Webb by phone, he drove to Webb's office in Prairie City. Osgood met with Webb, who confirmed that Osgood would need to notify Webb before going into the Department to talk to employees.

107. On March 16, 2009, the Union notified Judge Webb that the bargaining unit had elected Brandsma and Horn as their stewards.

March 2009 Tree-trimming Job

108. On March 23, a crew was trimming tree limbs which were hanging over the road. Lissman was driving the forklift and Hickerson was in the forklift basket. Horn was flagging and Nodine was also present. When Lissman had to leave for an appointment, he suggested that Horn operate the forklift. Nodine said Horn was not to do anything but flagging and that they needed three people for the job, one in the basket, one driving the forklift, and one flagging. Nodine told Horn and Hickerson to go work with the chipping crew until Lissman returned. In the past, Horn had operated a forklift and the crew had trimmed trees without a flagger. Horn had previously complained to Hensley about not having enough flaggers and he supported her, but sometimes when the crew was out on a job, Nodine would change the number of flaggers.

March 2009 Layoff

109. As of March 2009, all Department employees had become members of the Union. Sometime after that, mechanics Immoss and Negus decided to become fair-share payers. They told Osgood they did this because they believed that the Union was being unreasonable by filing grievances that did not have merit. They also told Osgood that they did not believe that other employees were performing work in the manner they should. Osgood believed that Immoss and Negus based their decision on conversations they had with management, although Immoss and Negus had never told Osgood this. At

some later point, Hensley became aware from general workplace discussions that the two mechanics had changed to fair-share payers.

110. Article V of the parties' agreement provides that except to the extent modified by the parties' agreement, the County retains the right to "[t]o determine the need for a reduction or an increase in the work force * * *." (Exh. J-1 at 5.) Article XVIII, Health, Welfare and Retirement, also provides that an employee must work 120 hours in the proceeding month to receive County-paid health insurance benefits.

111. During late February and early March 2009, Hensley and Webb discussed the possibility of laying off some of the employees. Webb also consulted with the other commissioners about the layoff. While they recognized there was always work that could be done by employees, they discussed the amount of work required under the Department's new focus of working more efficiently and on priorities. Some efficiencies the Department had implemented included reducing the number of times a road is graded from four or five times per year to twice per year; cleaning ditches when drainage is an issue rather than on a regular basis; replacing current road signs with the new reflective signs as needed, rather than all at once as they would have in the past; and using one person instead of two to run both the grader and truck. Department managers did not have a broad discussion about these planned efficiencies and work changes with employees.

112. In early March, Webb decided to layoff four Department employees, but delayed the layoff until the employees had worked enough hours during March to qualify them for County-paid insurance in April. On March 24, 2009, the County notified Ledgerwood, Horn, Brown, and Gagnon, who were the least senior employees, that "[d]ue to a persistent lack of sufficient work, it has become necessary to initiate a layoff, for an indefinite period, beginning tomorrow." (Exh. C-16.) The layoff letter also stated that employees had to work 120 hours in a month to qualify for paid health insurance benefits for the following month, that they could use any available vacation or compensatory time to extend their paid benefits, and that they would be notified of their right to continue coverage at their own expense once the paid benefits ended.[13] The letter included no reference to a new federal insurance subsidy under the Consolidated Omnibus Budget Reconciliation Act (COBRA). During the layoff in 2007, the County human resources department met with the laid-off employees prior to the layoff. No meeting with the human resources department was held with the four employees laid off in March.

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[13]Horn testified that when Webb handed out the layoff notices he told her that the County-paid insurance would not continue after March 31. However, the layoff letter itself provided that the insurance continued in April if the employees had worked 120 hours in March. Horn testified that after Brandsma told her the coverage continued in April, she called the County personnel office, who confirmed this. While there was clearly some confusion at the time of the layoffs regarding insurance coverage, we do not credit that Webb would state something in direct contradiction to the layoff letter, which he drafted.

113. After the layoff, several employees were confused about their insurance benefits and contacted the Department and the County personnel office with questions. Some employees even indicated that they wanted to cancel their insurance. On April 2, Webb sent the laid-off employees a letter which clarified that they were eligible for County-paid insurance during the month of April, that they would need to work or use vacation/compensatory time to meet the 120-hour requirement to obtain County-paid benefits in May, and that they would be notified by the County regarding their right to continue the insurance at their own expense once their eligibility for County-paid insurance ended. The letter also notified each employee of the amount of their current accrued vacation time.

114. Sometime in April, Horn contacted County Treasurer Kathy Smith, who was responsible for insurance issues, and asked about her right to continue the County insurance under COBRA. Around this time, as part of the economic stimulus plan, the federal government had passed a new requirement that employers pay a portion of a laid-off employee's COBRA benefits, for which employers would then be reimbursed. However, neither Smith nor Webb were clear about the federal requirement and reimbursement procedure and they were frustrated at the lack of information they had been provided. Smith told Horn that she was upset and frustrated that she was unable to provide employees clear information about their COBRA benefits at that time. In mid-May, the County sent the laid-off employees a letter explaining their COBRA rights and the new federal requirement that the employer pay a portion of their COBRA benefits. Employees were given 60 or 90 days to notify the County of their intent to continue their insurance benefits under COBRA.

115. Ledgerwood was confused about being laid off for lack of work because March and April, which were usually wet months, were traditionally the time during which the crew tried to get most of the roads bladed. Horn didn't understand why she was laid off because the crew almost always needed flaggers, although she recognized all crew members were certified to be flaggers. Hickerson believes that the Department's decision to use a two-person crew to grade roads is less efficient, and that the roads currently do not get wet enough to be properly bladed. Hickerson also felt the Department was behind in laying rock on some of the roads. Brandsma believes that with the current crew, the roads either do not get watered enough or rolled enough when they are graded, which effects the quality of the work. Brandsma also believes there is enough work for a crew of eight to gravel roads for a year. Lissman was concerned that the crew had not cleaned ditches or done any drainage work that year and stated that by June they were usually halfway finished with this work.

116. On April 1, a public meeting was scheduled to be held at the County courthouse regarding the layoffs and work reductions at the Department. The day before the meeting Nodine saw Brown out on the road. Brown had been out taking pictures of the roads for the public meeting the next day. Nodine did not observe Brown taking the pictures. Nodine went to talk to Brown at his house. Brown was very upset about being laid off and told Nodine he had sent a letter to Webb telling him that there were lots of roads to blade and brush to cut. Brown told Nodine he was very upset with Webb.

Nodine told Brown that "if you want to return, you shouldn't burn any bridges behind you." (Tr. 376-77.) Brown subsequently testified at the public meeting.

117. In late April or early May, while Nodine and Lissman were out on the Fourteen Road, they talked about the ULP and where things might end up. (Tr. 849.) Lissman told Nodine that he believed that the public supported good roads. Nodine told Lissman that the County had made some mistakes and figured it probably was going to lose the ULP hearing. Then Nodine stated that "in the long run since [the County] didn't care how much money they spent on this deal, that the union would get tired of spending money and the County was willing to spend more money than [the Union] were on the chance that they would win in the long run." (Tr. 501) Lissman then told him that Osgood had said the Union was prepared to spend $1 million on the grievances and the ULP.

118. In either April or May, 2009, the County held a management training, which was attended by Department managers. The training focused in part on professionalism and not having conflicts with the Union.

ULP Hearing Subpoenas

119. Article XIV, Section 6, of the parties' agreement provides in part that

> "employees shall be granted leave with full pay, computed on the basis of eight (8) or ten (10) hour day's pay per day, whichever is applicable, at the employee's regular straight-time hourly rate, any time they are required to appear in connection with his/her official duties before a court, legislative committee, judicial or quasi-judicial body as a witness in response to subpoena. An eligible employee shall endorse any fee to the County as a condition to receipt of witness fees, except when compensated for witness duty on a regularly scheduled day off. Witness fees do not include per diem reimbursement." (Exh. J-1 at 21.)

120. The ULP hearing was scheduled for May 19 and 20. On May 13, 2009, Hensley notified employees that due to business reasons, the Department would be temporarily closed the week of May 18. The County chose to implement a temporary layoff that week because Webb, all of the Department managers, the office receptionist, and two of the five equipment operators would be in Salem at the ULP hearing. The Department was closed from Monday through Thursday and the three bargaining unit employees who did not testify at the hearing were placed on temporary layoff. They were allowed to use vacation time and compensatory time to cover those days. After Hensley and Nodine returned to the Department on Thursday, they notified all bargaining unit employees that they could return to work on either Friday or the next Monday.

121. Hensley, Nodine, and Davis are management employees exempt under the Fair Labor Standards Act (FLSA). They appeared as witnesses for the County at the hearing. During the week of May 18, they traveled to the hearing on Monday, attended the hearing on Tuesday and Wednesday, drove back to Grant County Wednesday

evening, and worked part-time on Thursday and Friday. They took vacation for the time not worked, although they were not told to do this. The County paid Hensley, Nodine, and Davis their salary for the entire week and they were also reimbursed for their travel expenses.

122. Gillam, who is an hourly employee covered by the FLSA, was subpoenaed by the Union for the ULP hearing. During the week of May 18, Gillam traveled to the hearing on Monday and attended the hearing on Tuesday and Wednesday. Gillam could have returned to work on Thursday and Friday, but chose to take vacation. The County paid Gillam's salary for Tuesday and Wednesday, but she was not paid for Monday.

123. Browning, who was also subpoenaed by the Union, is an hourly employee covered by the FLSA. During the week of May 18, Browning traveled to the hearing on Monday, attended the hearing on Tuesday and Wednesday, and returned to work on Thursday and Friday. The County paid Browning wages for Tuesday through Friday, but not Monday.

124. Hickerson and Brandsma, who were subpoenaed by the Union, are hourly employees covered by the FLSA. During the week of May 18, they traveled to the hearing on Monday and attended the hearing on Tuesday and Wednesday. They were allowed to take vacation time for Monday, Thursday, and Friday and were also offered the opportunity to return to work on Friday. The County paid their regular wages for Tuesday and Wednesday.

125. On May 27, Webb issued a "Grant County Road Department Communications Policy" to all Department employees, which stated that "[c]ommunications between employees at all levels are required to be courteous, constructive, respectful and professional." (Exh. C-19 at 2.) In the memorandum attached to the new policy, Webb discussed an employee's right to make decisions regarding union affiliation, directed all employees to work together regardless of an employee's choice, and stated that the County prohibited harassment based on these decisions.

126. In late May 2009, the County recalled two of the laid-off employees to work on a dust abatement project.

STIPULATED CONCLUSIONS OF LAW AND DISCUSSION

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

The Union alleges numerous violations of the Public Employee Collective Bargaining Act (PECBA) arising out of a series of events which began in the fall of 2008. This series of events emanated from the County's well-intentioned attempt to improve its employees' work performance for reasons completely unrelated to protected activity. Unfortunately, due to both miscommunication and a lack of communication between the employees and management, matters between the employees and management took a serious downward turn resulting in this complaint. We address the Union's allegations separately below.

2. The County did not violate ORS 243.672(1)(a) by changing to a 5/8 schedule on September 24, 2008.[14]

Under ORS 243.672(1)(a), it is unlawful for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." In subsection (1)(a) cases, we analyze allegations of an employer's violation of ORS 243.662 rights under both the "because of" and the "in the exercise of" prongs of that statute. *Oregon Public Employes Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 520-21 (1988).

In considering an allegation that the employer acted "because of" the exercise of PECBA-protected rights, we first identify the existence of protected activity of which the employer was aware and then make a factual determination as to why the employer acted. As we explained in *Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07, 23 PECBR 170, 192, *recons*, 23 PECBR 219 (2009), *appeal pending*,

> "To determine if an employer violated the 'because of' portion of subsection (1)(a), we examine the employer's reasons for the disputed action. If the employer acted 'because of' an employee's exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer's actions are unlawful. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). In order to show a violation of the 'because of' prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action

[14]The Union also alleged in its complaint that the claims we have addressed in Conclusions of Law 2 though 16 violated ORS 243.672(1)(b). However, the Union did not address these subsection (1)(b) claims in its post-hearing brief. Therefore, we do not address those claims in our decision.

> because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1,* Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986)."

If under the "because of" prong of subsection (1)(a), we find that the employer acted for both lawful and unlawful reasons, we then apply a mixed-motive analysis. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County,* Case No. UP-18-03, 20 PECBR 733, 741 (2004). In applying a mixed-motive analysis, we "determine whether the employer would not have taken the disputed action but for the unlawful motive. In other words, we must decide whether the employer would have treated the employee the same way if the employee had not engaged in protected activity." *Oregon School Employees Association v. Cove School District #15,* Case No. UP-39-06, 22 PECBR 212, 221 (2007).

In analyzing an alleged violation of the "in the exercise of" portion of ORS 243.672(1)(a), we

> "[d]ecide if the natural and probable effect of the employer's conduct would tend to interfere with, restrain, or coerce employees in the exercise of the their [*sic*] PECBA rights. *ATU,* 17 PECBR at 789 [*ATU v. Tri-Met,* Case No. UP-48-97, 17 PECBR 780 (1998)]. Neither anti-union animus or actual interference, restraint, or coercion need be proved. *Id.* The subjective impressions of employees, however, are not controlling. *Id.* There are two types of 'in' violations. The more common is derivative of a 'because of' violation since typically employer coercion because of protected activity also has the natural effect of interfering with the employee's exercise of protected activity. *Malheur County,* 10 PECBR at 521. The other type of 'in' violation, which is independent, or stands alone, usually arises in the context of employer threats of reprisal for engaging in protected activity. *Id.*" *Portland Association of Teachers and Poole v. Multnomah School District No. 1,* Case No. UP-72-96, 17 PECBR 470 (1997), *recons,* 17 PECBR 549 (1998), *rev'd and rem'd,* 171 Or App 616, 16 P3d 1189 (2000), *order on remand,* 19 PECBR 284, 295-96 (2001).

The Union alleges that the County implemented the 5/8 schedule in violation of both the "because of" and the "in the exercise of" prongs of ORS 243.672(1)(a). The Union argues that the County changed to the 5/8 schedule as a result of the employees' expression of concerns during the September 22 meeting. The Union asserts that the employees' participation during that meeting constituted protected activity within the meaning of ORS 243.662.

We find that the County changed to the 5/8 schedule for two reasons. First, the decision was primarily made as a result of Webb's long-term goal to move all County operations to a 5/8 schedule due to his concerns about the productivity of a 4/10 schedule and its effect on inter-departmental relationships. Webb had implemented this change elsewhere in the County and had talked with Hensley about moving to a 5/8 schedule in the Department since his election in 2007. The Department employees were

obviously aware that such a change at the Department was under consideration. Otherwise, there would have been no reason for their discussion with Webb during the September 22 meeting about the benefits of a 4/10 schedule versus a 5/8 schedule.

Second, we find that the move to the 5/8 schedule was implemented on September 24 as a result of management's frustration with the employees' responses during the September 22 meeting. While Webb and Hensley had discussed the schedule change since 2007, they had taken no steps to implement it. The only motivation for the change at the time it occurred was the September 22 meeting. Nodine's conversation with Gagnon, in which he stated "until we take care of our problem, we're going to be on five-eights," clearly reflects a connection between the schedule change and the problems that Hensley had attempted to address during the September 22 meeting.[15] (Tr. 905.)

Our next step is to determine whether the employees' activities during the September 22 meeting constitute protected activity within the meaning of ORS 243.622. ORS 243.622 provides that "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." This Board has the "authority to determine the range of activities that are protected under ORS 243.662. *Central School Dist. 13J v. Central Education Assoc.*, 155 Or App 92, 94, 962 P2d 763 (1998). We exercise this authority in a manner that furthers the purposes and policies of the PECBA." *Gresham-Barlow School District,* 23 PECBR at 193.

Under our authority to determine whether activity is protected, we have held that employees asserting contract rights without the assistance of a union are still engaged in protected activity within the meaning of ORS 243.662. *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 54 (1996), *recons*, 17 PECBR 250 (1997), *aff'd*, 155 Or App 92, 962 P2d 763 (1998). As we recently explained, under the PECBA policy of encouraging "the peaceful resolution of disputes that arise from differences about wages, hours, and other working conditions," employees must be free to "bring their concerns about working conditions to the employer." *Gresham School District*, 23 PECBR at 193.

However, our determination in prior cases that individual employees had engaged in protected activity were all based on evidence that the employees had raised complaints or concerns about their employer's compliance with their contract rights. In *Central School District*, we found that an employee's assertion of the right to the union representative of his choice under the contract was protected activity. In *Grants Pass Association of Classified Employees/OEA/NEA and Bullington v. Grants Pass School District No. 7*, Case No. UP-5-07, 22 PECBR 806 (2008), we found an employee's protest that another employee's transfer violated the collective bargaining agreement

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[15]While Gagnon believed that Nodine was referring to Brandsma as "the problem," this is not clear from their discussion. However, even if he was, Nodine's frustration was not directed at Brandsma's union activity, but Brandsma's work performance on September 21.

was protected activity. Finally, in *Gresham School District*, we held that employees' challenges to a school improvement process at times involved protected activity because the employees had notified the employer that they were concerned about the effect of the process on their contractually-protected working conditions, including preparation time and the normal workday, and had mentioned the need to enforce specific contract provisions.[16]

On the other hand, we have held that "[g]eneral carping about working conditions and managerial actions are not of themselves activities protected by ORS 243.662." *Karcher v. Columbia County Communications Agency*, Case No. UP-52-87, 11 PECBR 175, 192 n 17 (1989). In *Karcher* we found no violation because "it was not shown that Karcher presented employe grievances concerning personnel and management policies, only that she constantly challenged them." *Id.* We also held that teachers who made general complaints to the superintendent about a principal, without any evidence of the labor organization's involvement, did not participate in protected activity. *White v. Oakland School District No. 1*, Case No. C-128-78, 5 PECBR 2830, *AWOP*, 49 Or App 483, 621 P2d 682 (1980). More recently we held that "[p]rotected activity does not include strictly individual complaints about working conditions and other protest actions that are unrelated to the activities of a labor organization." *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316 (2009).

We conclude that the employees' activities during the September 22 meeting do not constitute protected activity under ORS 243.622. The September 22 meeting was called by management to attempt to secure improvement in employees' work performance. While some employees responded negatively to management's request for improvement and others asked for specifics, the focus of that meeting continued to be management's request for improvement. There is no evidence that employees raised concerns about management's failure to comply with their contract rights or questioned the effect of the issues being discussed on their contract rights. We are unwilling to find that a meeting called by management for the purpose of discussing employees' work performance falls within the meaning of protected activity without clearer evidence of the assertion of contract rights or grievances by the employees who were present. Therefore, the County did not implement the 5/8 schedule because of protected activity.

Our decision that the employees were not engaged in protected activity during the September 22 meeting is consistent with the cases decided under the National Labor Relations Act (NLRA) cited by the Union. Unlike the matter before us, those cases all involved complaints by represented employees regarding their contract rights, or by unrepresented employees regarding specific working conditions. In *The Salvation Army and Kalaveeta Dean*, 345 NLRB 550 (2005), an unrepresented employee was discharged because of her conduct during a meeting with management regarding employee complaints about wages and other working conditions, some of which had

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[16]These employees were also union building representatives, although we did not specifically find that they had raised their concerns in this role.

previously been presented in the form of grievances. In *American Red Cross Blood Services*, 322 NLRB 590, 594 (1996), an unrepresented employee was found to have "engaged in concerted activity when she voiced the grievance shared by a number of employees concerning the extensive working hours" and raised the need for a winter travel policy, which was later included in a petition to the employer about employee concerns. Finally, in *City Disposal Systems, Inc.*, 465 US 822, 104 S Ct 1505, 79 L Ed 2d 839 (1984), the Supreme Court held that an employee, who refused to drive a truck that he believed was unsafe, engaged in concerted activity because he invoked the protections of the collective bargaining agreement for himself and other employees. The Court found that although the employee did not directly refer to the contract, because of the specific contract protections regarding the operation of unsafe vehicles, there could have been no doubt that the employee was invoking his contract protections.

We also conclude that the County did not violate the "in the exercise" prong of ORS 243.672(1)(a) when it changed to the 5/8 schedule. Because we have found no violation of the "because of" portion of subsection (1)(a), we find no derivative violation. We also do not find that the County's lawful meeting with employees to discuss performance concerns when viewed objectively would have the natural and probable effect of chilling employees in their exercise of protected rights. *Ridgeline Montessori Public Charter School*, 23 PECBR at 331; *Oregon School Employees Association v. Lebanon School District No. 16C*, Case No UP-53-91, 13 PECBR 292, 299 (1991). Therefore, we do not find that the County independently violated the "in the exercise of" prong of ORS 243.672(1)(a), and will dismiss this portion of the complaint.

3. The County did not violate ORS 243.672(1)(a) by placing three employees on the rock crusher schedule on October 13, 2008.

The County did not violate the "because of" prong of ORS 243.672(1)(a) when it scheduled three employees to work on the rock crusher contract. In determining the reason for the schedule change, we recognize that Osgood's call to Hensley asking about the rock crusher contract work schedules was protected activity. However, the Union does not argue, and we do not find, that the County set the rock crusher schedule "because of" Osgood's call.

The evidence is clear that the schedules were established to address the short-term requirements of the rock crusher contract. It is undisputed that the County had a practice of offering such short-term projects to employees, and apparently also had a practice of doing this without providing a seven-day notice. While the Union argued that the County failed to inform Osgood about the schedule change as he requested and that the rock crusher schedule was another example of the County's disrespect for the Union contract, it did not prove that the County set the schedule "because of" employees' exercise of PECBA-protected activity. Therefore, this portion of the complaint will be dismissed.

We also do not find that the manner in which the schedules were set would discourage employees from exercising their PECBA-protected rights under the "in the exercise of" prong of ORS 243.672(1)(a). As previously stated, the rock crusher schedule

was set in a manner consistent with the prior County practice. That practice was apparently somewhat informal and may not have always followed the strict dictates of the contract. However, the three employees whose schedules were changed did not find the County's conduct unusual. In fact, the employees volunteered for the work and selected the modified schedule they would work. Therefore, we will also dismiss this portion of the complaint.

4. The County did not violate ORS 243.672(1)(a) by deciding to implement a temporary layoff on October 13, 2008.

The County did not violate the "because of" prong of ORS 243.672(1)(a) when it decided to implement a one-week temporary layoff on October 13. The County's reason for the October temporary layoff was its continuing concern about employees' work performance and its dissatisfaction with employees' responses to its requests for improvement during the September 22 meeting. The Union does not dispute this. In fact, the Union admits that the "road crew's unsatisfactory work performance had become the reason for the County's action, and for the County's exploration of subcontracting out the bargaining unit's work." (Union's Post-Hearing Brief at 34.) Finally, Hensley's statement that the intent of the layoff was "to find some way to shock them back to reality * * *to shock them back into * * * what they're supposed to be doing" is further evidence that the decision was related to management's attempts to address work performance issues. (Tr. 208.) Neither the employer's concerns about work performance nor the employees' activities during September 22 meeting constitute protected activity.

The Union also argues that the County decided to implement the layoff in response to Osgood's telephone call in which he told Hensley of his intent to file a grievance over the rock crusher schedule. We agree that Osgood's call to Hensley constitutes protected activity. However, Webb and Hensley began discussing the layoff in the beginning of October, long before Osgood's call. In addition, after deciding to move forward with the layoff, the County took time to have its legal counsel draft the layoff notice. Osgood did not make the telephone call until October 13, the same day the employees were notified about the layoff. We think it highly unlikely that the County had sufficient time to make a decision to go forward with the layoff and take the necessary measures to implement that decision between the time of the call and the posting of the layoff notice. Therefore, we find that the County did not decide to implement the layoff because of the exercise of PECBA-protected activity.

The Union also did not prove that the County violated the "in the exercise of" portion of ORS 243.672(1)(a) when it notified employees about the October temporary layoff. Again, there is no evidence from which employees could conclude that the County's actions were related to employees' exercise of PECBA-protected rights. The Union itself recognized that the crew's unsatisfactory work performance was the reason for the layoff and it is likely that the employees also held this view. Therefore, the October 13 layoff would not have the natural and probable effect of chilling the employees in the exercise of their PECBA-protected rights. Having found no violation of ORS 243.672(1)(a), this allegation will be dismissed.

5. The County did not violate ORS 243.672(1)(a) by implementing the 2008-09 snow schedule on November 13.

The Union alleges that the 2008-09 winter snow schedule was implemented to punish employees "because of" their exercise of protected activity. In support of this allegation, the Union relies on the fact that the new snow schedule was made just after the exercise of protected activity, the employees' belief that the prior winter schedules better addressed the County's snow removal priorities, and the Union's belief that the manner in which employees were assigned to weekends under the schedule violated the parties' agreement.

We acknowledge that during the month prior to the implementation of the snow schedule on November 13, the Union had engaged in protected activity. The Union had both objected to the October temporary layoff and filed a grievance over the rock crusher schedules. We have held that when an employer's action closely follows a protected act, we will infer a causal connection between the two, unless other circumstances indicate a legitimate reason for the timing of the employer's action. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 95 (2007). In this case, we find that such other circumstances exist.

The timing of the implementation of the snow schedule was a result of weather, not protected activity. It was not disputed that the County had historically modified its regular work schedule at this time of year to meet its snow plowing needs. In the past, the County had modified employees' schedules to address the needs of specific snow routes and to cover the seven-day work week. Therefore, the County did not implement the schedule when it did because of protected activity.

The Union's real objection here is the fact that the 2008-09 schedule was so different than the schedules implemented in past years. However, the past snow schedules had been based on a 4/10 schedule. In September 2008, the County changed to a 5/8 schedule. The County choose not to return to the 4/10 schedule during the snow-plowing season, but to construct a schedule under which employees continued to work eight hours a day, five days a week. Under this 5/8 schedule, to address the County's early morning and afternoon school bus schedules, some employees were scheduled to start their shifts very early, while others were scheduled to start work later. In addition, as in the past, the Department was required to design a schedule that covered weekends.

Aside from the timing, we see no connection between the 2008-09 snow schedule and employees' protected activity. There is no evidence that the County treated the employees on whose behalf the Union had filed grievances better or worse than other employees under the new schedule. As in the past, the County allowed employees to trade schedules to meet their individual needs and to modify schedules to meet the needs of their route. In addition, even if the County's assignment of employees to weekends did violate the contract, which we do not decide here, it was not disputed that the County assigned employees in this way because of employees' suggestions that

weekend work be shared, rather than assigned to the least senior employee. Therefore, we are not convinced that the County implemented a different snow schedule in 2008-09 because of employees' exercise of protected activity.

We also find no independent violation of the "in the exercise of" prong of subsection (1)(a). At the point the snow schedule was implemented, employees were more likely to believe that the new schedule was a result of management's unhappiness with their work performance and the change to a 5/8 schedule, rather than the Union's objection to the temporary layoff and the rock crusher schedule grievance. Although protected activity had occurred at this point, aside from the timing there is little connection between the protected activity and the snow schedule. In fact, the Union's objection to the temporary layoff had been successful, resulting in management rescinding the layoff. In addition, the implementation of the snow schedule had no discriminatory impact on the employees on whose behalf the rock crusher schedule grievance was filed. Finally, while there is evidence that Hensley was clearly frustrated with the Union's interference with his ability to manage, at this point the frustration was primarily directed at Osgood and not the employees. Therefore, we find that the natural and probable effect of the County's action would not have interfered with, restrained or coerced employees in the exercise of their PECBA-protected rights, and we will dismiss this portion of the complaint.

6. The County violated ORS 243.672(1)(a) by issuing a written warning to Brandsma on November 13.

The County had mixed motives for issuing the written warning to Brandsma on November 13 .[17] Hensley had a legitimate basis for concluding that Brandsma had failed to adequately secure the oil cap and to be concerned about the potential damage to the equipment. It is not disputed that Brandsma had refilled the oil prior to the leak, or that the leak could cause damage to the equipment. Hensley spoke with Brandsma, reviewed the equipment reports, and discussed with Blackwood the cause of his problem with the oil cap on the same grader before reaching his decision. Blackwood admitted to Hensley that he had likely not tightened the cap sufficiently and that the problem had never happened again. In addition, Hensley was not aware of the fact that Ledgerwood had a similar problem until after the warning had been issued.

However, we also find that the County issued the written warning to Brandsma for reasons related to the exercise of protected activity. Not long before the warning was issued, the Union had engaged in protected activity by filing a grievance over the rock crusher schedule and threatening to file a grievance over the temporary layoff. Brandsma was a long-term Union steward and the acknowledged representative of the Union in the Department. The County also had a prior practice of addressing these types

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[17]In reaching our conclusion here and under Conclusion of Law 7, we do not decide whether the written warnings issued to Brandsma and other Department employees constituted "discipline" under the parties' contract. Under ORS 243.672(1)(a), the Union is not required to establish "adverse action," as long as it establishes "employer action or employment-related action." *Multnomah School District No. 1, on remand,* 19 PECBR at 295 n 9.

of incidents informally and issued this formal written warning only after the exercise of PECBA-protected activity.

Since this is a case of mixed motives, we next determine whether the County would have issued the formal written warning to Brandsma if no protected activity had occurred. The County argues that it decided to issue a written warning because its prior informal attempts at improving employee performance had been unsuccessful. However, we conclude that the County would likely not have decided to use more formal measures but for the Union's protected activity.

Hensley, who made the decision to issue the written warning, was clearly unhappy with the Union for holding the County to the strict requirements of the contract and frustrated about the impact of the Union's activities on his ability to manage the Department. Hensley had little respect for Osgood and did not even try to hide his anti-union animus. Under these conditions, it is particularly troubling that the County's first formal action in addressing work performance issues was directed at the Union steward. Hensley's resentment about other employees lining up behind Brandsma in support of the Union also makes it clear that Hensley identified Brandsma as a representative of the Union, and that his resentment at Osgood and the Union extended to Brandsma. Finally, the warning itself goes beyond the incident with the grader and directs Brandsma to be "respectful and courteous in all work related interactions," without identifying the basis for this direction. (Exh. C-11.) Therefore, we conclude that the County would not have issued a formal written warning to Brandsma but for employees' exercise of protected activity. For these reasons, we find that the County violated the "because of" portion of ORS 243.672(1)(a).

Since we have found a violation of the "because of" prong of ORS 243.672(1)(a), we also find a derivative violation of the "in the exercise of" prong. The County's decision to issue a formal written warning to Brandsma because of employees' exercise of protected activity would inevitably have a chilling effect on employees. *Malheur County*, 10 PECBR at 521. We will order that the warning be removed from Brandsma's file and not be used as the basis of any future discipline or other action.

7. The County violated ORS 243.672(1)(a) by issuing written warnings to Gagnon and Horn for riding double on December 9, 2008.

The County had mixed motives for issuing the written warnings to Gagnon and Horn on December 9, 2008. There is no dispute that the employees rode double or that this violated safety regulations. However, again we have the exercise of protected activity and Hensley's clear frustration with the Union occurring not long prior to when the warnings were issued. For similar reasons to those we expressed in regard to our conclusion concerning Brandsma's warning, we find that the County violated both the "because of" and "in the exercise of" prongs of ORS 243.672(1)(a) when it issued the written warnings to Gagnon and Horn for riding double.

The County's decision to issue these warnings only makes sense when seen as a response to the Union's attempts to hold the County to the strict terms of the contract.

Riding double had long been an accepted practice at the County, even for managers. While a decision to discontinue this practice certainly was legitimate, the manner in which the County acted was not. The County never notified employees that it would no longer allow this practice. Instead, it issued written warnings to a few employees who had no reason to know that what they were doing was no longer allowed. The County also never explained why it issued the warnings in writing after Hensley told the employees that it would be done orally. Finally, the warnings again went beyond the incident and addressed the employees' work-related interactions. Therefore, we will order that these warnings be removed from the employees' files and not be used as the basis of future discipline or any other action.

8. Webb's e-mail to the Union, dated January 20, 2009, did not violate ORS 243.672(1)(a).

The issue before us is whether the County's January 20 e-mail to the Union violated the subsection (1)(a) rights of the bargaining unit employees.[18] An employer who threatens adverse employment action against employees for engaging in PECBA-protected activity may be found to have violated the "in the exercise of" prong of ORS 243.672(1)(a). *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-2-08, 23 PECBR 108, 127-28 (2009). As we explained in *Clackamas County Employees' Association v. Clackamas County/Clackamas County District Attorney*, Case No. UP-07-08, 23 PECBR 90, 96 (2009), *appeal pending*.

> "[a]n employer's threatening statements violate subsection (1)(a) if the statements, when viewed objectively, would reasonably be expected to chill employees from exercising their protected rights. *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989 (1985). We analyze the totality of the circumstances to determine whether the employer's conduct and statements would have the natural and probable tendency to interfere with employees' exercise of protected rights. *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995); *Oregon Public Employees Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). As a result, a 'possible effect' is not sufficient to sustain a finding of

[18]The January 20 e-mail was directed at Osgood. However, we have previously held that "[w]hile a labor organization may bring a (1)(a) complaint on behalf of its members (who are public employees), the terms of (1)(a) do not extend to the organization itself." *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-53-97, 17 PECBR 675, 679 (1998). Claims regarding interference with a labor organization's rights are appropriately raised under ORS 243.672(1)(b).

unlawful conduct. *Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988) (emphasis omitted). The subjective impression of employees is not relevant. *Spray Education Association v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 20, 219-20 (1989). Nor is it necessary to provide evidence of employer anti-union animus. *Oregon School Employees Association v. The Dalles School District #12*, Case No. UP-75-87, 11 PECBR 167, 171-72 (1989)."

The question then is whether the County's e-mail would "inevitably have the effect of interfering with the employe's exercise of protected rights." *Malheur County*, 10 PECBR at 521. (Emphasis in original.) Here, the County has essentially stated that if employees continued to meet with the Union representative during work hours, they could be subject to discipline for using County-paid time for non-County purposes. It is likely that as a result of this e-mail employees would have a tendency to no longer meet with Osgood during County work hours. In fact, that was the very intent of the County's e-mail. However, for the reasons discussed below, we do not find that the employer's e-mail violated ORS 243.672(1)(a).

The County's attempt to clarify its understanding that employees should not meet with their Union representative during work hours, and the possible consequences of employees for doing this, does not interfere with the employees' protected activity. We have previously held that "[a] rule prohibiting union-related speech and distribution of materials in working areas or during work time is presumptively valid. This presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced." *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864, 873 (2005). *Also see Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-52/62-03, 21 PECBR 98, 117-18 (2005). There is no evidence in the record that the County allowed other individuals to come onto County property to talk with employees about non-work related matters during work time. Osgood himself admitted he generally obtained permission prior to meeting with employees during work time.

Here, the e-mail was a legitimate attempt by the County to clarify what it believed to be the appropriate conditions for Osgood's Department visits and initiated by Webb because of his concern that the contract provision addressing this issue was not being followed. While the e-mail included the potential consequences to employees, we have held that an employer's statement of its intent to exercise its lawful rights does not violate subsection (1)(a). *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 605 (2004). Therefore, Webb's January 20 e-mail did not violate ORS 243.672(1)(a).

9. The County did not violate ORS 243.672(1)(a) by requiring that Osgood notify Webb before visiting the Department premises on March 6, 2009.

We do not find evidence to support a claim that Webb's request that Osgood obtain his permission before visiting the Department violated the subsection (1)(a) rights of bargaining unit employees. Webb's communication was not directed at the

employees, but at Osgood. There is no direct or implied threat related to employees' working conditions in this communication. There is also no evidence Webb denied Osgood permission to visit the Department or that the requirement that Osgood notify Webb before going on the Department premises interfered with Osgood's ability to meet with the bargaining unit employees.

Webb's communication was a legitimate attempt to clarify what he believed to be the appropriate conditions for Osgood's visits to the Department under the provisions of the parties' contract. Webb made the request only after being informed by Gillam that Osgood was not notifying Department managers when making such visits and because Hensley, who Osgood would normally notify, was on an extended leave. While the circumstances under which Osgood was informed of the need to notify Webb when coming to the Department were unfortunate, there was no evidence of interference with the protected rights of employees. Therefore, we conclude that the County did not violate ORS 243.672(1)(a) when it required Osgood to notify Webb before entering the Department.

10. The County did not violate ORS 243.672(1)(a) by harassing or threatening Osgood on December 10, 2008.

While we do not condone Hensley's statement to Osgood that he might use his knife to cut Osgood, under the totality of the circumstances we do not find that it would have had the natural and probable tendency to interfere with employees' exercise of protected activity. It is important to keep in mind that employees and managers in the Department communicated directly and informally. In addition, profanity was not unusual. Department employees were also familiar with Hensley's practice of playing with his knife and did not see it as a threat. Hickerson, and employees in general, were also aware that Hensley had little respect for Osgood and had heard Hensley make other negative inappropriate comments about Osgood in the past. In this context, both Hickerson and another employee who observed the incident saw Hensley's comment as nothing more than a very inappropriate joke.

In addition, no one present acted as if a threat had been made and there was no showing of an impact on employees' exercise of protected rights. Right after Hensley's statement, Hickerson met with Osgood to discuss his grievances. Later that day, Osgood and Hickerson met with Hensley and Nodine over the grievances. In fact, that grievance meeting resulted in the resolution of one of Hickerson's grievances. In *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499-500 (1993), we recognized that

> "[t]his Board has given parties wide latitude in making *critical*, but not *threatening* remarks about their adversaries in the collective bargaining relationship. Otherwise, every time a supervisor 'expressed disagreement with some [union] action [the] comments would have to be deemed in violation of the PECBA * * *.' *Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 780 (1989)." (Emphasis in original.)

Therefore, when viewed objectively, Hensley's statement did not tend to deter Hickerson's or other employees' exercise of their protected rights.

We also do not find that Nodine's statement "why don't I just write fuck you on it," referring to Hickerson's written warning, would have had the natural and probable tendency to interfere with Hickerson's exercise of protected activity. We recognize that Nodine made his statement in the context of a grievance meeting. However, we have previously upheld the right of employers to make disparaging remarks or vigorously disagree with the union over the merits of a grievance. *Hood River County School District*, 14 PECBR at 501; *also see Bend Education Association v. Bend School District No. 1*, Case No. C-27-79, 4 PECBR 2617 (1980). We recently affirmed that an employer's expressions of displeasure and angry comments during a grievance meeting, which were "not a serious, credible threat," did not violate ORS 243.672(1)(a). *Clackamas County*, 23 PECBR at 98 (no violation of subsection (1)(a) found when a manager told a union steward to stop smirking during a grievance meeting or he would be removed from the office and not allowed to return). Here, the parties were engaging in a vigorous debate over the merits of Hickerson's grievance. Nodine expressed his displeasure with Osgood's response, no more. Therefore, we do not find that Nodine's statement would naturally and probably chill Hickerson or other employees in exercising their PECBA-protected rights.

11. The County did not violate ORS 243.672(1)(a) by making harassing or insulting comments to bargaining unit employees.

The Union asserts that the County violated ORS 243.672(1)(a) when managers verbally harassed and insulted employees based on a number of alleged negative or derogatory comments that management made to or about employees. The Union contends that such comments resulted in embarrassment to those employees, and in some cases employees felt threatened regarding their jobs.[19] We acknowledge that some of management's comments were potentially embarrassing or inappropriate. However, we do not find that these statements constituted a "serious, credible threat" to employees which would have the probable tendency to interfere with the exercise of their PECBA-protected rights. *Clackamas County*, 23 PECBR at 98.

The Union did not prove that the "WANTED A FEW GOOD MEN!!" sign was a credible threat made by management that would have a tendency to interfere with employees' exercise of protected rights. There was no proof that management was responsible for posting the sign. Hensley wasn't even working at this time. When Nodine and employees discussed the sign, Nodine told employees that he knew nothing about the sign or its intent. At most, the Union showed that the County's failure to promptly remove the sign was evidence of poor management.

We do not view Nodine's statement to Horn that she was not allowed to run the forklift and could only work as a flagger as a credible threat that would have a probable

[19]While many of the alleged comments are more actions than statements, the Union's allegations relate to the content of the speech, and so we analyze them in this manner.

tendency to discourage employees from exercising their protected activity. The statement was neither made in the context of nor had any stated relation to protected union activity. While Horn may have been embarrassed by this comment in front of other employees, it is not disputed that management often spoke to employees in such a direct and informal manner. The fact that Horn may have run a forklift before is also not persuasive.

We recognize that Hensley's statement to Horn that she had not been allowed to drive the snow plow because she was a "girl" was made in the context of discussing the ULP complaint. However, Hensley was responding to Horn, who had asked him to explain his decision not to allow her to plow snow. Hensley's response to Horn, while likely inappropriate, was neither a direct or implied threat in regard to Horn's exercise of protected activity. Therefore, his statement would not have the natural and probable tendency to interfere with or coerce her in regard to her exercise of protected rights.

The Union also alleges that the County's direction to Brandsma to wax a trackhoe in the fall of 2008 violated ORS 243.672(1)(a). However, the Union failed to address this allegation in its brief and we find no evidence to support a violation here. There is no evidence that protected activity had even occurred at the time Brandsma was directed to wax the trackhoe. In addition, while Brandsma believed the work may have been unnecessary, even he admitted that he did not believe he was being punished by being asked to do the work.

12. The County violated ORS 243.672(1)(a) by making threats to Brandsma, Ledgerwood, Gagnon, and Brown.

We find that under the circumstances of this case, Nodine's statement to Brandsma that "a fucking mouse must have ate it," referring to Brandsma's equipment report, is a credible implied threat that would have a tendency to deter employees in exercising protected activity in violation of subsection (1)(a). At the point Nodine made this statement, the Union had already filed a number of grievances and employees were well aware that Brandsma was the Union steward. In addition, management had already treated Brandsma differently than other employees by issuing him the first formal warning, after which the Union filed another grievance. Here, once again, Nodine clearly treated Brandsma differently than another employee whose report was also missing. We recognize that the comment was neither directed at nor related to Brandsma's exercise of protected rights and included no specific threat regarding his employment. However, under the circumstances, employees would likely view Nodine's statement as a serious implied threat to Brandsma's continuing employment. Therefore, Nodine's statement would naturally and probably have a tendency to interfere with employees' exercise of protected rights.

We also find that Hensley's statements in front of Ledgerwood, Gagnon, and other employees in February 2009 that they may be asking the local sawmill owner for a job was a credible implied threat that would have a tendency to deter employees in exercising protected activity in violation of subsection (1)(a). At the point this comment was made, employees had participated in a significant amount of protected activity.

Hensley had been very negative about Osgood, the Union, and the Union's attempts to enforce the parties' contract. Employees could easily have had concerns about the possibility of future layoffs as a result of Hensley's angry comment. Therefore, Hensley's response would have had the natural and probable tendency to interfere with or coerce employees in regard to the exercise of their protected rights.

We also find that Nodine's statement to Brown that he better not burn any bridges in relation to his appearance at the County Court meeting was a credible threat regarding his exercise of protected activity in violation of ORS 243.672(1)(a). Although Brown was no longer working for the County at the time Nodine's statement was made, he was in layoff status and still had the right to be recalled to the County. Therefore, Brown's activities fell within the protection of ORS 243.662. *Oregon School Employees Association v. Cascade Union High School District No. 5*, Case No. C-254-79, 5 PECBR 3038, 3045 (1980). Nodine's statement was directed at Brown's exercise of protected activity in appearing at the County Court meeting to challenge the basis for the layoffs. The statement clearly implied that if Brown appeared at the meeting, he would place his future employment at risk. It is likely that Nodine did not intend his statement to be a threat, but rather a friendly warning. However, Nodine's motive is irrelevant. *The Dalles School District #12*, 11 PECBR 171. Nodine's statement, when viewed objectively, would have the tendency to interfere with Brown's exercise of protected activity.

13. The County did not violate ORS 243.672(1)(a) when it made negative comments about the Union to bargaining unit members.

The Union alleges that management's negative and derogatory comments about the Union violated ORS 243.672(1)(a). The comments include 1) Nodine's statement to employees on October 16, 2008, that they all were just pawns for the Union when discussing the rock crusher schedule grievance; 2) Hensley's comments to employees that the problems at the Department were because of the Union; 3) Hensley's statement on or about February 11, 2009, to Horn referring to Osgood as "your little Rod Osgood;" and 4) Hensley's statement to Horn in February 2009 that the Union might be legally right, but was morally wrong.

While these statements in themselves are certainly evidence of anti-union animus, they do not violate ORS 243.672(1)(a). The statements are criticisms of the Union. However, they are not the type of serious or credible threat that violates subsection (1)(a).Therefore, this allegation will be dismissed.

14. The County did not violate ORS 243.672(1)(a) when it implemented a temporary layoff in January 2009.

The County did not implement the January layoff because of employees' exercise of protected rights in violation of subsection (1)(a). We find that the reason the County decided to temporarily layoff employees was a lack of snow and its goal of implementing efficiencies in the Department. It was uncontested that the weather was unseasonably warm at the time the layoff was implemented, that such a long stretch of warm weather

had not occurred in past years, and that it was not easy to use the snow removal equipment for other work. The evidence also showed one of the efficiencies introduced by the County was to stop "making work" for employees. In addition, at the point the County recognized that the weather conditions were not going to change, it did not prolong the layoff, but converted the snow removal equipment so employees would be able to return to work.

The Union asserts that the County's need for efficiencies based on its budget is a pretext, and that the County really laid off employees because of their exercise of protected activity. In support of its assertion, the Union relies on the evidence of Hensley's reaction to the Union's protected activity and his anti-union animus, the County's prior practice of making work available to employees even when there was no snow to plow, and the County's failure to communicate its intent to implement efficiencies due to its concerns about the Department's funding to the employees.

We recognize that Hensley had responded negatively to the Union grievances. Hensley also clearly did not like Osgood and was frustrated with what he saw as the Union's interference with his management of the Department. However, the decision to layoff employees due to lack of snow was made primarily by Webb, who did not show any evidence of anti-union animus. In addition, while temporary layoffs during snow season had not previously occurred, Webb had originally exercised the County's contractual authority to implement a temporary layoff in October, prior to the exercise of any protected activity. Although the October layoff was rescinded because of the reaction of employees, at the time Webb continued to assert the County's right to implement such temporary layoffs under the terms of the parties' contract.

In addition, the County had been addressing issues related to the impact of the threatened decrease in federal funding and implementing work efficiencies long before the exercise of any protected activity. As far back as 2005, Hensley notified the County budget committee of the Department's intent to implement efficiencies. In 2007, the County permanently laid off four employees. Webb was directly involved in the implementation of the work efficiencies in the Department, and had initiated the Department's 5/8 schedule. He also encouraged Hensley to address work performance issues and adopt more efficient standards of operation. We find the fact that the County entered into a snow-plowing contract for one road at a time employees were unable to timely plow that road irrelevant to the County's subsequent decision to implement a temporary layoff at a time there was no snow to plow.

We also do not find that the County violated the "in the exercise of" prong when it laid off employees due to lack of snow. Here we have found that the County acted lawfully when it implemented the layoff. As we have stated, "[a]n employer's lawful conduct, when viewed objectively, does not have the natural and probable effect of chilling employees in their exercise of protected rights." *Ridgeline Montessori Public Charter School*, 23 PECBR at 331. (Footnote omitted.) Nodine's statement to at least one employee that employees would have returned to work sooner if not for the requirements under the Union contract does not change our conclusion. The Union does not dispute that Nodine's statement was accurate and there is no evidence that Nodine

did any more than state it as a fact. Therefore, no violation of the "in the exercise of" prong occurred.

15. The County violated ORS 243.672(1)(a) when it closed the Road Department during the ULP hearing.

The Union argues that the County's decision to close the Department during the week of the ULP hearing violated ORS 243.672(1)(a). The County admits that it closed the Department during the week of the hearing. However, the County argues that it was entitled to close the Department during that time because all of its managers and most of the Department employees were required to attend the ULP hearing in Salem. The County asserts that it was left with no one to manage or oversee the work of the few employees remaining at the Department.

This is a case of mixed motives. The absence of Department managers is a legitimate reason to close the Department. However, the reason that the managers were absent was the Union's ULP hearing. Filing and processing a complaint with the Board is protected activity. *Federation of Oregon Parole and Probation Officers v. Washington County Department of Community Corrections*, Case No. UP-97-93, 15 PECBR 260, 274 (1994). Here, the County would not have closed the Department but for the fact that the Union had filed a complaint. Therefore, the County closed the Department "because of" protected activity in violation of ORS 243.672(1)(a). In addition, since we have found a violation of the "because of" prong of subsection (1)(a), we also find a derivative violation of the "in the exercise of" prong.

16. The County did not violate ORS 243.672(1)(a) or (1)(d) by compensating bargaining unit employees appearing for the Union differently than it compensated employees appearing for the County at the ULP hearing.

The Union alleges that the County violated ORS 243.672(1)(a) because it compensated the witnesses who appeared for the County and those that appeared for the Union differently. The evidence shows that the employees who appeared for the Union were compensated only for the hearing days, while the employees who appeared for the County were also compensated for a travel day. However, the issue under ORS 243.672(1)(a) is not whether the employees were compensated differently, but whether they were compensated differently "in or because of the exercise of" their PECBA-protected rights.

In analyzing a claim under subsection (1)(a), we first determine the reason that the County compensated employees differently. The County asserts that it lawfully paid the bargaining unit employees for their appearance during the ULP hearing, and not for the travel day, under the terms of the parties' contract and based on their status as hourly employees. Here, the parties' contract requires that the County grant bargaining unit employees leave at their hourly rate for "any time they are required to appear in connection with his/her official duties before a court, legislative committee, judicial or quasi-judicial body as a witness in response to subpoena. * * * Witness fees do not include per diem reimbursement." (Exh. J-1 at 21.) The County further asserts that it

paid the management employees who appeared for the County for the travel and hearing days because it was obligated to based on their status as salaried employees.

We have previously found violations of subsection (1)(a) when employers paid witnesses for the employer differently than witnesses for the Union. However, none of those cases are similar to the situation before us. In *Federation of Oregon Parole and Probation Officers v. Polk County,* Case No. UP-32-86, 9 PECBR 8958 (1986), we held that the employer violated subsection (1)(a) when it failed to comply with its own policy that required it to grant an employee a leave of absence with pay for appearing as a witness before a judicial or quasi-judicial body. We noted in that case that the employer had paid an a management employee who it had called to testify as provided in the policy, and that the employer would have paid the employee who testified for the union, "but for the fact that the testimony was rendered in a hearing sought by the labor organization." (*Id.* at 8961.) This Board concluded that the employer's failure to pay the employee, "under these circumstances, tends to interfere with, restrain, or coerce employes in the exercise of rights protected by ORS 243.662." (*Id.*)

In *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon (Tri-Met),* Case No. UP-62-05, 22 PECBR 911, *recons,* 23 PECBR 34 (2009), *appeal pending,* this Board held that the employer violated subsection (1)(a) when it compensated witnesses at a grievance arbitration hearing based on a policy that provided that employees would be paid a different amount depending on whether their testimony was favorable to the employer. We stated that the employer's policy had "the natural and probable effect of unduly interfering with the employees' testimony. Both an employee's decision to testify and the content of the testimony will reasonably be influenced by the realization that the employee may pay a price for his or her testimony." (*Id.* at 950.)

The bargaining unit employees appearance at the ULP hearing of behalf of the Union is clearly protected activity. *Polk County Deputy Sheriffs' Association v. Polk County,* UP-43-90, 12 PECBR 503, 510 (1990). However, the County paid the bargaining unit employees for their appearance at the ULP hearing pursuant to the terms of the agreement negotiated by the parties. The Union does not assert that the County did not comply with the parties' contract language or that the County had an obligation under that language to compensate employees for the travel day. The Union also presented no evidence that the County had compensated bargaining unit employees for travel days when they were witnesses at a different proceeding or when they had testified at a proceeding on the County's behalf. Therefore, we do not find that the County paid the bargaining unit employees differently because of their exercise of protected activity.

The County also did not violate ORS 243.672(1)(d) by compensating bargaining unit employees differently than it compensated the witnesses for management. Under ORS 243.672(1)(d), it an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782." We have previously held that in order to prove a violation of

subsection (1)(d), "a complainant must show that the employer acted adversely toward an employee because of the employee's role in proceedings before this Board." *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, Case No. UP-18-97, 17 PECBR 515, 527 (1998). For the same reason we did not find a violation of the "because of" prong of subsection (1)(a), we do not find that the Union proved that the County acted adversely toward the bargaining unit employees because they appeared for the Union in this case.[20]

17. The County did not violate ORS 243.672(1)(b) when Nodine met with the employees regarding the rock crusher grievance.

Under ORS 243.672(1)(b), it is a violation for an employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to establish a violation in subsection (1)(b) cases,

> "a complainant must prove that an employer took actions which impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation a complaining labor organization must provide evidence to support the conclusion *that some actual interference* with its existence or administration occurred as a result of the employer's actions." *Junction City Police Association v. Junction City*, Case No. UP-18-89, 11 PECBR 780, 789 (1989). (Emphasis added.)

The Union argues that "Nodine's attempt to negotiate a resolution to the Union's grievance constituted direct dealing and violated the County's good faith bargaining duty concerning 'employment relations'" and that Nodine's intent to undermine the Union is evidenced by his comments to employees that his name had been smeared in the paper during a grievance process and that they were all just pawns of the Union. (Union's Post-Hearing Brief at 43.) The County contends that Nodine's meeting with the employees could not violate ORS 243.672(1)(b) because there is no proof that it actually interfered with the administration of the Union and the meeting was held pursuant to the terms of the parties' contractual grievance process.

In the present case, we do not find that Nodine's communications with the employees during the grievance process had a direct effect on the administration of the Union in violation of ORS 243.672(1)(b). Nodine met with the employees to attempt to resolve a grievance which had been filed under the parties' grievance process. Nodine

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[20]We note that this Board also failed to find a violation of subsection (1)(d) in either the *Polk County* or *Tri-County Metropolitan Transportation District of Oregon (Tri-Met)* cases. In *Tri-Met*, we dismissed the subsection (1)(d) allegation because the difference in witness compensation occurred during an arbitration and subsection (1)(d) applies only to proceedings before this Board. In *Polk County*, this Board stated that it did not find a violation of subsection (1)(d) because those allegations arose out of the same action relied on to prove the (1)(a) and the facts were "not sufficient for this Board to rationally infer a violation of * * * (1)(d) in addition to the (1)(a) violation." 9 PECBR at 8961.

believed he was entitled to meet with the employees under the parties' contract. While Nodine shared his prior experience and questioned the motive of the Union for filing the grievance, the Union failed to prove that it suffered any actual harm as a result of Nodine's meeting with the employees. The employees did not request that the Union withdraw the grievance or ask that the Union no longer represent them in regard to the grievance. They also did not withdraw from Union representation after the meeting, but continued to pursue the grievances with the Union's assistance. Therefore, we are unwilling to find that Nodine's meeting with the employees during the grievance process violated ORS 243.672(1)(b).

The Union argues that we should find a violation of subsection (1)(b) under our decision in *AFSCME, Local 2909 v. City of Albany,* Case No. UP-26-98, 18 PECBR 26 (1999). In that case, the employer had negotiated directly with four employees over the compensation they would receive for responding first to call-backs, a matter that was not specifically addressed in the parties' contract. We found that the employer's decision to bypass the union and negotiate directly with the employees in itself "impacts the [u]nion's ability to fulfill its obligations because it undermines unit members' willingness to rely on and trust the Union to protect their interests." *Id.* at 39.

We explained further that:

> "[o]ne of the fundamental purposes of the PECBA is to obligate public employers to bargain with the representative of its employees. The process of collective bargaining requires not only that public employers and employee representatives bargain in good faith concerning employment relations matters and enter into written agreements about such matters, but also that they meet and confer in good faith during the term of a contract concerning its interpretation or application. When a labor organization is chosen by the employees as their exclusive representative, it has the statutory *right* to represent those employees in dealing with the employer. By bypassing the exclusive representative and dealing directly with the employees on contractual matters, a public employer undermines the exclusive representative's status and impairs the representative's ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer." *Id.* at 39. (Emphasis in original.)

Our decision in *City of Albany* is consistent with other decisions in which we held that an employer violated ORS 243.672(1)(b) by bypassing the union and attempting to negotiate directly over employment relations matters with employees. As we explained in *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution,* Case No. UP-51-05, 22 PECBR 372, 398 (2008),

> "certain employer statements to bargaining unit members are so inimical to the core values of the PECBA that they violate subsection (1)(b), even if there is no proof that these statements directly affected any union activity * * * [T]his type of employer communication violates subsection (1)(b) because it undermines a labor organization's ability to fulfill its statutory duties to represent bargaining unit members in negotiations and undermines bargaining unit members' 'willingness to rely on and [*sic*] trust the Union to protect their interests.' *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999). *See also Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 773 (2007); *Amalgamated Transit Union v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 576, *adhered to on reconsid,* 16 PECBR 707 (1996); and *AFSCME Council 75 v. Oregon Health Sciences University*, Case No. UP-37-96, 17 PECBR 343, 363 (1997)."

However, the circumstances in those cases are different than the matter before us. None of those cases addressed a violation of subsection (1)(b) in the context of the processing of a grievance under the terms of the parties' contract. In *Hood River County School District,* 14 PECBR at 502, we specifically addressed that issue. We held that we would not find a violation of ORS 243.672(1)(b) regarding an employer's contact with employees during grievance processing without a showing of a direct effect on the administration of the union. We explained in that case, in the context of discussing the subsection (1)(a) violation, that "[a]n employer may lawfully engage in various activities with the intention of dissuading a union or grievant from pursuing arbitration. Indeed, in our experience, employers do frequently attempt to discourage the processing of a grievance." 14 PECBR at 500.

We will continue to follow our decision in *Hood River County School District.* There are clear differences between a party's rights and obligations during bargaining and those during a grievance process. A party's bargaining rights arise under the statutory protections of the PECBA, consistently apply to all parties subject to the PECBA, and are directly enforced by this Board. However, a party's rights arising out of a collective bargaining agreement are applicable only to the parties covered by that agreement and are dependant on the particular language of the parties' agreement. In our experience, some grievance processes specifically provide for a grievant and the grievant's immediate supervisor to meet informally to discuss a grievance prior to the involvement of the representatives of the union and upper management. Where parties disagree over the interpretation of their agreement on such matters, as they do here, such disputes are generally resolved under their contractual grievance process. Under these circumstances, we are unwilling to conclude that an employer's direct contacts with bargaining unit members in the context of grievance processing alone are so inimical to the core values of the PECBA that they violate subsection (1)(b) without proof that these contacts had a direct affect on the administration of the union.

18. The County did not violate ORS 243.672(1)(c) when it failed to allow Horn to operate a snow plow.[21]

Under ORS 243.672(1)(c), it is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." We have said that "[o]ur test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the 'because of' prong of subsection (1)(a). An employer's conduct violates subsection (1)(c) if there is a causal connection between an employee's protected activity and the employer's action." *Santiam Correctional Institution,* 22 PECBR at 396 citing to *Oregon School Employees Association v. Cove School District #15,* Case No. UP-39-06, 22 PECBR 212 (2007). In analyzing a subsection (1)(c) claim, it is "not enough that the employer treated the employee unfairly; the unfair treatment must have been intended to discourage or encourage union membership." *AFSCME Local 2067 v. City of Salem,* Case No. UP-17-00, 19 PECBR 1, 9 (2001)(citing *Schreiber v. Oregon State Penitentiary,* Case No. UP-124-92, 14 PECBR 313, 320 (1993)).

We do not find a causal connection between the County's failure to assign Horn to operate a snow plow during the 2008-09 snow season and her exercise of protected activity.[22] First, we do not view the County's failure to assign Horn to plow snow as the removal of a regular, long-term duty. It is undisputed that Horn was not regularly assigned to operate equipment and that, in fact, she did not want to operate equipment on a regular basis. When Horn was assigned additional duties after another employee resigned, she was not initially assigned that employee's snow-plowing duties. These duties were assigned to Horn during the 2007-08 snow season, only because management had concerns that there were insufficient employees to adequately remove snow after the 2007 layoff. However, there is no evidence that Horn was told or given the impression that this would be a permanent assignment.

Second, the County's reason for not assigning Horn to plow snow was Hensley's concerns about her ability as a woman to operate the snow removal equipment.[23] Horn and the Union admit that "management's sexism against Horn was abhorrent." (Union's Post-Hearing Brief at 45.) They also do not dispute that Hensley treated Horn differently than he treated the male equipment operators even prior to the employees' exercise of protected activity. In addition, this is the reason Hensley gave both Gillam

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[21]The Union did not allege that the County's failure to assign Horn to plow snow violated ORS 243.672(1)(a), so we do not address that issue in our decision.

[22]In its post-hearing brief, the Union also argued that the County violated subsection (1)(c) when it moved Horn's office and laid off Horn. However, the only claim alleged as a subsection (1)(c) violation in the complaint is related to the removal of Horn's snow plow duties. Therefore, we limit our analysis to that issue.

[23]While Webb testified he made the decision, he admitted that he made it because of the concerns Hensley expressed.

and Horn. Soon after he made the decision, Hensley told Gillam that he did not assign Horn to plow snow because Horn did not understand the snow plow's mechanics. Hensley later told Horn that she was not assigned to plow snow because she is a woman. These responses are both consistent and credible. While we certainly do not condone such behavior or Hensley's anti-union animus, we do find that Hensley was generally direct, open, and honest about his actions, even when this was neither to his nor the County's advantage.

The Union argues that Hensley's concerns about Horn's ability to operate snow removal equipment were a subterfuge, and that the real reason for the decision was Horn's protected activity. We recognize that Hensley had identified no specific problems with Horn's performance during the prior year. However, Hensley's concerns about Horn's ability to operate such equipment were not new. Hensley had raised his concerns with Webb the prior year. In an attempt to address his concerns, Hensley required Horn to ride with him and another employee before she was allowed to plow snow. Horn herself admitted that no other employee had been required to do this.

In addition, Hensley decided not to assign Horn to plow snow sometime prior to November 12, 2008. At that point, Horn had engaged in limited protected activity and there is little to show that the relationship between Hensley and Horn had changed due to her statements in support of the Union. While Horn had told Hensley that she disagreed with the change to the 5/8 schedule and the temporary layoff, she had not yet filed a grievance herself. The decision to not assign her to plow snow also occurred prior Horn's warning and her office move. In addition, Horn admitted that it was her practice to give Hensley feedback regarding such management decisions and that, even though she did this, Hensley continued to treat her the same and talked freely with her about his unhappiness with the Union. Therefore, while Hensley may have treated Horn unfairly, we do not find that he removed her snow plowing duties because of or with the intent to discourage her participation in Union activities. Therefore, this portion of the complaint will be dismissed.

Remedy

We will order the County to cease and desist from violating ORS 243.672(1)(a). Specifically, it will be ordered to cease and desist from making threatening statements to employees that might have a tendency to interfere with their PECBA-protected rights, from issuing written warnings to employees because of their protected activity, and from placing employees on temporary layoff during a ULP hearing. The County will also be ordered to remove the written warnings from Brandsma's, Gagnon's, and Horn's personnel files and not rely on those written warnings for any reason in the future; make whole the bargaining unit employees who were placed on temporary layoff from May 18 through May 21, by compensating them or reinstating any vacation time they used during that period; and make whole the bargaining unit employees who testified at the ULP hearing, but did not work on Thursday, May 21, due to the temporary layoff, by compensating them or reinstating any vacation time they used that day.

In addition, we will order the County to post a notice in the appropriate County facilities. In *Oregon School Employees Association v. Fern Ridge School District*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984), we established criteria that we consider in deciding when the posting of a notice is appropriate.[24] The factors listed include whether the violation:

> "(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employes; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge. * * *" *Id.* at 5601.

Here, the violations which we found affected a significant portion of the Union's bargaining unit, and had the potential for a significant impact on the functioning of the Union. Therefore, the posting of a notice is appropriate.

The Union also requests that the notice be published in the local paper citing to *Baker Education Association v. Baker School District 5J*, Case No. UP-5-00, 19 PECBR 712, 731 (2002). In the present case, there was some publicity about the events and changes at the County which began in September 2008. However, unlike *Baker School District*, there is no evidence in this case that the County sought to publicize these events. In addition, we have found that some of the publicized changes made by the County were lawful. Therefore, we do not find that the evidence in this case supports placing the posting in the local paper.

Civil Penalty

The Union asks that we award a civil penalty against the County. Under ORS 243.676(4)(a), we may award a civil penalty if we find

> "that the person who had committed, or who is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious." *Also see* OAR 115-035-0075.

The Union asserts that the County's conduct was both repetitive and egregious.

The Union failed to prove that the employer's conduct was repetitive within the meaning of ORS 243.676(4)(a). In *AOCE v. Oregon Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999), we stated that we would generally require that a complainant show "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful," to prove that a violation was

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[24]In subsequent cases we have held that the Board need only find a violation of one of these factors. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908 (2007).

repetitive. *Also see Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). No evidence of a prior Board order was presented by the Union in this case.

The Union also failed to prove that the County's conduct was egregious within the meaning of ORS 243.676(4)(a). We have defined egregious as "conspicuously bad" and "flagrant." *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987). The violations in this case arose out of an unfortunate series of events that started with the lawful actions of the County. While we found that some of the Union's allegations had merit, we also found that many others did not. Therefore, we do not find that the County acted in a manner that is conspicuously bad and flagrant.

Reimbursement of Filing Fee

We will not order reimbursement of the Union's filing fees. Under ORS 243.672(3), we may order reimbursement of filing fees to a prevailing party only if "the complaint or answer is found to have been frivolous or filed in bad faith." We have previously stated that we will find that defenses are frivolous only if:

> "* * * *every* argument on appeal is one that [1] a reasonable lawyer would know is not well grounded in fact, or that [2] a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law." *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93, 14 PECBR 796, 797 (1993) quoting *Westfall v. Rust International*, 314 Or 553, 559, 840 P2d 700 (1992). (Emphasis added.)

Since we have dismissed some of the Union's allegations, it is clear that the County's defenses were not frivolously filed in this case.

STIPULATED ORDER

1. The County shall cease and desist from making threats which would have a tendency to interfere with employees' exercise of PECBA-protected activity in violation of ORS 243.672(1)(a).

2. The County shall cease and desist from issuing written warnings in or because of the exercise of protected activity. The County shall remove the written warnings from the personnel files of Terry Brandsma, Phil Gagnon, and Sue Horn and not use them as the basis of any future action.

3. The County shall cease and desist from placing employees on temporary layoff during a ULP hearing. The County shall make whole the bargaining unit employees who were placed on temporary layoff from May 18 through May 21, by compensating them or reinstating any vacation time they used during that period. The County shall also make whole the bargaining unit employees who testified at the ULP

hearing for not working on Thursday, May 21, due to the temporary layoff, by compensating them or reinstating any vacation time they used that day.

4. Within 10 days of the date of this order, the attached notice shall be signed by the Judge of the County Court and prominently posted for 30 days at all of the Department facilities where members of the Union work and at the County Courthouse.

5. The remainder of the complaint is dismissed.

Dated this 28th day of January, 2010.

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This Consent Order is hereby approved and adopted.

DATED this 5th day of February, 2010.

Paul B. Gamson, Chair

Vickie Cowan, Board Member

Susan Rossiter, Board Member

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-8-09, *International Union of Operating Engineers, Local 701 v. Grant County,* and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

The Employment Relations Board has found that Grant County (County) violated the PECBA by discriminating against employees at the Road Department in and because of their exercise of activity protected under the PECBA. The violations occurred when the County issued written warnings to three employees, made threatening statements to employees which might have a tendency to interfere with their PECBA-protected rights, and placed employees on temporary layoff during the ULP hearing.

The Employment Relations Board has ordered the County to:

1. Cease and desist from making threatening statements to employees which might have a tendency to interfere with their PECBA-protected rights, from placing employees on temporary layoff during a ULP hearing, and from issuing written warnings to employees because of protected activity.

2. Make whole the bargaining unit employees who did not testify at the ULP hearing and were placed on temporary layoff from May 18 through May 21; make whole the bargaining unit employees who did testify at the ULP hearing but did not work on Thursday, May 21, due to the temporary layoff; and remove the written warnings from the three employees' personnel files and not rely on those written warnings for any reason in the future.

The County shall comply with the Board's order. The County shall cease and desist from such unlawful conduct in the future.

Dated this ____ day of _____, 2010. GRANT COUNTY

By_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED