

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-22-10

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF)
STATE, COUNTY AND MUNICIPAL)
EMPLOYEES COUNCIL 75,)
LOCAL 88,)
)
Complainant,)
)
v.)
)
MULTNOMAH COUNTY,)
)
Respondent.)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew, on December 23, 2011, after a hearing held on November 30, 2010, at the offices of Multnomah County in Portland, Oregon. The record closed on January 26, 2011, with the submission of the parties' post-hearing briefs.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented Complainant AFSCME.

Kathryn A. Short, Assistant County Attorney, Multnomah County Attorney's Office, Portland, Oregon, represented Respondent County.

On May 10, 2010, the American Federation of State, County and Municipal Employees Council 75, Local 88 (Union) filed this Complaint alleging that Multnomah County (County) had engaged in unfair labor practices. Respondent filed its timely Answer on August 24, 2010.

The issues are:

1. Did the County interfere with, restrain, or coerce Leon Knaap in or because of Knaap's exercise of protected activity in a December 8, 2009 draft performance appraisal meeting in violation of ORS 243.672(1)(a)?
2. Did the County retaliate or discriminate against Knaap regarding his conditions of employment because of Knaap's exercise of protected activity in a December 8, 2009 draft performance appraisal meeting in violation of ORS 243.672(1)(c)?

RULINGS

The rulings of the ALJ have been reviewed and are correct.¹

FINDINGS OF FACT

1. The County is a public employer as defined by ORS 243.650(20). The Union is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of County employees.
2. The Union and the County were parties to a collective bargaining agreement in effect from July 1, 2007 through June 30, 2011.
3. Leon Knaap works as a Juvenile Court Counselor in the Juvenile Services Division of the County Department of Community Justice, a position in the AFSCME bargaining unit. Knaap has held this position for eighteen years. Juvenile Court Counselors supervise youths placed on probation because of criminal conduct.
4. Knaap has been a Union steward for more than five years. Knaap's steward duties include representing employees in investigative meetings, filing and processing grievances, participating in formal and informal labor/management meetings, and raising possible contract violations in meetings with managers. For several years, Knaap was the only Union steward in the Department of Community Justice.

¹In its Answer, the County suggested that several allegations in the Complaint were untimely. Satisfied that (1) the facts occurring prior to the limitations period were relevant to interpreting events that took place during the limitations period, and that (2) the events alleged to have taken place during the limitations period stated a claim for relief, the ALJ correctly considered facts which took place prior to the limitations period and addressed the merits of the Complaint.

5. Knaap saw his role as steward in part to address problems that could, if unresolved, result in a grievance; Knaap's efforts at problem resolution included informing his supervisor that a proposed change in employee schedules might violate the collective bargaining agreement, or asking his supervisor a hypothetical question about a situation where an employee had no County vehicle available for necessary County travel.

6. Approximately two years prior to hearing, Juvenile Court Counselor Sylvia Aguilar also became a Union steward.

7. Knaap's supervisor since 2007 has been Community Justice Manager Adrian Navarro.² The two men have known each other for eighteen years. Navarro reports to Thach Nguyen, who reports in turn to Dave Koch, head of the Juvenile Services Division and an assistant director of the Department of Community Justice.

8. Navarro, Nguyen, and Koch were aware of Knaap's Union activities. While supervised by Navarro, Knaap represented an employee accused of inappropriate conduct through the disciplinary and grievance process.

9. At the time of hearing, Navarro had prepared two performance appraisals of Knaap. Navarro's general practice regarding formal evaluations of employees he supervises is as follows: (1) he performs the evaluation every year on the employee's anniversary date; (2) he generally bases an evaluation on his observations of the employee's work, professional interactions, entries in the Department weekly report database, and conversations with the employee's clients; and (3) he relies on his relationship with the employee, which he considers to be a professional working relationship.

2008 Performance Evaluation

10. Shortly after November 14, 2008, Navarro presented Knaap with a draft performance appraisal for 2008. This was the first performance appraisal Navarro had done for Knaap. The draft included the following comments:

*"1a. Interpersonal relationships with * * * work group * * *: Leon is articulate and honest in his communication. However, I would like to observe a more concerted effort on his behalf in clearly distinguishing the myriad of*

²Aguilar is also supervised by Navarro, but has been significantly less active in her steward role than Knaap, and works out of a different location than Knaap. Navarro has rated Aguilar the highest of the employees under Navarro's supervision.

responsibilities with his union stewardship and Juvenile Court Counselor obligations.” [Rating: Satisfactory.] (Emphasis added.)

“1c. *Interpersonal relationships* with community partners * * *: *I would like for Leon to challenge himself with separating professional interactions with that of union representation.*” [Rating: Satisfactory.] (Emphasis added.)

“* * * **committee work, staff training and other activities, beyond what is normally expected** * * * : *It appears that the time Leon has available for committee work is compromised by his union steward responsibilities.* It is known that presently Leon is the sole representative for the Counseling department.” [Rating not applicable.] (Emphasis added.)

11. Knaap disagreed with the draft evaluation because of the references to his Union activities and because of low ratings he believed were undeserved. Knaap and Navarro discussed these concerns in a meeting to review the draft evaluation.

12. After the meeting, Navarro revised the evaluation, including the following changes to the items quoted above:

“1a. *Interpersonal Relationships with * * * work group* * * * :” Navarro deleted the comment regarding “union stewardship obligations” quoted above and increased the rating to Above Average.

“1c. *Interpersonal Relationships* with community partners * * * :” Navarro deleted the comment regarding “union representation” quoted above, and increased the rating to Above Average.

“* * * **committee work, staff training and other activities, beyond what is normally expected** * * * :” Navarro deleted the statement that Knaap’s time for committee work was “compromised by his union steward responsibilities;” and added that Navarro “will support [Knaap’s] position as a representative, and develop a trust level with him.” Navarro also wrote that Knaap’s Union role “involves him in professional meetings and consultations I may not be aware of.” There was no rating on this benchmark to change.

13. The changes met Knaap’s concerns about the references to his Union activity and low ratings. Knaap believed that the final evaluation was a fair one and that he and Navarro had come to a better understanding of Knaap’s Union role.

2009 Interim Meeting and Interim Events

14. In June 2009, in accordance with their previous discussions, Knaap requested a meeting to discuss his performance since the last evaluation. Navarro set the meeting for June 16, 2009.

15. Knaap requested a list of topics for the meeting, and on June 3, 2009, Navarro responded with an e-mail listing three topics. The third topic Navarro listed was “[t]he system or thought process you use to disconnect your role as a shop steward when it is not necessary to perform in the shop steward capacity.”³

16. At a regular staff meeting supervised by Navarro, Knaap told Navarro that he needed to assume his Union role to discuss some issues. Some time between the 2008 and 2009 evaluations, Navarro told Knaap that he preferred that Knaap raise Union issues in fora other than staff meetings. While Knaap believes that Navarro has no right to dictate when he can pursue Union issues, Knaap stopped raising issues at staff meetings. (Knaap then discussed Union-related matters with Navarro and other managers independently of staff meetings helmed by Navarro.)

17. There is no evidence of any County rules barring an employee from raising the issue of a potential violation of the collective bargaining agreement at a staff meeting. Issues such as the amount of time spent by employees on union issues are dealt with by the parties’ labor management committee or other union/management interactions, including telephone conversations between County managers and AFSCME representative Bryan Lally. County officials never contacted Lally about any problems with the amount or timing of Knaap’s Union-related activity.

2009 Performance Evaluation Meeting

18. At the end of October 2009, Navarro wrote a draft performance evaluation for Knaap. Knaap received this draft on December 7 or 8, 2009. The evaluation included the following comments:

“I a. *Interpersonal relationships with immediate members of your work group*
*** * *:** *Leon has defined opinions, and is not reticent in expressing his beliefs. I would like to challenge Leon with understanding and then practicing empathetic listening skills. I have experienced interactions where it is my opinion Leon internalizes assumed comments, without knowing/clarifying the intent, a stalemate is reached. This type of problem solving prolongs*

³Neither party presented evidence of any significant events taking place at this meeting.

resolution. Leon loses composure and becomes defensive in posture. However, Leon is becoming a more adept listener and does not interrupt conversation. I will encourage Leon to seek conflict resolution skills to enhance his ability to seek resolution.” (Emphasis added.)

“5. *Quality of work:* * * * **Supervisor’s comments:** I would like to encourage Leon to be a *positive role model for others*⁴ which is [*sic*] capable of. In doing so, he would instruct and motivate his colleagues to strive rather than embrace complacency.” (Emphasis added.)

“6. *Quantity of Work:* * * * **Supervisor’s comments:** Leon appears to manage his time wisely in that he keeps appointments with clients and community partnerships. I will continue to motivate Leon to keep current with notations and other required documentation. *It is understood that other commitments may be affecting the paying close attention to the department’s accountability factor of record keeping for Leon. I do not believe Leon is presently involved in department working committees.*” (Emphasis added.)

“12. *[C]areer goals* * * * **Supervisor’s comments:** * * * This past year he has instructed a volunteer student, and *he continues to represent Juvenile Court Counselors in his capacity as a union shop steward. Leon does abdicate when necessary, but in a reluctant, compulsory manner. I highly respect his intellect and logic, however, there are challenges which prevent him from fully embracing direction.* * * * *It is my perception through professional experience/interactions with Leon, he is quick to judge without gathering all the information, he assumes without clarification.* * * * *He can demonstrate leadership qualities, however, his leadership can be negative and non supportive.*” (Emphasis added.)

⁴At hearing, Navarro was unable to identify any lead role held by Knaap except for Knaap’s steward role. However, Knaap’s experience as an 18-year employee in this position would create a reasonable expectation on the County’s part that less senior employees would look to Knaap as a role model.

19. The ratings contained in Knaap’s 2009 draft evaluation⁵ were lower in some areas than Knaap expected.⁶ However, it differed little from his previous ratings, as set out below:

Facet of Performance Rated	2008 Final Evaluation (Exh. R-101)	2009 Draft Evaluation (Exh. R-103)
1a. Interpersonal relationships with immediate members of your work group	Above Average	Above Average
1b. Interpersonal relationships with clients, families and youth	Above Average	blank (due to what could have been an oversight by Navarro) ⁷
1c. Interpersonal relationships with community partners, schools, neighborhood associations and others	Above Average	Above Average
2. Knowledge, skills and expertise	Above Average	Satisfactory
3. Cultural Competency	Above Average	Satisfactory
4. Customer Orientation	Satisfactory	Above Average
5. Quality of Work	Satisfactory	Satisfactory
6. Quantity of Work	Satisfactory	Satisfactory

⁵Navarro filled in the actual ratings after his meeting with Knaap, but his comments were prepared prior to the meeting.

⁶At hearing, Knapp testified that his ratings in the areas of “Interpersonal relationships with * * * your work group,” and “Knowledge, skills and expertise,” should have been “Excellent,” and his ratings in the area of “Quality of Work” should have been “Above Average.” However, as the County points out, Knaap provided no specifics about which evaluation items were too low when interviewed about the issue on February 24, 2010, and stated that he was “less concerned about the ratings and more concerned about the comments.” In addition, the 2009 evaluation ratings were very similar to the 2008 ratings—in 2009, one item (customer orientation) was one increment higher and two items (knowledge, skills and expertise, and cultural competency) an increment lower.

⁷Neither party ascribes any significance to Navarro’s failure to fill in this rating.

Facet of Performance Rated	2008 Final Evaluation (Exh. R-101)	2009 Draft Evaluation (Exh. R-103)
7. Data and Measurement	Satisfactory	Satisfactory
8. Work Rules and ethics	Satisfactory	Satisfactory

20. At Knapp's request, Knaap and Navarro met on December 8, 2009, to discuss the draft evaluation. The meeting stopped and started several times because Knaap left the room several times to regain control of his emotions.

21. Knaap told Navarro that he believed the draft evaluation raised concerns about retaliation for his Union activities, and mentioned the 2008 appraisal, Navarro's June 2009 e-mail, and their subsequent discussions. Knaap also told Navarro that the draft contained factual errors, including the statement that Knaap was not on any committees when Knaap was in fact on multiple committees. Navarro told Knaap that he would not change the appraisal.

22. Knaap asked Navarro about his process of reaching conclusions for evaluations. Navarro stated that he based the appraisals of employees on his relationships with the staff member being evaluated.⁸ Knaap told Navarro that he had seen Navarro having conversations in his office, lunch, and walks with other staff who were not stewards, but that Navarro never did any of those things with him. Navarro mentioned that he had hosted one employee's wedding at his house, but he did not have that type of relationship with Knaap.

23. Knaap asked why he and Navarro did not have that type of relationship. Navarro answered that this was because of Knaap's position as a Union steward. Navarro stated that he believed that it would be bad for him, and possibly for Knaap, for them to have that type of relationship when Knaap was a Union steward.⁹

⁸The County insists that what Navarro meant by these statements was that he based his appraisals on his professional relationships with the employees. Whether or not Navarro based his employee evaluations in part on his personal relationships with his subordinates, as the Union contends, the evidence demonstrates that even Navarro's professional relationship with Knaap was limited, at Navarro's choice, because of Knaap's Union role and activity. We also conclude that Navarro and Knaap conflated the personal and professional in this discussion. At hearing, Navarro testified that "it was a possibility that he may have said something to the effect that [he based evaluations on personal relationships] which may have been miscommunicated."

⁹Navarro did not recall the conversation in the detail that Knaap did. Navarro stated that it was "possible" that he told Knaap that Knaap's Union activity affected his relationship with
(continued...)

24. Navarro actually filled in the rating scores after the meeting, as noted above. However, Navarro did not otherwise change the appraisal or fill in the missing rating, although Navarro knew or should have known that it contained inaccuracies and although he changed errors in the evaluations of other employees. Knaap signed the appraisal on December 15, 2009.¹⁰

25. Knaap believed that Navarro's comments and previous comments and conduct demonstrated that Navarro treated Knaap differently from other staff because he was a Union steward. As a result, Knaap altered his participation in Union activities. In particular, Knaap began avoiding discussion of labor relations issues with Knaap, instead seeking conversations with higher levels of management. Knaap is also reluctant to bring up Union-related issues in groups where Navarro is present.

26. After the December meeting, Knaap and AFSCME Business Representative Lally had a series of discussions with Juvenile Services Division Director Koch and Human Resources staff about Knaap's 2009 evaluation and the Knaap-Navarro meeting.

Those discussions led to a County Human Resources Department investigation into the matter conducted by Senior Human Resources Analyst Chris Radzom, initiated by notice to Navarro on February 19, 2010.

27. On February 24, 2010, Radzom interviewed Knaap as part of her investigation. Lally was also present for the interview. During the interview, Knaap told Radzom that the difference between the performance ratings on the 2009 evaluation and 2008 evaluation was minimal. Knaap also told Radzom that the 2008 evaluation process was acceptable to him, and did not tell her that the 2008 appraisal initially contained comments that Knaap believed inappropriately targeted his Union activity. Knaap told

⁹(...continued)

Navarro. Navarro also testified that he generally changed errors brought to his attention in evaluations but did not explain why he did not change Knaap's evaluation. He also stated that he had not seen Knaap act in his steward capacity but then, under questioning, listed several significant examples where he had seen and interacted with Knaap in his steward capacity. Navarro also testified that Knaap was "on the verge of being disruptive" in meetings because of his pursuit of Union issues, that Knaap was not a problem solver but a naysayer, and that Knaap was negative and non-supportive.

¹⁰The Union did not prove that Navarro awarded the "ratings" in the evaluation based on Knaap's Union activity—they were not significantly different from the previous evaluation. However, the record shows that it is more likely than not that Navarro's narrative comments, refusal to change errors, and overall view of Knaap's performance were influenced by his belief that some of Knaap's Union activity was inappropriate, and that Knaap would be a better employee if he stopped raising Union issues with Navarro.

Radzom that he was less concerned about the 2009 ratings, and that it was the 2009 comments that he believed were inappropriate. Radzom asked Knaap if he had any suggestions for other witnesses for her to interview. Knaap had no suggestions.

28. On March 16, 2010, Knaap and Radzom had another conversation. When asked, Knaap did not identify any specific performance rating in the 2009 personnel evaluation that was lower than it should have been.

29. Also on March 16, 2010, Radzom interviewed Navarro. Radzom summarized some of Navarro's comments as follows:

- “● Regarding the comments, Mr. Navarro recalls telling Mr. Knaap that he put a lot of thought into the comments and took them seriously, so he was not willing to change them. When asked why Mr. Navarro was open to revising comments on the 2008 evaluation but not in 2009, Mr. Navarro first said it was because he saw improvements. Mr. Navarro further explained that in 2009, there was data available that was not available in 2008 to support ratings; therefore there was no reason to change ratings based on the data (the quick facts/quality assurance reports on case management). When asked whether anyone else's comments were changed in 2009, Mr. Navarro said he had made changes to Tori Lopez', Debra Mead's and Delaina Knaap's evaluations, but could not articulate why he would be open to changing comments on their evaluations but not Mr. Knaap's. He then said the only changes to those evaluations were grammatical and not substantive.
- “● Mr. Navarro would not directly acknowledge that Mr. Knaap's ratings were lowest, comparatively (marginally), in his team. He said that the families of youth Mr. Knaap works with 'love him' and he is part of a good team with seven different personalities. He noted that Mr. Knaap does not show initiative and would not be one to volunteer.
- “● Mr. Navarro reviewed the comments he made on Sylvia Aguilar's performance evaluation regarding her union steward status (see Attachments 1 and 2). He said he wrote these comments to recognize Ms. Aguilar's role and denied he saw any conflict between being a shop steward and an excellent Juvenile Counselor. Mr. Navarro noted that when he was a Parole Officer, he thought about being a shop steward but his case load was too high. He also volunteered that his father was active as a shop steward and in organized labor throughout his career.”

30. On March 18, 2010, Radzom issued her report, which she addressed to Koch and Human Resources Manager James Opoka. Radzom concluded: (1) there was no adverse employment action because the actual ratings in 2008 and 2009 were virtually identical, and Knaap did not identify any 2009 ratings that were lower than they should have been; (2) if, in fact, Navarro spent less time with Knaap professionally or personally, this was not an adverse employment action; (3) there was no evidence of anti-union bias on Navarro's part, especially in light of Aguilar's high ratings; and (4) Navarro did not tell Knaap that he spent less time with Knaap because Knaap was a steward. Radzom recommended that the County give Navarro counseling and formal training concerning the appropriate roles of supervisors regarding Union issues. This recommendation was not disclosed to Knaap or the Union. Navarro did not see Radzom's report prior to the hearing in this case.

31. On March 26, 2010, the County sent Knaap a letter informing him of the results of the investigation. The letter stated, in part:

"Based on the results of the completed investigation, the allegations that Mr. Navarro rated your performance lower in your 2009 annual performance evaluation, or that Mr. Navarro admitted treating you differently than others because you are a union steward, were unsubstantiated. However, the investigation did reveal that there were communication and process issues related to your performance evaluation. As a result, DCJ Human Resources is working with management to take the appropriate follow-up action and to facilitate a meeting between you and Mr. Navarro to revisit your 2009 annual performance evaluation. Next steps will be reviewed with you."

32. The Union and Knaap chose not to pursue a mediation process, turning instead to this action.

33. Knaap's 2009 performance appraisal was never actually completed or placed in Knaap's personnel file, but it has not been changed or repudiated.

34. During the 2009 performance appraisal period, Knaap had the lowest rating of any employee under Navarro's supervision, and Union steward Aguilar had one of the highest.

35. Assistant Director Koch and Radzom believe that it is not County policy for a manager to bring up Union activities in a performance evaluation.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The County interfered with, restrained, or coerced Leon Knaap in or because of Knaap's exercise of protected activity in a December 8, 2009, draft performance appraisal meeting in violation of ORS 243.672(1)(a).

Standards for Decision: ORS 243.672(1)(a)

ORS 243.672(1)(a) makes it an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." The statute creates two violations. An employer violates the statute if it: (1) takes action "because of" employee's exercise" of PECBA-protected rights or (2) takes action that interferes with employees "in the exercise" of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739 (2004).

"Because of" Claim

In analyzing a subsection (1)(a) "because of" claim, we focus on the reason for the employer's conduct. If the employer took the action in dispute because of the employees' exercise of protected rights, the action is unlawful. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 786 (1998); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).

If this Board concludes that the employer had multiple reasons for its actions, we determine whether all of those reasons were lawful. If some of the reasons were not lawful, "we can then proceed to a mixed-motive analysis and ask whether the unlawful reason 'was a sufficient factor to attribute the decision to it.'" *Umatilla County*, 20 PECBR at 741 (quoting *Portland Association of Teachers*, 171 Or App at 639); *Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07 (2009), 23 PECBR 170, 194, *recons*, 23 PECBR 219 (2009), *AWOP*, 241 Or App 352 (2011).

We turn to the facts of this case. There is no dispute that Knaap was involved in protected activity in performing his Union steward duties and in raising Union issues with Navarro. There is no evidence or argument that Knaap's conduct violated

reasonable employer workplace standards of conduct or was otherwise inappropriate.¹¹ It is apparent that Navarro wished to curtail Knaap's Union activity, at least insofar as it involved Navarro, and took steps to accomplish that goal through the text of Knaap's performance evaluation and the refusal to correct errors in the evaluation.¹² Navarro plainly took the steps he did because of Knaap's exercise of protected rights.

"In the Exercise" Claim

We turn to the "in the exercise" portion of ORS 243.672(1)(a). Under this provision, the District's motive is irrelevant. Instead, we examine the consequences of its actions. If these actions, viewed objectively, would naturally and probably deter a reasonable employee from engaging in protected activity, the employer violates the "in the exercise" portion of subsection (1)(a). *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354 (2008); *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, 698 (2008); *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004); *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000) (citing *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 520 (1988)).

There are two types of "in the exercise" violations. First, an employer that violates the "because of" portion of subsection (1)(a) also commits a derivative violation of the "in the exercise" portion. "A 'because of' violation will almost always restrain, coerce, or interfere with the exercise of protected rights." *Lebanon Community School District*, 22 PECBR at 354 (citing *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 (1986)). Second, an employer may also independently violate the "in the exercise" portion, typically by coercive or threatening statements. *State Teachers Education Association v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003).

¹¹This is not, therefore, a case where the interests of an employer and a labor organization are in conflict over the appropriate time, place, or manner of union activity in the workplace.

¹²On this record, it does not appear that Navarro was motivated by a generalized anti-union animus, but rather that he perceived Knaap's Union advocacy conduct as a challenge to his authority or as an obstacle to implementing his vision of his role as a manager. In particular, Navarro believed that Knaap was "on the verge of being disruptive" when he pursued Union issues, and was a "naysayer." (Finding of Fact 23 n 9.)

We have concluded that the County violated the “because of” portion of subsection (1)(a). Here, the County made negative and inaccurate comments in Knaap’s draft evaluation because Knaap engaged in protected activity. These comments would have the natural and probable effect of deterring employees from engaging in protected activity. The City thereby committed a derivative violation of the “in the exercise” portion of subsection (1)(a).

We do not address the question of whether the County committed an independent violation of the ‘in the exercise’ portion of subsection (1)(a). Having found two violations of subsection (1)(a), one under each prong, it would add nothing to the remedy to find a third. *See AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 793 (2008) (citing *Lebanon Community School District*, 22 PECBR at 354).

In sum, we conclude that the County’s 2009 evaluation of Knaap violated both prongs of subsection (1)(a). We will order that the County cease and desist from conducting the performance evaluation process in a manner that interferes with, restrains, or coerces bargaining unit employees in the exercise of their PECBA-protected rights which do not violate the County’s reasonable time, place, and manner restrictions applicable to such activity. We will also order that the County remove the 2009 performance appraisal from all files.

3. The County retaliated or discriminated against Knaap regarding his conditions of employment because of Knaap’s exercise of protected activity in a December 8, 2009 draft performance appraisal meeting in violation of ORS 243.672(1)(c).

Standards for Decision: ORS 243.672(1)(c)

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 conditions of employment for the purpose of encouraging or discouraging membership in an employee organization.” We broadly construe the word “membership” to protect all types of union activity. *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, 223 (2007)). Our analysis of an alleged violation of subsection (1)(c) is similar to the one we use to determine a violation of the “because of” portion of subsection (1)(a). To prove a violation of subsection (1)(c), a complainant must show protected activity, employer action, and a causal connection between the two. *Santiam Correctional Institution*, 22 PECBR at 396; *Schreiber v. Oregon State Penitentiary*, Case No. UP-124-92, 14 PECBR 313, 320 (1993). We examine the reasons for the employer’s conduct and will find a violation of this statutory provision if

the employer acted with a discriminatory motive, intending to undermine employees' exercise of PECBA-protected rights. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003).

DISCUSSION

We have already determined that Knaap was engaged in protected activity, that he received negative comments on his evaluation and during his evaluation meeting, and that the County refused to correct factual errors in the draft evaluation. We have also determined that there was a causal link between Knaap's union activity and the County's conduct, and that the County acted for the unlawful purpose of seeking to diminish Knaap's Union-related activity. Therefore, we conclude that the County violated ORS 243.672(1)(c).

We will order that the County cease and desist from conducting the performance evaluation process in a manner that discriminates against those engaged in union activity which does not violate County time, place, and manner restrictions applicable to such activity and which is intended to affect the exercise of PECBA-protected rights, and that the 2009 performance appraisal be removed from Mr. Knaap's working or personnel files.

Additional Remedy: Posting a Notice

AFSCME asks that this Board order the County to post a notice of its misconduct. This Board has identified six factors in determining whether a party should be required to post a notice:

"This Board generally requires the posting of an official notice in situations in which 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." *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984).

Not all of these conditions need be fulfilled for this Board to order a posting. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05, 21 PECBR 891, 908

(2007); *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 781-82 (2007). Here, we are concerned with the actions of one line manager regarding one evaluation meeting with one employee, albeit a steward. The County did not finalize the evaluation, and did not endorse a practice of addressing union-related issues in performance evaluation meetings. Under these facts, we conclude that none of the above factors are met, and this Board will not order the City to post a notice.

Civil Penalty

4. The County is not required to pay the Union a civil penalty.

This Board may assess a civil penalty of up to \$1,000 against a party that committed an unfair labor practice if (1) a party acted repetitively with knowledge its actions were unlawful, or (2) the party's conduct was "egregious." ORS 243.676(4)(a); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). The Union seeks such a penalty in this case.

OAR 115-035-0075 provides in part:

"(2) Pleadings. Any request for a civil penalty must be included in a party's complaint or answer. The request must include a statement as to why a civil penalty is appropriate in the case under these rules, with a clear and concise statement of the facts alleged in support of the statement. A party may move to amend its complaint or answer to request a civil penalty at any time prior to the conclusion of the evidentiary hearing."

AFSCME's pleadings fail to contain the statement in support of a civil penalty required by our rules, and we do not consider it. *See Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, *supplemental order*, 19 PECBR 804 (2002), *recons*, 19 PECBR 895, 896 n 2 (2002); *Oregon Public Employees Union v. Wallowa County*, UP-77-96, 17 PECBR 451 (1997); *International Association of Firefighters, Local 1817 v. Jackson County Fire District #3*, Case No. UP-130-91 (Rep. Cost Order, February 1993); *Oregon Public Employees Union v. Deschutes County*, UP-106-93, 15 PECBR 221 (1994). *See also Lincoln County Education Association v. Lincoln County School District*, UP-27-02, 20 PECBR 571 (2004).

ORDER

1. The County shall cease and desist from conducting the performance evaluation process in a manner that violates ORS 243.672(1)(a) and (c).

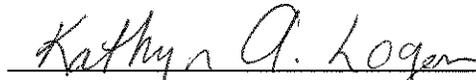
2. The County shall remove Knaap's 2009 performance appraisal from Mr. Knaap's working and personnel files.

DATED this 26 day of June 2012.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

Member Gamson, Concurring

There is a glaring inconsistency in Board cases that establish the test for analyzing an alleged violation of subsection (1)(c). One line of cases states that "a complainant *must* show protected activity * * *."¹³ But a separate line of cases says the exact opposite: "the exercise of protected rights is *not* a necessary element of a (1)(c) case."¹⁴

¹³E.g., *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 223 (2007) (emphasis added); *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).

¹⁴*AFSCME Council 75, AFL-CIO and Haphey and Bondietti v. Linn County, Linn County Sheriff's Office and Sheriff Martinak*, Case No. UP-115-87, 11 PECBR 631, 650 (1989) (emphasis added) (citing *Mission Valley Mills*, 225 NLRB 442, 93 LRRM 1227 (1976)). See also *Teamsters Local 670 v. City Of Vale*, Case No. UP-14-02, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003); *AFSCME Local Union No. 328 v. Oregon Health Sciences University*, Case No. UP-105-94, 16 PECBR 177, 186 (1995).

These tests are obviously incompatible. Logically, we must either require proof of protected activity or not require it; we cannot have it both ways. My colleagues turn a blind eye to the inconsistency. They choose one of the tests—the one that requires proof of protected activity—and fail to acknowledge the existence of the other incompatible test.¹⁵

This Board needs to cogently explain the analysis that led to its outcome here, and we should identify the appropriate analytical framework so that parties subject to the PECBA know what is lawful and what is not. In my view, my colleagues need to acknowledge the inconsistency in our subsection (1)(c) cases and resolve it. They need to describe what role, if any, the exercise of protected rights plays in our subsection (1)(c) analysis. They should explore the legislature's intent, the language of the statute, the purposes and policies of the PECBA, the relevant caselaw, and any pertinent legislative history. Once they have arrived at the proper analysis, they should disavow any cases that are inconsistent with that analysis.

In my view, the analysis in *Haphey and Bondiotti* (the one my colleagues did not follow) is the correct one. But I see no point in offering an extended explanation for my preference because, without another vote, it would resolve nothing. In applying that analysis, I reach the same conclusion as my colleagues, *viz.*, that the County violated subsection (1)(c). I therefore concur in the result but not the reasoning on this issue.



*Paul B. Gamson, Board Member

¹⁵They are certainly aware of the inconsistency. In the Recommended Order, the ALJ included a quote from *Haphey and Bondiotti* describing the test the majority did not use. My colleagues simply deleted that quote from the final Order. Ignoring the inconsistency does not make it go away.