

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-05

(UNFAIR LABOR PRACTICE)

WY'EAST EDUCATION ASSOCIATION/)	
EAST COUNTY BARGAINING COUNCIL,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
OREGON TRAIL SCHOOL DISTRICT)	AND ORDER
NO. 46,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on February 28, 2007 on both parties' objections to the Proposed Order issued by Administrative Law Judge (ALJ) Vickie Cowan on October 27, 2006, following a hearing on December 15, 2005, and February 7, 8, and 9, 2006, in Sandy, Oregon. The hearing record closed on April 11, 2006, upon receipt of the parties' post-hearing briefs.

Elizabeth A. Joffe, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 N.W. Johnson Street, Portland, Oregon 97209, represented Complainant.

Bruce A. Zagar, Attorney at Law, Garrett, Hemann, Robertson, Jennings, Comstock & Trethewy, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

On July 8, 2005, Complainant Wy'East Education Association (Association)/East County Bargaining Council (ECBC) filed this unfair labor practice complaint alleging that Oregon Trail School District No. 46 (District) violated ORS 243.672(1)(a), (c), and (e). Complainant amended its complaint on November 2, 2005,

to clarify that the ECBC was the true party in interest. The District filed a timely answer and an amended answer.

The issues presented for hearing are:

1. Did the District violate the status quo and ORS 243.672(1)(e) by disciplining Jean Grunst?
2. Did the District give Jean Grunst a poor performance review in response to Grunst's exercise of protected activity in violation of ORS 243.672(1)(a) and/or (c)?
3. Did the District violate the status quo and ORS 243.672(1)(e) by giving Grunst the May 31, 2005 performance review?
4. Did the District violate the status quo and ORS 243.672(1)(e) by requiring Jeff Reiser to attend an Individualized Education Plan (IEP) meeting during his duty-free time?
5. Did the District violate the status quo and ORS 243.672(1)(e) by refusing to compensate Patty Klascius for prep time in connection with the Twilight School?
6. Did the District violate the status quo and ORS 243.672(1)(e) by failing to give Carol Unkefer college credit for in-service programs she attended?
7. Did the District violate the status quo and ORS 243.672(1)(e) by unilaterally changing the method of compensating teachers during the summer months?
8. Did the District violate the status quo and ORS 243.672(1)(e) by failing to adjust the workday to stay within eight hours or compensate teachers for the extra time spent at the August 2005 Firwood Elementary School ice cream social?
9. Did the District violate the status quo and ORS 243.672(1)(e) by changing the Firwood Elementary School teachers' break times?

RULINGS

1. Complainant filed its original unfair labor practice complaint on July 8, 2005. The *cover page* of the complaint states that Complainant is Wy'East

Education Association/East County Bargaining Council. However, the first paragraph of the *narrative* to the complaint identifies Complainant as Wy'East Education Association (WEA)/OEA. In its answer, the District alleged, as an affirmative defense, that WEA/OEA is not the exclusive representative of the bargaining unit and thus has no standing to bring this action.

On November 2, 2006, Complainant amended its complaint, correcting the name of the exclusive representative to ECBC in the narrative and alleging that the District committed two additional unfair labor practices.

On November 4, 2005, the District filed a motion to dismiss as untimely portions of the amended complaint that occurred more than 180 days before the date of filing of the *amended* complaint. The ALJ denied the motion to dismiss.

ECBC's complaint of July 8, 2005 sufficiently identifies the Complainant as the Wy'East Education Association/East County Bargaining Council. Any confusion regarding the identity of the real party in interest was then resolved by ECBC's amended complaint.

In *OPEU v. State of Oregon, Department of Administrative Services*, Case No. UP-112-93, 15 PECBR 567, 568-69 (1995), we held that where the amended complaint is timely and does not unduly surprise or inconvenience the other side, this Board generally will grant a motion to amend. If the original complaint was filed within the statutory 180 days, the amended complaint "relates back" to the date that the original complaint was filed, and is also considered timely.

The Complainant filed a timely amended complaint correcting the name of the real party in interest and adding allegations which occurred within 180 days of the date of the original complaint. The Respondent has not asserted that it was unduly surprised by any allegations in the amended complaint. Because the original complaint was timely filed, allegations in the amended complaint "relate back" to the date on which the original complaint was filed and are timely. Accordingly, the ALJ correctly allowed ECBC to amend its complaint and denied the District's motion to dismiss.

2. The ALJ's remaining rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Association is a local affiliate of the ECBC, and both are affiliates of the Oregon Education Association/National Education Association (OEA).

2. ECBC is the exclusive representative for the licensed staff employed by the District, a public employer.

3. ECBC and the District were parties to a collective bargaining agreement effective July 1, 2001 through June 30, 2004.

4. In the spring of 2004, ECBC and the District began negotiations for a successor collective bargaining agreement. The District declared impasse on June 28, 2005, and implemented its final offer on August 8, 2005.

5. When the parties' collective bargaining agreement expired, the contractual grievance procedure also expired, and the District declined to process grievances through the grievance procedure.

Jean Grunst

6. Jean Grunst has been a teacher for 21 years and worked for the District for 19 years. Prior to the events giving rise to this complaint, Grunst had never been disciplined and had received favorable performance evaluations.

7. Grunst taught fourth and fifth grade at Bull Run Elementary School from 1996 through 2003, when the school closed due to budget cuts.

8. At the beginning of the 2003-04 school year, the District transferred Grunst to Cottrell Elementary School to teach a blended fourth/fifth grade class.

9. Grunst replaced retiring teacher Judy Lofsted who had taught in the District for approximately 30 years. Lofsted was regarded as an excellent teacher, particularly in the area of math.

10. Lofsted and Grunst had different teaching styles. Lofsted's style was more rigid, and textbook based. Grunst's teaching style is more creative using different modes and styles to reach students' different learning styles. She uses hands-on projects, field trips, and other experiential learning tools.

11. Cottrell Elementary School has had four principals in the last five years. There is also a very vocal and involved group of parents at Cottrell.

12. For the 2003-04 school year, Patrick Sanders was the principal at Cottrell. It was his first year as a principal. Previously, he had been a fifth grade teacher.

13. Sanders had concerns about Grunst's classroom environment and teaching strategies. After oral discussions with Grunst on January 23 and February 2, 2004, Sanders wrote Grunst about his concerns on March 1, 2004. In his letter, Sanders informed Grunst that she needed to teach Everyday Math for one or more hours, four days per week, and Math Problem Solving or Accelerated Math one day per week; provide more space for the students in their seating area; remove hanging items that may interfere with the students' vision; remove all unneeded materials that were transported from Bull Run or that were left by the previous teacher; organize the back of the room (teacher desk, counter, etc.); and maintain that orderliness. Sanders told Grunst that he expected her to comply with his directions in order to "promote effective teaching strategies and create an environment that is conducive to student learning."

14. Although Grunst felt Sanders' criticism was unfair, she addressed Sanders' concerns and provided him with a written response on March 19, 2004. Grunst explained that she taught the requisite math curriculum, but that even the math program specialists indicated that it was not realistic to teach those programs to many different ability levels. Grunst moved tables around to make more seating space for the students. She removed some of the hanging student work so that it would not interfere with the students' vision and removed many of the unneeded items in the room. Sanders raised no further issues for the remainder of the school year. Nor did he conduct any formal observations of Grunst's teaching during the school year.

15. For the 2004-05 school year, Kimberly Braunberger served as Cottrell's fourth principal in five years. She was new to the District and had never held an administrative position. During that school year, the parties worked without a collective bargaining agreement, and relations between the administration and teachers were strained.

16. In September 2004, a member of Grunst's family passed away. Grunst applied for, and Braunberger and District Superintendent Clementina Salinas granted, bereavement leave.

Article 7(B), Bereavement Leave, from the parties' 2001-04 collective bargaining agreement entitled teachers to up to three consecutive days of bereavement leave for each death in the family during any school year.

17. Shortly after the funeral, Grunst discovered her brother had advanced lung cancer and required surgery. Grunst applied for and Braunberger granted two days of personal leave for September 21 and 22 so Grunst could be with her brother during his surgery.

Article 7(C), Other Paid Leaves, from the parties' 2001-04 collective bargaining agreement provided that bargaining unit members were entitled to up to five days personal leave per year upon submission of a request for such leave.

18. Grunst applied for and Braunberger granted three more days of personal leave on October 20, 21, and 22, 2005, for Grunst to attend a family wedding on the east coast. Grunst had informed Braunberger of the wedding in September of 2004.

19. From November 29 through December 17, 2004, Grunst missed 6½ days due to illness. All absences were approved by Braunberger.

Article 7(A), Sick Leave, from the parties' 2001-04 collective bargaining agreement provided that a regular full-time employee accrues ten working days of sick leave for each school year. Sick leave not taken accumulates for an unlimited number of days.

20. From the beginning of the school year through the end of December 2004, Grunst missed a total of 14½ days. As of January 7, 2005, she still had 96 hours of sick leave remaining.

21. Grunst has never abused sick leave by using it for improper purposes. Prior to the 2004-05 school year, the District had never raised any concern about Grunst's attendance.

22. In the midst of these absences, a group of parents formed and complained about Grunst. The primary instigators of this parent group were two friends, Gretchen Adams and Michelle Hornback. Hornback and Adams called other parents to ask that they join in an effort to get Grunst removed from the school. The parents in the group called Braunberger to complain about Grunst.

23. In early November 2004, Braunberger met informally with Grunst regarding the calls from parents Braunberger had received about Grunst. At the meeting,

Braunberger talked about Grunst's organizational issues, and Grunst acknowledged that organization is not one of her strengths. Grunst told Braunberger that she has been, and is being, treated for attention-deficit/hyperactivity disorder (ADHD). Grunst asked Braunberger for a coach to help her deal with some of the organizational issues that related to her ADHD.¹ Braunberger closed the meeting by stating they would set up separate meetings to discuss each parent's concern.

24. In one of the meetings scheduled to discuss parent complaints, Braunberger and Grunst talked about a concern Adams raised about Grunst purportedly allowing students to lead the class. Grunst explained to Braunberger that she uses a monitor program in the classroom. Students are selected, as a reward, to be teacher's helpers. They do not teach or lead the class, and Grunst is always in the classroom assisting students or working with small groups. Grunst said that using such helpers is a common teaching practice. Braunberger agreed that this was a legitimate tool for Grunst to use.

25. On November 5, 2004, Grunst and Braunberger met to discuss Michelle Hornback's concerns that her daughter's homework was too difficult and sometimes took four to five hours per night to complete. Grunst responded that she assigns approximately 40 minutes of homework per night and that this student was a very low-level academic student who received little home support for homework. For this reason, Grunst doubted the student was spending the amount of time on homework the parent claimed she was. Instead, Grunst believed that the student was waiting for two weeks to turn in overdue assignments and was ending up with more work on certain nights. Nonetheless, Grunst agreed to modify the assignments for the student by cutting back on her work.

26. Adams and Hornback were the only parents who followed up with individual meetings in November 2004.

27. On December 7, 2004, a Life Flight helicopter landed in a field on school property near the Cottrell Elementary School building. This was a very exciting event for Grunst's fifth grade students. The children became distracted when they saw fire trucks and other emergency vehicles in the parking lot adjacent to the field. They were too excited to focus on the math lesson Grunst was teaching because they knew a

¹Braunberger did not ask for medical verification nor did Grunst ever provide any. Braunberger did not provide a coach for Grunst.

helicopter was about to land. Grunst saw the event as a “teachable moment”² because the students were obviously interested and she could connect the event to elements of the safety curriculum. She took her students outside the building and walked them toward the parking lot area through a crosswalk along the same route they follow to go to physical education class twice a week. Because they could not see the helicopter well from that vantage point, Grunst walked the students back across Proctor Road to the west side. They stopped about four to five feet off Proctor Road in a grassy slope and drainage ditch and watched the helicopter for a few minutes. The spot where they stood was about 30 feet from the edge of the school property and about 120 yards—a full football field—away from where the helicopter landed. While Grunst was outside with the students, she talked with them about various safety issues. The students were not close enough to see who was being transported. In any event, Grunst took her students back into the school *before* the patient was taken from the ambulance to the helicopter. The students were outside for a total of five to ten minutes. Proctor Road is a small country road which is not busy. It is straight in the area near the school, and the speed limit is 20 miles per hour.

28. The District field trip policy provides, in relevant part:

“The Board recognizes the value of special activities to the total school program. Further, students need to be allowed to participate in and profit from carefully planned learning experiences which fall outside of the normal school program/day.

“Field trips and other curricular/cocurricular activities involving travel may be authorized by the superintendent or his/her designee when such trips and/or activities contribute substantially to the achievement of desirable educational/social/cultural goals.

“In planning and authorizing such trips, primary consideration will be given to the educational values to be derived, the safety and welfare of students involved,

²A “teachable moment” is an educational term of art meaning the teacher spontaneously uses an unexpected event to teach something outside the planned lesson, but related to some subject within the curriculum.

community standards of conduct and behavior on the part of all participants and the selection of appropriate adult supervision, either from within the school staff or from the parent and community volunteer pool.

“Prior written parental permission must be obtained for field trips.”

Grunst did not consider that taking her students outside to see the helicopter was a field trip. Grunst has led many field trips, and is well aware of the District’s field trip policy³

29. Prior to this incident, Cottrell school had no protocol for how teachers should deal with Life Flight transports on school property.⁴ After the incident, Braunberger set up a protocol for Cottrell whereby teachers are informed of an imminent landing, can explain to students what is happening, but must stay inside the building and not attempt to witness the transport.

30. In 2004-05, the District implemented a new student grading system. The previous system used a continuum that had scores ranging from “developing” to “proficient” to “exceeding” expectations on which the teacher would mark an “X” to rate the student’s progress toward meeting each fifth grade benchmark. In 2004-05, the District switched to a the following grade system:

A	= 90-100%	Strong (Mastery of grade-level standards)
B	= 80-89%	Proficient (Meets grade-level standards)
C	= 70-79%	Developing (Working towards grade-level standards)

³Grunst is renowned for her Newport Aquarium overnight field trip and her Oregon Trail snowshoeing trip on Mt. Hood.

⁴The Life Flight helicopter often lands near Welches Middle School, another District school, at times when students are at recess. When that happens, the students are kept outside the track that circles the football field where the helicopter lands. They are not taken inside and there is no effort to prevent them from looking at the helicopter.

- IP = In Progress (More time and work needed to meet standards)
- IE = Inadequate Effort has been given by student to meet standards
- NA = Not Applicable
- Y = Yes
- PR = See attached progress report

Teachers issued the first report cards under this new system in December 2004. The District provided no training, memos, staff meetings, or other guidance explaining the new system and the meaning of the new grades.

31. On December 13, 2004, Braunberger spoke with Grunst because some parents had raised concerns about Grunst's use of the "IP" grade on the report cards she issued on December 10. Grunst explained that, based on the previous system's continuum, she thought "IP" meant the student was in progress to meet the fifth grade standard. She explained that she reached this conclusion after consulting with another teacher in the building. Grunst offered to reissue her report cards, but Braunberger told her to wait until she could gather information about the District's interpretation and how others were interpreting the grading. Braunberger then spoke with the other teacher Grunst had mentioned, and discovered that, while her interpretation was slightly different, she too was misusing the IP markings.

32. On January 3, 2005, Braunberger talked with Grunst again about the report cards. Braunberger explained to Grunst that the District intended the IP grade to mean below a 70 percent "C" grade. Braunberger became concerned at this meeting because Grunst had given IP grades to two students at very different levels: a fifth grade boy who was struggling with reading and a fourth grade girl who was advanced in reading. Grunst explained that because there is no fourth grade benchmark, a fifth grade student struggling with reading and a fourth grade student at or above expected reading level could both be "in progress" toward the fifth grade benchmark, especially early in the school year. At the close of the meeting, Grunst agreed to reissue her report cards to eliminate the IP grades. She subsequently did so and the completed report cards were sent to students' homes on January 7, 2005.

33. By letter dated January 3, 2005, Braunberger identified her concerns about Grunst's excessive absenteeism, the use of IP grades in the recent grade reports, and the helicopter incident; she asked Grunst to respond to each area of concern by January 10, 2005. Grunst responded on January 10, 2005. In her response, she explained the unfortunate events leading to her absences, noted that she worked extra hours to try to compensate, explained her contractual right to leave, and expressed her hope that she would not have any more unfortunate life events in the ensuing months. Grunst also explained her confusion regarding the IP grades and her lack of training. Grunst admitted that her choice to take children outside to see the helicopter was a mistake.

34. On January 10, 2005, Superintendent Salinas hand-delivered a memo to Grunst asking Grunst to meet about a disciplinary matter the following day.

35. Grunst attended the January 11, 2005 meeting with Salinas, District Assistant Superintendent Russ Hasegawa, ECBC Representative Steve Snow, and Grunst's husband, Rick Sward. The purpose of the meeting was to address a list of concerns that a parent group had delivered to Salinas the previous day. Salinas discussed the parents' complaints about Grunst: lack of classroom structure, no follow-through with parent concerns, failure to grade student work, poor judgment regarding the helicopter incident, incomplete report cards, and excessive absenteeism. Salinas placed Grunst on administrative leave. Later that day Salinas mailed a letter to Grunst confirming the leave, directing her to respond to each parent allegation, and ordering her to obtain a medical release specifying she was mentally and emotionally fit for duty.⁵ Salinas barred Grunst from the school campus and informed her that she would be on administrative leave for five days; thereafter, the leave would be charged against her sick leave balance until an investigation was completed.

36. On January 12, 2005, Braunberger sent Grunst a letter regarding a number of problems with her performance. Braunberger told Grunst that she had an excessive number of absences and stated: "I would not expect that you would average more than one day absence per month unless there were extenuating circumstances." Braunberger faulted Grunst for misusing the IP grade. Braunberger told Grunst that improvement in her attendance and grading practices were "expectations for future performance." Braunberger reprimanded Grunst for "your violation of [District] policy

⁵In 2001, Grunst suffered from severe depression and was off work for an extended period of time.

and rules” by taking students off school property to view the Life Flight helicopter on December 7, 2004. She told Grunst that her “choice in the matter of the field trip was of significant * * * concern to me because it compromised the welfare and safety of elementary students. * * *”

37. Grunst sought additional assistance from her union. On January 12, 2005, OEA General Counsel Mark Toledo sent Salinas an e-mail in which he assured her that, while ECBC disagreed with the District’s conclusion that Grunst should be evaluated, ECBC was arranging for one.

38. Grunst saw a psychiatrist on January 24, 2005, and received a written release dated Thursday, January 27, 2005. Grunst hand-delivered the release to Salinas on Monday, January 31, 2005. The release provided that Grunst was able to return to her regular job without restrictions.

39. On January 25, 2005, Grunst provided Salinas with a detailed response to the alleged parental concerns identified in Salinas’ January 11 letter.⁶

40. Article 12 from the 2001-04 collective bargaining agreement provided in relevant part:

“No teacher in the bargaining unit shall be disciplined, reprimanded in writing or reduced in rank or basic salary without just cause. * * *”

41. On February 3, 2005, Grunst and ECBC Representative Debbie Hagan met with Superintendent Salinas. Salinas gave Grunst a letter she had written which stated, in relevant part:

“I have concluded my investigation of the complaints filed against you and submitted to me by a parent group on January 10, 2005. I gave you opportunity to respond to each of the complaints and I considered your responses in my investigation. My conclusions are as follows:

⁶Neither Salinas nor any of the parents who complained about Grunst testified at the hearing

“1. Lack of classroom structure. I find this complaint to be valid. My review of your lesson plans determined that they lacked structure and clarity of your purpose and intended direction. At best, your lesson plans appeared to be sketchy notes, rather than guided learning plans. Chronological progression from lesson to lesson and scope of planned learning outcomes was not evident. I found no correlation between your written lesson plans and the state standards.

“I observed your classroom environment and could find little or no evidence of student work in progress. There was no display of student work samples or showcasing of student projects. The classroom environment appeared to be in disarray. Your classroom structure did not include a routine of any significance to provide students with some focus, consistency or expectation. There was no evidence that the classroom environment you created had parameters or rules to maintain/reinforce total student control. From my investigation, I learned that there were times when your students were off-task or involved in independent/unguided activities not relevant to the learning while you directed your attention to individual students or left the room. (In one particular incident, a student was left alone outside of the classroom while crying. Students need assurance, not isolation, when they are having emotional breakdowns.) All students should be on task at all times, even when your attention might be directed to an individual student.

“2. No follow through with parent requests and concerns. I find this complaint to be valid. That, at minimum, there is a communication breakdown between you and your students’ parents is sufficiently demonstrated by the fact that a coalition of parents submitted a list of

complaints and concerns against you to the school district superintendent. From my investigation, I concluded that you did not clearly communicate to parents what your expectations were of their students. The general consensus given to me by the parents is that you did not provide them with work samples of their students, even when requested. Without clear feedback from the teacher, the parents lacked understanding about their students' learning and their role in the partnership with this district for educating their students.

- “3. No grading of students' work and assignments. I find this complaint to be valid. I find no evidence that students have received clear and understandable expectations about your instructional goals and objectives. Homework assignments are not consistently graded or accounted for. Progression through practice is not visible and your purpose in homework assignments is apparently unclear to students and parents. A 'homework folder' program you developed has not been effective. * * *
- “4. Lack of judgment. I find this complaint to be valid. You led your students off the school campus in an unplanned activity, without authorization by your school principal, and in total disregard of school and district safety rules. There was no apparent consideration of the students' age sensitivity. This is a very serious matter, and I make no exception that it shall not happen again.
- “5. Report cards not completed. I find this complaint to be valid. In a review of report cards submitted to your principal, I found that you gave a majority of your students 'in progress' grades during a reporting period when you were supposed to be reporting clearly to the

parent and student where the student was in his/her academic progression. I understand that you revised the report cards after a discussion with your principal. However, I found no evidence that you have a reliable system in place to track student academic progress (see 3. above). This lack of structure would directly impact your inability to make definitive assessments of your students' work.

- “6. Excessive absenteeism. I find it a valid concern at any time when the regular teacher has a high use of substitute coverage in the classroom. The report of substitute coverage for your classroom reflects high usage. This concern is heightened by the lack of clearly defined lesson plans for the substitute teacher to rely on during your absence (see 1 above).

“My investigation has determined that your actions have been deficient in the above areas. Because I have a significant concern about your performance abilities, I have determined that it is not in your best interest, or the best interest of the district, to return you to your teaching assignment at Cottrell. * * * Remaining at Cottrell would only heighten what has become a tense environment that is not productive for you or the students. Instead, I will place you at Firwood School in a 1st grade position where you will team-teach with three other teachers. * * * Your Firwood School assignment commences on February 14, 2005. * * *

“We do have a medical clearance from your psychiatrist stating that you are able to return to your regular job without restrictions. He included no reference to limitations due to ADHD (Attention Deficit with Hyperactivity Disorder). Therefore, it is not appropriate for you to communicate to your students' parents that you have this disability, and I am directing that you cease doing it in the future

“Your job description delineates your responsibilities as an elementary teacher within this district. Additionally, you are guided by Oregon Administrative Rules - Standards for Competent and Ethical Performance of Oregon Educators. Your continued employment is dependent upon your ability to meet these standards and responsibilities. In your future dealings with students, both in the classroom and on field trips, you are expected to use good judgment and follow school district rules at all times. Your classroom should be maintained with organization and structure; that includes your lesson plans, instructional choices and delivery, student management and classroom control. You are expected to communicate with parents and students with clarity and in a manner that they can understand, in relaying your expectations and learning objectives. Learning objectives in the classroom should be tied to state standards, with consideration given to student abilities/disabilities. If you have questions regarding the district’s expectations of you, you need to immediately make those known. Failing to meet these expectations could result in disciplinary action, up to and including dismissal.”

42 Grunst, with assistance from her ECBC representatives, protested the District’s January 12 and February 3, 2005 disciplinary actions. On January 19, 2005, Hagan wrote Braunberger and Superintendent Salinas and requested the information on which the January 12 disciplinary letter was based, and information about the parent complaints. By letter dated February 7, 2005, OEA General Counsel Toledo wrote the District’s attorney to confirm that the District would not process a grievance regarding the actions taken against Grunst. Toledo noted that he planned to review the February 3 reprimand, and would then decide whether to file an unfair labor practice. Toledo invited the District to discuss resolution of Grunst’s “grievances” in order to avoid an unfair labor practice. Also during this time frame, Toledo wrote to Salinas to protest her directive that Grunst obtain a psychiatric evaluation. Toledo later wrote to the District’s attorney regarding the January 12 and February 3 reprimands, and to confirm that Grunst’s sick leave would not be charged during the time Grunst was placed on administrative leave.

43. Although Salinas received a release from Grunst's psychiatrist on January 31, she kept Grunst on leave until February 14, 2005, when Grunst began teaching first grade at Firwood Elementary School. Grunst never returned to Cottrell after January 10, 2005.

44. Prior to the transfer to Firwood, Grunst had taught fourth and fifth grade for almost nine years. Grunst had never taught first grade. The switch from fourth/fifth grade to first grade was a tremendous change.

45. Grunst did not have her own classroom at Firwood. Rather, she team-taught with the other first grade teachers in their classrooms.

46. Debbie Johnson was the principal at Firwood. Johnson observed Grunst three times between April 13 and May 23, 2005. Terry Prochaska observed Grunst once.⁷ Two observations were formal, and two were informal. Each of Johnson's formal observations included a pre- and post-observation conference with Grunst. In addition, Johnson dropped in several times to watch Grunst teach

47. When Grunst taught at Cottrell, neither Braunberger nor Sanders made any formal or informal observations of her teaching. Braunberger did not seek any input from Sanders about Grunst's performance. Braunberger had worked with Grunst for a few months while Sanders worked with her for a full year during the evaluation cycle. Neither Braunberger or Sanders reviewed Grunst's grade book⁸ or lesson plans for the 2004-05 school year. Salinas did not review Grunst's grade book for the 2004-05 school year. Sanders reviewed Grunst's lesson plans for the 2003-04 school year and concluded that they were appropriate.

48. The District's teacher evaluation ratings are:

Commendable: Performance exceeds all standards
Proficient: Performance meets all standards and may exceed some

⁷When Prochaska was Grunst's principal at Bull Run Elementary, she gave Grunst a favorable evaluation.

⁸Grunst kept a grade book for her fourth and fifth graders. However, she did not keep one for her first graders after she moved to Firwood, until Johnson asked her to do so. Teachers in the earlier grades normally keep work samples and use items such as check-off lists to track student progress. Grunst tracked student progress most often with check-off lists

- Developing: Performance meets some, but not all standards
- Unsatisfactory: Performance is deficient in most or all standards

49. Article 11, Evaluation, from the 2001-04 collective bargaining agreement provided, in relevant part:

“The purpose of the evaluation is to improve instruction. Contract employees will be evaluated biennially with annual informal and substantial observations and feedback (substantial is defined as more than a walk through and less than a formal) * * *.

Article 14, Complaint Procedure, from the 2001-04 collective bargaining agreement provided, in relevant part:

“A. The building principal or superintendent or his/her designee shall meet with the teacher within five (5) contract days of receipt of complaints to discuss the complaint and attempt to resolve the matter to the satisfaction of all parties.

“* * * * *

“D. Any complaint which the administrator or supervisor chooses not to discuss with the teacher or which is not discussed within the required time shall not be considered in the teacher’s evaluation, shall not be used against the teacher in any subsequent action by the District, nor shall any record be kept by the District.”

50. On May 31, 2005, Braunberger and Johnson completed an evaluation of Grunst’s performance for the 2004-05 school year which was based on her work at both Cottrell and Firwood. Braunberger and Johnson rated Grunst as Developing in the areas of Professional and Personal, Classroom or Activity Management, and Teaching, and Unsatisfactory in the areas of Planning and Evaluation. She received no Proficient or Commendable ratings. The evaluation included the following references to the subjects about which parents had complained:

"1. Professional and Personal

"* * * * *

"Rating: Developing

"Comments: * * * During her assignment as a 4/5th teacher at Cottrell, Jean did have difficulty communicating in a timely fashion with parents, causing frustrations for the community in the classroom.

"* * * * *

"3. Classroom or Activity Management

"* * * * *

"Rating: Developing

"Comments: * * * At Cottrell, Jean had difficulty grading and returning assignments in a timely manner resulting in a cluttered classroom environment. * * *

"* * * * *

"5. Evaluation

"* * * * *

"Rating: Unsatisfactory

"Comments: * * * While at Cottrell, assignments and projects were not graded in a timely manner. Many assignments took 1-2 months to be corrected and returned to students. Some assignments were not returned to students at all. This feedback to students and parents is unacceptable. * * *

51. Grunst was shocked when she received the evaluation. On her prior evaluations, Grunst was consistently rated at and above standards. Her most recent

evaluation, prior to the May 31, 2005 evaluation, was in June 2003. That evaluation contained three Commendable ratings, two Proficient ratings, and no Developing or Unsatisfactory ratings. The evaluation prior to that—in June 2000—rated Grunst as Commendable in one area and Proficient in four areas, and contained no Developing or Unsatisfactory ratings. Grunst’s earlier evaluations predated the District’s current ranking system, but generally indicated that she had met or exceeded performance standards.

52. Many teachers who have worked with Grunst consider her a very good teacher. Many parents who have had students in Grunst’s classroom also consider her to be a good teacher.

IEP Meetings During Preparation Time

53. Article 18(B.1) of the 2001-04 collective bargaining agreement provided, in relevant part:

“1. In addition to his/her lunch period and within the normal teaching work day, each full time, regular classroom employee shall have a minimum of duty-free preparation time per week of at least:

“* * * * *

“b Grades 7-12: One class period every full teaching day. * * *

“* * * * *

“4. As in the past an employee’s designated preparation time may from time to time be used by the district for a consultation with the principal and/or for parent consultation without additional compensation or compensatory time off.

“5. * * *

“7-12: Classroom employees shall have one (1) class period of preparation daily (minimum of 40 minutes in length) during which they shall not be assigned

any teaching or supervisory duties, except during unforeseen emergencies. This shall be the same length as all other instructional periods, and it shall be during the student contact day. * * *

54. Jeanne Hansen is a special education teacher at Sandy High School, and a bargaining unit member. Sometime in February 2005, Hansen told Sandy High School Teacher Jeff Reiser to attend an IEP meeting at 8:45 a.m., during Reiser's 55-minute preparation period.

55. Students who qualify for special education services must have IEPs that outline their annual educational goals and objectives as well as their educational placement. IEPs are developed by multi-disciplinary IEP teams consisting of the student and parent, at least one special education teacher, at least one regular teacher, a District administrator, and other relevant specialists. The teams must meet at least annually to review the IEP, but can meet more often as needed. While parents are invited and encouraged to attend all IEP meetings, their attendance is not required.

56. IEP meetings are normally scheduled at least 10 days in advance to ensure that parents will be able to attend.

57. Most IEP meetings are scheduled just before the start or right after the end of the instructional day. Sometimes the meetings are scheduled during class or preparation time because of a particular participant's schedule (e.g., the school psychologist). Prior to February 2005, bargaining unit members have occasionally been required to attend IEP meetings during their preparation periods.

58. Reiser was frustrated that Hansen told him to attend the meeting during his duty-free preparation time and asked his ECBC representative, Lanning Russell, about it.

59. Russell advised Reiser to attend the meeting so as not to be insubordinate. On February 22, 2005, Russell then sent two e-mails regarding the matter. He sent the first to the Sandy High School special education staff telling them that a member had complained about being required to attend an IEP meeting during his preparation time, that this would violate the collective bargaining agreement if the directive had come from District administration, but that the situation was unclear when the meetings are scheduled by other bargaining unit members. He explained that meetings should not be scheduled during preparation time. However, if that is the only time that was convenient, then the teacher should put "the ball back in the court of the

administration” so that it can decide whether to schedule the meeting and provide extra pay, or get a substitute teacher. The e-mail closed with the following sentence: “Requiring participation in meetings or scheduling other duties during a teacher’s prep is a violation of the contract. Please consider this when you schedule IEP meetings.” Russell’s second e-mail, which went to all Sandy High School teachers, simply reminded them that Article 18 of the collective bargaining agreement guarantees one class period per day of duty-free preparation time with limited exceptions, and that members should refer to that section or speak to a ECBC representative if assigned duties during their preparation time.

60. Reiser also asked Vice Principal Jim Carbajal if he had to attend the IEP meeting during his preparation time, and Carbajal told him that he did.

61. Reiser attended the IEP meeting, which took most of his preparation period. The purpose of this particular meeting was to determine whether the student met certain criteria. The student’s mother attended and participated in the meeting. It was not an emergency situation. Hansen, Director of Student Services Paula Epp, and Vice Principal Kim Ball were also present. The District did not offer to give Reiser additional preparation time or otherwise compensate him for attendance at the meeting.

62. Reiser’s objection, and Russell’s e-mail, prompted Hansen to raise the issue with District Administrators Epp and Principal Jim Saxton. Both told her that teachers could be directed to attend IEP meetings at any time during the contractual workday, including preparation time.

63. Since the incident with Reiser, Hansen has directed a number of other bargaining unit members to attend IEP meetings during their preparation time. Hansen considers attendance at IEP meetings during her preparation time a requirement of her job. She routinely attends IEP meetings during her preparation time without extra pay, compensatory preparation time, or time off.

64. When IEP meetings are scheduled at a time when a teacher must miss class, the District provides a substitute for the class. When a teacher must miss his or her preparation period to attend an IEP meeting, however, no substitute teacher is arranged to cover a class so the teacher can receive compensatory preparation time.

65. When teachers are assigned other teaching duties during their preparation period, they are either paid for their extra time or given compensatory time off. For example, if a teacher has to leave early to attend an athletic event or shows up late because of a car accident on the way to school, and another teacher covers that

missed class during his or her preparation time, the teacher who covered the class would be compensated for the missed preparation time.

66. The District attempted to bargain language that would have allowed administrators to assign teachers more duties during their preparation time. In addition to other changes, the District proposed the following:

“* * * Classroom employees shall not be assigned teaching or supervisory duties during this preparation time unless there is a significant building or District priority, or an unforeseen emergency.”

The District, however, was not successful in obtaining this change, and the relevant language from the 2001-04 collective bargaining agreement regarding preparation time was carried over to the successor collective bargaining agreement.

Patty Klascius Twilight School Pay

67. Article 34(D), Extended Classroom Instruction, of the 2001-04 collective bargaining agreement provided that extra-duty teaching assignments would be reimbursed at the teacher's pro rata salary.

68. Patty Klascius, a bargaining unit member, is in her 16th year with the District and her 21st year of teaching. She teaches English at Sandy High School.

69. For several years, the District has operated a credit recovery after-school program called the Twilight School. The program allows students who failed classes with a 40-60 percent grade to recover credit without repeating the entire class. It is generally offered at least once a year, after school, from 3 to 5 p.m.

70. Twilight School is funded entirely by tuition payments of students or by grants awarded to students who cannot afford the tuition. The District must have at least five students enrolled in a Twilight School class in order to pay the teacher's salary. Classes are frequently canceled due to insufficient enrollment, often on the day the classes are scheduled to begin. Teachers received no pay if their Twilight School classes were canceled.

71. In 2005, Twilight School began on February 15 for students who failed classes in the term that ended in January 2005.

72. In January 2005, District Vice-Principal Ball asked teachers if they wanted to teach a Twilight School class, and Klascius told Ball that she was interested. On January 27, 2005, Ball notified Klascius by e-mail that she was assigned to teach English I at the Twilight School. The e-mail stated, in relevant part:

“Thank you for teaching Twilight School this go around. As mentioned earlier, compensation is for 24 hours of direct instruction and 12 hours of preparation all at your regular hourly rate. I will begin the paperwork to have extra duty contracts/time sheets generated. Twilight School will run from 3-5 PM, Tuesday, Wednesday and Thursday from February 15-17, 22-24, March 1-3 and 8-10. * * *”

73. On February 1, 2005, Klascius signed an extra duty form provided by the District which specified that she would be paid \$34.82 per hour for up to 36 hours of Twilight School work. The form stated, in relevant part:

“Use this form to request payment that is in addition to regular compensation. * * * All requests are subject to approval by the personnel administrator and verification of availability of funds * * *”

74. Since Twilight School began, teachers have been paid for 36 hours of work, 24 of which were for classroom instruction and 12 of which were for preparation time.

75. On the Thursday and Friday prior to the February 15 start of Twilight School, Klascius spent about four hours per day preparing for Twilight School. The Twilight School curriculum is not the same as the curriculum used for regular school; it is much more compressed. Klascius chose the important components of the curriculum, wrote a class schedule, prepared a syllabus and handouts, and checked out books the class was to use. The District has never provided any guidelines regarding use of the 12 hours of preparation time expected for Twilight School.

76. On February 14, 2005, approximately three hours after Klascius' workday ended, and long after she had left the building, Ball sent Klascius an e-mail in which she explained that due to low enrollment, the District was consolidating her English class with the Composition class, and that Klascius would not be teaching

Twilight School.⁹ Klascius did not see the e-mail until the following day, the same day Twilight School was to start.

77. Klascius asked Ball about getting paid for the time she spent preparing to teach her Twilight School class. Ball said she would have to find out. Ball subsequently informed Klascius that she would not be compensated for her preparation time. Klascius submitted a time sheet requesting pay for six hours of preparation time, but was never paid. Her request was denied.

Carol Unkefer's Movement on the Salary Scale

78. Article 19, Tuition Reimbursement, from the 2001-04 collective bargaining agreement provided, in relevant part:

“E. The District may conduct inservice programs for teachers during the normal work year. All such courses which are offered or conducted by the District for Staff Development and inservice shall have college credit equivalency for horizontal movement on the salary schedule. * * *

“F. Any teacher enrolled in a Masters, Doctoral or required 5th year program shall be permitted up to an additional three (3) credit term hours in addition to those provided in Section A of this Article to support completion of such program.

“G. If a teacher completes the necessary credits for advancement to a higher educational level, advancement on the salary schedule will be either September 1 or April 1 if proper verification of successful course completion has been submitted to the District on or before November 1 or May 1, respectively, *of the calendar year in which the hours are earned.*” (Emphasis added.)

⁹Klascius works part-time and her workday ends earlier than the workdays of other teachers

79. In bargaining for a successor collective bargaining agreement, the District initially proposed to eliminate Article 19(E) in its entirety. The District was unsuccessful, however, and Article 19(E) remained in the collective bargaining agreement.

80. ARTICLE 16, Professional Improvement, from the 2001-04 collective bargaining agreement provided, in relevant part:

“A. Teachers may submit application for hours of credit toward salary schedule change for experiences that fall outside of college courses. Such requests shall be directly related to the teacher’s current teaching assignment, and approved in advance by an Equivalency Credit Committee to be established by the Administration and Council. * * *

“The Equivalency Credit Committee will develop procedures for receiving approval on requests. Criteria developed by the Equivalency Credit Committee will be utilized. Final approval will rest with the Superintendent and Board of Directions [*sic*] for granting credit.

“Normally, equivalency credit will be awarded on the basis of twelve (12) cumulative hours of non-college credit for *one quarter hour of college credit.*” (Emphasis added.)

81. Unkefer, a bargaining unit member, began working as a teacher for the District at the beginning of the 1997-98 school year.

82. The current District Equivalency Credit Committee (ECC) policy was adopted on March 8, 2001. It applies to “[c]ourses, workshops, or clinics, offered outside of the normal work day” that are not part of the regular curricular program of the school or financed by District funds and that have been pre-approved by the ECC. One equivalency credit will be awarded for twelve “clock hours” and one equivalency credit equals one hour of college credit. Bargaining unit members are awarded no more than three equivalency credits per year.

83. In a memorandum dated March 19, 2001, the District gave Unkefer and other teachers a listing of the in-district equivalency credits they had been awarded from 1997 through 2000, and also explained the March 8, 2001 District policy regarding

equivalency credit. The District credited Unkefer with 1.04 college equivalency credit for attending two workshops outside of the normal workday in 1999.

84. In the spring of 2005, Unkefer was placed at the Masters +24 level of the salary schedule contained in the 2001-04 collective bargaining agreement. She believed she had earned enough credits to move horizontally on the schedule to the Masters +45 column.

85. In the spring of 2005, Unkefer had accrued 44.54 credits. These consisted of 43.5 college credits and the 1.04 equivalency credit the District awarded her in 1999. Unkefer had also attended 20 hours of staff development in-service courses completed on January 3, 2005, February 18, 2003, May 13, 2002, April 8, 2002, and October 17, 2001. Unkefer thought that these five courses would count for additional in-District college equivalency credit. Under the formula used by the District, Unkefer believed these hours were equivalent to 1.67 hours of college credit. Unkefer needed .46 credits to advance to the Masters + 45 column on the salary schedule. All of this training occurred during the normal workday on teacher in-service development days.

86. Unkefer contacted District Assistant Superintendent Hasegawa sometime in mid- to late-March 2005 to ask him about receiving equivalency credit for the staff development in-service training she completed between 2001 and 2005. After consulting with another administrator, Hasegawa told Unkefer that she could not receive college equivalency credit for her in-service training.

87. Unkefer did not understand why she could not receive college equivalency credit for her in-service training. She asked Paul Heistuman, a 30-year teacher who spent many years on the Association's bargaining team, whether this was correct. Heistuman told Unkefer that Hasegawa's position was wrong because Article 19(E) of the collective bargaining agreement was clear, and Heistuman himself had advanced on the salary schedule because of credits received for in-service training. Heistuman received a total of 6.13 college equivalency credits from 1989 through the 1996 school year for attending in-service staff development training during the regular workday.¹⁰

88. Unkefer went back to Hasegawa who then told her to contact District Personnel Specialist Patti Knox. On March 31, 2005, Unkefer asked Knox about getting college credit equivalency for her in-service training. Knox responded that they

¹⁰Heistuman did not have to apply to an equivalency credit committee for any of these credits.

were not working under the collective bargaining agreement, and that Unkefer should send her written questions.

89. On April 4, 2005, Unkefer e-mailed Knox her written request for college equivalency credit for her attendance at five District in-service programs she had attended from 2001 through 2005. Unkefer listed a total of 20 hours for her attendance at these programs. She expected to be awarded at least one college credit under the formula in the 2001-04 collective bargaining agreement.

90. Knox told Unkefer that she would get back to her. Unkefer heard nothing further from Knox and e-mailed Knox again on April 13, 2005.

91. By memorandum dated April 13, 2005, Knox notified Unkefer that the District would not grant college equivalency credit for in-service training. Knox explained that her position was based on a decision of the ECC policy.

92. Prior to the merger that created the Oregon Trail School District,¹¹ the collective bargaining agreements for both the Sandy High School and Sandy Elementary School Districts included language that was identical to the language in Article 19(E) of the 2001-04 collective bargaining agreement between ECBC and the District. The Sandy High School District collective bargaining agreement in effect prior to the merger also included language regarding the ECC that was identical to the language in Article 16(A) of the 2001-04 collective bargaining agreement between ECBC and the District.

93. The ECC first formally convened in the Oregon Trail School District in the spring of 2001. The ECC has processed all requests for college equivalency credit except for requests that were granted by the assistant superintendent for curriculum.

94. On July 6, 2005, Unkefer requested equivalency credit for an in-service training on special education law. Unkefer asked Hasegawa to advise her of the ECC's decision. Hasegawa informed Unkefer that credit equivalency was not available for that program. Unkefer told Hasegawa that she was confused and asked for more information about the ECC. When Hasegawa did not respond, Unkefer e-mailed him again on July 19, 2005. Hasegawa answered that he could not respond at that time.

¹¹In 1997, the following school districts merged to create the Oregon Trail School District: Sandy Elementary, Sandy High, Cottrell Elementary, and Welches. The Bull Run, Ness, and Boring School Districts had previously merged into the Sandy Elementary School District. Knox was employed by the Sandy High School District prior to the merger.

95. If the District had granted Unkefer the credit she requested for her in-service training, she would have advanced to the Masters + 45 column on the salary schedule and her pay would have increased on April 1, 2005. Instead, Unkefer took a college class over the summer so that she could move to the Masters +45 column at the beginning of the 2005-06 school year.

Summer Paychecks

96. Article 21(C) of the 2001-04 collective bargaining agreement provided in relevant part that the June, July, and August salary payments would be available on the last contracted workday but that “[t]eachers shall have the option of receiving their July and August paychecks on the fourth Friday of those months.”

97. The District’s longstanding practice has been to send bargaining unit members a form in the spring of each year in which bargaining unit members are asked to indicate how they wished to be paid. Bargaining unit members are asked to choose between receiving three paychecks on the last workday in June, or receiving three separate checks in June, July, and August.

98. In May 2005, the District gave bargaining unit members a form to choose how they wished to receive their summer paychecks. Sixty-eight members of the bargaining unit indicated that they wanted to receive three separate checks over the summer: one on June 13, another on July 22, and a third on August 26.

99. On May 24, 2005, the District notified bargaining unit members who chose to receive summer checks in June, July, and August that there had been a “change in the pay plan” and that they would receive one check on June 13 and two checks on June 30, 2005. The District implemented this changed pay plan. The District made this change to avoid an increase in Public Employees Retirement System (PERS) rates that became effective on July 1, 2005.

100. Prior to changing the system for issuing summer paychecks, the District never notified ECBC or offered to bargain over it.

Evening Event at Firwood Elementary School

101. Article 18(A) of the parties’ 2001-04 collective bargaining agreement provided, in relevant part:

“1. The normal contract day shall not exceed eight (8) consecutive hours including the 30-minute duty-free lunch period provided pursuant to ORS 342.608.”

102. During negotiations for a successor to the 2001-04 collective bargaining agreement, the District proposed contract language that would allow the District to do the following: 1) exclude the 30-minute lunch period from the eight-hour day; 2) allow the District to occasionally extend the day beyond eight hours for various activities; and 3) permit the District to require teachers attendance at up to three evening events per school year for open houses, parent conferences, and school socials.

103. The District withdrew its proposals to extend the eight-hour workday. Article 18(A.1). The District’s implemented offer contained exactly the same language as the 2001-04 collective bargaining agreement.¹²

104. In an August 11, 2005 newsletter to the staff, Firwood Principal Johnson told staff about an “August 31 * * * ice cream social * * * from 6-7 p.m.” The newsletter also listed a number of events on the staff schedule for August 30 through September 6. Among the events listed was the August 31 ice cream social offered by the Parent Teacher Committee (PTC) Johnson never indicated that attendance at the ice cream social was voluntary. All Firwood teachers attended the ice cream social on August 31, 2005.

105. The ice cream social is an opportunity for parents and their children to visit their classroom and meet their teachers. For the past three years, the Firwood PTC has held an ice cream social and teacher attendance has been voluntary.

106. Teachers’ normal work hours at Firwood are 8 a.m. to 4 p.m. On August 31, 2005, teachers worked their normal eight-hour day and also attended the ice cream social. Teachers received no additional pay or compensatory time off for the extra hour they spent at the ice cream social.

107. The District regularly adjusts the starting and ending times for teachers’ workdays so that teachers who attend evening events work no more than eight hours a day. At Sandy High School, teachers are required to attend two evening events

¹²The successor to the 2001-04 collective bargaining agreement also included the same language.

per year. On the days these evening events are held, teachers work from 12 to 8 p.m. rather than 7:10 a.m. to 3:10 p.m. When parent conferences are held at Cedar Ridge Middle School, teachers work from 12 to 8 p.m. rather than 7:20 a.m. to 3:20 p.m. When parent-teacher conferences are held at Firwood, the starting and ending times for the teachers' workday are changed so that the teachers work no more than eight hours.

Breaks at Firwood Elementary

108. Article 18(A.2) of the 2001-04 collective bargaining agreement provided that "[e]mployees of kindergarten up to and including sixth grade shall each receive a morning and afternoon relief break of at least fifteen continuous, duty-free minutes during the student contact day."

109. During negotiations for a successor to the 2001-04 collective bargaining agreement, the District tried to eliminate one of the two daily breaks and give administrators discretion to schedule the remaining break in accordance with building schedules. The Association and ECBC opposed this change and the District eventually dropped this proposal. Article 18(A.2) of the District's implemented offer contains the same language regarding break periods as did the 2001-04 collective bargaining agreement except "fifth grade" is substituted for "sixth grade."

110. The District's practice has been to schedule relief breaks separate from the lunch period and as close as possible to the middle of the morning and afternoon. Prior to the 2005-06 school year, breaks were consistently scheduled between 9:30 a.m. and 10:30 a.m., and between 1:30 p.m. and 2:30 p.m. Teachers work from 8 a.m. to 4 p.m.

111. Beginning with the 2005-06 school year, however, Firwood principal Johnson changed the schedule. She scheduled at least one of the daily breaks at the beginning or the end of the teacher's lunch period. Consequently, teachers no longer had breaks in the middle of the morning or middle of the afternoon. This change in the scheduling of break times was made to give teachers in the first through fifth grades adequate time for professional development activities.

112. When ECBC's Representative Mike Cospers learned about the change in break schedules, he contacted Superintendent Salinas. Salinas initially took the position that the District had complied with the contract by giving teachers two daily breaks. After Cospers objected further, the District altered the schedule so that a five-minute "prep" was inserted between the scheduled break and lunch periods. For example, if a teacher's lunch was from 11:25 to 11:55 a.m., the District scheduled a

“prep” period for the teacher from 11:55 a.m. to 12 p.m., and an afternoon break from 12 to 12:15 p.m. These schedules went into effect on or about Monday, October 3, 2005, and remained in effect without further changes.¹³

113. As elementary teachers, Firwood teachers remain with their students in their classrooms all day. As a result of the new schedule, Firwood teachers must remain in their classrooms from 12:15 to 4 p.m. without a break.

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it disciplined Grunst.

ECBC contends that the District reprimanded Grunst without just cause on January 12 and February 3, 2005, and that these disciplinary actions were unlawful changes in the status quo in violation of ORS 243.672(1)(e).

An employer’s duty to bargain in good faith under subsection (1)(e) includes the obligation to maintain the status quo by making no unilateral changes in employment relations during the hiatus period, which typically occurs after the parties’ collective bargaining agreement has expired and before the Public Employee Collective Bargaining Act (PECBA) dispute resolution procedures are exhausted. *AOCE v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, Case No. UP-22-00, 18 PECBR 847, 858 (2000). Because the employer’s duty to maintain the status quo applies only to employment relations, *i.e.*, subjects which are mandatory for negotiations, the employer can make changes in subjects which are permissive for bargaining under ORS 243.650(7).

In a unilateral change case, we begin our inquiry by identifying the status quo and then determine whether the employer unilaterally changed the status quo. *Portland Community College Declaratory Ruling*, Case No. DR-6-86, 9 PECBR 9018, 9024 (1986). Our primary reference point for determining the status quo is the parties’ expired collective bargaining agreement. *Salem-Keizer Association Of Classified Employees v.*

¹³The District put into evidence a schedule also dated September 29, 2005, that is slightly different from the September 29 schedule that was e-mailed to Cosper. On this schedule, all first through fifth grade teachers have one of their two breaks scheduled immediately before or after their lunches, with 10 minute “preps” between lunches and breaks.

Salem-Keizer School District No. 24J, Case No. UP-104-90, 13 PECBR 89 (1991). In addition, we also examine the parties' past practice. *Coos Bay Education Association v. Coos Bay School District*, Case No. UP-67-96, 17 PECBR 502, 509 (1998).

Article 12 of the parties' expired collective bargaining agreement provided, in relevant part: "No teacher in the bargaining unit shall be disciplined, reprimanded in writing or reduced in rank or basic salary without just cause. * * *" A just cause provision of this type is a mandatory subject for bargaining. An employer fails to maintain the status quo and violates subsection (1)(e) if the employer disciplines an employee without just cause during the hiatus period. *AOCE v. State of Oregon, Department of Corrections, Oregon Corrections Enterprises*, 18 PECBR at 858. Here, the District reprimanded Grunst at a time when the parties' collective bargaining agreement had expired and the District and Association were bargaining a successor contract. Accordingly, we must determine whether the District had just cause to reprimand Grunst on January 12 and February 3, 2005. If the District did not have just cause for its actions, it violated subsection (1)(e).

In just cause cases, this Board's role is analogous to that of a grievance arbitrator. To determine just cause, we apply a "reasonable employer" test. This is an objective test under which the employer's disciplinary action will be judged in terms of whether a fictive reasonable employer would have taken the same disciplinary action under similar circumstances. There is no single, comprehensive definition of a reasonable employer. Among the traits of a reasonable employer, however, are the following: (1) disciplinary action is taken in good faith, for cause, and for nondiscriminatory reasons; (2) rules enforced are reasonable, and employees are given fair notice that violations of the rules may lead to discipline; (3) disciplinary action is taken in a timely manner; (4) an employee is warned of proposed discipline and given an opportunity to refute the charges; (5) a fair investigation is made before discipline is administered, and any action taken is based on substantial evidence; and (6) the burden of proving the elements needed to justify discipline is borne by the employer. *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-52 (1986) citing *Brown v. Oregon College of Education*, Case Nos. 1046 and 1067 (October 1980), *reversed and remanded* 52 Or App 251, 628 P2d 410 (1981), *order on remand* (September 1981). With these principles as our guide, we analyze the District's reprimands of Grunst.

The January 12 Reprimand

In her January 12, 2005 letter to Grunst, Cottrell Principal Braunberger reprimanded Grunst for taking her students off school grounds to view a Life Flight helicopter rescue on December 7, 2004. Braunberger also told Grunst that she had an excessive number of absences during the 2004-05 school year, and that she had

incorrectly used an “in progress” grade on her students’ report cards. Braunberger explained that improvement in Grunst’s attendance and grading practices were “expectations for future performance.” The law differentiates between performance standards and discipline. Teacher performance standards are a permissive subject for bargaining. ORS 243 650(7)(e). Thus, the District had no obligation to maintain the status quo in regard to the performance standards it required or expected Grunst to meet. Braunberger was entitled to establish performance standards for Grunst regarding absences and student grading.¹⁴

Discipline under the just cause standard of the expired contract is a mandatory subject for bargaining, however. We will determine whether the District had just cause to reprimand Grunst for the Life Flight incident; if it did not, the reprimand was an unlawful change in the status quo in violation of subsection (1)(e). We begin by reviewing this reprimand under the reasonable employer standard.

On December 7, 2004, Grunst took her class to a spot approximately 30 feet from the edge of school property to watch the transfer of an individual from an ambulance to a Life Flight helicopter. At the time, Grunst believed that the incident was an opportunity to reinforce lessons about safety with her class. Grunst kept her students outside for approximately five to ten minutes, and the students were too far away to identify the person who was placed in the helicopter.

In her January 12 reprimand, Braunberger accused Grunst of violating the District’s field trip policy and compromising the “welfare and safety” of her students. Prior to this incident, the District had no protocol or rule for situations of this nature, even though Life Flight helicopters regularly landed near another District school. Although the District alleges that Grunst’s actions violated the District field trip policy, it does not appear that the students’ five to ten minute walk outside the classroom constituted a field trip under the applicable District policy. Indeed, the District apparently agreed that the field trip policy did not apply to Grunst’s trip outside the classroom with her students, since it implemented a separate and specific procedure for teachers to deal with Life Flight helicopter landings after the incident with Grunst’s class. The District also failed to present any evidence to demonstrate how Grunst’s actions jeopardized student safety.

¹⁴If the District subsequently disciplined Grunst for violating one of these performance expectations, it would require us to decide whether the expectations were reasonable. *See OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-52 (1986).

A reasonable employer does not discipline an employee on the basis of a rule of which the employee had no notice. Here, the District had no rule applicable to the type of brief excursion on which Grunst took her class on December 7. In addition, the District failed to demonstrate that the January 12 reprimand was based on substantial evidence, since it did not establish that Grunst's actions endangered her students. The District failed to carry its burden to demonstrate that it had just cause to issue the January 12 reprimand.

February 3 Reprimand

On February 3, 2005, District Superintendent Salinas gave Grunst a letter in which she reprimanded Grunst for the following deficiencies: lack of classroom structure, failure to "follow through" with parent requests and concerns, failure to grade students' work and assignments, lack of judgment, failure to complete report cards, and excessive absences.¹⁵ We will consider each of these alleged deficiencies under the reasonable employer standard.

Salinas concluded that Grunst lacked structure in her classroom after reviewing Grunst's lesson plans and observing Grunst's classroom. On the basis of this investigation, Salinas determined that Grunst's lesson plans lacked "structure and clarity," that there was "little or no evidence of student work in progress," and "no evidence that the classroom environment [she] created had parameters or rules to maintain/reinforce total student control."

During the 2003-04 school year, Cottrell Principal Johnson directed Grunst to improve the appearance of her classroom and change her teaching strategies. Johnson also reviewed Grunst's lesson plans and found them to be appropriate. Grunst complied with Johnson's directives and Johnson did not express any further concerns. By the end of the 2003-04 school year, Grunst reasonably concluded that her lesson plans were acceptable and that any deficiencies in the organization of her classroom had been corrected. Although Braunberger and Grunst had discussions about parental complaints in November and December 2004, the District waited until halfway through the 2004-05 school year—until January and February 2005—to notify Grunst that her

¹⁵Although the February 3 letter does not expressly state that it is a reprimand, we note that the District agrees that this letter is a disciplinary action (Respondent's Objections at p. 1.) We also note that the letter states that Grunst's failure to meet the expectations set forth in the letter "could result in disciplinary action, up to and including dismissal." It thus appears to be a step in the progressive discipline process. We conclude, therefore, that the letter can best be described as a written reprimand.

efforts to solve problems that had earlier been identified were insufficient. According to Salinas, Grunst continued to have serious problems with her lesson plans and classroom environment. The District's actions were not those of a reasonable employer; a reasonable employer gives employees prompt, timely notice of deficiencies, and fair warning that discipline may result if these deficiencies are not corrected. The District took none of these steps.

In her February 3 reprimand, Salinas also faulted Grunst for failure to "follow through" with parent requests and concerns, and failure to grade student work. According to Salinas, Grunst did not "clearly communicate to parents" her expectations of their children, did not provide parents with their children's work samples, and did not effectively or consistently grade student work. Salinas failed to mention any specific incidents where Grunst failed to tell parents what she expected from their children and cites no examples of parents who did not receive samples of their children's work. Nor does Salinas indicate when or how much student work she reviewed to determine that Grunst was not properly grading assignments. The only proof that Salinas cites to support the charge that Grunst communicated poorly with parents was the fact that "a coalition of parents submitted a list of complaints and concerns against [her] to the school district superintendent." The *existence* of parent complaints proves nothing about the *validity* of these complaints. The District failed to meet its burden of proof and did not demonstrate it had substantial evidence to support charges that Grunst did not appropriately deal with parent concerns and did not properly grade student work.

Finally, Salinas' reprimand cites three matters that were previously addressed in Braunberger's January 12 letter—the Life Flight helicopter incident, the use of the "in progress" grade on report cards, and excessive absenteeism. As discussed above, Braunberger reprimanded Grunst for taking her students outside to view the Life Flight helicopter rescue, and told Grunst that proper use of the "in progress" grade on report cards and improvement in her attendance were performance expectations.

A reasonable employer does not resolve problems involving an employee's on the job conduct and then subsequently discipline the employee for the same conduct. See *Joe R. Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994) (a reasonable employer does not assure an employee that a problem has been solved and then discipline the employee for the same conduct that caused the earlier problem). After she received the January 12 letter from Braunberger, Grunst understood that she was expected to improve her performance in two areas—attendance and report card grading. Grunst had every reason to believe that her supervisor's concerns about these matters were settled by the directive Braunberger issued: Grunst was to limit her absences and properly use the District grading system. A few weeks later, the District

disciplined Grunst for the same conduct that Braunberger identified as areas in which she needed to improve her performance. The District's actions were not those of a reasonable employer. A reasonable employer does not talk with an employee about work-related problems, instruct the employee to improve performance in certain areas, and then subsequently discipline the employee for the same problems about which the employee was counseled. An employer fails to give an employee clear, unequivocal notice of the consequences of the employee's actions if it first counsels an employee about an action and then disciplines the employee for the same action.

In addition, we conclude that the District's actions in reprimanding Grunst for excessive absences and failure to implement the new grading system were not those of a reasonable employer. All of the absences Grunst took that Salinas found excessive were taken because of serious personal circumstances, in accordance with the terms of the expired collective bargaining agreement and with the approval of Grunst's supervisors. A reasonable employer does not reprimand an employee for absences that its own supervisors approved under the terms of the applicable contract.

In regard to Grunst's supposed failure to use correct grades under a new system, we note that the District implemented the system without any training or adequate explanation as to what the new grading standards signified. We also note that Grunst was not, understandably, the only teacher who did not use the grades in the way the District expected: Grunst's colleague was also mistaken about how the grades were to be applied. A reasonable employer does not discipline an employee for failing to meet standards that were never clearly explained to the employee.

In regard to the Life Flight incident, we have earlier discussed why the District's reprimand concerning this event was unreasonable. We also note that the District compounded its error by unreasonably choosing to reprimand Grunst *twice* for the same incident.

In sum, we conclude that the District did not have just cause to reprimand Grunst for the Life Flight helicopter incident on January 12 and February 3, 2005. Nor did the District have just cause to reprimand Grunst on February 3, 2005 for lack of classroom structure, failure to "follow through" with parent requests and concerns, failure to grade students' work and assignments, lack of judgment, failure to complete report cards, and excessive absences. Because the District lacked just cause for imposing this discipline, it unlawfully changed the status quo and violated subsection (1)(e) when it took these actions.

We note that ECBC does not object to Grunst's transfer from Cottrell to Firwood and does not request that we order the District to rescind this action as a remedy for the District's violation of subsection (1)(e). Accordingly, we will order the District to delete all portions of the January 12 letter that refer to the Life Flight incident and to withdraw the February 3 letter.

3. The District did not violate ORS 243.672(1)(a) and/or (c) when it gave Grunst a poor performance review.

ECBC alleges that the District gave Grunst a negative evaluation in May 2005 in violation of ORS 243.672(1)(a) and (c). A public employer violates ORS 243.672(1)(a) if it interferes with, restrains, or coerces employees "in" or "because of" the exercise of rights guaranteed under the PECBA. ECBC asserts the District violated both the "because of" and "in" portions of subsection (1)(a).

In analyzing a "because of" claim, this Board determines the reason for the employer's conduct to decide if the employer acted because of the employee's exercise of protected rights. A complainant does not have to show that the employer acted with hostility or anti-union animus to demonstrate a violation of the "because of" portion of subsection (1)(a). A complainant need only demonstrate that the employer was motivated by some PECBA-protected activity to take the disputed action. *ATU v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 786 (1998).

In analyzing a claim that an employer violated the "in" portion of subsection (1)(a), we decide if the natural and probable effect of the employer's conduct would tend to interfere with, restrain, or coerce employees in the exercise of their PECBA rights. *ATU v. Tri-Met*, 17 PECBR at 789. The subjective impressions of employees are not controlling. We must determine whether the employer's actions, when viewed objectively, would materially and probably deter employees from exercising their protected rights. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). There are two types of "in" violations. The first is a derivative of a "because of" violation. We have held that employer actions that are taken in response to an employee's exercise of protected activity inevitably interferes with employees' exercise of protected rights. *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). A stand alone violation of subsection (1)(a) usually, but not always, arises in the context of employer threats of reprisal for engaging in protected activity. *ATU v. Tri-Met*, 17 PECBR 789.

We begin with ECBC's allegations that the District negatively evaluated Grunst in May 2005 "because of" her exercise of protected rights. Downgrading

an employee's evaluation based on the employee's union activities violates subsection (1)(a). *IAFF, Local #1489, and Brown v. City of Roseburg*, Case No. C-53-84, 8 PECBR 7805, 7817-18, *AWOP 76 Or App 402, 708 P2d 1210* (1985) and *Monument Association of Classified Employees v. Monument School District No. 8*, Case No. UP-66-86, 9 PECBR 9506, 9518 (1987). Our analysis begins with an examination of the employer's motives. Once we have determined why the employer acted, we then decide if these reasons are lawful. If all of the reasons are lawful, we will dismiss the complaint. If all of the reasons are unlawful, or if the employer's supposedly lawful reasons are only a pretext for its unlawful conduct, the complainant will prevail. If we conclude that the employer acted for both lawful and unlawful reasons, we then apply a mixed motive analysis. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 741 (2004).

Here, ECBC asserts that Grunst engaged in protected activity when she sought and received representation from the union after the District reprimanded her in January and February 2005. According to ECBC, the District responded to this exercise of Grunst's PECBA rights by giving her an unfavorable evaluation in May 2005. ECBC notes that this was the first poor evaluation Grunst had received in several years, and that the observations upon which the evaluation was based were all conducted between April 13 and May 23, 2005. According to ECBC, the District unfairly "crammed" four observations into this short period at a time when the District had only recently imposed a radical change in Grunst's teaching assignment. ECBC argues that these circumstances demonstrate that the District had no legitimate motive for negatively evaluating Grunst and did so for unlawful reasons.

We note that our inquiry in this case is limited to determining if the District negatively evaluated Grunst because of her exercise of PECBA-protected rights. Whether the District treated Grunst unfairly is not relevant to our analysis, so long as the unfair treatment did not violate the law. *See Schreiber v. Oregon State Penitentiary*, Case No. UP-124-92, 14 PECBR 313, 320 (1993) (whether an employer unfairly discharged an employee is irrelevant so long as the unfair treatment was not intended to discourage or encourage union membership in violation of ORS 243.672(1)(c)).

We find little evidence in the record of any connection between Grunst's exercise of protected activity in January and February 2005 and her May 31, 2005 evaluation. Although timing can sometimes raise an inference of causality (*see Amalgamated Transit Union, Division 757 v. Basin Transit Service*, Case No. UP-36-85, 8 PECBR 8305, 8314, *amended* 8 PECBR 8318 (1985)), the timing of the relevant events here permits no such inference. Grunst received a negative evaluation three months after she got help from the union. Contrary to ECBC's assertion, we find a number of

legitimate reasons for the District's evaluation. Under the terms of the expired contract, the District was required to evaluate Grunst during the 2004-05 school year. The evaluation was based on several supervisors' observations of Grunst, not on unsupported conjecture and opinion. Prochaska, one of the supervisors who observed Grunst in 2005, had given Grunst favorable evaluations in the past.

Grunst herself acknowledged that she was experiencing some difficulties with her job. When Braunberger talked with Grunst about parent complaints she had received in November 2004, Grunst admitted that organization was not one of her strengths. Grunst also found that the move from teaching a fourth/fifth grade class at Cottrell to teaching a first grade class at Firwood was a substantial change. Given the magnitude of the change in Grunst's assignment, the District would understandably want to assess Grunst's abilities in her new job and provide her with suggestions for improvement, if needed.

The evidence thus fails to demonstrate any causal relationship between Grunst's exercise of protected activity and the negative evaluation of her teaching performance the District gave her in May 2005. The record also establishes that the District had legitimate reasons for the evaluation. We conclude that the District did not negatively evaluate Grunst because of her exercise of protected activity.

Next, we consider whether the District's actions in giving Grunst an unfavorable evaluation interfered with, restrained, or coerced her in her exercise of PECBA-protected rights. Since we have decided that there is no "because of" violation of subsection (1)(a), we also conclude there is no derivative "in" violation of this provision. To determine whether the District's actions independently violated the "in" portion of subsection (1)(a), we must decide whether the natural and probable effect of the District's actions, when considered objectively, was to chill employees in their exercise of PECBA-protected rights. *ATU v. Tri-Met*, 17 PECBR at 789.

When we conclude that an employer's conduct is lawful, we have held that natural and probable effect of the employer's actions is not to interfere with, restrain, or coerce employees in their exercise of protected rights. See *OSEA v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407, n. 7 (1990) ("** * the natural and probable effect of a lawful discharge, viewed objectively, would not be to restrain or coerce employees' exercise of protected rights.") In this and subsequent sections of this Order, we conclude that the District's May 31, 2005 evaluation of Grunst violated no provision of the PECBA. Accordingly, we also conclude that the lawful evaluation Grunst received did not independently violate the "in" prong of subsection (1)(a).

We next consider whether the District's unfavorable evaluation of Grunst violated ORS 243.672(1)(c), which provides that it is an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." We construe the term "membership" quite broadly so as to protect "union activity of any nature." *Schreiber v. Oregon State Penitentiary*, 14 PECBR at 319 (quoting *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, n. 20 (1989)). Our analysis of a complaint alleging a violation of subsection (1)(c) is quite similar to our analysis of an alleged violation of subsection (1)(a). To prove that an employer violated subsection (1)(c), a complainant must demonstrate protected activity, employer action, and a causal connection between the two. *Schreiber v. Oregon State Penitentiary*, 14 PECBR at 320. For the same reasons we found no causal link between Grunst's negative evaluation and her exercise of protected rights sufficient to establish a violation of subsection (1)(a), we find no connection between the two events sufficient to support a violation of subsection (1)(c).

In sum, we conclude that ECBC failed to demonstrate that the District negatively evaluated Grunst in violation of ORS 243.672(1)(a) or (c). We will dismiss these allegations of the complaint.

4. The District did not violate the status quo and ORS 243.672(1)(e) by giving Grunst the May 31 performance review.¹⁶

ECBC alleges that the District unilaterally changed the status quo in violation of subsection (1)(e) when it based Grunst's evaluation on complaints that were not processed in accordance with the procedure in the expired contract. A procedure for dealing with complaints made against bargaining unit members is a mandatory subject for bargaining. *Gresham Grade Teachers v. Gresham Grade School District*, Case No. C-61-78, 5 PECBR 2771, 2803 (1980). The status quo concerning this subject was established by the terms of Article 14, Complaint Procedure, from the expired contract. ECBC did

¹⁶In its amended complaint, ECBC alleged that the District failed to maintain the status quo in violation of subsection (1)(e) when it based Grunst's May 31 evaluation on complaints that were not properly processed under Article 14 in the expired collective bargaining agreement. The Association did not address this allegation in its post-hearing brief. The ALJ concluded that the District had not violated subsection (1)(e) by failing to maintain the status quo in regard to the evaluation procedure. We will address the issue pled by ECBC in its amended complaint and determine whether the District unlawfully failed to maintain the status quo in regard to the complaint procedure.

not demonstrate, however, that the District failed to comply with the provisions of the complaint procedure in the expired contract when it evaluated Grunst on May 31.

Under the provisions of Article 14(A) and (D), a complaint cannot be considered in the teacher's evaluation unless it was discussed with the teacher within five "contract days" from the date on which the complaint was received. In Grunst's May 31 evaluation, her supervisors note Grunst's difficulties in communicating effectively with parents and her failure to promptly grade student work so that parents and students received timely feedback. These matters were among the subjects about which parents complained to District Superintendent Salinas on January 10, 2005. Salinas then met with Grunst and her representative to discuss these parent complaints on January 11, 2005. The superintendent complied with the provisions in the expired contract that required her to promptly notify and talk with Grunst about any complaints she had received. As a result, the complaints were properly included in Grunst's May 31 evaluation in accordance with the procedure in Article 14 from the expired collective bargaining agreement.

ECBC did not demonstrate that the District violated any portion of the status quo concerning complaints when it evaluated Grunst on May 31. We will dismiss this allegation of the complaint.

5. The District did not violate ORS 243.672(1)(e) by requiring Reiser to attend an IEP meeting during his duty-free time.

ECBC alleges that the District changed the status quo in violation of subsection (1)(e) when it required high school teacher and bargaining unit Member Reiser to attend an IEP meeting during his preparation time in February 2005.

The amount of preparation time teachers receive is a mandatory subject of bargaining. *Springfield Education Association v. Springfield School District No. 19*, Case Nos. C-144/161-83, 7 PECBR 6357, 6391 (1984) (citing *Eugene Education Association v. Eugene School District*, Case No. C-65-78, 4 PECBR 2413 (1979), *reversed and remanded* 46 Or App 733, 613 P2d 79 (1980), *order on remand* 6 PECBR 4653 (1981)). The status quo in regard to preparation time was established by Article 18 from the expired collective bargaining agreement, which provided that teachers in grades 7 through 12 would receive one class period of duty-free preparation time daily. Under the terms of Article 18(B.4) and (B.5), bargaining unit members could not be assigned any teaching or supervisory duties during their preparation time, except in cases of unforeseen emergency. From time to time, however, preparation time could be used for consultation with the principal or consultation with a parent "without additional compensation or

compensatory time off.” We will determine whether the District’s requirement that Reiser attend an IEP meeting during his preparation time was contrary to these provisions in the expired collective bargaining agreement.

Some time in February 2005, Hansen, a special education teacher and member of the ECBC bargaining unit, told Reiser that he needed to attend an IEP meeting during his preparation period. By law, the District is required to prepare IEPs for students who qualify for special education services. A multi-disciplinary team, which includes teachers, a District administrator, and specialists, meets at least annually to review the IEPs. Parents are invited to IEP meetings, though they are not required to attend. Reiser’s supervisors confirmed that Reiser was obligated to attend the meeting, and Reiser did so. The student’s mother attended the meeting.

A consultation is defined as “[a] conference at which advice is given or views are exchanged.” *American Heritage Dictionary*, p. 395, (Fourth Edition 2000). The IEP meeting Reiser attended was just such a conference and one in which the parent of the special needs student participated. Accordingly, we conclude that the District complied with the provisions of the expired contract by requiring Reiser to attend a “consultation with * * * [a] parent” during his preparation period. The parties’ past practice is consistent with the language in the expired contract. The record demonstrates that ECBC bargaining unit members have occasionally been required to attend IEP meetings during their preparation period.

The District did not unilaterally change the status quo and violate ORS 243.672(1)(e) when it required Reiser to attend an IEP meeting during his preparation time. We will dismiss this allegation of the complaint.

6. The District did not violate ORS 243.672(1)(e) by refusing to compensate Klascius for preparation time in connection with the Twilight School.

ECBC alleges that the District unlawfully changed the status quo in violation of subsection (1)(e) when it refused to pay bargaining unit Member Klascius for the time she spent preparing for a Twilight School class. Salary for work performed outside of the normal workday is a mandatory subject for negotiations, since it concerns a direct monetary benefit. ORS 243.650(7)(a). Our task is, therefore, to decide if the District unilaterally changed the pay for teachers who taught at Twilight School, an extra duty assignment.

Because the expired contract is silent on the subject of payment for teaching at Twilight School, we turn to the parties’ past practice to determine the status

quo concerning this matter. A past practice in labor relations is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. Acceptability means that both parties know about the conduct and consider it the acceptable method of dealing with a particular situation. Mutuality means that the practice arose from a joint undertaking by the labor organization and the employer. *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005).

Here, the evidence demonstrates that the District has offered Twilight School for a number of years. Classes are frequently canceled, often on the day they are scheduled to begin. The District has never paid a teacher for any preparation or instructional time when a class is canceled. Based on this record, we conclude that the past practice of denying teachers payment for canceled Twilight School classes has been both clear and consistent. The practice has been in existence for as long a period as possible—since Twilight School began. Both District administrators and teachers were aware of the practice. Before accepting the assignment, the District vice-principal gave each teacher a form that warned the teacher that payment for teaching at Twilight School is “subject to approval by the personnel administrator and verification of availability of funds.” The pay practice was also characterized by mutuality, since it arose from a joint undertaking. The District notified teachers about the conditions of their salary before Twilight School began, and teachers consented to the arrangement when they chose to take the assignments. We conclude that the District’s denial of pay to teachers for canceled Twilight School classes meets the criteria for a past practice.

ECBC argues that the past practice regarding Twilight School pay is neither fair nor sensible. That consideration is irrelevant to our analysis. Our task is to identify the past practice and then determine whether the employer acted consistent with it. Because the record establishes that the District’s past practice has been to deny teachers payment for canceled Twilight School classes, it follows that the District did not unilaterally change the status quo in violation of ORS 243.672(1)(e) when it refused to pay Klascius for time she spent in preparing for her canceled Twilight School class. We will dismiss this allegation in the complaint.

7. The District violated ORS 243.672(1)(e) by failing to grant Unkefer college credit for in-service courses taken in 2001, 2002, and 2005.

ECBC contends that the District failed to maintain the status quo in violation of subsection (1)(e) when, on April 4, 2005, it denied Unkefer’s application

for college credit for in-service programs she had taken.¹⁷ Teachers' advancement on the salary schedule is tied to the amount of college credits they earn. Consequently, the method that the District uses to determine how many credits teachers have earned directly affects a monetary benefit—their salaries—and is a mandatory subject for negotiations. ORS 243.650(7)(a). In order to evaluate the District's action in denying Unkefer college credit, we begin by looking to the provisions concerning college credit equivalency in the expired collective bargaining agreement.

Article 19 from the 2001-04 collective bargaining agreement granted teachers college credit equivalency for in-service and staff development training offered by the District during the normal work year, and permitted college credit equivalency for in-service training to be used for advancement on the salary schedule. Teachers were required to submit verification of successful completion of college courses in the calendar year in which the courses are taken. Article 16 from the expired collective bargaining agreement established the ECC, a committee that was charged with developing procedures for approving college credit "for experiences that fall outside of college courses." The specific procedures developed by the ECC in accordance with the expired contract provided that its role is to evaluate "[c]ourses, workshops, or clinics, offered outside of the normal work day" that are not financed by District funds.

We find that the language of Article 19 is clear on its face: teachers will receive college equivalency credit for in-service and staff development training offered by the District during the work year. The procedures the ECC implemented under Article 16 apply only to courses, workshops, or clinics of other educational experiences that are offered outside of the normal workday and were not financed by the District.

Based on the language in the expired collective bargaining agreement, we conclude that the District unilaterally changed the status quo in violation of subsection (1)(e) when it refused to grant Unkefer's application for college equivalency credit for District funded in-service classes she had taken during the work year.

¹⁷In its post-hearing brief, the District contends that these allegations of the unfair labor practice complaint are untimely. The District notes that the most recent in-service training for which Unkefer applied for college credit was taken on January 3, 2005—over 180 days from the date on which the original complaint was filed on July 8, 2005. ECBC alleges that the District action which violated subsection (1)(e) was the District's denial of college credit to Unkefer on April 4, 2005. Since this occurred less than 180 days from the date on which the original complaint was filed, ECBC's allegation is timely.

We note that Unkefer submitted certificates indicating that she completed four in-service courses offered by the District on January 3, 2005; May 13, 2002; April 8, 2002; and October 17, 2001. All these certificates were signed by a District administrator. These certificates are sufficient evidence that Unkefer complied with the requirements of Article 19 from the expired collective bargaining agreement by submitting proof of course completion to the District in the calendar years in which she took these courses. We will order the District to grant Unkefer college equivalency credit for these four courses.

In regard to a course that Unkefer took on February 18, 2003, the record contains no evidence that this course was offered by the District as an in-service training or that Unkefer submitted proof to the District that she had completed this course in the calendar year in which she took it. Accordingly, we will not order the District to grant Unkefer college equivalency credit for this 2003 course.

In regard to the remedy, if the District had properly granted Unkefer credit for in-service training taken in 2005, 2002, and 2001, Unkefer would have advanced to the Master's + 45 column on the salary schedule on April 1, 2005. Instead, Unkefer's advancement to the Master's + 45 column occurred at the beginning of the 2005-06 school year, after she completed a summer school course. We will order the District to make Unkefer whole for the loss of salary she suffered due to the delay in advancement to the Master's + 45 column on the salary schedule.

8. The District violated ORS 243.672(1)(e) by changing the method of paying teachers during the summer months

ECBC alleges that the District unlawfully changed the status quo in violation of subsection (1)(e) when it changed the method by which bargaining unit members were paid during the summer months. Prior to 2005, the District allowed bargaining unit members to choose how they wished to receive their summer paychecks. A bargaining unit member could elect to receive three checks on the last workday in June, or one check in June, another in July, and a third in August. On May 4, 2005, the District announced a change in the arrangements for issuing summer paychecks. Teachers who elected to receive three separate checks over the summer would not be permitted to do so. Instead, they would receive one check on June 13 and two checks on June 20, 2005. The District implemented this change in order to avoid an increase in PERS rates that became effective on July 1, 2005.

As previously discussed, monetary benefits are a mandatory subject for bargaining under ORS 243.650(7)(a). This includes the timing of wage payments. We

turn to the expired collective bargaining agreement to determine the status quo in regard to the issuance of summer paychecks. Article 21(C) provides, in relevant part: “Checks for June, July and August will be available on the last day contracted and after all job requirements have been fulfilled. Teachers shall have the option of receiving their July and August paychecks on the fourth Friday of those months.”

We conclude, without difficulty, that the District unlawfully changed the status quo in violation of subsection (1)(e) when it refused to comply with the provisions of the expired collective bargaining agreement concerning the distribution of summer paychecks. These provisions required the District to allow teachers the option of receiving one check in June, a second in July, and a third in August. We will order the District to cease and desist from refusing to allow bargaining unit members to receive paychecks in June, July, and August.

9. The District did not violate ORS 243.672(1)(e) by requiring Firwood teachers to attend an ice cream social on August 31, 2005.

ECBC contends that the District unlawfully changed the status quo when it required Firwood teachers to attend an ice cream social from 5 to 6 p.m. on August 31, 2005. The subject of work hours is mandatory for negotiations. ORS 243.650(7)(a). We turn to the provisions of the implemented final offer to determine the status quo in regard to bargaining unit members’ hours of work.¹⁸ Article 18(A) of the final offer the District implemented provides that the teachers’ normal contract day shall not exceed eight hours, and that staff meetings will not extend beyond the normal eight-hour day except under limited circumstances.

The parties agree that the District can require teachers to work no more than eight hours per day. Here, the only dispute is whether the District required more than eight hours of work, *i.e.*, whether teacher attendance at the Firwood ice cream social was mandated.

¹⁸Both this alleged violation of the PECBA and the alleged violation concerning changes in teachers’ break times (*see* Conclusion of Law 10) occurred *after* the District implemented its final offer on August 8, 2005. All other alleged unfair labor practices occurred prior to District implementation of its final offer. We have held that an implemented offer does not have the same force and effect as a contract. *See Jefferson County v Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 421 (2000) (order on reconsideration.) We have never specified the effect of an implemented offer on the status quo. We conclude that an employer’s lawfully implemented offer creates a new status quo that must be adhered to in determining whether the employer violated subsection (1)(e).

In an August 11, 2005 newsletter to the staff, Firwood Principal Johnson announced that there would be an ice cream social provided by the Parent Teacher Committee on August 31 from 6 p.m. to 7 p.m. and that classrooms would be open. Teachers were required to work a normal workday on August 31. Johnson did not specify whether attendance at the ice cream social was mandatory or optional. The undisputed evidence, however, shows that this event has been optional for at least three years. There was no evidence that teachers asked whether the event was mandatory. Instead, they assumed that they were required to attend.

We conclude that ECBC failed to carry its burden to prove that the District required teachers to attend the August 31 ice cream social at Firwood. Accordingly, the District did not violate the status quo in regard to work hours in violation of subsection (1)(e). We will dismiss this allegation in the complaint

10. The District did not violate ORS 243.672(1)(e) by changing the Firwood teachers' break times.

ECBC contends that the District unilaterally changed teachers' break times at Firwood in violation of the status quo. The new status quo that the District implemented after bargaining provided that kindergarten through fifth grade teachers would receive morning and afternoon relief breaks of at least 15 continuous, duty-free minutes during the student contact day.¹⁹ Prior to the fall of 2005, the Firwood principal scheduled morning and afternoon breaks in the middle of the morning and in the middle of the afternoon. In fall of 2005, after the District had implemented its final offer, the principal changed that practice. In order to free time for first through fifth grade teachers to work on professional development, some morning and afternoon breaks were scheduled close to the teachers' 30 minute duty-free lunch. A 5 to 10 minute prep time was also scheduled between lunch and breaks.

We begin our inquiry by determining whether the change made at Firwood concerned a mandatory subject for bargaining. In general, the employer has the right to control the time at which duties are performed during the workday. For example, we have consistently held that the issue of *how much* preparation time teachers receive is mandatory for negotiations. We have, however, held that the *scheduling* of preparation time is permissive. In reaching this conclusion, we balanced the element of educational

¹⁹The language in the expired collective bargaining agreement provided that teachers in First through Sixth grades would receive morning and afternoon relief breaks. The only change between this provision and the one implemented by the District was to limit the applicability of the language to teachers in First through Fifth grades.

policy involved in such scheduling proposals against the effect the subject has on teachers' employment. We have determined that any proposal that mandates when preparation time is to be provided "directly restricts the District's ability to assign teachers to various duties when the District, in the legitimate exercise of its educational policy rights, decides to schedule nonclassroom activities for students." *Eugene Education Association v. Eugene School District*, Case Nos. C-116/117-81, 6 PECBR 4849, 4855-56 (1981). See also *Int'l Assoc. of Firefighters v. City of Salem*, Case No. C-61-83, 7 PECBR 5819, 5829 (1983) *aff'd* 68 Or App 793, 684 P2d 605, *rev den* 298 Or 150 (1984) (the right to assign duties during certain times within the workday is an inherent management prerogative and permissive for bargaining).

Accordingly, we conclude that by changing the time at which morning and afternoon breaks were scheduled, the District made a change in a subject we have found permissive for bargaining: the scheduling of duties during the workday. Because the change involved a permissive subject, the District's actions did not violate ORS 243.672(1)(e).²⁰

Remedy

We have found that the District unlawfully changed the status quo in violation of ORS 243.672(1)(e) when it reprimanded Grunst in January and February 2005; when it failed to allow teachers to receive summer paychecks in June, July, and August 2005; and when it failed to grant Unkefer college equivalency credit for in-service training courses taken in 2001, 2002, and 2005. We will order the District to cease and desist from engaging in these unlawful actions. ORS 243.676(2).

We will order affirmative relief in regard to the reprimands given to Grunst by requiring the District to remove these reprimands from her file. In regard to the summer paychecks, it does not appear that any additional affirmative relief is needed since bargaining unit members did not lose any money as a result of the District's actions.²¹ Because the District unlawfully denied Unkefer credit for in-service training she had taken, she was unable to advance to the Master's + 45 column on April 1, 2005. She was only able to advance to the Master's + 45 column at the beginning of the

²⁰The parties did not argue that mid-morning and afternoon breaks present health and safety issues which may be mandatory for bargaining. We do not decide the issue.

²¹In fact, some bargaining unit members may actually have earned additional interest when the full amount of their summer pay was deposited a month or two earlier than anticipated in June 2005.

2005-06 school year, after she took a summer school class. We will, therefore, order the District to make Unkefer whole for the loss of salary she suffered due to the delay in advancement to the Master's + 45 column on the salary schedule.

ECBC also asks that we order the District to post a notice of its wrongdoing. We will order an employer to post a notice when its unlawful actions were: (1) calculated or flagrant; (2) part of a "continuing course of illegal conduct"; (3) perpetrated by a significant number of the employer's personnel; (4) affected a significant number of bargaining unit members; (5) significantly or potentially impacted the functioning of the exclusive 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 criteria need to be satisfied for us to order a posting. *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007)

Here we find that an insufficient number of these criteria were met to justify an order that the District post a notice. We do not find the District's actions in violating subsection (1)(e) either flagrant or calculated, or part of a course of continuing illegal conduct. The District's actions did not involve a large number of District personnel, and did not significantly or potentially impact the functioning of ECBC as exclusive representative. The District's violations of the law did not concern a strike, lockout, or discharge. Assuming *arguendo* that the 70 employees affected by the District's actions was a significant number of bargaining unit members, this alone is not enough to justify posting a notice. We decline, therefore, to order the District to post a notice

ORDER

1. The District shall cease and desist from reprimanding Grunst without just cause. The District shall delete any references to the Life Flight helicopter incident from Braunberger's January 12, 2005 letter to Grunst. The District shall rescind the February 3, 2005 letter to Grunst.

2. The District shall cease and desist from refusing to grant Unkefer college equivalency credit for in-service staff development courses. The District shall grant Unkefer college equivalency credit for the in-service courses she attended in 2001, 2002, and 2005, and make her whole for the salary she would have received if she had been placed at the Master's +45 column on April 1, 2005, with interest at 9 percent per annum.

3. The District shall cease and desist from refusing to allow bargaining unit members to receive three summer paychecks in June, July, and August.

4. The remaining allegations of the complaint are dismissed.

DATED this 26th day of November 2007.



Paul B. Gamson, Chair

*Vickie Cowan, Board Member



Susan Rossiter, Board Member

*Board Member Cowan is recused from this matter.

This Order may be appealed pursuant to ORS 183.482.