EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-46-08

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 189,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
CITY OF PORTLAND,	)	
Respondent.	)	

On October 3, 2011, this Board heard oral argument on Respondent's objections to a Recommended Order issued June 20, 2011, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing held before ALJ Wendy L. Greenwald on March 16 and 17, 2010, in Salem, Oregon. The record closed on June 8, 2010, with the submission of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, AFSCME Council 75, Eugene, Oregon, represented Complainant AFSCME at the hearing. Jason Weyand, AFSCME Council 75, Salem, Oregon, represented AFSCME at oral argument.

Diana Moffat, Attorney, Local Government Personnel Institute, Salem, Oregon, represented Respondent City of Portland at the hearing. Dan Rowan, Labor Relations Consultant, Local Government Personnel Institute, Salem, Oregon, represented the City at oral argument.

On December 12, 2008, the American Federation of State, County and Municipal Employees Council 75, Local 189 (AFSCME) filed this Complaint alleging that the City of Portland (City) engaged in unfair labor practices by charging fees for staff time for

material it sought in a request for information regarding two grievances and withholding production of those documents until the fees were paid. Respondent filed its timely answer on February 17, 2009. Complainant was granted leave to file an Amended Complaint, filed March 5, 2009, and Respondent filed its Amended Answer March 20, 2009.

The issues[1] in this case are:

1. Did the City change the *status quo* in violation of ORS 243.672(1)(e) by charging AFSCME for the cost of staff time needed to produce information requested by AFSCME under the Public Employee Collective Bargaining Act (PECBA)?

2. Did the City fail to provide information requested by AFSCME related to the Mersereau and Oswalt grievances in violation of its duty to provide such information under ORS 243.672(1)(e)?

3. Did the City's imposition of fees on information requested by AFSCME related to the Mersereau and Oswalt grievances interfere with the existence or administration of AFSCME in violation of ORS 243.672(1)(b)?

4. If the City violated ORS 243.672(1)(b) or (e), is AFSCME entitled to a civil penalty?

RULINGS

At the hearing, conducted by ALJ Greenwald, AFSCME sought to introduce the collective bargaining agreement in effect between the parties as Exhibit C-1. AFSCME had listed the agreement in its Exhibit List provided to the City prior to the originally scheduled hearing date, but had not included the agreement itself in the material it sent to the City. The City promptly notified Allison Hassler, counsel for AFSCME, that it had not received the exhibit and received no response. The hearing was rescheduled for reasons unrelated to this issue. Prior to the actual hearing date, AFSCME provided additional proposed exhibits to the City that did not include the agreement. The City again promptly notified AFSCME that it had not received Exhibit C-1; counsel for AFSCME did not respond.

At the second day of hearing, AFSCME provided copies of, and offered into evidence, Exhibit C-1. The City objected. In responding to the objection, counsel for AFSCME explained that she assumed that the City had a copy of the collective

[1]AFSCME withdrew a claim under ORS 243.672(1)(a) at hearing.

bargaining agreement. The ALJ stated that she would address the matter in the Recommended Order. Neither party discussed this issue in their post-hearing briefs.

The ALJ's February 3, 2009 pre-hearing letter, a standard form used by Employment Relations Board ALJs, stated in part:

> "• By seven days prior to the hearing date, mail or deliver to each other all exhibits and exhibit lists regarding your cases-in-chief (exhibits offered at hearing that were not mailed or delivered seven days before hearing will be received only upon a showing of good cause under OAR 115-010-0068(4)); if exhibits are voluminous, submit them in three-ring binders with separate numbered tabs for each exhibit;
>
> "• Before the hearing, review the exhibits the other party intends to offer and be prepared to state in the prehearing conference what exhibits you do not object to;
>
> "* * * * *
>
> "A party's failure to participate in a pre-hearing conference or to comply with these directives may result in sanctions such as dismissal of a complaint, a recommendation that any eventual representation cost order be increased or decreased, and a recommendation that a motion for reimbursement of filing fees not be granted."

OAR 115-010-0068(4) provides:

> "A party that fails to comply with prehearing requirements regarding an exhibit, witness or issue may be denied the right to offer such evidence or make argument regarding such matter at the hearing."

In *Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03, 20 PECBR 948 (2005), this Board stated:

> "[T]he purposes of OAR 115-10-068 are to 'streamline proceedings and eliminate undue surprise' and 'facilitate discussion toward possible settlement of the issues.' *Cascade Bargaining Council v. Crook County School District*, Case No. UP-83-94, 16 PECBR 231, 233 and n. 4 (1995). Also, 'in reviewing representation cost awards, we shall consider a party's failure to comply in a timely manner with an ALJ's prehearing directives.' *Crook County School District, supra*, 16 PECBR at 233, n. 4. The ALJ has the

> discretion to exclude evidence on the basis of noncompliance with a prehearing notice. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434 (1997)." 20 PECBR at 950.

Morgan-Tran's explanation for failing to provide the documents prior to hearing was that she and her representative, her husband, were laypersons who were ignorant of Board procedures. Most of the exhibits were also attached to her original complaint. The other parties made no showing of surprise or unfair prejudice as to the exhibits attached to the complaint, and this Board held that "[u]nder the circumstances, the ALJ acted properly within his discretion in ruling that he would admit the exhibits that were supplied with the complaint * * * and exclude the rest * * *." *Id.* at 950-51.

In *Redmond Police Officers' Association v. City of Redmond*, Case No. UP-62-02, 20 PECBR 250 (2003), the employer provided an exhibit list to the union as required, but did not provide copies of the exhibits themselves. The union objected to the employer's exhibits for that reason, and the employer failed to make a showing that the failure was for good cause. This Board stated,

> "[t]he City did provide an exhibit list to the Association as required. While it did not provide copies of the actual exhibits, a review of those exhibits indicates that, with the possible exception of Exhibit R-4, the Association had copies of the other City exhibits. Two of them are documents created by the Association. Under the circumstances, the Association was not prejudiced or surprised by the City's exhibits. The exhibits are received.
>
> "* * * * *
>
> "The purpose of directing parties to exchange exhibit lists, exhibits, and witness lists is to avoid surprise and streamline the hearing process. When a party, absent a showing of good cause, does not comply with the directive to exchange, it shows a disrespect for this Board, for the opposing party, and for the hearing process." *Id.* at 251-52.

Here, the ALJ concluded that AFSCME's reason for failing to provide the exhibit (that the other party already had a copy of the document) applies to most exhibits in most cases, and was not good cause. On the one hand, AFSCME's choices to ignore the City's queries, and to wait until the second day of hearing to provide its exhibit, show a disrespect for this Board, for the opposing party, and for the hearing process. On the other hand, the employer was not surprised or prejudiced by the introduction, on the second day of hearing, of that collective bargaining agreement. Based on this Board's precedent, the ALJ correctly concluded that she was constrained to receive the exhibit.

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

FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). AFSCME is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of City employees.

2. AFSCME Local 189 is one of eight labor organizations that comprise the District Council of Trade Unions (DCTU), through which AFSCME and the other seven unions have negotiated a series of collective bargaining agreements with the City. The term of the agreement in effect at the time of hearing was July 1, 2006 to June 30, 2010. The agreement does not address the issue of payment for documents supplied by the City in response to requests by AFSCME.

3. The eight DCTU unions bargain their primary collective bargaining agreement together. However, each union may also bargain individual side agreements and letters of understanding for its own members. Each DCTU union may process and investigate its own grievances. The eight unions rarely share information concerning their individual grievances. Each union has its own relationship with the City regarding contract administration, and each has its own arrangements with the City for requesting information.

The Parties' Past Practice

4. Attorney Barbara Diamond has represented AFSCME in the grievance and arbitration process for over 20 years. In Diamond's experience, both AFSCME and the City had demanded, and been provided, documents in response to information requests from one another pursuant to the Public Employees Collective Bargaining Act (PECBA). Those requests were made by Diamond as well as AFSCME stewards, officers, and Council Representatives, including James Hester.

5. AFSCME's practice was to provide documents to the City at no charge. AFSCME rarely provided documents to the City, however.

6. In 2000, AFSCME filed an unfair labor practice action (ULP) against the City regarding the City's failure to provide documents in response to Local 189's request. The ULP was later settled, along with the underlying grievance.

7. In 2001, AFSCME representative Joseph Schneider made several information requests. Assistant City Attorney Stephanie Harper told him that the union

would be charged for the requests because they were burdensome and would involve staff time. The ultimate result of these requests does not appear in the record.

8. Since at least 2001, the City has had a policy regarding charges for staff time spent responding to public records requests. Under the 2007-2008 version of that policy, the standard fee for obtaining photocopies of City documents was 25 cents per copy, which included some staff time.[2] The "City of Portland Standard Fees for Public Records Requests FY 2007-08" (Public Records Fee Schedule) states in part:

"Supplemental Labor Fees

"Standard per-page copy fees include staff time to retrieve and photocopy records. If your request requires additional staff time, research or attorney review, additional labor fees may be charged.

"Labor Research Attorney Review	See City Code Section 5.48.030 Actual cost of employee performing work which includes hourly payroll rate, benefits and overhead."[3]

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[2]There has been a paralegal working in the City Attorney's office since at least 2001.

[3]City Policy 5.48.030 "Accounting Procedure" effective April 4, 1974, provides:

"[u]nless the charge for services performed for private persons or governmental agencies other than the City is specifically fixed by the Charter, by action of the Council or by the Commissioner In Charge, all such services shall be charged for on the basis of actual costs, which shall be computed as follows:
"A. Labor.

"1. The amount for salaries and wages shall be either:
"a. Actual time computed at the applicable hourly payroll rate when the services being provided require less than the full time of an employee on an annual basis, or
"b. Annual salary including vacation, sick leave, holiday and other leave with pay when the services being provided require the full time of an employee on an annual basis.

"2. To the amount for salaries and wages computed under paragraph A.1.a. above, add for the indirect cost of vacation, sick leave, holiday and other leave with pay and for the cost of disability, retirement and insurance as follows:

(continued...)

AFSCME had notice of this policy and any changes made to it. AFSCME did not demand to bargain over the policy, but did not agree to the application of this policy to the Union's requests for information under the PECBA.

9. In 2003, AFSCME counsel Barbara Diamond provided medical records to counsel for the City in connection with the litigation of a grievance. Although producing the records required Diamond to review them for confidential information, with the assistance of a paralegal, Diamond did not charge the City for that work.

10. By 2004, the City had begun charging AFSCME 25 cents per photocopy of City documents produced under some requests for information under the PECBA.[4] As under the Public Records Fee Schedule, the 25 cents included the cost of the photocopies as well as staff time. Prior to that, the City had generally charged 5 cents

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[3](...continued)

"a. For other than sworn police personnel add 39 percent of salaries and wages.

"b. For sworn police personnel add 42 percent of salaries and wages for labor provided at straight time. Add only 15 percent for labor provided at overtime rates.

"3. To the amount for salaries and wages computed under paragraph A.1.b. above, add only for disability, retirement and insurance as follows:

"a. For other than sworn police personnel add 21 percent of salaries and wages.

"b. For sworn police personnel add 23 percent of salaries and wages provided at straight time only.

"B. Materials consumed shall be at actual cost including delivery to the City. The Bureau of Water Works shall charge an additional 5 percent for stock handling.

"C. Services from other City bureaus shall be at actual cost determined in accordance with Section 5.48.070.

"D. Services provided from non-City sources shall be at actual cost to the City."

[4]In 2008, pursuant to a change in the public records law requiring that a cost estimate be given to those making public records requests, the City adopted the Public Records Fee Schedule that specified a cost of 25 cents per page for photocopies. The 25 cents was intended to encompass the "composite rate" for staff and other costs for records requests. (Harper Testimony at 255.) If a request required additional time, attention, or expertise, the City charged 5 cents per page plus the actual cost of that extra time and attention. (Harper Testimony at 255.) The record shows, however, that the City began charging AFSCME 25 cents per page no later than 2004.

per copy, if it charged at all. The City continued its practice of (1) charging nothing for small quantities of documents, and (2) charging nothing for some easy to provide collections of documents, at least until the 2008 events at issue in this case.

11. Beginning in 2004, the City began including language similar to the following statement in response to AFSCME's requests for information, generally in letters from City Labor/Employee Relations Manager Ed Ruttledge:[5]

> "[T]he City will provide to the Local materials that can be obtained 'off-the-shelf.' If its expected that the research, and retrieval of the requested materials will require substantive[[6]] staff time, the Local will be requested to confirm that it accepts responsibility for reimbursing the City for said staff time before the research and retrieval tasks are begun."

12. During Ruttledge's tenure with the City, the City routinely supplied "off-the-shelf" information at no charge. Ruttledge never cited the City's Public Records Fee Schedule in his communications with AFSCME about the cost of producing documents, but was aware that the City Bureau of Human Resources had such a schedule. Ruttledge also was aware that the City had redacted copies of documents given to unions where they included such information as employees' Social Security numbers or drug testing information.

13. The City generally responded to PECBA requests for information through either its City Labor/Employee Relations Manager or City attorneys.

14. At the time of hearing, Hester had been AFSCME Council 75 staff representative for AFSCME Local 189 for five years, and president of the DCTU for at least four years.

15. Hester was aware of the City's standard statement in its letters regarding document production charges. He did not see this language as binding AFSCME to pay for staff time and did not see it as a change in policy. Instead, he considered it a tactic the City sometimes used to delay responding to AFSCME's information requests.

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[5]Ruttledge left this position in November 2006. Steve Herron held the position at the time of hearing.

[6]The parties do not discuss the meaning of the term "substantive" here. There is no evidence in this record that the City has ever charged AFSCME for legal staff time involved in such tasks as drafting protective orders, issuing subpoenas, doing legal research, or writing letters.

AFSCME never filed a demand to bargain over the City's statements regarding production costs.

City Responses to AFSCME Information Requests

16. In 2004-2005, the City responded as follows to AFSCME's requests for information:

- In August 2004 AFSCME paid $34.00 for documents produced pursuant to a subpoena. The cover letter and invoice were sent by Deputy City Attorney Lori Kraut. The City invoice stated that AFSCME was charged 25 cents per page for "copying charges" and $10.25 for a courier delivery fee.

- In a letter dated August 1, 2005, "'[Labor/Employee Relations] Manager Ruttledge e-mailed Hester that, based on a prior conversation, "Labor/Employment Relations will make a run from the [computerized] discipline log to see if there are any 'hits' on key words of 'evidence' or 'mishandling.' We may then refine the query, depending on the information we get." Ruttledge subsequently provided AFSCME with the results of that computer search in a spreadsheet dated August 3. The record contains no evidence that the City charged AFSCME for these documents.

- Also in August 2005, a law firm representing AFSCME paid the City $67.65 for "reimb for copies." The record does not reveal additional details about this charge.

- In November 2005, the City provided discipline logs regarding Police Bureau employees to AFSCME in a grievance pursuant to a protective order signed by arbitrator David Stiteler at no charge.

17. In 2006, the City responded as follows to AFSCME's requests for information:

- In July 2006 AFSCME paid $56.70 for "copies Foxworth Rpt." That amount was the City's standard charge for this oft-requested document.

- During the fall of 2006, Harper told Diamond that the requests for information AFSCME had made in the "Kineberger grievance" would result in charges to the union. The City provided a substantial amount of information in that case and did not charge AFSCME for paralegal or City Attorney time, however.

18. The record contains the following evidence concerning requests for information AFSCME made in 2007:[7]

- In June 2007, the City and AFSCME entered a stipulated order through ERB in *AFSCME Local 189 v. City of Portland*, Case No. UP-13-06, 21 PECBR 858 (2007). The Order stated that the City had violated ORS 243.672(1)(e) by failing to provide or object to certain documents requested pursuant to the PECBA in a timely manner. The Order also stated that "[i]f this matter proceeded to hearing, City witnesses would testify that any failure to provide information was either inadvertent, or due to its failure to object to the scope and relevance of some of the information requested and/or to clarify the requests." 21 PECBR at 865.

- In August 2007, then-Deputy City Attorney Catherine Riffe[8] responded to AFSCME's request for information regarding grievant Walter Garcia. Riffe told AFSCME that she would "prepare an estimate of the costs associated with the production of the information" and also said that she would have tapes AFSCME requested transcribed, and would provide AFSCME with copies of the transcription if AFSCME split the approximate $700 with the City. AFSCME representative Hester agreed to share the cost of transcript preparation. The City ultimately did not charge for the transcripts, however, because Riffe determined that the City would submit them as exhibits in the arbitration.

19. Prior to the Mersereau and Oswalt grievance, the City responded as follows to AFSCME's 2008 requests for information:

- In February 2008, Rob Wheaton, a Council Representative for AFSCME, wrote to City Labor/Employee Relations Manager Steve Herron about a request for information regarding the Walter Garcia grievance under the PECBA. Wheaton wrote that "[t]he Union is willing to accept responsibility and pay for all reasonable costs incurred as a result of reproduction of the above documents and information."

- In March 2008, AFSCME paid $22.75 for "Walter Garcia Info Req." The record does not reveal additional details about what this charge was for.

- On June 5, 2008, a law firm representing AFSCME paid the City $171.87 for "ERB transcript UP-07-07." The record does not reveal additional details about what this charge was for.

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[7]Beginning in 2007, the City believed that AFSCME's requests for information required the City to spend more time than in the past in preparing responses.

[8]Riffe became a Chief Deputy City Attorney in September 2008.

20. On September 16, Riffe provided documents regarding a grievance by Craig Trotti, based on the rate of 25 cents per page. Riffe's invoice cover letter, addressed to Hester, again conditioned receipt of the documents on prior or contemporaneous payment of $36.50. AFSCME did not object to the City's demand for contemporaneous or prior payment, and paid the $36.50.

Mersereau Grievance Information Requests

21. On August 8, 2008, AFSCME Shop Steward John Wheeler made an information request in pursuing a grievance arising from the July 10 discharge of Tamara Mersereau. Hester made two additional requests on August 21 and 22.

22. On August 27, 2008, Wheeler picked up 165 pages of documents the City provided in response to his August 8 request. On September 4, Louise Warshaw, Riffe's legal assistant, sent a bill to AFSCME Treasurer Robin Mariani-Moffit for $41.25 for the production of those 165 pages at 25 cents per page. The cover letter for the invoice stated in part, "enclosed is an invoice for the cost associated with this production of documents. The charges are based on the City's Standard Fee Schedule for providing copies of documents. A copy of the fee schedule is available on the City's website." This was the first time that City officials explicitly informed AFSCME in writing that its charges for complying with PECBA requests were based on the Public Records Fee Schedule. Warshaw's letter also enclosed a copy of the invoice and a copy of the Public Records Fee Schedule.

23. On September 11, 2008, Riffe responded by letter to Hester's information request of August 21 in the Mersereau grievance. Riffe's letter conditioned receipt of the documents on prior or contemporaneous payment. The letter stated, in part:

> "The cost associated with producing these documents is $57.31. You can either make payment when you pick up the documents or you can send me a check and I will mail the documents to your office. Please let me know which you prefer."

Riffe also stated that she was still working on a response to the remainder of Hester's August 21 request and his August 22 request.

The invoice attached to Riffe's September 11 letter stated that it was for items one and two of Hester's August 21 Mersereau request. The itemized costs included one hour of work for a staff paralegal at $25.29, photocopying costs of 339 pages at five

cents per page, and a ten percent "overhead charge" of $5.21, for a total cost of $57.31.[9] Had Riffe simply charged AFSCME 25 cents per page without separately billing for the paralegal and the photocopies, the total bill would have been $84.75. The separate billing reduced AFSCME's bill by $27.44. This was the first time that the City had separately billed AFSCME for the work of its paralegals and overhead in responding to a request for information, that is, billed that time separately from a 25 cents per page charge. Hester did not notice the staff work time entry on the invoice, and passed it on to AFSCME staff for payment. Hester did not object to the requirement to pay prior to receipt of the documents.

24. On September 19, 2008, AFSCME sent Riffe checks for $41.25 and $57.31 for the Mersereau information requests.

25. In complying with the remainder of Hester's August 21 request and his August 22 Mersereau requests, Riffe oversaw the review of approximately 3,400 pages of documents. Because the grievant worked in the Water Bureau customer service area, many of the documents at issue contained customer information that Riffe believed had to be redacted prior to disclosure to the union. Riffe did not recall a previous information request that raised privacy issues of members of the public.

Because AFSCME's requests sought information regarding discipline of similarly situated employees misusing sick leave, Riffe also believed she had to redact confidential medical information from sick leave records. The redacted information included the names of employees who had called in sick and the confidential medical description of their illness. Riffe did not attempt to contact AFSCME officials to inform them of the likely cost of these tasks or the reasons for them, raise the possibility of refining or limiting the request, offer to provide the documents on site for confidential review by union counsel, or propose entering into a confidentiality agreement or protective order to protect the information.[10] Riffe's paralegal went through the documents first, and Riffe reviewed items that the paralegal had questions about. Riffe's paralegal spent 10

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[9]AFSCME does not challenge the City's ten percent "overhead" charges, and we do not address it in this recommended order. According to her testimony at hearing, Harper derived the $200 figure by multiplying the Police Bureau's Discipline Coordinator's $53 "hourly rate" by the "two to four hours" the Coordinator estimated would be necessary for the hand search of the Bureau's disciplinary files. (Harper Testimony at 230.)

[10]Prior to the events at issue here, the City had sometimes provided a quantity of documents on site to union attorneys to review and mark what they wanted, so that the actual quantity of documents at issue was reduced. Diamond had reviewed City documents in this fashion on at least one prior occasion. On at least one prior occasion, the City and AFSCME entered a protective order regarding the use of certain documents that the City contended were confidential.

hours of time on the project, and Riffe spent 1.5 hours of time. Riffe ultimately designated 1,875 pages to be copied for production to AFSCME.

26. On October 7, 2008, Riffe wrote Hester about his August 22 request. Riffe wrote, in part:

> "Documents responsive to your request dated August 22, 2008, items 1, 2, 3 and 5, are available at the City Attorney's Office. The cost associated with responding to this request is $622.08. An invoice is enclosed.
>
> "* * * * *
>
> "With respect to request #4 (copies of all training), what are you looking for? Tami has received a significant amount of training while employed with the Water Bureau. We do not have all of the documentation she would have been given in those trainings. Trainings would have been given by many different people, and covered many different subjects. As far as tracking the training an employee has received, I am not aware of any master list. If you could narrow your request or be more specific, I will do my best to track down documents.[[11]]
>
> "Upon receipt of payment, you can either pick up the documents or we will mail them to you. Please let me know what you prefer. "

The invoice cited 10 hours of paralegal time at $25.29 per hour, 1.5 hours of attorney time at $57.67 per hour, 1,875 copies at 5 cents per copy, and a 10 percent "overhead charge" of $12.02 to reach the total of $622.08. Had the City simply charged AFSCME 25 cents per page for the 1,875 pages provided, the total amount would have been $468.75, approximately 75 percent of the billed amount.

The October 7, 2008 letter and invoice from Riffe was the second time that the City billed AFSCME for the work of its attorneys in responding to a request for information separately from a 25 cents per page charge.

27. On November 3, 2008, Hester sent Riffe a letter objecting to the $622.08 charge on the grounds that it violated the *status quo*, and demanded that the City "provide the information at no charge or nominal charge as the City * * * has done in the past * * * ."

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[11]Hester did not respond to this request for clarification.

28. On January 6, 2009, AFSCME sent an e-mail to the City withdrawing the Mersereau grievance. There is no evidence that this decision was related to the document dispute.

Oswalt Grievance Information Request

29. Between July and September 2008, AFSCME filed a grievance over a June 30 disciplinary suspension of Angela Oswalt.

30. On September 8, 2008, Hester made a request for documents relevant to the Oswalt grievance.[12] Among the items AFSCME sought were the following:

> "2. A listing of all previous disciplines for the same alleged offenses in particular off-duty traffic incidents involving PPB employees for the last five (5) years and;
>
> "* * * * *
>
> "5. A copy of Portland Police Bureau Rules and Policies and other directives regarding wearing of Police Bureau issued clothing and;
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> "6. A copy of all Portland Police Bureau Rules and Policies and directives related to 'non-cited' traffic incidents in other jurisdictions, and;
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> "7. A copy of all Portland Police Bureau Rules and Policies and directives related to 'cited' traffic incidents-in other jurisdictions * * *."

31. On September 17, 2008, City Labor/Employee Relations Manager Herron wrote Hester about his Oswalt information request that the City "will provide you with that information that can be easily and readily produced and will provide you with estimates on timing of production of the balance of the information * * *. AFSCME will be charged for production of information as allowed by PECBA." Hester did not respond to this letter.

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[12]The initial process for PECBA document production in a Police Bureau case was generally that union officials would review documents prior to the Performance Review Board hearing, and receive free copies of the investigation materials considered by that board after hearing if the board proposed discipline for the employee. If a grievance resulted, the affected union would then make additional document requests.

32. On September 30, 2008, Deputy City Attorney Stephanie Harper responded to Hester's September 8 request for documents related to the Oswalt grievance. Harper stated, in part:

> "My office received your request last week.
>
> "Items 1, 3, 4 and 8 are straightforward requests. We have collected records from PPB Internal Affairs Division and the Performance Review Board Coordinator. Our office procedure is to scan, number and review the documents. At that point, they will be available for you to pick up at 25 cents per page. I will let you know when they are ready.
>
> "* * * * *
>
> "Items 2, 5, 6 and 7 will require research and may be quite time consuming. I have asked my paralegal to develop a cost estimate before starting any work, so you can decide whether AFSCME is going to pay for the associated costs."

33. On October 24, 2008, Harper provided Diamond with a cost estimate for various parts of Hester's September 8 requests in the Oswalt grievance. Harper's letter stated, in part:

> "Documents responsive to Items 1, 3, 4 and 8 are ready to produce. The cost of producing those documents [photocopies and a tape recording] is $68.25. An invoice is enclosed. I understand that the way information requests with AFSCME have been handled is to let James Hester know that the documents are ready. He has either sent a check and then we mail the documents to him, or he will stop by with the check and pick up the documents.
>
> "We estimate it will cost approximately $200 [[13]] to do the research in order to respond to Items 2, 5, 6 and 7 [previous discipline in similar situations and Bureau rules regarding clothing and traffic incidents outside the jurisdiction]. Because of its time-consuming nature, no work will begin absent advance payment."[[14]]

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[13]AFSCME does not challenge the accuracy of the City's cost estimate of $200.

[14]The evidence at hearing did not address whether, or how, the requests for Bureau rules regarding clothing and traffic incidents in other jurisdictions were included in the cost as set out in Harper's October 24 letter.

Harper did not state who was to perform this research or why it was necessary for this request when the City had not claimed expensive research costs for previous, similar requests for comparative discipline information. Harper did not suggest other alternatives to AFSCME, such as producing the documents on site for review and marking by AFSCME attorneys, or providing the documents under a confidentiality agreement or protective order.

34. On October 29, 2008, Diamond objected to Harper's request for AFSCME payment for the Oswalt document search, stating,

> "I have gotten the letter from you regarding the payment of costs of $200 to respond to an information request from James Hester regarding the Oswalt grievance. You assert that James has paid such amounts in the past.
>
> "As you know, the grievance has been forwarded to counsel for preparation for arbitration. I have been involved in a number of arbitrations for AFSCME Local 189 in which information has been provided. I believe I have worked with several different City attorneys and made information requests. It is my recollection that our office has never had to request that AFSCME pay for documents which would otherwise be obtained for free through arbitral subpoena.
>
> "The choice is as follows. We can wait until we have an arbitrator chosen for the case and I can obtain the documents at no cost through a subpoena. The alternative is for you to provide the documents now by agreement in lieu of subpoena. In neither event does the union have to pay hundreds of dollars to the employer for documents you might well have obtained for your own preparation."

Diamond did not ask Harper to explain or substantiate the $200 research costs. Diamond did not offer to review the documents in the City's offices, or propose a confidentiality agreement or protective order for the documents.

35. When investigating previous discipline grievances, Diamond or AFSCME frequently sought information regarding the level of discipline imposed on other employees for similar conduct. Diamond viewed this "comparator" information as critical in some cases, and believes that it has resulted in a reduction in discipline in grievances she has pursued. Diamond had found that City discipline logs, like those sought in Hester's September 8 request, were good sources of comparator information.

Diamond and her colleagues had previously obtained comparable discipline documents in other cases involving other Bureaus as well as the Police Bureau. Diamond

was aware that it was City policy to place such records in a searchable database administered by the Bureau of Human Resources.[15] Diamond had previously received comparator information from the discipline logs in the Kineberger and Ricky Thomas Police Bureau grievances, and Ruttledge had agreed to provide the results of computer searches of the logs in his August 1, 2005 e-mail to Hester.

36. Harper had learned that the Police Bureau, although subject to the Bureau of Human Resources disciplinary recordkeeping policy, had not systematically provided those discipline records to Human Resources. Harper believed that a hand search of all discipline records was required to respond accurately to the request. There is no evidence, however, that Harper communicated this fact to Diamond until the hearing in this case. Harper also believed that there was a backlog of documents to be entered into the system at the Bureau of Human Resources level. Sometime after Harper's October 29 letter but prior to the Oswalt arbitration, the City began systematically transferring and entering this information into the Bureau of Human Resources database. This change resulted partly from the hiring of a new Police Department Discipline Coordinator.

37. On November 12, 2008, Diamond e-mailed Harper to state that AFSCME agreed to pay photocopying costs for the requested Oswalt documents.

> "I believe we can pay xerox copying but it is my sense that requiring any payment above that is a unilateral change and a ULP. Please forward all information without charge for time. We will pay xerox costs.
>
> "You should be aware that if we have to file yet another ULP against the City for refusing to provide information, we will request a civil penalty for repeat violations. I am urging you to reconsider your position on this, as it is not my desire to have to go through another ULP on the duty to provide information. Thank you in advance for your consideration. If we do not receive the information requested in the next 14 days, I will advise the Local on filing the ULP referred to above."

As before, Diamond did not offer alternatives to producing copies of the documents, such as her review of the documents in order to select the ones she needed, or to enter a confidentiality agreement covering the documents.

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[15]The 2009 version of the policy states, "[a] Discipline Log Entry must be recorded at the time the final copy of the notice of discipline is submitted to Labor Relations for inclusion in the discipline log." (City of Portland Human Resources Administrative Rule 5.01, Exh. C-25 at 3.)

38. On November 25, 2008, Harper e-mailed Diamond about the Oswalt documents, stating in part:

> "My schedule has been very hectic and I finally have some time this afternoon to drop you a meaningful response to your email.
>
> "The City is not refusing to provide information but rather trying to manage the request. As you know, the ERB has identified [four] factors to be taken into consideration when processing information requests including (1) the reason given for the request; (2) the ease with which the data can be produced; (3) the confidentiality of the information requested; and (4) the history of the parties' labor-management relations. ERB has also said that a party may charge.
>
> "The last time I communicated with you about this, I left a voice mail stating that I had a number of documents sitting on my desk ready to send you and the copy cost associated with the request was about $60. Your response was by email saying in essence the choice was to go to the arbitrator, once selected, and you will get the documents for free by subpoena or I can turn over the documents and not charge. I did not respond at the time because I was in the middle of some other matters and I was fine waiting for an arbitrator because I disagree with you that you would get documents for free through a subpoena.
>
> "The $200 estimate I gave you relates to the ERB factor of 'ease' with which the data can be produced. There are portions of the information request that are very time consuming in that they will literally require an employee to conduct a hand search of drawers full of PPB records or will require me or my paralegal to do research for you.[[16]] If AFSCME wants

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[16]Harper did not identify the portions of the information request that required a hand search and did not explain why that hand search was necessary. Previously, AFSCME had received information about both Police Bureau and non-Police Bureau discipline processes; as a result, Diamond had no reason to accept Harper's assessment of what was required to comply with the request for information as accurate. As noted above, the City presented evidence at hearing that Police Bureau discipline had not been regularly forwarded to the Bureau of Human Relations (BHR) for entry into the City's discipline database, and not all of the forwarded discipline had been entered into the BHR database. There is no evidence that the City revealed these facts to AFSCME prior to the hearing in this case, or explained why it had previously provided similar information in at least two prior grievances but could no longer do so. Harper also did not explain the role of the requests for rules regarding clothing and traffic incidents in this hand search. AFSCME did not provide evidence that the City had previously provided

(continued...)

hand searches of City records to be done, and the search will be time consuming and burdensome, then the City may recoup its costs. Also, I do not believe there is ERB case law that says that a union has the right to have the employer's attorney do its research for it. But, again, if I am going to be spending my time researching for AFSCME then the City should be entitled to recoup its costs.

"I am looking at the bill now for the records that are ready to go, and it is $63.25. Those costs are determined in accordance with a formula set forth in Portland City Code. I will be sending you those materials based on your representation in the email below that AFSCME will pay.

"On the other items, I would like to discuss them in more detail with you. It may be that we can narrow down the scope of your request so that it is more cost effective for AFSCME. In addition, I would like to discuss your sense that having to pay is a unilateral change and a ULP. I do not understand that because I am informed that AFSCME has been making a number of extensive requests for information and paying for the collection effort. I do not know the details of those since they did not involve the Police Bureau but will seek more information.

"Please give me a call so we can discuss ways to make the information request more time and cost effective. I would like for both of us to have the information request in front of us when we talk, so we can go through the remaining items. That is how I have handled it in the past with other labor organizations.

"If you think it would be more effective to meet with you, me and James, I would be happy to do that.

"I am available tomorrow or we can schedule time on Friday this week."

39. On November 26, 2008, Harper provided AFSCME with copies of some of the documents Hester requested in his September 8 letter. In her cover letter, Harper stated, in part:

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[16](...continued)
responses requiring this amount of work by City staff before. Diamond was aware that the City had provided "voluminous" amounts of records in at least two cases in the past, comprised of disciplined employees' personnel files, investigative reports, e-mail chains, and the conclusions of City managers, for less than 25 cents per page or at no cost.

"The requests are set out in bold below followed by our response.

"Item 1: A copy of the Portland Police Bureau Internal Affairs file regarding the incident cited in the discipline.

"Enclosed * * *.

"Item 2: A listing of all previous disciplines for the same alleged offenses in particular off-duty traffic incidents involving PPB employees for the last five (5) years.

"Let's discuss this request so as to manage the costs. Also, I do not know if the term 'particular' is supposed to mean something, so would appreciate some clarification.

"* * * * *

"Item 5: A copy of Portland Police Bureau Rules and Policies and other directives regarding wearing of Police Bureau issued clothing.

"This request is very broad and I would like to discuss it further. Is this asking that every precinct and individual bureau unit be asked if they have a policy on police bureau clothing? Is this asking for all policies that apply to police bureau uniforms for sworn officers, even though Ms. Oswalt is non-sworn? For example, do you want policies that relate to body armor, which Ms. Oswalt does not wear? If so, that will be a very time-consuming and expensive request for documents that, in the end, will not be relevant.

"General rules about bureau-issued clothing would be in the PPB directives. PPB directives are on-line and easily accessible at http://www.portlandonline.com/police/index.cfm?c=29867. You can download the directive book and it is searchable. PPB has Bureau Directive 1110.00, which is the Bureau appearance standard directive. It is enclosed. If you are asking me to do more research for you, then we will need to discuss the cost and scope of your request.

Item 6: A copy of Portland Police Bureau Rules and Policies and directives related to 'non-cited' traffic incidents in other jurisdictions.

"I do not know what this means and do not want to interpret the request incorrectly so would like to discuss it further. I am not aware of a distinction made by policy about 'non-cited' traffic incidents. But, PPB has a directive that requires bureau employees to comply with city, state and federal law (Laws, Rules and Orders). It is enclosed.

"Item 7: A copy of all Portland Police Bureau Rules and Policies and directives related to 'cited' traffic incidents in other jurisdictions.

"I do not know what this means and do not want to interpret the request incorrectly so would like to discuss it further. I am not aware of a distinction made by policy about 'cited' traffic incidents. But, PPB has a directive that requires bureau employees to comply with city, state and federal laws (Laws, Rules and Orders). It is enclosed.

"Item 8: A copy of the City of Portland Police Review Board complaint and findings.

"There is no such document as the Review Board 'complaint and findings.' The Portland Police Bureau has a Performance Review Board that reviews cases and makes recommendations on fact and policy violation findings, as well as recommendations for corrective action, including discipline, if appropriate. The portion of that document relating to the one-day suspension is enclosed.

"In summary, there are about 250-260 documents * * * and a tape enclosed. Please ask AFSCME to send a check made payable to the City of Portland in the amount of $68.25. I sent you an email on 11-25-08 saying the bill was for $63.25, but I was looking at an outdated invoice. The cost of reproducing the tape is $5 and was not previously included. So, the total and correct billing for these items is $68.25. An invoice is enclosed.[17]

"Please give me a call to discuss items 2, 5, 6, and 7."

This was the first time Harper informed AFSCME that she did not understand several requests in Hester's September 8 letter.

40. On December 12, 2008, AFSCME filed this ULP.

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[17]The invoice for this charge was not submitted as an exhibit.

41. On December 29, 2008, Harper mailed Diamond a letter summarizing her view of the parties' previous charges and practices, along with copies of the cover letters for several responses to requests for information. Harper stated that 25 cents per page was "standard copy charges and administrative costs."

42. Subsequent to the filing of this action, AFSCME and the City agreed to a non-precedent setting response to the Union's comparative discipline request, in which Police Bureau managers would be e-mailed and asked to provide information about whether they had learned of certain types of employee actions, whether any discipline was imposed for those actions, and if so, what discipline was imposed. Harper viewed this as a low cost alternative which narrowed the scope of the request. She provided the resulting information to AFSCME without charge.

43. On September 9, 2009, the City provided documents to AFSCME regarding discipline of Police Bureau employees related to DUII and other traffic offenses in response to AFSCME's request for documents in the Oswalt grievance case.

44. At the time of hearing, the average number of requests for information by AFSCME had not declined significantly, if at all, and there was no evidence that the City had charged AFSCME more than 25 cents per page for responses to information requests subsequent to those at issue here.

CONCLUSIONS OF LAW

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

2. The City did not unilaterally change the *status quo* in violation of ORS 243.672(1)(e) by charging AFSCME for the cost of staff time needed to respond to AFSCME's requests for information for the Mersereau and Oswalt grievances.

AFSCME alleges that the City made an unlawful unilateral change in the *status quo* in violation of ORS 243.672(1)(e) when it billed AFSCME for the cost of legal staff time needed to respond to its requests for information relevant to the Mersereau and Oswalt grievances. The City, however, contends that its charges were justified under its policy specifying the fees charged for public records requests. Under that policy, the City generally charges a requester "[s]tandard per-page copy fees" that include the staff time needed to retrieve and copy records; if the request requires "additional staff time, research or attorney review, additional labor fees may be charged." (Finding of Fact 8.) According to the City, considerable staff time was spent in compiling the materials AFSCME requested and the City was, therefore, entitled to bill the union for these costs under its policy.

A public employer generally violates its duty to bargain in good faith under ORS 243.672(1)(e) if it makes a unilateral (i.e., unbargained) change in the *status quo* concerning a subject that is mandatory for bargaining. In such a case,

> "we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies)." *Lebanon Education Association/OEA v. Lebanon Community School District*, UP-4-06, 22 PECBR 323, 360 (2008).

We do not, however, always follow this analysis. Some of the steps are dispositive. "For example, a unilateral change is unlawful only if it concerns a mandatory subject for bargaining." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 761 (2012), citing *Wasco County v. AFSCME,* 46 Or App 859, 861, 613 P2d 1067 (1980). Here, we begin our consideration of AFSCME's claim as to whether charging a union for the costs involved in responding to its information request is mandatory for bargaining. In *Lebanon Community School District,* 22 PECBR at 362, we held that it was. We now believe we erred in reaching this conclusion. Our error arose from our mistaken application of the Public Employee Collective Bargaining Act (PECBA) statutory scheme and our failure to acknowledge relevant case precedent.

Under ORS 243.650(7)(a), the following subjects are "[e]mployment relations" and, therefore, mandatory for bargaining: "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." ORS 243.650(7)(b) provides that "'[e]mployment relations' does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995."

In *Lebanon Community School District,* we treated the subject of employer charges for production of documents as a case of first impression. We concluded that the subject was mandatory, explaining that:

> "A union is typically financed by dues and fair share payments from bargaining unit members. When the expenses of a union are lower, as when the employer does not charge the union for information, the dues and fair share payments of bargaining unit members are lower. '[D]irect or indirect monetary benefits' to employees are mandatory for bargaining.

ORS 243.650(7)(a). Lower dues and fair share payments constitute a direct or indirect monetary benefit to employees, and the cost of providing information therefore concerns a mandatory subject for bargaining." 22 PECBR at 362 (footnote omitted).

The first error in this analysis was our conclusion that we had never ruled on whether charging a union for its information requests was a mandatory subject. We had. In *South Lane Education Association v. South Lane School District No. 45J,* Case No. C-280, 1 PECBR 459, 473-74 (1975), we concluded that the following bargaining proposal was within the exclusive prerogative of management, and therefore a permissive subject of bargaining:

> "*A. Information. Upon request, the Board agrees to furnish without cost to the Association all information the association [sic] believes necessary for its functioning as exclusive bargaining representative.*" (Emphasis in original.)

In 1975, we determined that charging a union for information was a permissive subject for bargaining. As required by ORS 243.650(7)(b), it continues to be a permissive subject.

We unfortunately compounded our error by incorrectly applying ORS 243.650(7)(a) and (b). We conflated a benefit to the union (potential for lower costs to the organization) with a benefit to employees (reduced union dues and fair share fee payments), and concluded that charges for information requests constitute a "direct or indirect monetary benefit" to bargaining unit members. *Lebanon Community School District*. While it is possible that a union's costs may be lower if it does not have to pay the employer for information, those allegedly reduced costs do not necessarily result in lower dues and fair share fee payments for bargaining unit members. As with any organization, potential cost savings may be offset by other expenses. Any connection between reduced expenses for a union and reduced dues and fair share fee payments for bargaining unit members is purely speculative: reduction in a union's expenses may or may not ultimately benefit its members.

Further, we erred when we stated that there was "little difference between the cost of providing necessary information and other subjects we have found mandatory." There is, in fact, a substantial difference between the subject of charges for information and the subjects we found mandatory in cases cited in *Lebanon Community School District.* In *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* Case No. UP-91-93, 14 PECBR 832, 861-62 (1993), *AWOP,* 133 Or App 602, 892 P2d 1030, *rev den*, 321 Or 268, 895 P2d 1362 (1995), we determined that a proposal for employer-paid time for a union officer to conduct union meetings was mandatory. In *AFSCME, Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536, 541 (1989), we held that a proposal for employer-paid time for union bargaining team

members spent in negotiations was mandatory. In *South Lane School District No. 45J*, 1 PECBR at 473-74, we held that a proposal specifying that union representatives who participated in activities such as grievances or negotiations during working hours would "suffer no loss in pay" was mandatory.[18] All these proposals involved a subject—salary—that is mandatory under ORS 243.650(7)(a). All these proposals can readily be distinguished from proposals concerning charges for information that directly benefit only the union; any benefit to bargaining unit members from these proposals is too remote to constitute even an indirect benefit.

Charging for information is a permissive subject for bargaining. We erred when we held, as we did in *Lebanon Community School District*, that it was a mandatory subject. We correct that error in this proceeding.[19] Accordingly, the City did not make an unlawful unilateral change in a mandatory subject of bargaining when it applied its policy regarding charges for public records information requests and billed AFSCME for the cost of staff time needed to respond to AFSCME's requests for information relevant to the Mersereau and Oswalt grievances.

3. The City violated ORS 243.672(1)(e) by failing to respond in a timely manner to AFSCME's requests for information relevant to the Oswalt and Mersereau grievances.

AFSCME alleges that the City breached its good faith bargaining duty not only by charging the union the cost of staff time necessary to compile the information AFSCME sought, but also by failing to respond in a timely manner to AFSCME's requests for information relevant to the Oswalt and Mersereau grievances.

An employer's good faith bargaining duty to provide information includes the obligation to respond to the request in a timely manner. Whether the period of time

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[18]We also cited *South Lane School District No. 45J* for the proposition that a proposal regarding use of school facilities and equipment for union business was mandatory. A careful reading of that case, however, shows that the proposal advanced by the association regarding use of school equipment required that the association "pay for the reasonable cost of all materials and supplies incidental to such use." *South Lane School District No. 45J*, 1 PECBR at 473.

[19]*See Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10, 24 PECBR 521, 551, *nunc pro tunc*, 24 PECBR 557 (2012) (this Board re-examined conclusions reached in an earlier case to "develop more consistent and reliable standards for determining who must be excluded from a bargaining unit as a casual employee.") and *Oregon School Employees Association v. Baker School District 5J*, Case No. UP-21-11, 24 PECBR __, __ n 10 (2012) (this Board disavowed an earlier test for determining when an employer interferes with, restrains or coerces an employee "in the exercise" of PECBA-protected rights in violation of ORS 243.650(1)(a)).

between a union's information request and the employer's response is reasonable depends on the totality of circumstances. These circumstances include matters such as the accessibility and the amount of data sought, the clerical time needed to obtain the information, and the workload priorities of the employer. *Deschutes County 911 Employees Association v. Deschutes County 911 Service District,* Case No. UP-32-04, 21 PECBR 416, 429 (2006), citing *Oregon School Employees Association, Chapter 68 v.Colton School District,* Case No. C-124-81, 6 PECBR 5027, 5032 (1982). The union has the burden of establishing that an employer failed to promptly provide requested materials. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry,* Case No. UP-19-05, 22 PECBR 33, 42 (2007); OAR 115-035-0042(6).

An employer's response to a union's information request must include important details about the request. *See Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* Case No. UP-39-03, 20 PECBR 664, 674 (2004) ("[a] response to a request for information is required, and that response must include a definitive statement about the intended disposition of the request—even if the statement is simply to assert that all documents sought have been provided.").

We apply those factors to the City's response to AFSCME's requests for information for the Mersereau and Oswalt grievances. For the reasons discussed above, the City did not make an unlawful unilateral change when it applied its policy concerning charges for public records requests to AFSCME's requests for information. The City's insistence that AFSCME pay these staff costs before it would release the documents to the union also did not violate subsection (1)(e). As we stated in *Colton School District,* "[w]here the responding party incurs expenses in providing the information that it would not otherwise incur, it may ask for reimbursement of such reasonable costs after informing the requesting party of its intention to do so. If such reimbursement is refused, the party may decline to provide the data." 6 PECBR at 5032.

In regard to the Mersereau grievance, the City responded promptly to many of AFSCME's August 8, 21, and 22 requests by providing some of the requested materials on August 27 and September 11. The City demonstrated a legitimate reason why it could not provide the rest of the materials until October 7: fulfilling the rest of AFSCME's request required review of approximately 3,400 pages of documents containing confidential information that had to be redacted. The record is devoid of evidence, however, as to why the City waited until October 7 to tell AFSCME that it did not understand one of AFSCME's requests -- for copies of all training that Merserau received during her employment with the City -- and to ask that AFSCME "narrow down" its request. (Finding of Fact 26.)

In regard to the Oswalt grievance, the City again quite promptly provided some of the materials AFSCME sought: on August 27, the City gave documents Hester had requested on August 8, and on September 30, the City gave Hester some of the documents he had requested on August 21 and 22. The City's subsequent responses to AFSCME were less straightforward and timely, however. On October 24, City attorney Harper told AFSCME attorney Diamond that the remaining documents AFSCME wanted would cost approximately $200. On November 25 and November 26, Harper told Diamond that she did not understand several of the items AFSCME had requested, and wanted to discuss these items with Diamond in an attempt to "manage the costs" of the requests.

The City took an unreasonably long time to question AFSCME about its requests for materials relevant to the Oswalt and Mersereau grievances. There is no legitimate reason why the City could not ask AFSCME to clarify its requests at the time they were made instead of waiting a month and one-half (in the case of the Mersereau request) and over two months (in the case of the Oswalt requests) to tell AFSCME it did not completely understand what the union wanted. In addition, the City failed to give AFSCME a reasonable estimate of the staff costs involved in responding to its requests concerning the Oswalt grievance. On October 24, the City told AFSCME it would cost $200 to provide the materials requested. Then, on November 25 and 26, the City told AFSCME it did not understand a number of the items AFSCME had requested. Without an understanding of AFSCME's request, the City's $200 estimate was not reasonable.

4. The City's failure to timely respond to AFSCME's requests for information relevant to the Oswalt and Mersereau grievances did not interfere with the existence or administration of AFSCME in violation of ORS 243.672(1)(b).

ORS 243.672(1)(b) provides that it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to establish a violation of subsection (1)(b), a complainant must prove "'actual' domination, interference, or assistance that has a 'direct effect' on a labor organization." *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 608 (2004). *See also Lane County Peace Officers' Association v. Lane County*, Case No. UP-28-00, 18 PECBR 750, 767 (2000); *Oregon Public Employees Union v. Jefferson County*, Case No. UP-9-99, 18 PECBR 128, 140 (1999); *Thyfault and Oregon Education Association v. Pendleton School District No. 16*, Case No. UP-101-90, 13 PECBR 275, 284, *recons*, 13 PECBR 380 (1991), *AWOP*, 116 Or App 675, 843 P2d 514 (1992), *rev den*, 316 Or 529, 854 P2d 940 (1993). Unlawful employer interference with a union involves more than interference with individual employees' protected rights; it affects the labor organization as an entity. *AFSCME Council 75, AFL-CIO and Haphey and Bondietti v.Linn County, Linn County Sheriff's Office*, Case No.

UP-115-87, 11 PECBR 631, 656 (1989), quoting Morris, *The Developing Labor Law* (BNA 2d ed. 1983) at 282 (footnote deleted from *Linn County*). Thus, to prove a violation of subsection (1)(b), a complainant must show that the employer's conduct had an actual and direct effect on the labor organization.

This Board has inferred actual interference when an employer's actions have the "natural consequence" of interfering with the union's relationship with its members. In *AFSCME Council 75, Local 328 v. Oregon Health Sciences University*, Case No. UP-37-96, 17 PECBR 343 (1997), an employer provided information to a union about an alternative pension plan and later sent information about the option directly to bargaining unit members, causing unit employees to question the substance of the option and the union's role in considering it. We held that "[t]he natural consequence of that questioning was an undermining of AFSCME"s role, and an interference with the relationship between AFSCME and its members." *Id.* at 363.

Here, AFSCME proved that the City failed to timely respond to AFSCME's requests for information materials relevant to the Oswalt and Mersereau grievances. There is no evidence in this record demonstrating that the City's untimely delivery of requested information affected AFSCME's ability to represent bargaining unit members in the grievance and arbitration process, or that the City's conduct affected AFSCME's representation of its members in any other way. Nor does the record support a conclusion that the City's conduct prejudiced AFSCME's ability to prosecute the Mersereau and Oswalt grievances. Accordingly, AFSCME has not demonstrated that the City's actions had any actual effect on the labor organization. AFSCME also failed to prove facts that would warrant an inference that the natural consequence of the City's action interfered with AFSCME's administration or existence. We will dismiss this portion of the complaint.

Remedy

We have concluded that the City violated ORS 243.672(1)(e) when it failed to respond in a timely manner to AFSCME's requests for materials relevant to the Oswalt and Mersereau grievances. We will order the City to cease and desist from this conduct.

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

AFSCME argues that the City's conduct was repetitive because "[t]he City has been found guilty of violating the duty to provide information twice in the two years before this complaint was filed," citing *Laborers' Local 483 v. City of Portland,* Case No. UP-15-05, 21 PECBR 891 (2007), and *City of Portland,* 21 PECBR 858 (AFSCME's post-hearing brief at 16). In order to show that a violation was "repetitive," a complainant typically must prove "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Association of Oregon Corrections Employees v. State or Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). The *Laborers' Local 483 v. City of Portland* case was not between the same parties as this case, and we do not consider it here. The stipulated conclusions of law in the 2007 *City of Portland* case state in part that "[t]he City violated ORS 243.672(1)(e) by failing to provide or object to the requested information (comparator information, the internal affairs file related to the termination, portions of the police bureau's personnel file, and certain supervisors' files) in a timely manner." 21 PECBR at 865.

We agree with AFSCME that the City's conduct is repetitive: in a prior Order issued a year before this complaint was filed, we held that the City failed to respond to an AFSCME information request in a timely and complete manner. We note, however, that the City did respond promptly and appropriately to many of AFSCME's requests. In consideration of these factors, we conclude a civil penalty of $200 is appropriate.

Finally, AFSCME asks that we order the City to post a notice of its wrongdoing. We usually order an employer that has committed an unfair labor practice to post an official notice if the employer's unlawful conduct: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of the respondent employer's personnel; (4) affected a significant portion of bargaining unit members; and (5) had significant potential or actual impact on the functioning of the designated representative. *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 must be met to require a posting. *Oregon Nurses Association v. Oregon Health & Science University,* Case No. UP-3-02, 19 PECBR 684, 685 (2002).

Here, the City's actions were not part of a continuing course of illegal conduct, and were perpetrated by three City employees rather than a large number of personnel. The City's conduct did not affect a significant number of AFSCME bargaining unit members, and as discussed above, did not affect AFSCME's ability to represent bargaining unit members.

Nor do we find that the City's conduct was "egregious." "Egregious" is defined as "conspicuously bad" and is a synonym for "flagrant." *East County Bargaining Council v.*

David Douglas School District, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986). In *David Douglas School District,* we held that a school district's unlawful unilateral increase in student contact time violated subsection (1)(e). We awarded a $1,000 civil penalty to the union because the school district was aware of the law but chose to disregard it. *Id.* at 9195 n 14. Here, the record does not demonstrate that the City knowingly disregarded the law.

ORDER

1. The City will cease and desist from failing to respond in a timely manner to AFSCME's requests for information under the PECBA.

2. The City will pay AFSCME a civil penalty of $200.

3. The remainder of the complaint is dismissed.

DATED this 29 day of June 2012.

Susan Rossiter, Chair

*Paul B. Gamson, Board Member

Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Gamson, Dissenting In Part:

I dissent. The amount of money a union must pay an employer for copies of documents obviously concerns "direct or indirect monetary benefits," a subject the legislature expressly made mandatory for bargaining in ORS 243.650(7)(a). My colleagues conclude otherwise. In doing so, they overrule a recent, carefully considered, and unanimous Board decision.

As explained below, my colleagues have not given me sufficient time to address the merits of this complex legal problem. I will, however, address two disturbing aspects of the process my colleagues used to reach their decision. They chose a process which excluded consideration of all voices and viewpoints except their own.

First, the majority did not hear from the parties on the issue of whether payment for documents is mandatory for bargaining. Neither party raised it, and as a consequence, neither party had a reason or the opportunity to brief and argue it. Both parties assumed the issue is mandatory for bargaining. Our recent precedent clearly says it is. The majority nevertheless reaches out to overrule this precedent even though neither party asked us to do it. Precedent is important. It creates certainty and stability in the workplace, and parties act in reliance on it. For these reasons, we historically reverse precedent rarely and cautiously. Not so here. My colleagues acted without any input from the parties, and as a result of this unfair process made an ill-considered decision.

The majority's process demonstrates a basic misunderstanding of this Board's role. Our job is to answer the questions presented and argued by the parties, not to ask the questions in the first place. Due Process guarantees the parties the right to receive notice of the issues and an opportunity to be heard.[20] The majority denied AFSCME these rights. AFSCME lost without any opportunity to address the merits of the dispositive issue. Given the chance, perhaps AFSCME could have raised a persuasive argument, perhaps not. The point is that they were entitled to that opportunity. They did not get it. I view this process as fundamentally unfair.

Second, the majority's process precluded any meaningful input from me, the labor representative on the Board. My colleagues first gave me a copy of their order just four scheduled working days before my term in office ends. Four days is not enough time to research and draft a meaningful response on the merits of this complex issue.[21] By contrast, the majority had the case for nearly nine months—the case was argued and submitted on October 3, 2011. On that date, the full Board met and unanimously agreed on the result. The result we agreed to is different from the one issued in today's majority decision. The Chair is the lead author of the decision. In the nine months following submission of the case, she never once mentioned it to me or told me she changed her vote. This is true even though, as I subsequently learned, she met with the

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[20]Due Process guarantees AFSCME the opportunity to be heard *before* the Board makes its decision. An opportunity to request reconsideration after the decision is made is not enough.

[21]My colleagues were aware that in my few remaining workdays, in addition to this case, I also had to finalize a concurrence, draft another concurrence, and prepare for and attend two oral arguments.

management member of the Board to discuss the case, and the two of them exchanged drafts and comments. I was excluded from all of these activities, and never even knew they were occurring.[22]

Had I been included, I would have had the opportunity to try to influence the outcome; if I was unsuccessful, I would have had enough time to draft a dissent on the merits.

More fundamentally, I should have been included. The legislature created this Board as a delicate balance of the interests of labor, management, and the public. ORS 240.060(1). When my colleagues excluded my voice from the decision-making process, they upset the balance. That is especially important here because the management and public members overrule a recent and unanimous decision which established an important economic right for labor. They did so without first hearing from labor. As described, they provided no opportunity for input from either the labor organization that is party to the case or from the labor representative on the Board.

I will not speculate about my colleagues' motives or whether they intentionally manipulated the process.[23] But the effect of holding this order for nine months and issuing it at the last minute is clear: it left me inadequate time to respond.

The integrity and acceptance of this Board's orders depend not only on fairness, but also on the appearance of fairness. This order fails on both counts. The management and public members of the Board overturn a case establishing an important right of labor. They do so even though neither party raised the issue, and they do so without

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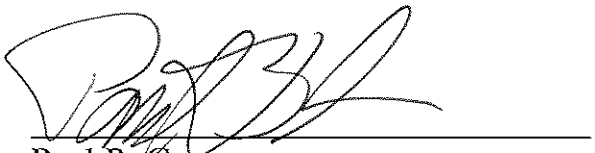
[22]Unfortunately, this is not an isolated incident. In the past four months, my colleagues have regularly excluded me from Board business. In the most recent example, they scheduled oral argument in Case No. UP-45-10 on a day they knew I was scheduled for vacation, did not tell me the case was set for argument, and instructed staff not to provide me the case materials that staff always automatically distribute to all Board members prior to each argument. I found out quite by accident that the argument was scheduled. There are other similar examples. In my nine years on the Board, including seven as Chair, nothing remotely like this ever occurred. To the contrary, until now, we unfailingly accommodated everyone's schedule and scrupulously included all Board members in every argument, decision, and all other aspects of Board business.

[23]My colleagues are also aware of the status of my replacement as the labor member on the Board—he was an advocate in this case on behalf of AFSCME, so he is ethically prohibited from participating in this decision as a Board member. The last minute issuance of this order means either that I will have inadequate time to respond, or if they delay release for several days, my replacement will be recused from participation. Either way, the Board's labor member is excluded.

allowing input from the labor union or from the labor member of this Board. I dissent from this attempt to silence the voice of labor.[24]



Paul B. Gamson

[24]I also dissent from my colleagues' decision to drastically reduce the civil penalty assessed against the City far below the amount recommended by the Administrative Law Judge. I concur with the results my colleagues reach on the other issues in this case.