

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-11-09

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,)	
)	
Complainant,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
STATE OF OREGON, DEPARTMENT OF)	
TRANSPORTATION,)	
Respondent.)	
_____)	

On April 28, 2010, this Board heard oral argument on Respondent's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on February 8, 2010, after a hearing on July 1, 2009, in Salem, Oregon. The record closed on September 14, 2009, with the receipt of the parties' post-hearing briefs.

Joel Rosenblit, Attorney at Law, SEIU Local 503, OPEU, Salem, Oregon, represented Complainant.

Kathryn Logan, Sr. Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On February 20, 2009, SEIU Local 503, OPEU (Union) filed an unfair labor practice complaint alleging that the State of Oregon, Department of Transportation (ODOT) disciplined David Sutkowski in violation of ORS 243.672(1)(a) and (c).

ODOT filed an untimely answer on April 14, 2009. On April 15, 2009, the ALJ notified ODOT that pursuant to OAR 115-035-0035, its answer would be stricken from the record and that it would not be allowed to present evidence, but would be allowed to present legal argument.

The issue is :

Did ODOT, on or about November 19, 2008, discipline David Sutkowski in violation of ORS 243.672(1)(a) and (c)?

RULINGS

1. The ALJ correctly denied ODOT's Motion to Dismiss the complaint on the basis that the Union failed to exhaust its administrative remedies under *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864 (1978.) The *West Linn* exhaustion doctrine "requires a party to utilize its contractual remedies before pursuing a breach of contract unfair labor practice with this Board." *Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO v. Southwestern Oregon Community College*, Case No. UP-135-92, 14 PECBR 657, 662 (1993) (footnote omitted). We have previously found, however, that the exhaustion requirement "applies only to subsection (1)(g) contract violation claims." *Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 626, 627 (1996). We have specifically rejected this defense in regard to cases filed under ORS 243.672(1)(a) and (c). *Southwestern Oregon Community College*, 14 PECBR at 663; *AFSCME Council 75, Local 1246 v. State of Oregon, Fairview Training Center*, Case No. UP-103-92, 14 PECBR 610, 611 (1993). For these reasons, the exhaustion doctrine does not apply to the subsection (1)(a) and (c) allegations in this case.

2. The ALJ also correctly determined that ODOT's answer was untimely filed without good cause and struck the answer.

ODOT failed to file an answer within 14 days from service of the complaint under OAR 115-035-0035(1). On April 10, 2010, the ALJ notified the parties that ODOT failed to file an answer. The ALJ asked that ODOT show good cause why sanctions should not be applied under OAR 115-035-0035, which provides that "[i]f the respondent fails to file a timely answer, absent a showing of good cause, it will not be allowed to present evidence at the hearing, and will be restricted to making legal arguments." On April 13, ODOT responded that the notice of hearing "was mistakenly filed by a clerical support person who had no knowledge of what it meant and did not give notice to anyone that it needed to be calendared."

ODOT failed to establish good cause for filing a late answer. This Board has previously held that "the failure of a support person to docket an answer date is not good cause for accepting an untimely answer." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-45-98, 18 PECBR 377, 380 (1999). We stated that, "[w]hether a support person calendared an answer date, counsel is responsible for all correspondence regarding representation of a client." *Id.* Here, as

in that case, the correspondence and notice of hearing were directed to the Respondent's attorney. While we evaluate "'good cause' for a late filing based upon the circumstance of the individual case," we find nothing to distinguish the circumstances of the present case from those in our prior decision. *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 426 (2008).

3. At the hearing, ODOT objected to the receipt of Exhibits C-1, C-2, and C-4, and testimony related to those exhibits.¹ The evidence to which ODOT objected related to ODOT's investigation into charges that DP² engaged in misconduct by using a state credit card for personal reasons. The charges against DP were ultimately determined to be groundless. ODOT argued that evidence concerning the investigation into DP's alleged misconduct goes beyond the scope of the allegations in the complaint. ODOT asserts that this Board should limit its consideration of the evidence in this matter solely to the admitted allegations in the complaint, and not allow the Union to present additional evidence.

The ALJ correctly received Exhibits C-1, C-2, and C-4, and allowed the related testimony. Evidence concerning ODOT's investigation into DP's alleged misconduct and Sutkowski's criticism of that investigation does not go beyond the facts alleged in the complaint. Paragraph IV of the complaint alleges that

"[d]uring a labor-management committee meeting on September 24, 2008, Sutkowski called for the resignation of Michaelene Larson, the Employer's Region 2 Human Relations Manager. He stated that he sought her resignation for two reasons: (1) because of the way she had handled the [DP] matter and (2) the way she responded to employee complaints about interviews conducted by Department of Justice attorneys concerning a law suit filed by employee [MA]."

Paragraph V of the complaint alleges that ODOT unlawfully disciplined Sutkowski "for his Union activity on behalf of [DP] and for speaking frankly in the labor-management meeting as a steward representing the Union." Attached to the complaint as Exhibit A is a copy of the grievance which Sutkowski filed on DP's behalf; the grievance concerns ODOT's investigation into DP's alleged misconduct.

¹ODOT also initially objected to Exhibit C-5, but later agreed to its admission.

²"DP" and all other initials used instead of an individual's name in this Order are pseudonyms.

These allegations are sufficient to place facts concerning ODOT's investigation of DP at issue for the hearing.³ Accordingly, the Union was entitled to present evidence concerning this matter as part of its *prima facie* case.⁴

4. After the ALJ received Exhibits C-1, C-2, and C-4, ODOT sought the right to present evidence or cross-examine witnesses to rebut facts presented by the Complainant that went beyond those specifically stated in the complaint. The ALJ correctly denied ODOT's request to present this evidence. As discussed above, evidence regarding the investigation into DP's alleged misconduct concerns facts pled in the complaint. Because ODOT failed to file a timely answer to this complaint under OAR 115-035-0035, it is not entitled to present evidence concerning these matters.

ODOT's reliance on *Department of Higher Education, Portland State University v. Shapiro, Ward, and Oregon State Employees Association*, Case No. C-192-78, 4 PECBR 2303 (1979) is misplaced. In *Shapiro*, the complainant amended the complaint at hearing to allege additional violations of the Public Employee Collective Bargaining Act (PECBA). The respondent filed a timely oral answer to the allegations in the amended complaint, and we allowed the respondents to present evidence only to rebut the new allegations in the amended complaint.

³Allegations in a pleading are adequate to state a claim if they provide the respondent with sufficient notice of the claim or affirmative defense. *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 536, 537 (1998), and *McMinnville Education Association and Mid-Valley Bargaining Council v. McMinnville School District #40*, Case No. UP-4-97, 17 PECBR 539, 540 (1998).

⁴ODOT also contends that because allegations which are not denied are deemed admitted as true under OAR 115-035-0035(1), the Union should not be entitled to present evidence on its admitted allegations. This Board previously took the position that when a respondent fails to file an answer, a complainant "should not be allowed or required to present evidence regarding admitted allegations." *Teamsters Local 57 v. City of Bandon*, Case No. UP-88-91, 13 PECBR 551, 553 (1992), citing *OSEA Chapter 35 v. Fern Ridge Sch. Dist. 28J*, Case No. C-19-82, 6 PECBR 5590, 5591, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984). However, in *Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245, 250 (1999), this Board held that where a respondent failed to file an answer, it would require the complainant to "present its *prima facie* case through sworn testimony and exhibits received on the record." We explained our rationale for this decision as follows:

"we are now of the opinion that the better practice is to require the formal production of evidence in a hearing. We affirm the ALJ's ruling as being consistent with the Administrative Procedure Act requirement that this Board provide a full and fair hearing of the issues in dispute. ORS 183.415(10)." (*Id.*)

Shapiro does not apply here. The Union did not allege any additional violations of the PECBA and ODOT did not file a timely answer. Therefore, ODOT is not entitled to present rebuttal evidence.

5. On August 3, 2010, ODOT filed a Motion to Vacate Proposed Order and Dismiss Complaint. In its motion, ODOT noted that after the oral argument, Sutkowski entered into a settlement agreement with the State of Oregon on another matter. As part of that settlement, ODOT agreed to do the following: withdraw the November 19, 2008 disciplinary action, which is at issue in this unfair labor practice proceeding; pay Sutkowski all money deducted from his pay as a result of the pay reduction that was imposed by the November 19 discipline; and promote Sutkowski to a position in management service. ODOT contends that the unfair labor practice complaint should be dismissed because the matter was now moot. The Union responded to the motion and opposed dismissing the complaint. As part of its response and at the request of this Board, the Union submitted a copy of the settlement agreement referred to in ODOT's motion.⁵ We will address ODOT's motion in our Conclusions of Law. In order to do so, however, it is first necessary to reopen the record to admit into evidence facts about the settlement agreement.

We generally grant a party's motion to reopen a record for submission of additional evidence if the evidence offered is material to the issues and was unavailable at the time of the hearing. *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998). We apply the same standard to this Board's *sua sponte* action to admit additional evidence. Here, evidence of Sutkowski's settlement agreement is material to the issues in this case and was unavailable at the time of the hearing. Accordingly, we will mark the settlement agreement as Exhibit B-1 and admit it into evidence.

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

FINDINGS OF FACT

1. The Union is a labor organization that represents a bargaining unit of employees at ODOT, a public employer.

2. Sutkowski was employed by ODOT as a transportation maintenance specialist 2 at the District 2, Region 1, Humbug Maintenance Station. Sutkowski worked in a position represented by the Union and served as the Union's Humbug

⁵The copy of the settlement agreement is undated, and is not signed by all parties to it. The parties do not dispute, however, that the settlement agreement was entered into.

Maintenance Station shop steward. Sutkowski was also a representative for the Union on the District 2 SEIU/Department Labor-Management Committee (LMC).

E-Mailing of Grievance Meeting Recording

3. In January 2008, ODOT initiated an investigation to determine whether DP, a Department employee, used a State credit card to purchase gasoline for his personal use.

4. In his role as union steward, Sutkowski conducted his own investigation into DP's alleged personal use of the State credit card and determined that the disputed charges were purchases of biodiesel for DP's State vehicle made during work time. On June 19, 2008, Sutkowski notified ODOT's Electrical Manager Dave McNeel and Human Resources (HR) Manager Michaelene Larson about the results of his investigation, and offered to give ODOT the information he had obtained. ODOT's investigator also determined that the charges against DP were unfounded; ODOT subsequently withdrew the charges.

5. Sutkowski believed that ODOT acted inappropriately in its investigation of DP. On July 10, 2008, Sutkowski filed a grievance on behalf of DP under Article 22 of the parties' collective bargaining agreement, alleging that ODOT discriminated against DP on the basis of DP's race.

6. Article 22 of the parties' collective bargaining agreement

“provides that a grievance alleging unlawful discrimination may be filed with an Agency Head or designee. If not resolved, the unlawful discrimination grievance may be submitted by either the union or grievant to the Bureau of Labor and Industries (BOLI) or the Equal Employment Opportunity Commission (EEOC). Allegations of unlawful discrimination do not proceed to arbitration.” *In the Matter of the Petition For Declaratory Ruling Filed by the State of Oregon, Department of Administrative Services, Case No. DR-3-08, 22 PECBR 867, 868 (2008).*⁶

7. On August 18, 2008, Sutkowski attended a step two grievance meeting with Department Labor Relations Manager April Makalea, which he recorded on an audio tape.

⁶The parties stipulated at the hearing that we should take official notice of the facts and conclusions in this Declaratory Ruling.

8. On August 19, 2008, during non-work hours, Sutkowski downloaded his audio recording of the August 18 meeting onto his home computer. Sutkowski then e-mailed a copy of the audio recording from his home computer to the Union and his Department e-mail account. Sutkowski also e-mailed the recording to three private attorneys who represent employees in employment-related matters. He asked the attorneys for their comments and advice about the discrimination grievance.

Labor-Management Committee Meeting

9. On September 24, 2008, the parties held a District 2 LMC meeting. Those present at the meeting representing the Union included Sutkowski, Union Organizer Nakita Santiago, and several employees. Department representatives at the meeting included HR Manager Larson, District Manager Dave Neys, Region 2 Maintenance and Operations Manager Dick Fenske, and several other managers. The participants in the LMC had not yet agreed upon ground rules; as a result, ground rules were one topic of the meeting.

10. During the meeting, Sutkowski raised a concern about management's response to an issue he raised at the prior LMC meeting, stating that it was not up to management to decide which issues the Union could bring to the meeting. The committee members disagreed about which issues could be appropriately raised at the LMC meetings and who should determine which issues were appropriate for consideration at the LMC meetings. HR Manager Larson pointed out that until the parties established ground rules for their committee, they were unlikely to agree on certain aspects of the committee. Sutkowski and Larson then had the following discussion:

"MR. SUTKOWSKI: Absolutely. Absolutely. Which brings me to our next point. I -- once again, I -- of last meeting I brought up the fact that my people, uh, were not happy with the Department of Justice interviews⁷. They're still extremely angry and the response I got from you, Michalene [Larson], was you need to just get over it. And --

"MS. LARSON: I think it's been three months. We need to move on.

"MR. SUTKOWSKI: -- it's been three months, we need to move on. And I reminded you that I just received a letter of reprimand at that time for something that happened during the DOJ -- or you say happened during the DOJ interviews three months ago. So, I'm pointing

⁷The Department of Justice interviews to which Sutkowski referred concerned a lawsuit filed by employee MA.

out a hypocritical statement on your part. I was told that we're not supposed to discuss grievance related issues. That doesn't mean -- doesn't mean we can't.

"MS. LARSON: So, if you're -- if your crew's so unhappy about it, what are they wanting? What do they want with that?

"MR. SUTKOWSKI: How about an apology?

"MS. LARSON: For what?

"MR. SUTKOWSKI: For the improper and heavy-handed way that went down.

"MS. LARSON: That's what they're seeking is an apology?

"MR. SUTKOWSKI: Absolutely.

"MS. LARSON: Well --

"MR. SUTKOWSKI: You don't -- you don't think they have it coming to them? You have your job threatened? If you don't answer and cooperate with people that -- that -- and ask -- they were asking questions that a manager can't ask. Okay. My manager can't ask me personal questions about what I do off my job.

"MS. LARSON: Okay. We've already had this debate one time.

"MR. SUTKOWSKI: No, we haven't.

"MS. LARSON: I'm not going to argue this again with you, Dave, I'm not.

"MR. SUTKOWSKI: We haven't had this discussion at all.

"MS. LARSON: No. We've had -- this -- we've been round and round with this before. ODOT, as the employer, has a right to ask an employee for information pertaining to a civil matter. Bottom line. I'm not going to argue this again.

"MR. SUTKOWSKI: Well -- well, it's going to -- it's just going to keep festering because the -- the people are upset. I'm upset. What are you going to do ?

"MS. LARSON: I'm sorry they're upset.

"MR. SUTKOWSKI: Well --

"MS. LARSON: ODOT had to do what it had to do.

"MR. SUTKOWSKI: And we need to just move on. Right?

"MS. LARSON: Well, that would be my suggestion. There's nothing we can do about it now. I mean, it -- it's over. It's done.

"MR. SUTKOWSKI: Hmm. Okay. I'm trying to think if there's anything else. Uh, oh, yeah. One more thing. Due to, uh, again, the things that happened in the DOJ interview, uh, spreading the whole length of the spectrum to the [DP] fiasco, uh, incompetence, misconduct and everything in between, I hereby call for the resignation of you, Michalene Larson.

"MS. LARSON: Request denied."

11. Later during the meeting, District Manager Neys stated that he was uncomfortable with what had occurred and did not believe the LMC meeting was the place to talk about individual performance issues. HR Manager Larson stated that she did not think it was appropriate to bring people up by name or “ask for someone to resign in front of 20 people.” Region Manager Fenske stated that he thought that it was inappropriate for Sutkowski to use the LMC to ask for Larson’s resignation or to insult someone publically. He continued, “I just think that it’s highly inappropriate and unprofessional and not the first thing that should have happen [*sic*] here if we’re trying to build trust.”

12. Sutkowski responded that he believed the trust was broken and that nothing would change that. Another Union representative on the LMC indicated that a number of the Union committee members agreed with and supported Sutkowski. Sutkowski stated that he felt someone had to say such things because of ODOT’s investigation of DP and the damage to DP’s reputation. After further discussion, Regional Manager Fenske explained that his concern was with Sutkowski’s manner. Fenske stated that he believed he had given Sutkowski feedback in a respectful manner, without raising his voice, that he had not asked for Sutkowski’s resignation, and that he believed Sutkowski’s manner was neither professional, polite, nor civil. Fenske concluded that he thought they would get further in the LMC meeting if Sutkowski did not put people on the defensive all the time and if they all conducted themselves in a manner that was respectful and preserved everyone’s dignity. Sutkowski indicated that he disagreed with Fenske’s interpretation of events and that he did not believe he was being uncivil. The discussion then moved on to other matters.

Discipline

13. On November 19, 2008, ODOT issued Sutkowski a one-step, one-month salary reduction. The notice of discipline provides in part as follows:

“BACKGROUND:

“In an investigatory meeting on October 30, 2008, attended by you; * * * you acknowledged the following ODOT policies and expectations apply to you as an employee of ODOT: Code of Conduct Policy; Maintaining a Professional Workplace Policy; Information Security Policy; Acceptable Use Policy and the Responsibilities/Expectations of Employees in ODOT Region 2, District 1.

“Maintaining a Professional Workplace Policy is a statewide policy that reads in part, ‘It is the policy of the State of Oregon to create and maintain a work environment that is respectful, professional and free from

inappropriate workplace behavior ... building positive relationships with others, communicating in a respectful manner, holding oneself accountable and pursuing change within the system.' Examples of inappropriate workplace behavior listed in the policy include comments or behaviors that disparage, demean or show disrespect for another employee, a manager, a subordinate, a customer, a contractor or a visitor in the workplace.

"The Code of Conduct Policy provides general employee responsibilities and states employees shall not disclose confidential information to anyone 'to whom issuance of this information has not been authorized.'

"Information Security and Acceptable Use of Information Related Technology Policies provide guidelines for the use of State resources. State information, computer systems and devices are provided for business purposes only and information on those systems is the sole property of the State of Oregon.

"The District 1 Responsibilities and Expectations you received on September 16, 2008, states that all employees are expected to follow directives, verbal or written issued by the manager or supervisor. Employees are expected to communicate appropriately and issues are to be raised with the appropriate parties.

"On June 5, 2008, you received a Letter of Reprimand for your disruptive, discourteous and disrespectful behavior. Specifically, you said 'Eat me' to a Department of Justice Trial Attorney. You were told to immediately and permanently cease and desist engaging in this type of behavior

"On August 7, 2008, Darin Weaver, Transportation Maintenance Manager, instructed you via e-mail that it is not appropriate to share e-mails related to conducting ODOT business with individuals or entities outside the agency. Mr. Weaver sent this e-mail after he had discovered that you had copied Beth Creighton, your personal attorney, on an electronic communication related to ODOT business. You were advised to refrain from this type of activity in the future.

"On September 16, 2008, you received your Annual Performance Evaluation that informed you that 'drawn out,' continued criticisms toward individuals or about agency directions with which you do not agree is not productive or acceptable. Inflammatory or derogatory comments, e-mails or other forms of communication are also unacceptable. You were

also advised to resolve your disagreements or differences of opinion in the smallest arena possible. You were told that your current behavior does not demonstrate the ability to work collaboratively with ODOT management to set direction for District programs.

“The SEIU Collective Bargaining Agreement (CBA) states that union representatives and SEIU-represented employees may use an Agency’s e-mail messaging system to communicate about Union business provided that the use does not contain false, unlawful, offensive or derogatory statements or contain profanity, vulgarity, sexual content, character slurs, or threats of violence. The Agency has the right to control its e-mail system, its uses or information. The Agency can review and monitor the use of the e-mail system. E-mail messages sent to more than five people simultaneously cannot be more than approximately one page and shall not include attachments; and e-mail usage shall comply with Agency policies applicable to all users such as protection of confidential information. E-mail communications shall only be between SEIU-represented employees and managers, within their respective Agency, and the Union. Employees may forward an e-mail message to his/her home computer. (CBA Article 10 § (5)(b).)

“Facts supporting this action:

“1) You continue to disregard management’s instructions and violate agency policy regarding the use of system resources.

“In the investigatory meeting you admitted that on August 19, 2008, you forwarded a tape recording of a Step 2 Grievance meeting with April Makalea, ODOT Labor Relations Manager, entitled ‘April’s Greatest Hits,’ to outside sources, including your attorney, Beth Creighton, and the law firm of Lafky and Lafky, neither of whom represented anyone involved in the grievance. You further stated you had the right, as a Steward, to forward the recording to outside sources based on Article 10(5)(b) of the CBA. You argued that once you forwarded the recording to your home computer, you could do whatever you wanted with the recording. You stated that your boss does not have the authority to tell you who you can e-mail documents to when you are acting as a Steward.

“2) You continue to engage in behavior that is disruptive, disrespectful, and discourteous.

“In the investigatory meeting you also acknowledged that in a September 24, 2008, district labor -management meeting, you called for the resignation of Michaelene Larson, Region 2 HR Manager ‘for incompetence, misconduct and everything in between.’ You defended your conduct by stating that, as a Steward, you were asking for a manager’s resignation. You claim that your Steward status allows you to behave as you wish, even if it is contrary to what ODOT tolerates. You also felt the Labor-Management Meeting was the correct forum in which to ask for Ms. Larson’s resignation.

“Summary:

“Despite your understanding of the expectations and policies of professional conduct in the workplace, and a need to obey the directives of your supervisors, you continue to disregard management’s expectations and agency policy and act in a manner that is counter-productive to the agency’s mission, values and goals.

“You claim your Steward status protected you when you disobeyed your supervisor’s directive not to forward Agency information to outside parties. You are also of the opinion that forwarding a recording of a Step 2 Grievance meeting to attorneys not involved in the grievance was within your Steward role.

“There is no dispute that a Steward has equal status with management. However, your conduct goes beyond what the Agency believes is protected activity and is not protected by the CBA language. Despite a directive to the contrary, you sent confidential information to outside individuals who had no business need to know the agency’s workings. And, you asked an employee to resign in a meeting attended by approximately a dozen ODOT employees; in doing so, your behavior was disrespectful, contemptuous and served no constructive purpose. In fact, the ridicule and embarrassment your request inflicted was counter-productive to building effective labor management relationships which, as a Steward, is your contractual responsibility.”

14. After Oral Argument before this Board in this case, Sutkowski entered into a settlement agreement with ODOT on another matter. As part of the settlement, ODOT agreed to take the following actions:

- a. Remove all notices of discipline from Sutkowski’s personnel file;

- b. Reimburse Sutkowski for the pay he lost as a result of the one-month, one-step reduction imposed by the November 19, 2008 disciplinary action; and
- c. Effective August 1, 2010, employ Sutkowski as Assistant District Manager in Salem, Oregon.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. ODOT violated ORS 243.672(1)(a) when it disciplined Sutkowski because he e-mailed a recording of a grievance meeting to private attorneys.
3. ODOT violated ORS 243.672(1)(a) when it disciplined Sutkowski for engaging in disruptive, disrespectful, and discourteous behavior by requesting the resignation of a manager during an LMC meeting.

The facts concerning Sutkowski's discipline are largely undisputed. Sutkowski, a Union steward, recorded an August 18, 2008, grievance meeting in which he participated. The grievance concerned ODOT's investigation into bargaining unit member DP's alleged misconduct. After the meeting, Sutkowski e-mailed the recording to three private attorneys who specialize in employment-related matters. Sutkowski sought the attorneys' advice about DP's grievance. In a separate incident on September 24, 2008, Sutkowski and other Union and ODOT representatives participated in an LMC meeting. Discussion between the Union and ODOT representatives became heated during the meeting. At one point, Sutkowski asked for the resignation of an ODOT manager.

By letter dated November 19, 2008, ODOT disciplined Sutkowski by imposing a one step, one month salary reduction for: (1) sending the recording of a grievance meeting to three attorneys in violation of management's instructions and ODOT policy, and (2) engaging in "disruptive, disrespectful, and discourteous" behavior by calling for the ODOT manager's resignation. The Union contends that ODOT's disciplinary action violates ORS 243.672(1)(a), which makes it 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" prongs of that statute. *Oregon Public Employees Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 520-21 (1988).

"Because of" Claim

In considering an allegation that the employer acted "because of" the exercise of rights protected under the Public Employee Collective Bargaining Act (PECBA), our emphasis is on the reasons for the disputed action. We examine the facts to determine why the employer took the action it did. A complainant will prevail on a claim that an employer violated the "because of" prong of subsection (1)(a) if the complainant establishes that the employer took the disputed action "because of" the employee's exercise of the protected right. *AFSCME Council 75, Local 3694 v. Josephine County*, 234 Or App 553, 557-558, 228 P3d 673 (2010) (citing *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000)).

A complainant need not show employer hostility or anti-union animus to prove a violation of the "because of" portion of subsection (1)(a). A complainant only need demonstrate that the employer was motivated by the protected activity to take the action it did. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986). We typically begin our analysis by looking at the record to determine the reasons for the employer's actions; we then decide whether these reasons are lawful. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 351 (2008). Here, the reasons why ODOT disciplined Sutkowski are undisputed. Accordingly, we move to the next step to determine whether these reasons are lawful, *i.e.*, whether the conduct for which ODOT disciplined Sutkowski was protected activity.

E-Mailing the Grievance Meeting Recording

ORS 243.672(1)(a) protects the exercise of rights guaranteed by ORS 243.662. ORS 243.662 grants public employees the right to "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 Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07, 23 PECBR 170, 193, *recons* 23 PECBR 219 (2009), *appeal pending*.

We conclude, without difficulty, that Sutkowski engaged in protected activity when he e-mailed the recording of the step two grievance meeting to three private attorneys. Sutkowski, a union steward, represented DP during ODOT's investigation into DP's alleged misuse of a State credit card. In his role as union steward, Sutkowski filed a grievance concerning this investigation on DP's behalf and participated in the grievance process. Because the grievance alleged unlawful discrimination, the contract required that the Union submit the matter to BOLI and EEOC and not to arbitration. Sutkowski sent the recording of the grievance to three attorneys with experience in employment law to get their advice and assistance regarding DP's claim.

As discussed above, this Board has authority to determine the nature and extent of employees' rights under the PECBA; we exercise this authority in a manner that effectuates the purposes and policies of the PECBA. One such policy is "establishing greater equality of bargaining power between public employers and public employees." ORS 243.656(3). Permitting unions to seek legal advice as they see fit regarding workplace disputes furthers this policy. In addition, we have observed that "[f]or policy reasons, the law affords labor organizations broad discretion in their decisions regarding representation of employees." *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05, 21 PECBR 564, 574 (2006), *recons* 21 PECBR 597 (2007). By permitting union representatives to consult with attorneys of their own choosing, we further this policy of allowing unions broad discretion in making decisions regarding representation of bargaining unit members.

We reject ODOT's contention that Sutkowski's activity is not protected under the PECBA because only Union attorneys could provide Sutkowski an opinion about DP's discrimination grievance. Public employee associations—even those with in-house attorneys—are not prohibited from seeking advice from outside counsel. It would not promote equal bargaining power if public employee unions were restricted in this regard, in a way public employers are not.

The only support ODOT offers for this argument is *Strickland v. State of Oregon, Department of Human Resources, Employment Division*, Case No. UP-70-91, 13 PECBR 602, *recons* 13 PECBR 642 (1992), a case which is inapplicable to the facts here. In *Strickland*, the union refused to arbitrate an employee's grievance. The union assigned the right to arbitrate to the grievant, on condition that the grievant pay the cost of the arbitration. In *Strickland*, we considered the right of an individual employee to pursue a grievance through a private attorney under the parties' collective bargaining agreement. We held that the Union could not assign an employee its right to pursue a grievance to arbitration. Here, Sutkowski did not act on his own behalf or seek to arbitrate his personal grievance. He acted as a representative of the Union on DP's behalf. Sutkowski

did not attempt to assign the Union's rights. Our decision in *Strickland* does not address a union representative's right to seek assistance from private attorneys concerning a bargaining unit member's grievance.

ODOT contends, however, that it did not discipline Sutkowski "because of" protected activity. It asserts that it disciplined Sutkowski because he violated ODOT policies when he "sent confidential information to outside individuals who had no business need to know the agency's workings." ODOT argues that two policies prohibited Sutkowski from disclosing the recording of the grievance meeting—a Code of Conduct Policy banning employees from providing confidential information to anyone not authorized to receive the information, and an Information Security Policy restricting use of State computer systems to ODOT business. According to ODOT, it reminded Sutkowski of these policies on August 8, 2008, when it warned him that he could not share e-mails concerning confidential ODOT business with individuals outside the agency.

These policies do not apply. The material Sutkowski sent the attorneys was a recording of a grievance meeting attended by both Union and ODOT representatives. As a party to this meeting, the Union had as much right to the recording of the meeting as ODOT. Thus, the recording was not a matter of concern only to ODOT. The parties could certainly agree to limitations on the distribution of this information. There is no evidence, however, that any such limitations existed here.

Nor did Sutkowski's use of his ODOT computer to e-mail the recording of the grievance constitute an impermissible use of ODOT equipment in violation of ODOT's Information Security Policy. Under the terms of the Union collective bargaining agreement, Union representatives may use ODOT's e-mail messaging system to communicate about Union business so long as the messages sent contain no false, unlawful, offensive, or derogatory statements. In addition, e-mail usage must comply with ODOT policies regarding confidential information. The message Sutkowski sent—a recording of a grievance meeting—concerns grievance processing, an activity that is an essential part of the Union's role in representing bargaining unit members. The message contained no confidential information and included no statements prohibited by the contract.

Even if we were to conclude that the recording Sutkowski sent the attorneys is the type of information that ODOT policies prohibit employees from disclosing, Sutkowski's violation of these policies does not provide a lawful reason to discipline him. A public employer cannot base its discipline of a public employee on a policy that prohibits protected union activity. In *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008), a school district disciplined a union president for communicating directly with school board members. The district

asserted that the president's actions violated a district channels policy that required staff members to submit any communications to board members through the superintendent. We held that the district's channels policy infringed on bargaining unit members' PECBA-protected right to freely discuss workplace problems and concerns with employer representatives. Because the union president had a PECBA-guaranteed right to communicate with board members, we concluded that the school district violated subsection (1)(a) by disciplining the union president for violating the channels policy. *Id.* at 353-354.⁸

Here, even if we assume the e-mailed recording contained confidential information, ODOT's policy prohibiting disclosure of confidential information directly conflicts with the Union's PECBA-protected right to obtain legal advice about a grievance. ODOT's information security policy also conflicts with the Union's contractual right to use ODOT's e-mail system for Union business. We hold, as we did in *Lebanon*, that these policies do not provide lawful reasons for disciplining Sutkowski because of his protected union activity. Accordingly, ODOT violated subsection (1)(a) when it disciplined Sutkowski for e-mailing a recording of the DP grievance meeting to three attorneys.

Labor-Management Committee Meeting

We next consider whether Sutkowski engaged in protected activity when he asked a manager to resign during a LMC meeting. The parties agree that Sutkowski's participation in the LMC meeting was protected activity. ODOT contends, however, that Sutkowski's request for the ODOT manager's resignation was not. ODOT cites two reasons in support of its position: first, it asserts that Sutkowski did not act in his role as a union steward when he called for the manager's resignation because he was raising a strictly personal issue unrelated to union affairs; and second, it asserts that his request that the manager resign was disrespectful misconduct for which he was appropriately disciplined. We address each of these reasons in turn. We begin with the contention that Sutkowski's call for a manager's resignation is not protected activity.

An individual's complaints about working conditions and protest actions that are unrelated to a labor organization's activities are not protected activity under the PECBA.

⁸See also *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 789-790 (2008), *recons* 22 PECBR 908 (2009) in which we held that a city violated subsection (1)(a) when it disciplined a union officer for asking a supervisor about rumors concerning replacement of an employee who planned to retire. We concluded that the disciplinary action was imposed because the employee engaged in PECBA-protected activity when she acted in her capacity as a union officer and inquired about the rumors. We held that a city policy prohibiting employees from disseminating rumors provided no legitimate reason for the city's actions.

White v. Oakland School District No. 1, Case No. C-128-78, 5 PECBR 2830 (1980), *AWOP*, 49 Or App 483, 621 P2d 682 (1980) (a teacher's attendance at a meeting with the superintendent to complain about a principal did not constitute participation in a labor organization's activities, and was not PECBA-protected, when the meeting was not sponsored by a labor organization); *Lane County Public Works Association, Local 626 and Bushek v. Lane County*, Case No. UP-36-90, 13 PECBR 187, *recons den*, 13 PECBR 233 (1991), *aff'd*, 118 Or App 46, 846 P2d 414 (1993) (a union leader who confronted an employee about his selection for a job, for which the union leader had also applied, was not engaged in protected activity); *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316, 328 (2009) (a teacher's threat to call a strike was an expression of the teacher's personal frustration with her working conditions unrelated to any union activities and not PECBA-protected conduct).

Here, Sutkowski participated in and spoke at the LMC meeting as a Union representative. He discussed his dissatisfaction with the way in which ODOT managers handled several matters in which he had been involved on the Union's behalf. As his statements during the meeting made clear, Sutkowski was expressing not only his own frustration, but the continuing frustration of the employees he represented. In addition, at least one other Union representative attending the meeting supported Sutkowski's statements. While it is probable that Sutkowski alone decided to ask for the ODOT manager's resignation, his request resulted from his dissatisfaction with the way the manager handled Union matters in which Sutkowski was involved. The record contains no evidence that Sutkowski's request was the result of Sutkowski's strictly personal dislike of the manager. Because Sutkowski acted in his role as a Union representative in asking the manager to resign, his request was protected conduct.

We turn next to ODOT's contention that Sutkowski's request for the manager's resignation was the type of conduct that justified the discipline ODOT imposed on him. An employer may discipline an employee for "serious proven misconduct" that occurs during otherwise protected activity. *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444, 458 (2003) (an employer was justified in investigating allegations of public nudity, fighting, gross intoxication, and inappropriate sexual contact that occurred at a union Christmas party).

Even if we agree with ODOT's description of Sutkowski's behavior as "disruptive, disrespectful and discourteous," we would still consider his conduct to be protected activity. An employer may not lawfully take adverse action against an employee simply because the employee exercises protected rights in a rude or discourteous manner. An employer may only discipline the employee if the employee's conduct is "so outrageous as to remove his protected activity from the protection of the PECBA." *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 54,

70, *recons den*, 17 PECBR 93 (1996), *aff'd*, 155 Or App 92, 962 P2d 763 (1998) (citing *International Association of Firefighters, Local 1395 v. City of Springfield*, Case No. UP-48-93, 15 PECBR 39 (1994)). We have frequently applied this standard to determine whether an employee's conduct was so outrageous as to remove it from the protection of the PECBA. *See, e.g., City of Springfield*, 15 PECBR at 49 (a union officer's discussions about working conditions were protected activities, even though the employer considered the officer's manner to be abrasive and insensitive); *Central School District 13J*, 17 PECBR 54 (a teacher's conduct in asserting his contractual right to representation in a meeting with a supervisor was PECBA-protected, even though the teacher angrily argued with and repeatedly interrupted his supervisor during the meeting); and *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668 (2008), *appeal pending* (a striking picketer's activities, which included yelling at employees who crossed the picket line, shouting at the district superintendent and briefly stopping her from leaving a parking lot, and approaching a non-striking employee in the dark and confronting her, were PECBA-protected).

Here, we readily acknowledge that Sutkowski's conduct was rude and probably counter-productive. At a meeting presumably intended to improve relations between labor and management, he called for a manager's resignation and accused the manager of "incompetence, misconduct and everything in between." This conduct was not so outrageous that it lost the protection of the PECBA, however. Although we do not condone his behavior, it was no more offensive than the actions of the yelling striker in *Wy'East*, the outburst of the angry teacher in *Central School District*, or the disrespectful manner of the union officer in *City of Springfield*. Accordingly, we conclude that Sutkowski's actions were not so outrageous as to lose PECBA protection.

In sum, Sutkowski engaged in protected activity when he e-mailed the recording of a grievance meeting to three attorneys and when he called for the resignation of an ODOT manger. ODOT violated the "because of" portion of subsection (1)(a) when it disciplined him for engaging in these PECBA-protected activities.

"In the Exercise of" Claim

We turn next to the Union's allegation that ODOT violated the "in the exercise" portion of subsection (1)(a) when it disciplined Sutkowski. In making such a determination, we do not consider the employer's motive. We analyze the consequences of the employer's actions. If the natural and probable effect of these actions is to deter employees from exercising their protected rights, we will conclude that the employer violated the "in the exercise" prong. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). A violation of the "in the exercise" portion of subsection (1)(a) may be either independent or derivative. An employer's actions that violate the "because of" portion of the statute almost invariably chill employees in their

exercise of protected activity. *Lebanon Community School District*, 22 PECBR at 354. An employer may also independently violate the “in the exercise” prong, typically by making threatening remarks. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-02-08, 23 PECBR 108, 124 (2009).

Because we conclude that ODOT violated the “because of” prong of ORS 243.672(1)(a), we also hold that ODOT committed a derivative violation of the “in the exercise” portion of the statute. ODOT reduced Sutkowski’s salary for engaging in protected activities. Any reasonable employee who knew what happened to Sutkowski would hesitate to engage (or would refrain from engaging) in similar conduct due to fear of the consequences.

We choose not to address the issue of whether ODOT independently violated the “in the exercise” prong of subsection (1)(a). We have already found a violation of each prong of the statute; it would add nothing to the remedy to find a third. *Lebanon Community School District*, 22 PECBR at 354.

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

ORS 243.672(1)(c) makes it 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).” *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 396 (2008) (citing *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212 (2007)). Because we conclude that ODOT violated the “because of” prong of ORS 243.672(1)(a) when it disciplined Sutkowski, we need not consider whether the same actions violated ORS 243.672(1)(c). *Lebanon Community School District*, 22 PECBR at 355. We will dismiss this allegation.

Remedy

After we heard oral argument, Sutkowski and ODOT reached a settlement agreement on another matter. As part of the settlement, ODOT agreed to rescind all disciplinary action imposed on Sutkowski, reimburse Sutkowski for any loss of pay resulting from the November 19, 2008 discipline, and promote Sutkowski to a management position.

On August 3, 2010, ODOT filed a “Motion to Vacate Proposed Order and Dismiss Complaint.” ODOT asserts that the settlement agreement reached with Sutkowski requires it to take all the actions the ALJ ordered in the Recommended Order, except for the posting. According to ODOT, “no justiciable controversy remains” and “the matter is now moot.” The Union opposes ODOT’s motion. We deny ODOT’s motion for the following reasons.

We have consistently held that a complaint alleging a violation of subsection (1)(a) does not become moot if the employer ceases the behavior at issue or takes other remedial actions. “Such violations [of subsection (1)(a)] impact core PECBA rights, and merely ceasing the unlawful conduct may not be sufficient to undo the harm caused.” *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 87, 101 (2002). *See also Klamath County Education Association v. Klamath County School District*, Case No. C-28-78, 5 PECBR 2991 (1980); *Oregon City Education Association v. Oregon City School District No. 62*, Case No. C-163-79, 5 PECBR 4068 (1980) (a violation of subsection (1)(a) that occurred during contract negotiations is not mooted by execution of a collective bargaining agreement); *Washington County Police Officers Association v. Washington County*, Case No. UP-99-89, 12 PECBR 910, 915 (1991) (a violation of subsection (1)(a) “cannot be ‘undone’ by subsequent remedial conduct or admission of fault.”).

We see no reason to reconsider this principle. Although ODOT ceased its unlawful interference with Sutkowski’s protected rights, it has not undone the chilling effect its actions had on other bargaining unit members. As discussed above, ODOT’s illegal actions have the natural and probable effect of deterring other ODOT employees from exercising their PECBA-protected rights. We can effectively counter this chilling effect and make employees feel more secure about engaging in PECBA-protected activities only by ordering remedies that will inform them of ODOT’s illegal actions. Accordingly, we will issue a cease and desist order and require that ODOT post a notice in which it admits to wrongdoing and agrees to refrain from engaging in such unlawful conduct in the future.

In *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J* Case No. C-19-82, 6 PECBR 5590, 5601 (1983), we established criteria that we consider to determine if posting a notice is appropriate. 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 employees;

(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.*

Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007).

Here, ODOT unlawfully disciplined Sutkowski when he was acting as a Union steward. As a result, ODOT’s conduct had a significant potential or actual impact on the functioning of the Union. We will order ODOT to post the attached notice.

Although ODOT’s remedial actions do not cure its violation of subsection (1)(a), they do affect certain aspects of the remedy we will order. *See Washington County Police Officers Association*, 12 PECBR at 915 (although an employer’s subsequent remedial conduct does not cure a subsection (1)(a) violation, it may be relevant to determining the appropriate remedy). ODOT has rescinded the November 19, 2009 disciplinary letter. It also appears that it made Sutkowski whole for the loss of salary he suffered due to this disciplinary action. We will order ODOT to make Sutkowski whole for any other monetary losses or losses in benefits that Sutkowski incurred because of the November 19 disciplinary action, but only those losses for which he was not reimbursed under the terms of the settlement agreement.

In addition, we order ODOT to cease and desist from interfering with, restraining, or coercing bargaining unit members in or because of the exercise of rights guaranteed under ORS 243.662 in violation of ORS 243.672(1).

Reimbursement of Filing Fee

We decline to 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)).

Since we did not permit ODOT to file an answer in this matter, we are unable to determine whether it would have been filed frivolously or in bad faith. However, we do not find that the legal arguments presented by ODOT were frivolous or unreasonable.

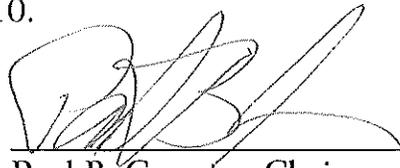
ORDER

1. ODOT will cease and desist from interfering with, restraining, or coercing bargaining unit members in or because of the exercise of rights protected under ORS 243.662 in violation of ORS 243.672(1)(a);

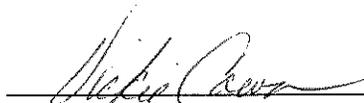
2. ODOT will make Sutkowski whole for any monetary losses or lost benefits resulting from the November 19, 2008 disciplinary letter but only to the extent those losses were not reimbursed under the terms of the settlement agreement. The period for which ODOT must make Sutkowski whole for these losses begins on November 18, 2008 and ends on the date this Order is issued; and

3. Within 10 days of the date of this Board's final order, the attached notice shall be signed by the Director of ODOT and prominently posted for 30 days at all ODOT facilities where bargaining unit members work.

DATED this 18 day of October, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-11-09, *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, 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 the State of Oregon, Department of Transportation (ODOT) violated the PECBA by discriminating against David Sutkowski in and because of his exercise of activity protected under the PECBA. The violations occurred when ODOT disciplined Sutkowski for sending a recording of a step two grievance meeting to private attorneys and for requesting a manager's resignation during a Labor-Management Committee meeting.

The Employment Relations Board has ordered ODOT to:

Cease and desist from disciplining Sutkowski for his protected activity in violation of ORS 243.672(1)(a); rescind the disciplinary letter and remove it and all documentation related to his discipline and the investigation of the incidents that were the basis of his discipline from all Department files; and reimburse Sutkowski for any lost wages or benefits resulting from the discipline, but only for those losses for which Sutkowski has not already been reimbursed.

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

Dated this ___ day of _____, 2010.

STATE OF OREGON, DEPARTMENT
OF TRANSPORTATION

By _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED