

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-32-07

(UNFAIR LABOR PRACTICE)

GRESHAM-BARLOW EDUCATION)	
ASSOCIATION/OEA/NEA,)	
)	
Complainant,)	
)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
GRESHAM-BARLOW SCHOOL)	AND ORDER
DISTRICT NO. 10J,)	
)	
Respondent.)	
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On September 23, 2008, this Board heard oral argument on Complainant's objections to a Recommended Order issued on June 11, 2008, by Administrative Law Judge (ALJ) Larry L. Witherell after a hearing on March 5, 6, and 18, 2008, in Gresham, Oregon. The record closed with the receipt of post-hearing briefs on May 9, 2008.

Margaret S. Olney, Attorney at Law, McKanna, Bishop, Joffe & Arms, Portland, Oregon, represented Complainant.

Nancy J. Hungerford and Brian Hungerford, Attorneys at Law, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent.

On August 6, 2007, Gresham-Barlow Education Association (Association) filed an unfair labor practice complaint against the Gresham-Barlow School District (District) alleging that the District violated ORS 243.672(1)(a) and (1)(b) when it involuntarily transferred teachers Josie Minni and Tony Williamson because of their response to the

school improvement process required under the federal No Child Left Behind Act. The District filed a timely answer to the complaint.

The issues in this case are:

1. Did the District violate ORS 243.672(1)(a) when it transferred Josie Minni from East Gresham Elementary School to East Orient Elementary School for the 2007-2008 school year?

2. Did the District violate ORS 243.672(1)(a) when it transferred Tony Williamson from East Gresham Elementary School to Hall Elementary School for the 2007-2008 school year?

3. Did the District's decision to transfer Minni and Williamson interfere with the administration of the Association in violation ORS 243.672(1)(b)?

RULINGS

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

FINDINGS OF FACT

Introduction

1. The District, a public employer, has 11 elementary schools, 5 middle schools, 3 high schools, and a charter school.

2. The Association is a labor organization that represents approximately 700 District employees who are required to possess an academic certificate, license, degree, or equivalent issued by the State of Oregon, an institution of higher education, or a professional society.

3. The District and the Association were parties to a collective bargaining agreement in effect from July 1, 2004 through June 30, 2008.

4. At all times relevant to this complaint, the District employed the following administrators:

Tadd Gestin – Principal, East Gresham Elementary School
Mike Harris – District Administrator

Stephen Lewis – Director of Human Resources
Jim Schlachter – Director of Education

5. Prior to his transfer at the end of the 2006-2007 school year, Association bargaining unit member Tony Williamson taught music at East Gresham Elementary School (East Gresham) for 16 years. He has served in a number of Association positions, including co-president, building representative, delegate to the state-wide representative assembly, political action chair, and UniServ Council president¹. During the 2005-2006 school year, Williamson was Association building representative at East Gresham. He did not serve as East Gresham building representative during the 2006-2007 school year.

6. Association bargaining unit member Josie Minni began teaching at East Gresham as a probationary teacher in the 2005-2006 school year. During the 2006-2007 school year, Minni was the Association building representative at East Gresham. She also served on the UniServ Council from 2005 through 2008.

7. The building representative acts as a spokesperson, liaison, and troubleshooter for the staff regarding the collective bargaining agreement and working conditions in general. The building representative also talks regularly with the principal about bargaining unit members' concerns.

2005-2006 School Year

8. During the 2005-2006 school year, a number of East Gresham teachers complained about Principal Gestrin to Building Representative Williamson. Williamson spoke with UniServ Consultant Judy Casper about these concerns, and the Association decided to survey staff members about Gestrin's performance.

9. In the spring of 2006, the Association surveyed staff about Gestrin's performance. The survey results indicated that the majority of East Gresham teachers believed that Gestrin's performance was fair or poor in a number of areas. In June 2006, Casper discussed the survey results with Gestrin. In the fall of 2006, Casper also talked with Director of Education Schlachter, Human Resources Director Lewis, and District Superintendent Ken Noah about the survey results. She told the District administrators that she hoped to work with Gestrin, as she had with another District building principal, in order to improve teacher-principal relations. Gestrin was unwilling to work with Casper, however.

¹The UniServ Council is a group of representatives from several local associations in area school districts who meet regularly to discuss matters of concern to the union and its members.

10. Toward the end of the 2005-2006 school year, Gestrin scheduled classroom observations and evaluations for nearly half the East Gresham teaching staff. A number of teachers were concerned that these observations and evaluations were not timely under the terms of the collective bargaining agreement, and complained to Williamson. Williamson talked with Association Grievance Chair Jan Speciale, who contacted District Human Resources Director Lewis. As a result of these discussions, Gestrin postponed some end-of-the-year observations and evaluations until the 2006-2007 school year.

11. In March or April of the 2005-2006 school year, East Gresham teachers complained to Williamson about the use of their classrooms by the SUN and Café programs. SUN and Café are before and after school programs whose staff were not District employees. As a result of these programs, some East Gresham teachers were unable to work in their classrooms before and after their instructional day, during their preparation time. Williamson talked with Speciale and Gestrin about these problems, but they were unable to find a solution by the end of the school year.

12. Toward the end of the 2005-2006 school year, Williamson asked Minni to serve as the Association building representative at East Gresham for the 2006-2007 school year. Minni agreed to do so, and was elected building representative for the following year.

2006-2007 School Year

13. During the 2006-2007 school year, East Gresham had 24 or 25 licensed teachers, 4 or 5 other licensed professionals, 22 educational assistants, 2 custodians, 2 secretaries, 2 SUN program staff members, and a principal. Approximately 530 students attended East Gresham. The State provided the District approximately \$5,700 per student. East Gresham was designated as a Title I school because it had a high proportion of students considered economically disadvantaged under federal guidelines. All District Title I schools received additional funds from the state.

14. The federal No Child Left Behind Act, which became law in 2002, requires that each school district annually evaluate its schools to assess whether the schools are making adequate yearly progress (AYP). Measurement of AYP is based upon factors specified in the law, including the standardized test results in content areas such as English/language arts and math; school attendance or graduation rates; and student participation rates in state-wide standardized tests. The objective is to measure student achievement in each school based on a standardized scale.

15. If a school does not achieve AYP for two consecutive years, the school is placed on school improvement status for a minimum of two years or until the school demonstrates AYP. A school on school improvement status is subjected to certain sanctions until the school demonstrates it is achieving AYP

16. During the summer of 2006, the Oregon Department of Education (ODE) notified the District that East Gresham was not expected to make AYP. On September 6, 2006, ODE gave the District formal and final notice that East Gresham failed to make AYP for the second year. As a result, ODE placed East Gresham on school improvement status. East Gresham was the first District school to face serious sanctions as a result of being placed on school improvement status.²

In its formal notification, the ODE warned: "This status remains in effect for a minimum of two years. Title 1-A School Improvement status brings sanctions that increase each year until the school makes adequate yearly progress. School Improvement status requires that the District and school take specified documented actions."

According to the ODE notification, during the first year of school improvement (2006-2007) the District was required to:

- "1. Notify parents of Title 1-A School Improvement status before the first day of school.
- "2. Offer parents the opportunity to choose a public school in your district that is not in Title 1-A Improvement status, with transportation costs covered at the district's expense. * * *
- "3. Set aside an amount equal to 20% [*sic*] of your Title 1-A allocation for Title 1 School Improvement related expenses, including public school choice. * * *
- "4. Develop a district plan to provide technical assistance to any school in Title 1-A Improvement status.

²Schlachter testified that in the past, other District middle and high schools failed to make AYP. However, because these schools do not receive Title I funds, this designation resulted in no sanctions.

- “5. Assist the school(s) in its revision of the School Improvement Plan to include activities that cover two years and are specifically designed to ensure the school(s) will meet adequately [*sic*] yearly progress.”

If East Gresham did not make AYP during its first year on school improvement status, ODE required the District to take the following steps during year two of school improvement (2007-2008): again notify parents about the school’s status, offer parents the opportunity to choose another school and provide transportation, offer and provide supplemental educational services to students, revise and implement the School Improvement Plan, and provide professional development to staff.

If East Gresham did not make AYP during its second year on school improvement status, ODE required the District to take some or all of the following additional steps during year three of school improvement (2008-2009): replace some of the school staff, institute new curricula, decrease management authority over the school, appoint an outside expert, extend the school year and/or school day, and restructure the school.

If East Gresham did not make AYP during its third year on school improvement status, ODE required the District during year four of school improvement (2009-2010) to prepare a restructuring plan that would propose implementing at least one of the following steps: replace all or most of the school staff, contract with an outside entity to operate the school, turn the school over to the ODE for operation, re-open the school as a charter school, or restructure the school’s governance.

If East Gresham did not make AYP during the fourth year on school improvement, then during year five of school improvement (2010-2011) ODE required the District to implement and put into operation the restructuring plan developed in the preceding year.

17. When one school is put on school improvement status, the entire district is also put on improvement status. One of the consequences of this development was that the District was required to take approximately \$180,000 of Title 1 money away from the Title 1 schools and allocate it to district-wide projects and programs. The District was also concerned about future and prospective sanctions, particularly the restructuring requirement and the possible replacement of school staff.

18. Consistent with ODE requirements, East Gresham needed to develop a school improvement plan during the 2006-2007 school year. As part of this process,

ODE required the District to hire a regional school improvement coordinator (Coordinator). The Coordinator could not be an East Gresham staff member.

In summer 2006, after the District received preliminary notice that it was not making AYP, the District hired Chuck Tomac as Coordinator at East Gresham. Tomac was a recently retired District principal who was technically employed and compensated by the Multnomah Education Service District (Multnomah ESD). Tomac provided services to East Gresham through a contract between the District and the Multnomah ESD. During 2006-2007, Tomac worked about nine hours per week at East Gresham. Tomac had a table and a computer next to the library at East Gresham, and also had an office at the central District office. He reported to Tim Drilling, director of student achievement, and Director of Education Schlachter. The District also employed Tomac to provide other services to the District unrelated to the school improvement process at East Gresham.

Tomac's role in the District was to train and advise East Gresham staff in the development of a school improvement plan. Tomac had no supervisory authority over any East Gresham staff members and could not evaluate, discipline, hire, or fire staff, or effectively recommend such actions. Part of Tomac's services were paid for by an ODE grant that the District received in late 2006 or early 2007.

19. Under Oregon law, schools must undertake school improvement through SITE councils, which are groups composed of representatives from the teaching, classified, and administrative staffs at a particular school building, and community members. In the fall of 2006, the District used the existing East Gresham SITE council as the core for the school improvement planning team. The school improvement planning team was composed of the members of the SITE council and others, such as the English language learning teacher, who were added because of their necessary expertise. Coordinator Tomac and East Gresham principal Gestrin were also school improvement planning team members. Sam Breyer, a third-grade/fourth-grade teacher, was the school improvement planning team and SITE council facilitator. As a result, he presided over much of the school improvement process and many of the meetings.

The school improvement planning team at East Gresham was responsible for developing the school improvement planning process. The school improvement plan had to be approved by the District and then submitted to ODE for acceptance and approval. In January 2007, after the school improvement plan was accepted and approved by ODE, the school improvement planning team was dissolved and the SITE council assumed responsibility for the implementation of the school improvement process and plan.

20. During the fall of 2006, the school improvement planning team held numerous meetings regarding the school improvement process, and conducted six or seven workshops for the East Gresham teaching staff. The team collected data regarding student achievement, attendance, behavior, and parent perceptions.

At an October 11 staff in-service meeting (referred to as the carousel meeting), the school improvement planning team displayed this data for East Gresham teachers. Staff were invited to review the information and comment about it. The objective of the in-service meeting was to encourage staff to consider and address the condition of the core instructional program at East Gresham.

At an October 13 session to debrief the carousel meeting, the school improvement planning team concluded that it made some real breakthroughs by having the staff examine student achievement data. However, the team decided that several teachers were resistant to the need for school improvement. Coordinator Tomac and the school improvement planning team believed the entire staff needed to support the school improvement process. The school improvement planning team also concluded that the staff needed to agree on a common mission for East Gresham.

21. Tomac contacted ODE official Kathryn Gardner, who agreed to conduct a November 1 workshop for East Gresham staff to help develop a common vision for the school.

During the morning session of the workshop, staff broke into small groups and each group discussed and developed its concept of the ideal school. During the small group meetings, someone in the group that included Minni brought up a desire to have a vegetable garden, more computers, a mobile laptop cart, and a corkboard installed in the halls of the school in order to display student work. While the groups were still meeting separately, Minni approached Gardner and asked if the school improvement grant could be used to purchase computers or corkboard. Gardner told Minni that improvement funds could not be used to purchase computer technology, but could be used to purchase corkboard if it could be justified as part of the school improvement vision.

District Education Director Schlachter observed the morning session of the November 1 workshop, but left before the lunch break. Schlachter was concerned about the reaction of Minni and other teachers to Gardner's presentation. He believed that many teachers at East Gresham were resistant to change, and that this resistance would mean that the school improvement would be unsuccessful. Schlachter talked with District Human Resources Director Lewis about his concerns.

During the lunch break, Principal Gestrin, Coordinator Tomac, and school improvement planning team facilitator Breyer discussed Minni's questions about the corkboard. All three were frustrated because they believed Minni was spending valuable time on a trivial detail that was unimportant to the entire school improvement process.

After lunch, Gardner led an all-staff discussion regarding the results of the small group meetings. Minni again asked Gardner if the grant money could be used to purchase computers and corkboard. Gardner responded that grant funds could not be used to buy computers, but could be used to purchase corkboard if it could be shown that the corkboard was consistent with the East Gresham mission statement

Also during the all-staff discussion, Gardner stated it was important for everyone in the school to work together. She said that unless someone has been in the principal's position, that individual would never understand the pressures on the principal from parents, the school board, and the district office. Minni interrupted Gardner and said that she believed that teachers best understood the situation in a school.³

Tomac was deeply upset by Minni's remark. He knew that Gardner had volunteered her time and expertise to assist East Gresham teachers with their school improvement plans, and he was embarrassed by Minni's interruption, which he thought was rude.

22. At the beginning of the 2006-2007 school year, Minni told Gestrin that she was the new East Gresham building representative, and asked to meet weekly with him to discuss matters of mutual concern. Although Gestrin and Minni were unable to meet weekly, they maintained regular contact with one another throughout the year

Minni continued discussions with Gestrin about the displacement caused by the SUN and Cafè programs. Although Gestrin was very receptive to Minni's concerns and attempted to solve the problem, he and Minni were unable to reach a solution.

Gestrin held weekly 30-minute, all-staff meetings on Tuesdays, after the instructional day had concluded. Minni believed Gestrin held more meetings than allowed by the collective bargaining agreement. She spoke with Gestrin about this

³We credit the descriptions of the event given by Tomac, and Gestrin. Minni did not deny the incident, but instead stated, "I don't remember doing that at all." Tomac and Gestrin, on the other hand, clearly remembered Minni's statements. Their recollection of the events, as well as their reactions to them, support their version of the November 1 meeting that Minni did in fact engage in the above-described conduct

concern. Gestrin eliminated Minni's complaint by rearranging the schedule for his all-staff meetings.

A number of teachers also complained to Minni that they were not receiving all the preparation time required by the collective bargaining agreement.⁴ Minni and Association Grievance Chair Speciale talked with Gestrin about the problem, and they discussed a number of different schedules that would guarantee teachers an adequate amount of preparation time. In December 2006, Gestrin changed East Gresham building hours and the teacher work day in order to provide sufficient preparation time.

Minni also talked with Gestrin about a complaint she had received from the kindergarten teachers. Kindergarten teachers often lost part of their lunch or preparation time because they needed to supervise students until the students were picked up after the end of the morning class. Minni and Gestrin were unable to satisfactorily resolve the problem.

23. Fourth-grade students were scheduled to take a statewide writing test in February 2007. In order to prepare for this test, fourth-grade teachers agreed to conduct a preliminary writing assessment of their students in November 2006. Coordinator Tomac arranged to have the November tests scored by Heidi Jones, an East Gresham teacher on maternity leave. In an e-mail dated November 29, 2006, Tomac asked Minni if she would make arrangements to get the student writing tests to Jones and provide a simple scoring sheet for each test.

Minni wrote back.

"Actually, until we get the issue with our prep minutes worked out, I'm not willing to do this. If this is a directive, I would request money for doing work outside of my normal work day and description. Thank you."

⁴Article 24, subsection B, provides the following preparation time for teachers:

"Elementary teachers will receive a minimum of five hundred and twenty-five (525) minutes weekly. Two hundred (200) minutes of that five hundred twenty-five (525) will be member directed and uninterrupted. Within the five hundred twenty-five (525) minutes, each elementary member will receive a minimum of twenty-five (25) minutes preparation time during the student day on the non-early release days. Blocks of fifteen (15) minutes or less during the student day are not to be counted for purposes of meeting the five hundred twenty-five (525) minutes requirement of prep time."

Tomac responded to Minni:

“Your response surprises and confuses me; I totally expected a response of, ‘I’d be glad to.’ Of course this was not a ‘directive.’ as I have no authority, I am just here to support.”

“I recruited an outside person trained in state scoring to score your students’ work samples for you. I thought my request was simply for you to provide a scoring cover sheet, to contact Heidi to take your papers to score them, and to connect the other fourth-grade teachers with Heidi

“Three assumptioins [*sic*] led me to think this was a simple request. My first assumption was that the scoring of student work samples was part of a teacher’s responsibilities, not ‘outside of...normal workday and description.’ We had agreed to arrange for an outside scorer because of the short time frame and the desire for consistency between classrooms. I honestly viewed this as a simple, 15-minute task that would easily fit into prep on any given day, but especially on a Wednesday. Another assumption was that you would already have a cover sheet as part of the annual scoring of writing work samples for the student portfolio. My final assumption was that you would be willing to support your team in this way.

“So...I am not sure where we go from here. I guess your grade level team, along with Tadd, will need to decide who is going to take care of the arrangements with Heidi. If we are using students’ writings as your PLT focus area, ideally they should be scored by next Tuesday; unless Heidi begins scoring soon, it is unlikely that she can help us meet the timelines and purposes we agreed upon last week ” (Emphasis in original.)

On November 30, 2007, Minni responded to Tomac:

“Perhaps I misunderstood your request Chuck. The way I interpreted it, the task would take much longer than 15-minutes. I thought you asked me to contact Heidi, talk with her, and somehow arrange for her to get these papers. Am I suppose [*sic*] to mail them to her? Am I going to the post office? Am I suppose [*sic*] to drive them to her? Is she suppose [*sic*] to drive here and pick them up? I don’t know what you’re asking there or what you expect to be done. Secondly, I read you wanted me to provide a cover sheet for each paper written by all the students in 4th grade with a scoring guide.

I would have to create the appropriate scoring guide (it changes slightly year to year), find out how many copies each teacher needed, and then make copies for them. Again, perhaps I misunderstood the request, but that is what I thought you were asking me to do. I'm sure you can see that that would take a lot longer than 15 minutes."

Minni was upset by Tomac's implication that she was unwilling to support other teachers. Two other fourth-grade teachers wrote Tomac to assure him that all of the fourth-grade teachers, including Minni, were working together to do the best job possible for the students.

Tomac obtained a scoring sheet for the writing tests from another school, made sufficient copies for the student writing samples, and arranged to have the tests and scoring sheets delivered to Jones. It took Tomac about 15-20 minutes to accomplish these tasks.

24. Some time in November, an educational assistant complained about her salary to Minni as Minni, Tomac, and other East Gresham staff members were eating lunch in the staff room. The educational assistant told Minni that she was frustrated because she did the same work as another Title I educational assistant, but was paid less. Minni then talked with the assembled group about her frustrations with the fourth-grade reading program, which the teachers had not yet begun. Minni felt that Principal Gestrin had not given them enough time to plan and implement the reading program. Minni asked Tomac what he thought of their problems. Tomac told Minni that it was counter-productive to complain behind the principal's back and that they should talk with Gestrin about their concerns. Minni replied that they were only "letting off a little steam" by discussing their frustrations. Tomac responded that research demonstrated that "letting off steam" could be destructive to a work environment. Minni became very emotional during this conversation and abruptly left the staff room. She spent a few minutes composing herself in the restroom before returning to her classroom.

25. As part of the school improvement process, East Gresham teachers were organized into horizontal and vertical professional learning teams (PLTs). The horizontal PLTs consisted of all teachers at a particular grade level. The vertical PLTs were formed by subject, and consisted of groups of teachers, regardless of grade level, who focused on a particular subject, such as math, science, or language arts.

On December 6, 2006, the school improvement planning team held an in-service meeting for East Gresham staff in which Jacqueline Rafael from the Northwest Regional Lab assisted the staff in organizing PLTs.

Rafael found it particularly difficult to work with the fourth-grade PLT. Minni and the other teachers had a hard time focusing on the PLT process. The fourth-grade teachers felt that they were facing particularly difficult challenges during the start of the 2006-2007 school year. Because of large class sizes, the District added a new fourth-grade teacher on September 27, 2006, a few weeks after the school year began. The formation of the new class increased the workload for the other fourth-grade teachers because their classes were temporarily disrupted when some of their students transferred into the new class, and they also had to help orient the new teacher to their curriculum and support her work. Fourth-grade teachers also had a shortage of and turnover in their educational assistants.

When they met with Rafael, the fourth-grade teachers told her that because of the problems they had experienced, they needed time to plan and implement their reading program. Tomac, who was sitting in on the meeting, told the teachers they needed to work on students' writing skills as part of the school improvement process. The fourth-grade teachers became upset with Tomac's insistence that they focus on writing. Eventually, Principal Gestrin joined the meeting and told the teachers that he would try to find them some additional time to work on their reading program if they would agree to emphasize writing in their classrooms.

Because of the conflict at the session with the fourth-grade PLT, Rafael was unable to accomplish all of her objectives on December 6. She returned in January 2007 to provide additional training to East Gresham's fourth-grade PLT. Rafael told Tomac that she had never experienced such futility with a PLT as with East Gresham's fourth-grade PLT, and was almost ready to recommend that the fourth-grade PLT be disbanded.

26. As the school improvement planning process developed during the fall of 2006, Minni, Williamson, and other teachers became concerned about the workload of the East Gresham teachers. During either the November 2006 meeting with ODE facilitator Gardiner or the December 2006 meeting with Northwest Regional Education Laboratory facilitator Rafael, Williamson told the facilitator that she needed to talk to the union leadership because there were workload issues involved in the school improvement process.

27. The Association was worried that teachers were required to spend a significant amount of meeting time on the planning process and undertake additional assignments related to school improvement without compensation. Although the District arranged for substitutes to take teachers' classes so that they could attend meetings, preparing for the substitutes required extra work.

On December 14, 2006, Minni met with UniServ Consultant Casper to discuss the impact of the school improvement process on the East Gresham staff workload. Minni told Gestrin that she was taking an Association day to meet with Casper. During their meeting, Minni and Casper prepared a survey to determine how much time teachers were spending on school improvement issues, particularly in vertical and horizontal PLT meetings. At some point in the meeting, Casper telephoned Schlachter and obtained information about school improvement, Tomac's role in the process, and Tomac's salary.

On January 8, 2007, Minni distributed the survey she and Casper prepared. Minni shared a copy of the survey with Gestrin. The survey stated, in relevant part:

"Hello staff,

"If you were at last week's 5 minute meeting, please dis-regard [*sic*] this notice. I've received many emails from people who were not able to come and asking for the information they missed. I may not be able to inform you of what you missed sometimes, so it would be best to ask a 'buddy' to pick up any paperwork for you and fill you in.

"I handed out a form I made on which I would like you to keep track of time spent working on Horizontal and/or Vertical teams, both within the 8 hour work day and outside of it. * * * All you need to do is mark the minutes spent in the appropriate box. This is important for us both as a union and as a district. Our school is setting the standard for all other schools to look to as far as what we have to put in to our AYP goals and directives.

* * * * *

"Please help GBEA maintain the quality parameters of our contract by keeping track of the time spent during our year of AYP in the following areas:

[The survey then provided spaces for staff to list time spent in horizontal and vertical PLT meetings]

* * * * *

"Were you given compensation/trade time for time spent outside of the work day for any of the preparation of these meetings (doing research,

reading research or other materials, visiting other locations, etc)? Please provide dates and hours of time spent that was compensated:

“Please provide dates and hours of time spent doing the above that was NOT compensated:

“Have you received sufficient resources (books, time, etc) to assist you in the implementation of any new structure, program, plan, etc.?”

“What would you like to get that you are not currently receiving?”

“What do you see we could use, school-wide that would greatly improve student learning?”

“Do you feel your [Educational Assistant] has had enough training to assist you properly?”

“Do you feel you have enough time to plan with your EA?” (Emphasis in the original.)

28. From December 7, 2006 through March 13, 2007, East Gresham teachers participated in numerous workshops on horizontal and vertical PLTs.

29. In January 2007, East Gresham also began the process of adopting a positive behavioral support (PBS) program, which sought to establish school-wide expectations for student conduct based on the principles of “be responsible, be respectful, be safe, be caring.” At an all-staff meeting, Williamson expressed a concern shared by other staff – that it would be difficult to simultaneously implement both the PBS and school improvement programs. There were two eight-hour PBS sessions held on January 30 and February 9, 2007.

At the January 30 PBS meeting, East Gresham teacher Kristi Richards, who was part of a team making a presentation about PBS, concluded that Minni and Williamson were trying to block the team’s efforts to implement the program. Richards abruptly told Minni and Williamson to be quiet.

After the meeting, Richards and Minni talked about what happened. Minni apologized for upsetting Richards and anyone else at the meeting. Richards also apologized for speaking sharply to Minni. Richards told Minni that she contributed a lot to meetings and that people listened to her, but that Minni sometimes talked too much. Minni agreed to ask fewer questions at the meetings.

Williamson also spoke with Richards after the meeting. He expressed concern that the school improvement process was not truly teacher led, but was a program the administrators sought to impose on teachers. Richards apologized for speaking curtly to Williamson.

30. During meetings concerning school improvement and the PBS program, Minni and Williamson often participated in the discussions and regularly questioned the meeting facilitators about the school improvement process. At times, Minni and Williamson expressed personal concerns about the programs. Other times, they discussed concerns shared by other teachers in the building.

At East Gresham all-staff meetings, Minni regularly questioned Principal Gestrin about the amount of preparation time teachers received, and whether teachers were getting the amounts required by the collective bargaining agreement. Minni also expressed concern about the hours spent in meetings, and whether the meetings increased teacher workload in violation of the contract.⁵ Tomac rarely attended these staff meetings.

Williamson was concerned that the school improvement process was not guided by teachers, but imposed upon the staff by administrators. Williamson often discussed this subject with school improvement program team facilitator Breyer, with whom he had a good working relationship.

Some East Gresham teachers were disturbed by Minni and Williamson's participation in meetings because they believed that Minni and Williamson were impeding the work of school improvement. Other teachers appreciated Minni and Williamson because they believed the two teachers expressed concerns other teachers shared but were reluctant to discuss publically.

31. Some time in January 2007, school improvement team program facilitator Breyer sent an e-mail to Minni in which he asked that she talk less during meetings in order to allow others to participate more. Breyer acknowledged that teachers valued Minni's opinions, but suggested that she might be more effective if she did not talk so much at meetings. Minni discussed Breyer's e-mail with him, and told Breyer that she would be more careful to avoid the appearance of dominating the discussion at meetings.

⁵Article 24 from the parties' 2004-2008 collective bargaining agreement provides that the workday will not exceed eight hours.

Also in January 2007, Breyer asked Williamson to talk less during the school improvement meetings.

32. Based on his observations of their participation in meetings and workshops, Coordinator Tomac concluded that Minni and Williamson were obstacles to the school improvement process at East Gresham. Tomac was less troubled by Minni's comments at meetings than he was by her gestures and actions. He believed that Minni regularly expressed her negative feelings about school improvement by rolling her eyes, shrugging her shoulders, and loudly disagreeing with ideas at meetings. Tomac thought that Williamson often brought up issues in meetings that were unrelated to the topics under discussion and that as a result, meetings were unproductive. Tomac believed that both Williamson and Minni talked too much at meetings and prevented other staff members from offering their opinions and ideas. While Tomac thought that other East Gresham staff members were resistant to school improvement, he believed that Williamson and Minni were the most negative about the process. Gestrin shared many of Tomac's opinions about Williamson and Minni. However, neither Gestrin nor Tomac ever discussed their concerns with Williamson or Minni. They knew that school improvement program team facilitator Breyer had talked with Minni and Williamson about their behavior at meetings, and thought that Breyer was taking care of the problem.

Tomac regularly spoke with Director of Education Schlachter about the school improvement process at East Gresham. Tomac tried to give Schlachter an optimistic yet realistic assessment. He explained that there were some barriers to school improvement and that some staff members did not support the school improvement efforts. Tomac told Schlachter that he considered Minni and Williamson part of the problem in achieving AYP.

Schlachter also talked with Gestrin about progress with the school improvement process and visited East Gresham three or four times between September 2006 and February 2007.

33. In February 2007, Schlachter and District Human Resources Director Lewis began considering staffing for the 2007-2008 school year. Although Lewis was ultimately responsible for all personnel decisions, including transfers, he regularly consulted with Schlachter about staffing issues. Teachers who desired a transfer to another school were required to file their transfer request by February 15. Teachers who intended to retire often gave the District notification during this same time period.

34. By mid-February 2007, the District knew that four East Gresham teachers intended to retire. The District also knew that three teachers had applied to transfer

from East Gresham to other schools. As a result, out of 24 or 25 teachers, East Gresham faced a turnover of seven teachers. Schlachter considered the upcoming years of AYP and school improvement. As a result of both the existing situation and the possibility of future sanctions, Schlachter and Lewis decided to make staffing changes that would create a more positive environment for school improvement at East Gresham. Schlachter and Lewis wanted to create a critical mass of new staff in the building who would support school improvement efforts. They also thought that by making preemptive changes in staffing, they could convince ODE that the District had already made the necessary staff changes that might be required in the future. Both administrators wanted to do what they could to help East Gresham avoid further sanctions.

Some teachers whom the administrators considered as impeding the school improvement process were leaving East Gresham. Jill Brooks and Carron Lund applied for a voluntary transfer to other schools. Fred Riedel and Sara Lagasse notified the District they intended to retire. As a result of these changes and based on their belief that Minni was one of the most outspoken challengers to the school improvement process, Schlachter and Lewis decided to transfer Minni.

35. Lewis knew a music teacher at Hall Elementary School who wanted to be a principal. Because the teacher had worked in only one school, he did not have the diversity or depth of experience to be a successful applicant for a principal position in the District. As a result, Lewis considered transferring him to East Gresham where he could work with the principal there, become more involved in the school improvement process, and improve his chances of getting a job as an administrator. Lewis met with the individual and offered him the opportunity to transfer to East Gresham. The teacher agreed to the transfer.⁶ In order to make room for him, Schlachter and Lewis then decided to transfer Williamson from East Gresham to Hall Elementary School.

36. Shortly after discussing the transfer plans with Lewis, Schlachter met with Tomac. He showed Tomac the list of changes he proposed for East Gresham, which included voluntary and involuntary transfers, and asked what Tomac thought of the proposed staffing. Tomac agreed that Minni and Williamson were impediments to what East Gresham needed to accomplish, and approved their involuntary transfers.

37. Schlachter did not know that Minni was East Gresham building representative. Schlachter knew that Williamson had been active in the Association in

⁶The teacher did not ultimately transfer to East Gresham but accepted a position in another school district.

the past, but did not know if Williamson was currently active in Association affairs. Neither Lewis nor Tomac knew that Minni or Williamson held positions in the Association or were otherwise involved in union affairs during the 2006-2007 school year.

38. Lewis and Schlachter then met with Gestrin. They told him about the staff changes they had decided to make at East Gresham, including the involuntary transfer of Minni and Williamson. They asked Gestrin if he could support the staffing changes and whether the changes would be positive. Gestrin agreed with the changes, and also agreed that they would have a positive effect on the school improvement process.

39. On February 28, 2007, Lewis met with Minni and gave her a letter in which he notified her that she would be transferred to East Orient Elementary School for the 2007-2008 school year. Minni asked why she was being transferred, and Lewis responded that the District was making a lot of changes and believed that her transfer would be in the best interest of East Gresham. Lewis told Minni that she need not tell other staff members that her transfer was involuntary, and could describe it as a voluntary transfer if she wished to do so. Minni refused. Minni also asked if she was the only one being transferred, and Lewis told her that Williamson was also being involuntarily transferred.

At some later date, Minni asked to teach at Hall Elementary School rather than East Orient. Hall is a Title 1 school, and Minni would receive special advantages on her student loans if she taught at a Title 1 school. Since there was an opening at Hall, Lewis was able to accommodate Minni's request and reassigned her to Hall instead of East Orient.

40. Lewis was unable to meet with Williamson to discuss his transfer because Williamson was attending an out-of-state conference. Some time during the first week of March, after Williamson returned from the conference, Lewis talked with him about his transfer to Hall Elementary School. Williamson had already learned about his transfer from Minni, however.

41. Minni contacted UniServ Consultant Casper, and Casper arranged to represent Minni and Williamson at separate meetings to discuss the two transfers with Lewis. At these meetings, Lewis told Casper that Minni and Williamson were not being transferred because of bad evaluations or complaints. Lewis explained that the District believed Minni and Williamson were not going in the same direction as the rest of the building in terms of school improvement. Lewis told Williamson that he was a negative influence on the positive direction of school improvement at East Gresham. At each of

these meetings, Casper asked if the transfers were made because Minni and Williamson were union representatives. Lewis stated that he had no idea that Minni or Williamson was active in the union.

42. Article 10, Section C, of the parties' 2004-2008 collective bargaining agreement provides, in relevant part:

"1. District initiated transfers are those in which the member is transferred from one school to another, one subject area or grade level to another or to fill a new or vacated position on the initiation of the District.

"* * * * *

"3. The District will consider the criteria listed below when using a District-initiated transfer:

- "a. Instructional and licensing requirements
- "b. Service to the District (seniority)
- "c. Basic qualifications as included on the posting and other special training and skills as may be applicable

"In addition, the District will also consider the length someone has worked in the current school and position, when the person was last transferred, where the person is in a looping sequence, and any professional change processes in which the member is already involved. District-initiated transfers shall not occur within the last two (2) years prior to retirement at unreduced PERS benefits, provided the member has given the district written notice of retirement effective that date or sooner.

"4. Notice of District-initiated transfer shall be given to the members of the bargaining unit at least thirty (30) days before the date of the transfer, except in cases of extreme emergency.

"5. A member who is transferred at District initiative will be extended the opportunity for a meeting with the superintendent, the appropriate building administrators and, at the member's option, the grievance rep, UniServ rep and other Council officials. The member will have the opportunity to make known his/her wishes in regard to the transfer. If, after the meeting, the member is to be

transferred against his/her will, he will receive an additional six (6) hours of tuition reimbursement so long as it is taken in the year of transfer or during the summers preceding and following the year of transfer and is related to the member's new assignment and responsibilities."

43. On March 23, 2007, Casper wrote an e-mail to Lewis:

"Dear Steve,

"It is my understanding from the separate meetings held with Josie Minni and Tony Williamson, and myself on March 21 that the reason the district is involuntarily transferring them is because they are perceived as 'not moving in the same direction' as the building is moving, in regards to AYP strategies. Both of these members are/were GBEA Building Reps (Josie, this year and Tony, last year – who is also currently the OEA UniServ Council President). Even though you stated you had no knowledge that they were the Building Reps, their principal, Tadd Gestrin, absolutely did."

44. On March 26, 2007, Lewis responded to Casper with the following e-mail:

"Judy–

"* * * * *

"In the first paragraph, you have accurately captured the reason for the transfer that I stated in the meetings with Tony and Josie. I indicated that the district wished to have all of the staff moving in the same direction in the efforts to move East Gresham out of the 'AYP doldrums.'

"As I stated in the meetings, the decision that I made to transfer these two individuals had nothing to do with their activities on behalf of their fellow members at East Gresham. I reiterate that I did not know about their status as building reps when I made the decision to transfer."

43. Some time in March 2007, Minni, accompanied by teacher Kelly Walsh, met with Gestrin and asked about her transfer. Gestrin explained that Human Resources Director Lewis came to him with a list of changes and asked if Gestrin could agree with them. Gestrin told Lewis that he agreed with the changes. Minni asked if she did

anything wrong, and Gestrin said she had not. Gestrin later wrote a letter of recommendation for Minni.

44. On the last day of the 2006-2007 school year, Williamson and Association President and East Gresham teacher Regina Norris met with Gestrin about Williamson's transfer. Gestrin explained that he had nothing to do with the decision to transfer Williamson, but that the decision had to do with school improvement and the children.

45. Three teachers turned down Norris' request that they serve as East Gresham building representative for the 2007-2008 school year. One teacher told Norris that she was afraid of the consequences if she became building representative. Another teacher told Norris that she did not want the job because she was pregnant, and the third teacher gave Norris no reason for refusing to take the position.

46. After the District involuntarily transferred Minni and Williamson, some East Gresham teachers were afraid to speak openly at school improvement meetings and workshops. They were concerned that the District would take adverse action against them if they made comments about school improvement that District administrators thought were negative.

47. The District infrequently chooses to involuntarily transfer Association bargaining unit members.

CONCLUSIONS OF LAW

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

2. The District did not involuntarily transfer Josie Minni and Tony Williamson from East Gresham Elementary School because of their Association activities in violation of ORS 243.672(1)(a).

Under ORS 243.672(1)(a), it is unlawful for a public employer to interfere with, restrain, or coerce employees "in the exercise" or "because of" the exercise of rights guaranteed by ORS 243.662. ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." The Association alleges that the District violated both the "because of" and "in the exercise" prongs of subsection (1)(a) when it

involuntarily transferred Minni and Williamson at the end of the 2006-2007 school year.

To determine if an employer violated the “because of” portion of subsection (1)(a), we examine the employer’s reasons for the disputed action. If the employer acted “because of” an employee’s exercise of rights protected by the Public Employee Collective Bargaining Act (PECBA), the employer’s actions are unlawful. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). In order to show a violation of the “because of” prong of subsection (1)(a), it is not necessary to demonstrate that an employer acted with hostility or anti-union animus. Nor must a complainant prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8646 n 10 (1986).

When we analyze an employer’s actions under the “in the exercise ” portion of subsection (1)(a), the employer’s motive is irrelevant. We focus only on the effect of the employer’s actions on the employees. If the employer’s conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity, the employer violates the “in the exercise of” prong of subsection (1)(a). *Portland Assn. Teachers*, 171 Or App at 623-624. A violation of the “in the exercise” portion of subsection (1)(a) may be either derivative or independent. An employer that derivatively violates the “because of” prong of subsection (1)(a) also violates the “in the exercise” portion of the statute. An employer’s actions may also independently violate the “in the exercise” prong, typically through threats. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 (2007).

We turn first to the Association’s contention that the District involuntarily transferred Minni and Williamson “because of” their exercise of PECBA-protected rights. We begin by determining why the District acted. This is a fact determination. *Portland Assn Teachers*, 171 Or App at 626. We then decide if the reasons for the District’s actions are lawful. If all of the reasons are lawful, we dismiss the complaint. If all of the reasons are unlawful, or the purportedly lawful reasons are a pretext for unlawful conduct, we will find a violation of subsection (1)(a). If we conclude that the District had both lawful and unlawful reasons for its actions, we will 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, the Association alleges that the District transferred Minni and Williamson because they were outspoken advocates for teachers' rights under the collective bargaining agreement. According to the Association, Minni and Williamson were respected leaders in the Association who spoke out on behalf of staff to guarantee that the District honored the contract during the school improvement process at East Gresham.

The District does not dispute that Minni and Williamson engaged in some activities that are clearly protected – Williamson served as Association building representative during the 2005-2006 school year, and Minni filled this position during the 2006-2007 school year. The District contends, however, that the decision to involuntarily transfer Minni and Williamson had nothing to do with their Association activity and everything to do with their attitudes about school improvement. According to the District, it faced an unprecedented situation when ODE placed East Gresham on school improvement status at the start of the 2006-2007 school year. Under federal law, the District faced stringent sanctions if East Gresham did not quickly demonstrate adequate yearly progress. The District argues that it needed to rapidly develop and successfully implement a school improvement plan. Because a supportive staff is an integral part of school improvement, the District asserts that it acted reasonably by transferring Minni and Williamson, two teachers it considered to be vocal challengers to the school improvement process. The District contends that it transferred Minni and Williamson because they impeded school improvement plans, and not because they were vigorous Association advocates.

However, Minni and Williamson's challenges to the school improvement process involved, at times, activity that is protected by the PECBA. Under the PECBA, we have authority to determine the range of activities that are protected under ORS 243.662. *Central School Dist. 13J v. Central Education Assoc.*, 155 Or App 92, 94, 962 P2d 763 (1998). We exercise this authority in a manner that furthers the purposes and policies of the PECBA. One such policy is to encourage the peaceful resolution of disputes that arise from differences about wages, hours, and other working conditions. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 786 (2008), citing ORS 243.656(3). Peaceful dispute resolution can only occur if employees may freely bring their concerns about working conditions to the employer. *Id.* at 786-787; *see also Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 185 (2007), *appeal pending* (peaceful resolution of disputes under the PECBA can only be attained if employees can freely present their workplace disputes to the employer).

On several occasions, Minni and Williamson told District administrators that they were worried about the effect of the school improvement process on teacher working conditions. At a November or December 2006 training session, Williamson cautioned the District to check with the union because some of the subjects under consideration could affect teachers' workload. When Tomac, the administrator assigned to facilitate the school improvement process at East Gresham, asked Minni to get student writing samples to the teacher scoring them, Minni declined to do so, citing a dispute about preparation time as her reason. She also questioned whether Tomac was ordering her to perform extra work outside of her normal work day and asked for extra pay if this was the case. At East Gresham staff meetings, Minni repeatedly mentioned the need to enforce contract provisions concerning preparation time and the work day.

The District transferred Minni and Williamson because it believed that Minni and Williamson resisted its school improvement efforts at East Gresham. Confronted with the need to quickly meet the requirements of federal law, the District sought to create a more supportive staff at East Gresham by transferring two teachers who challenged this process. The teachers' resistance to necessary changes on grounds or in ways that are not protected by the PECBA is a legitimate and lawful reason for the transfers. However, the District's perception that Minni and Williamson resisted efforts to improve East Gresham was also based at least in part on Minni and Williamson's exercise of a PECBA-protected right to discuss disputes (and potential disputes) about working conditions with District administrators. This is an unlawful reason.

We conclude that the District had a mixed motive – that is, its transfer decisions were based on both lawful considerations (its perception that Minni and Williamson challenged District school improvement plans) and unlawful considerations (the PECBA-protected activity in which Minni and Williamson engaged). In mixed-motive cases, we must determine if the unlawful motive was sufficient to attribute the employer's decision to it. *Portland Assn. Teachers*, 171 Or App at 639. Here, we determine whether the District would have transferred Minni and Williamson even if they had engaged in no protected activity. *Oregon School Employees Association v. Cove School District #15*, 22 PECBR at 221.

We have carefully examined the record regarding the District's decision to transfer Minni and Williamson. It shows that the teachers' exercise of protected rights was a minor consideration in this process. District Education Director Schlachter and Human Resources Director Lewis were the administrators who decided to transfer Minni and Williamson. Schlachter based his decision on his own observations of the school improvement meetings at East Gresham and his regular discussions with Tomac, the

school improvement facilitator at East Gresham.⁷ There is no evidence that Schlachter ever saw Williamson or Minni raise concerns about working conditions in school improvement meetings. Tomac, whose reports about the situation at East Gresham undoubtedly were a strong influence on Schlachter's decision, based his conclusion that Minni and Williamson impeded school improvement on factors unrelated to the their advocacy of teachers' rights. Tomac thought that both Minni and Williamson dominated discussions at meetings, that Minni expressed a negative attitude through her gestures and expressions, and that Williamson often hindered discussions by bringing up irrelevant topics at meetings. Tomac rarely attended the East Gresham staff meetings where Minni frequently emphasized the need to comply with the contract provisions concerning preparation time and the teacher work day. Principal Gestrin, who dealt with both Williamson and Minni as building representatives and regularly discussed contract issues with them, was not involved in the decision to transfer the two teachers.

The District had a compelling need to achieve school improvement at East Gresham. The District was threatened with serious consequences under the No Child Left Behind Act if it failed to quickly make improvements at East Gresham. East Gresham was the first District school to face sanctions for failing to make adequate yearly progress under the law. The financial impact of this failure was substantial and affected the entire District. The District was forced to take some federal Title I funds away from schools that needed and used the money and allocate these funds to school improvement efforts. Failure to make the improvements required by federal law would lead to increasingly onerous penalties. Clearly, the District had urgent reasons for attempting to speedily implement necessary changes at East Gresham. An important part of this effort was creation of a staff that supported the process.

Based on the limited amount of protected activity observed by District administrators who made the transfer decisions and the pressures the District faced to

⁷The District contends that because Schlachter, Lewis, and Tomac did not know that Williamson and Minni held positions in the Association, they were unaware that Minni and Williamson engaged in any PECBA-protected activity during the school improvement process. The Association, on the other hand, argues that Schlachter, Lewis, and Tomac knew about Minni and Williamson's roles in the Association. It is unnecessary for us to resolve this factual dispute. Williamson and Minni exercised PECBA rights guaranteed to *all* bargaining unit members when they questioned District administrators about the effect of school improvement on teachers' workload and preparation time. District administrators knew or should have known that this was protected activity under ORS 243.662, even if they were unaware that Minni and Williamson held positions in the Association during the 2006-2007 school year.

make school improvement, we conclude that the District would have transferred Minni and Williamson even if they had engaged in no protected activity.

We are troubled by the District's decision to transfer two Association leaders who were respected by their colleagues and whose teaching ability was never questioned. However, our inquiry is limited to determining whether the District made its transfer decision for reasons unlawful under the PECBA, *i.e.*, because of Minni and Williamson's protected activity. We do not decide whether the District's actions were prudent, made the best use of its teaching staff, or truly helped improve education at East Gresham. Instead, we examine the District's decision only to determine if it was made for unlawful reasons. Based on this record, we conclude that the District's actions were not unlawful. Although the District's motives in transferring Minni and Williamson were mixed, it would have transferred the two teachers even if they had not asserted rights guaranteed under the PECBA. Accordingly, we conclude the District did not violate the "because of" prong of subsection (1)(a) when it transferred Minni and Williamson.

3. The District interfered with, restrained, or coerced employees in their exercise of protected rights when it transferred Josie Minni and Tony Williamson.

We next determine whether the District's conduct in transferring Minni and Williamson interfered with, restrained, or coerced employees in their exercise of protected rights in violation of subsection (1)(a). Because we have held the District did not violate the "because of" prong of the statute, we conclude there was no derivative violation of subsection (1)(a).

However, the District's actions independently violated the "in the exercise" prong of subsection (1)(a). As we have discussed above, an employer's actions independently violate the "in the exercise" portion of subsection (1)(a) if they have the natural and probable effect of discouraging employees from exercising their protected rights. In making such a determination, we consider only the objective effect of the employer's actions, and not the subjective impressions of employees. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District*, Case No. UP-48-97, 17 PECBR 780, 789 (1998).

Here, East Gresham teachers knew and understood that Minni and Williamson were leaders in the Association and vigorous advocates for teachers' rights during the 2006-2007 school year. At meetings and workshops throughout the year, teachers heard Minni and Williamson question the effect of the District's school improvement plans on workload and preparation time. With the help of OEA UniServ consultant Casper, Minni surveyed East Gresham teachers and invited them to help the Association

“maintain the quality parameters of our contract by keeping track of the time spent during our [2006-2007] year” on school improvement activities.

Teachers also knew that Minni was involuntarily transferred, since Minni refused the District’s offer to characterize her transfer as voluntary. In addition, Minni and Williamson, the two vocal Association leaders, were the only teachers whom the District chose to involuntarily transfer from East Gresham – a relatively infrequent action in the District. Under these circumstances, any reasonable teacher would hesitate to raise concerns about working conditions with District administrators for fear that he or she might suffer the same fate as Minni or Williamson. We note that these fears are solidly based in fact.

In our mixed-motive analysis, we determined that the District considered Minni and Williamson’s activities in deciding to transfer them. Thus, the natural and probable effect of the District’s actions was to interfere with, restrain, and coerce other bargaining unit employees in their exercise of PECBA-protected rights to discuss workplace disputes with their employer. *See ATU, Division 757 v. TriMet*, 17 PECBR at 789 (although an employer’s discharge of an employee who challenged his discharge through the grievance procedure did not violate the “because of” prong of subsection (1)(a), it violated the “in the exercise” prong – employees would naturally and probably be chilled in the exercise of their PECBA right to file grievances).

4. The District did not violate ORS 243.672(1)(b) when it transferred Minni and Williamson from East Gresham Elementary School.

Finally, we consider whether the District’s transfer of Minni and Williamson violated ORS 243.672(1)(b), which makes it an unfair labor practice for an employer to “[d]ominate, interfere with or assist in the formation, existence or administration of an employee organization.” In order to prove a violation of subsection (1)(b), a labor organization must demonstrate that the employer’s actions impaired the union in performing its duties as exclusive representative. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 354-55 (2008).

We note that the Association did not pursue this claim in its brief and did not contend that the District’s actions in transferring Minni and Williamson actually impaired or affected the Association in its work representing bargaining unit members. Accordingly, we will dismiss this claim.

Remedy

Under ORS 243.676(2)(b), we must enter a cease and desist order when we determine that a party committed an unfair labor practice. We will do so here. The statute also permits us to order other affirmative relief to effectuate the purposes and policies of the PECBA. When an employer violates the “because of” portion of subsection (1)(a), we typically order the employer to restore the employee to the position he or she would have held but for the unlawful action. We do so to make the employee whole for the employer’s unlawful actions and so that the employer does not benefit from its illegal conduct. *See Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 54, 72 (1996), *modified on recon*, 17 PECBR 93 (1997), *aff’d*, 155 Or App 92, 962 P2d 763 (1998) (this Board ordered a school district that dismissed a teacher in violation of subsection (1)(a) to reinstate the teacher to his former position).

Here, the District did not transfer Minni and Williamson “because of” their exercise of protected rights. It is therefore unnecessary to require the District to rescind its transfer decisions and return Minni and Williamson to their former positions at East Gresham. Although the District violated the “in the exercise” portion of subsection (1)(a), those violations do not require restoration to their former positions. *See ATU, Division 757 v. TriMet*, 17 PECBR at 790 (this Board did not order an employer to reinstate an employee when the discharge violated the “in the exercise” prong of subsection (1)(a) but not the “because of” prong)

The Association asks that we order the District to post a notice of its wrongdoing. We generally order an employer to post a notice when its unlawful action “(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining unit representative as the representative; or (6) involved a strike, lockout, or discharge.” *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984). Not all these criteria need be fulfilled to require a posting. *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 782 (2007).

The District’s actions here affected a significant number of the District staff, since its actions chilled innumerable employees in the exercise of their PECBA rights. In addition, the District’s conduct had a significant potential impact on the Association.

Employees who fear adverse consequences if they assert their PECBA rights will probably hesitate to support the Association in grievance processing or negotiations or to accept positions in the Association. The District's actions thus may significantly diminish the Association's effectiveness by weakening bargaining unit members' support for the union. Accordingly, we will order the District to post a notice.

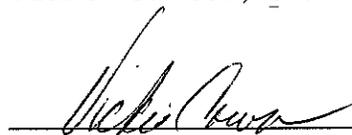
ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(a).
2. Within 30 days from the date of this Order, the District shall sign and post copies of the attached notice to employees for a period of 30 days in prominent places in all buildings in which Association bargaining unit members work, as well as in prominent places in the District administrative offices.
3. The remainder of the complaint is dismissed

DATED this 4th day of June 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.



NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

Pursuant to an Order of the Employment Relations Board in Case No. UP-32-07, *Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, and in order to effectuate the purposes and policies of the Public Employee Collective Bargaining Act, we notify our employees that:

The Gresham-Barlow Education Association/OEA/NEA (Association) filed a complaint against the Gresham-Barlow School District (District). The complaint alleged that the District violated ORS 243.672(1)(a) when it transferred Josie Minni and Tony Williamson from East Gresham Elementary School at the end of the 2006-2007 school year.

ORS 243.672(1)(a) provides that it is an unfair labor practice for a public employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” ORS 243.662 provides: “Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

The Employment Relations Board (ERB) concluded that the District violated ORS 243.672(1)(a) by interfering with, restraining, or coercing Association bargaining unit members in the exercise of their rights. ERB ordered the District to cease and desist from violating ORS 243.672(1)(a).

The District will comply with ERB’s order.

Dated this ___ day of _____ 2009

GRESHAM-BARLOW SCHOOL DISTRICT

By: _____
District Administrator

By: _____
Director of Human Resources

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED