

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-49-08

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES LOCAL 189,)
)
Complainant,)
)
v.)
)
CITY OF PORTLAND (Portland Police)
Bureau),)
)
Respondent.)

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

On March 30, 2011, this Board heard oral argument on both parties' objections to a Recommended Order issued on January 24, 2011, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing in Portland, Oregon, on July 29, August 20, and October 27, 2009. The record closed on January 26, 2010, with the submission of the parties' post-hearing briefs.

Patrick N. Bryant, McKanna Bishop Joffe & Arms, LLP, Portland, Oregon, represented Complainant AFSCME Local 189 at oral argument. Elizabeth A. Joffe of the same firm represented Complainant at hearing.

Stephanie Harper, Deputy City Attorney, City of Portland, Portland, Oregon, represented Respondent City.

On December 23, 2008, the American Federation of State, County and Municipal Employees Local 189 (AFSCME or Union) filed this Complaint alleging that the City had engaged in unfair labor practices by eliminating three bargaining unit positions and replacing them with reclassified positions outside the bargaining unit. Respondent filed its timely answer on March 17, 2009.

The issue is:

Did the City, on or about June 29, 2008, unilaterally remove the three Senior PASS positions that supported the Assistant Chiefs from the bargaining unit and treat the new positions (Administrative Assistants) as outside the bargaining unit in violation of ORS 243.672(1)(e) or (a)?

RULINGS

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

FINDINGS OF FACT

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City is a public employer as defined by ORS 243.650(20), and the Portland Police Bureau (Police Bureau) is a part of the City. AFSCME is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of City employees.
3. The Union is a member of the District Council of Trade Unions (DCTU) through which it has negotiated a series of collective bargaining agreements¹ with the City. The term of the agreement in effect at the time of hearing was July 1, 2006 to June 30, 2010.
4. Most sworn personnel at the Police Bureau are represented by the Portland Police Commanding Officers Association (PPCOA) or the Portland Police Association (PPA). AFSCME Local 189 represents a wide array of employees of the City of Portland, including most civilian, unsworn employees of the Police Bureau. There are close to 300 employees in approximately 12 job classifications in AFSCME's Police Bureau bargaining unit. Among the Police Bureau positions represented by AFSCME are the Senior Police Administrative Support Specialists (Senior PASS).
5. James Hester is the President of DCTU and a staff representative of AFSCME Council 75 assigned to the Union.

¹Throughout this order, we will use the term "contract" interchangeably with "collective bargaining agreement."

6. Yvonne Deckard is the Director of the City's Bureau of Human Resources (HR). She reports directly to the City Council concerning labor relations matters. During the events at issue in this case, Steve Herron was the Manager of Labor/Employee relations within HR. Herron and Hester frequently discussed matters concerning Union contract administration.

The Portland Police Bureau

7. The Portland Police Bureau is led by a Chief and three Assistant Chiefs who head the three branches of the Police Bureau: Investigations, Operations, and Services. The Chief appoints the three Assistant Chiefs, who serve at will. The Chief reports to a City Council member who is the Police Commissioner. At the time of hearing, the Chief of Police was Roseanne Sizer and the Police Commissioner was Dan Saltzman. There are approximately 1,300 Police Bureau employees, of which approximately 1,010 are sworn and 290 are unsworn.

8. The Chief and the three Assistant Chiefs work in a suite of offices referred to as the "Chiefs' Office." At the time of hearing, the Assistant Chief for Investigations was Bret Smith, the Assistant Chief for Operations was Brian Martinek, and the Assistant Chief for Services was Larry O'Dea. Martinek was the Assistant Chief for Services from September 2006 until November 2008.

9. The City Bureau of Human Resources performs much of the labor relations functions of the Police Bureau. In May 2007, Sean Murray was assigned to work exclusively with the Police Bureau in the position of Police HR Manager. Because Murray's labor relations experience is far more extensive than that of the Assistant Chiefs, he expanded HR's role in labor relations at the Police Bureau. Murray has an assistant who is a Police Bureau employee and a member of the PPCOA bargaining unit.

10. The Chief has an unrepresented civilian assistant. At the time of hearing, this position was held by Linda Metzger.

11. Each Assistant Chief has an assistant who is a sworn officer, either a Sergeant or Lieutenant. Only sworn officers are considered to have the knowledge and experience needed to make judgments about the appropriateness of officers' conduct, officers' qualifications for positions, and other police matters. Therefore, only sworn officers do substantive work on matters such as officer after-action reports, disciplinary issues, and promotions.

12. Each Assistant Chief also has a non-sworn assistant for administrative work. Since at least 2000, these three positions were in the Senior PASS classification. Prior to their classification as Senior PASS, these positions had other classifications, also within the Union bargaining unit.

13. From 2002 through June 2008, these Senior PASSes reported directly to the Assistant Chiefs to whom they were assigned. The City formalized this reporting relationship in Spring 2006.

14. Prior to the events at issue in this case, the following individuals filled Senior PASS positions: Jeanette Pallori in Investigations, Norita Marquart in Operations, and Kathy Lee in Services.

15. Civilian employees of the Police Bureau have only limited opportunities for advancement. The Senior PASS classification is considered the top position within the Union's bargaining unit at the Police Bureau.

The City's Reclassification Process

16. The City uses a civil service system created by its City Charter. It is implemented by a Civil Service Board as well as by HR administrators, including David Rhys, HR Classification and Compensation Manager.

17. Under the City's system, managers can seek to have an existing position "reclassified" to a new job classification. To initiate a reclassification, managers fill out a "P-4" form and submit it to HR. The manager indicates what classification the manager would like to have assigned to the position. The manager also provides information to support the request, such as a description of the duties and reporting structure that the position currently has or is planned to have.

18. HR uses the information provided on the P-4 to determine whether to reclassify the position as requested. Before or after managers file a P-4, HR staff consults with the managers to assist managers with their request.

19. A particular classification attaches to a position only when HR issues a classification or reclassification decision. The reclassification of an existing position, as defined by the City, does not require any action by the City Council. The creation of a new permanent position, as defined by the City, requires City Council approval.

20. The City's reclassification process determines the status of a *position*, but not necessarily the status of the *individual holding the position*. When a position is reclassified, the incumbent employee may not have civil service status in the position as reclassified. That employee could temporarily hold the position but would be required to earn civil service status in the position, typically by reapplying for the position in competition with others, before returning to permanent status. The degree of competition is greater when the position is outside the Union bargaining unit.

21. The incumbent in a position undergoing reclassification may also obtain civil service status in the position through an “accretion of duties” standard. In this situation, the manager seeking reclassification indicates on the P-4 that the relevant aspects of the position have already changed to those of the new classification. Therefore, the individual holding the position is granted civil service status in the new reclassified position because he or she already performs the work of the new classification. If HR approves an application for accretion of duties, the incumbent remains in the position on a permanent basis.

22. Article 26 of the Union/City collective bargaining agreement concerns wage scales and reclassification. It states, in part:

“26.2 Before requesting the reclassification of any position, proposing a new classification, or abolishing any represented classification, the Human Resources Director shall notify the Unions affected by the proposed reclassification, creation or abolition, and, discuss the effect thereof.

“26.2.1 If the City reclassifies any represented bargaining unit position(s), and there is a disagreement over whether the new classification remains in the bargaining unit or over representation of the new classification, the parties will meet, within five (5) working days, to resolve the matter by mutual agreement prior to resorting to the procedures of ORS 243.650 to ORS 243.782.

“26.3 **Reclassification:**

“* * * * *

“26.3.2 Disputes about the appropriateness of reclassification of employees by management or denial of employee-initiated requests for reclassification may be appealed to the Human Resources Director and the Civil Service Board in accordance with the Personnel Rules of the City of Portland.

“26.4 The Unions recognize that the Human Resources Director and Civil Service Board have the sole authority to classify or reclassify positions. The above does not preclude the Unions from monitoring the City’s classification plan.

- “26.5 **Wage Rates for New Classifications:**
- “26.5.1 When any classification not listed in Schedule A is established, or when an existing classification is substantially revised, the City will set a wage range for the classification which is reasonably related to wage ranges for comparable positions in comparable labor market areas for the classification and to wage ranges for existing classifications in Schedule A.
- “26.5.2 Upon setting a wage range for the new classification, the City shall notify the Union of the range and its effective date. The Union may either accept the established range or within ten (10) working days of receipt of the City’s notice, notify the City’s designee for labor relations of its desire to bargain under the provisions of state law. The union’s demand to bargain shall include their proposed wage for the classification and a brief description of the reasoning supporting the wage rate. The City can establish an interim rate during bargaining.”

23. If a reclassification decision is appealed to the City Civil Service Board, that Board may overturn HR’s decision if the decision is “without rational basis or contrary to law or rule promulgated by the Director for classification or taken for a political reason.” No Civil Service appellant has prevailed during the last eight years. The Civil Service Board does not have the authority to consider questions of representational status.

24. The City classifies or reclassifies roughly 550 positions each year. From fiscal year 2005 through fiscal year 2009, forty-six classifications in the DCTU-represented work force were reviewed; as a result of these reviews, nine Police Bureau DCTU positions became unrepresented.

25. At times in the past, affected unions have voiced concerns about a requested reclassification, and union and City officials have, on occasion, met to discuss the concerns informally. Prior to the events at issue, the City had not proceeded with a reclassification application over the objections of a union.

26. The recognition provision of the parties’ contract provides in part, “[t]he City recognizes the Unions as sole collective bargaining agent for all employees of the City in all classifications contained in Schedule A of this agreement * * *.” The Senior PASS classification is listed in Schedule A. The classification Administrative Assistant is not.

27. Regarding promotions, the contract provides that the City must follow a "rule of two" when filling a promotion opportunity within the bargaining unit: if two or more bargaining unit members are qualified to promote to the position, the City must select from within the unit. The City rarely conducts an open recruitment process for non-entry-level positions in the bargaining unit. The Union has fought to maintain the rule of two in bargaining and objects if the City attempts to fill a position through open recruitment when qualified bargaining unit members are interested in applying for the position.

The Senior PASS Reclassification

28. Martinek joined the Police Bureau in September of 2006 as Assistant Chief for the Services branch. Prior to his employment with the City, he was Chief of Police for the city of Vancouver, Washington. After reviewing his new responsibilities, Martinek determined that the Police Bureau's business processes were archaic, that records management needed more development, that the office had insufficient administrative support staff, and that the office could benefit from a reorganization of support staff. Martinek also concluded that the office needed support staff who could manage any one of the three branches and have access to and an understanding of everything the three assistant chiefs did, including materials that were confidential or related to personnel, union, contract, or negotiations matters.

29. Martinek believed that it would be better for the Bureau if the Senior PASS positions in the Chiefs' Office were not included in a union bargaining unit.

30. Martinek did not assign his Senior PASS assistant any projects that involved information that should not be shared across bargaining units; instead, he kept separate records concerning these matters. This was inefficient, because many of his job duties involved labor relations matters. Police Bureau HR Manager Murray felt that Martinek was overburdened because he not only performed Assistant Chief duties, but also handled many administrative tasks that could have been delegated to an assistant.

31. In late 2006 or early 2007, Martinek and Hester met over coffee. Martinek stated in general terms that he believed the City should be able to select whomever it wanted for Senior PASS positions. Hester replied that he believed this would be a subject for bargaining. Hester and Martinek never discussed the issue further.

32. In late April or May 2008,² Martinek's Senior PASS, Kathy Lee, left her position. Another Senior PASS position was also vacant. Police Bureau officials decided this was an appropriate time to implement some of their goals for the positions, and Police HR Manager Murray reviewed the options.

²All subsequent events occurred in 2008, unless otherwise noted.

Murray met with Martinek to discuss what Martinek needed in an assistant. Based on what Martinek told him, Murray concluded that Martinek should have an assistant who could perform higher level administrative tasks. Murray decided that the Administrative Assistant classification was a good match for the type of assistant Martinek needed, because Administrative Assistants had more responsibility and performed more complex work than Senior PASSes. In addition, Administrative Assistants worked with confidential matters such as contract administration and negotiation issues. Murray believed that these were necessary skills for the assistants to the Police Bureau Assistant Chiefs.

33. On May 13, Murray e-mailed Martinek suggesting the Administrative Assistant classification for the positions at issue:

“Looking forward in filling your Sr. Pass vacancy, please review the attached job spec for Admin Assistant. The position is non-represented and FLSA non-exempt (subject to OT). As for salary structure, this position falls between a Sr. Pass and Executive Assistant (Linda M.’s position). Additionally, I believe the job duties encompasses [*sic*] almost everything you’re looking for in the position.

“Upon review of the attached, let me know your thoughts so we know the direction to proceed. If approved, Chris will work with class/comp to reclassify the position, as well as schedule a recruitment within the next few weeks.”

34. On June 19, Chief Sizer approved the reclassification request, and the Police Bureau sent a P-4 form to HR asking that the three Senior PASS positions be reclassified to Administrative Assistant positions using an “accretion of duties” standard. (If the accretion of duties proposal had been pursued and accepted, incumbent Jeanette Pallori would have been entitled to remain in the position.) The application stated that the desired change was urgent.

Murray made the application on an urgent basis because he believed that Martinek was overburdened by the administrative work he was performing in addition to his duties as an Assistant Chief.

35. The P-4 form the Police Bureau submitted stated, in relevant part:

“Due to the highly sensitive and confidential nature of work performed on a daily basis by these administrative support positions, the Police Bureau wishes to reclassify these positions.

“* * * * *

“[The position] Provides confidential secretarial and administrative support to the Assistant Chiefs of Police; responds to various requests from Police Bureau Personnel, Committee and Advisory Board representatives, Elected Officials, City Executives, Portland community leaders, other law enforcement jurisdictions, Union Executives (DCTU, PPA & PPCOA), and citizens.”

“* * * * *

“The Administrative Assistants are frequently responsible for highly important and confidential information for the A/C’s. Errors and omissions can have serious consequences, both in terms of the A/C’s and with the customers, and in the perception of the Police Bureau in the eyes of the people and the Community we serve. Errors, incompleteness or lack of timeliness can have a serious consequence for how the day-to-day business is conducted.”

36. By letter dated June 23, the City’s HR office notified Hester that it had received the Police Bureau’s P-4:

“Our office has received a request to classify or reclassify positions represented by your bargaining unit. Attached is a copy of the front page of the classification request form(s).

“This notice is being sent to give you an opportunity to discuss any effect of the proposed classification action with the City.

“If you have any questions regarding this classification request and/or pending decision please feel free to contact David Rhys * * *.”

This was the City’s first notice to the Union regarding the reclassification of these positions.

37. Also on June 23, City HR Classification and Compensation Manager Rhys asked Murray and other Police Bureau officials for information about the proposed position:

"We have received an urgent reclass request to reclass the 3 Sr PASS positions assigned to the A/Cs to the classification of Adm Asst and asking for accretion of duties to gain status in the new class for each of the incumbents.

"I need the following information today if possible, given that this is an urgent request.

"1. From your description and attached org chart, each of these positions is assigned on a one-to-one basis to an A/C. This is an important element of the class. If this is not the case, please explain.

"2. On accretion of duties, there is only one incumbent for whom this request applies--J Pallori assigned to the A/C for Investigations. The request contained no information about how this incumbent's job increased over a period of time which would allow us to approve the accretion of duties request. I am not sure this is an appropriate vehicle to use, but we are very willing to review a justification.

"Here is the rule and information that may assist in determining whether accretion of duties is a fit.

"* * * * *

"Questions:

"How long has the incumbent been in this assignment?

"It could be that the requested classification is just a better fit for the described work, and the level of duties of the position has not increased over the past year. If so, accretion of duties would not be an appropriate mechanism to use. If the level of duties has increased over the past year, please describe what are the duties that have increased in level, and how?

"How have these duties been given to the employee? Have they been assigned?

"Have they grown over time by gradual addition? Explain.

All of this is needed for us to be able to determine if accretion of duties is a possibility. If not, just let us know and we will move on without it.

"Thanks.

“UPDATE-- We are sending Notice on this P-4 to the Union (AFSCME) and providing a copy to Financial Planning today.”

Bureau officials responded to the first question that same day, and later that evening, the Bureau withdrew its request for an accretion of duties.

38. On Tuesday, June 24, Rhys approved the Police Bureau’s application.

39. On June 25, AFSCME received Rhy’s June 23 letter to Hester notifying him of the submission of the P-4 form.

40. On Thursday, June 26, the Mayor’s office approved the application. Under the City’s rules regarding reclassification and position creation, the reclassification at issue did not create a new position; new positions are created through City Council approval. Therefore, the decision to reclassify the positions at issue and the determination that they were excluded from the bargaining unit became effective with the Mayor’s signature. The PIN number assigned to the positions at issue was changed to reflect the new classification and the changes in the positions were entered into the City’s personnel database.

41. The key factor in Rhys’ determination that the positions at issue could be classified as Administrative Assistant positions was their reporting structure, namely that the P-4 form stated each position reported directly to an Assistant Chief.

42. The City did not retain the sole incumbent in the reclassified Administrative Assistant positions. It instead initiated an “open recruitment” process, opening the positions to the broadest possible range of applicants, including individuals not currently employed by the City.

43. Incumbent Senior PASS Pallori applied through the open recruitment process. She was selected for an interview. Under City rules, only individuals qualified for positions are entitled to an interview. She scored beneath four other candidates, and the Bureau did not offer her a position. The record does not reveal Pallori’s current employment status or position with the City.

44. The City selected Barbara Erspaner to serve as the Administrative Assistant for the Investigations branch, Diana Haman for Operations, and Pamela Mattys for Services.

45. As a result of City budget cuts, Senior PASSes have been laid off and bumped down into other positions.

The Union's Response

46. On Sunday, June 29, Hester mailed and faxed a response to the June 25 letter to the Chief, Mayor, Martinek, and others. Hester stated in part that the Union "vehemently objects" to the reclassification and wanted to discuss the matter "as soon as possible." Hester also telephoned Rhys to attempt to arrange a meeting to discuss the reclassification.

47. Rhys, whose office was adjacent to City Labor/Employee Relations manager Herron's, notified Herron of Hester's concerns because the Union had objected and there was a question concerning the positions' representation status. Rhys initially assumed Herron would respond to Hester.

When Hester made a demand to bargain, he usually sent it to City HR Director Deckard or Herron. Because Hester sent his June 29 letter and fax to Rhys, Herron did not believe that Hester intended to make a demand to bargain.

48. On July 7, Rhys acknowledged Hester's request to meet and suggested they do so the week of July 14. Hester asked for a copy of the job description for the positions, and a full copy of the P-4 application. Hester told Rhys that he was also trying to find a copy of City Council approval of the change. Hester was unaware that this type of reclassification did not require City Council approval. Hester explained that he needed this additional information to effectively discuss the reclassification. Hester told Rhys that he wanted to meet, but would get back to him on available dates.

49. Also on July 7, the City began its open recruitment for the three Assistant Chiefs' Administrative Assistant positions.

50. On July 14, Hester e-mailed Herron, Rhys, and others requesting details concerning the reclassification, such as the number of positions at issue, the names of the individuals affected, and the job description for the positions. Hester also stated that the Union anticipated filing a Unit Clarification Petition.

51. Hester received no response to his e-mail and on August 14, reiterated his request by e-mail. Hester also orally reminded Herron that he was awaiting Herron's response.

52. Herron did not respond to Hester's requests and on August 21, Hester made a third request for information. Hester told Herron that the Union would consider any further delay in responding to be an unfair labor practice.

53. On August 25, Herron responded to Hester's information request and explained that Maureen Weber, the HR Analyst and Civil Service Board Administrator in the City's Labor Relations department, would contact Hester to schedule a meeting. Weber and Hester had difficulty scheduling the meeting; Hester's schedule was one of the obstacles. The parties finally met to discuss the positions on November 25. The meeting did not resolve the dispute.

The Senior PASS and Administrative Assistant

54. The Senior PASS position has its origins in the Police Records Clerk position, and was created in February 1999 as a result of a class/compensation study. The specific job description for the Senior PASS position is incorporated in a series of job descriptions that range from Police Records Specialist Trainee to Police Administrative Support Specialist, Lead. The "General Summary" for these positions states:

"Positions in this broad class use Portland Police Data System (PPDS) and Law Enforcement Data System (LEDS) law enforcement computer applications to provide support for officers and the courts. These positions differ from the Administrative Support Specialist class because they work multiple shifts, require a high degree of accuracy affecting public safety and legal consequences, and provide service to the public in potentially threatening, emotional and problematic contexts. Incumbents are required to pass a background investigation."

55. According to its job description, the essential duties and responsibilities of the Senior PASS position are:

"Distinguishing Characteristics

"The third level of this class is highly specialized and requires program-specific knowledge that may not be readily transferable from program to program. This level is distinguished from Police Administrative Support Specialist by the degree of responsibility for program expertise and knowledge; the highly sensitive nature of information to which the employee has access; the complexity of procedures followed; and the

consequences of inadequate performance or inappropriate judgement. Typically, the incumbent is the sole contact person for bureau staff, staff of other agencies and the public for the specific program or area of responsibility. This class may provide lead direction and training to other police administrative support staff.

“* * * * *

“Typical Duties/Examples of Work

“1. Selects, compiles and summarizes information from various records and sources.

“2. Attends meetings; takes and transcribes minutes; provides general staff support.

“3. Responds to callers, in person and by telephone; provides factual and procedural information regarding policies, regulations and investigative procedures; assists complainants and victims in signing complaints; contacts other agencies for information.

“4. Establishes and maintains manual and automated specialized record-keeping systems; restructures automated files to sort items based on material and document content; purges files; maintains logs on processed materials; posts information to records and files to update information and document activities. Conducts file searches to locate misplaced documents; compiles data and researches information.

“5. Completes bookkeeping and purchasing records; assists in report and budget request preparation by researching and compiling information.

“6. Researches available information based on requests from Bureau management or the public; interprets appropriate rules, General Orders and operating procedures related to a particular program area; responds to requests for information or rules interpretation; resolves difficult issues.

“7. Produces highly visible or confidential correspondence and reports.

“8. Maintains current and historical public record files and/or financial records for program area; produces management information reports and summaries.

“9. Provides lead direction to police office support staff as formally assigned, including scheduling, coordinating, assigning, reviewing, and overseeing the completion of a variety of work; trains other employees; may provide input to performance evaluation.”

56. The position description describes the knowledge, skills, and abilities required for the Senior PASS position as follows:

“Knowledge of: specific program requirements and terminology; database manipulation and program specific software packages; availability and interrelationship of similar and related services.

“Skill in: working with staff and the public to resolve disputes or issues and/or problems; working independently, including prioritizing work assignments for self; making decisions, recommendations, and independent judgements; researching and [*sic*] applicable rules and procedures.”

The position requires the employee to have PPDS and LEDS certification, and may require a background check.

57. According to its position description, the duties and responsibilities of the Administrative Assistant position are:

“ESSENTIAL DUTIES AND RESPONSIBILITIES

“Any one position in this class may not perform all the duties listed below, nor do the listed examples of duties include all similar and related duties that may be assigned to this class.

“1. Provides confidential secretarial and administrative support to division managers and other City executives at or above the division management level; types and/or drafts City Council materials, memoranda, correspondence, reports, contracts, agreements, presentation and overhead materials, forms, requests for proposals, bureau manuals, technical reports, mailing and contact lists, press releases and public announcements and other documents ranging from routine to complex; types from drafts, notes, dictation or brief oral instructions, using word processing software; proofreads and checks typed and other materials for accuracy, completeness and compliance with City and bureau standards, policies and procedures; ensures materials, reports and documents for signature are accurate and complete; develops, revises and maintains master

documents, templates and forms and maintains and enters a variety of data in databases and spreadsheets; composes correspondence, reports and informational materials; copies reports for internal and external distribution; sends and receives faxes.

- “2. Maintains manager or management team calendars; coordinates, arranges and confirms meetings; arranges for meeting setup and refreshments; attends meetings, takes notes and transcribes minutes; screens requests for appointments; creates and maintains event calendars; coordinates special events.
- “3. Receives and screens visitors and telephone calls, providing information and handling issues that may require sensitivity and the use of sound independent judgment; conducts research, responds to requests for information and complaints from officials, customers and the public, refers the request or complaint to appropriate staff and/or takes or recommends action to resolve the issue; reviews, determines the priority and routes incoming correspondence.
- “4. Reviews, proofreads and edits bureau agenda items for City Council and staff meetings and meetings of public and interagency committees; maintains files for Council agenda materials; provides information to bureau managers on pending Council matters, bureau projects and assignments and a variety of other matters.
- “5. Prepares technical worksheets, tables and computations; establishes and maintains databases of information to track pending projects, budget expenditures, training certifications, facilities requests and services, bureau testing and similar matters.
- “6. Researches and assembles information from a variety of sources for the preparation of records and reports; makes arithmetic or statistical calculations; organizes and maintains office files; archives bureau records and files; assists staff in locating files and records; ensures files are imaged into the bureau imaging system; conducts special studies and recommends organizational, procedural or other changes to achieve greater productivity and/or to comply with new City requirements.
- “7. Prepares travel and training requests; makes and confirms travel and other arrangements for conferences and business trips; types itineraries, compiles expense reports and prepares post-travel memoranda; requests reimbursement for petty cash expenditures.

- “8. Attends to a variety of office administrative details; establishes and maintains confidential, subject, project, and specialized files; creates and maintains contract files; orders and disburses supplies and furniture; keeps inventory of bureau supplies; researches and recommends products and vendors; arranges for minor building and equipment repair and maintenance; performs on-line purchasing and receiving; performs timekeeping activities; develops and distributes informational and promotional materials; maintains manager’s annual subscriptions and dues; keeps reference documents up to date and orders new resource materials for the bureau library.
- “9. Provides administrative and secretarial support for professional association affiliations of City executives, including drafting meeting announcements and materials, making meeting hotel, room and food arrangements, composing and arranging for the duplication and mailing of newsletters, collecting and accounting for membership and other fees and drafting treasury and other reports for the City executive.
- “10. Assists in preparation of the bureau’s annual budget; tracks and reconciles expenditures against budget; processes purchase orders and pay requests; prepares bills for payment; prepares budget reports; processes vendor invoices; makes requests to accounts payable for payment; prepares budget adjustment requests and budget impact statements; bills outside agencies that use bureau facilities.

“OTHER DUTIES

- “1. Provides guidance to other administrative support staff on agenda and report preparation, City methods and practices and techniques and advanced uses of word processing, graphics, database and other software programs.
- “2. May provide lead work direction and guidance to other clerical staff; supervises and trains temporary and seasonal employees; provides backup for administrative support staff.
- “3. Maintains calendars for bureau-wide training classes; assembles materials, schedules training and registers students.

- “4. Coordinates maintenance of bureau fleet and telecommunications equipment; maintains schedule for manager’s shared automobile; tracks and maintains sign-out of bureau pool cars.
- “5. Coordinates and participates in space and ergonomic planning activities; maintains ergonomic records.
- “6. Assists in maintaining the bureau’s website by delivering web publishable bureau information to the webmaster for input onto the bureau website.
- “7. Assists with the administrative preparation for City public auctions; coordinates advertising; calculates expenses and arranges payment processing.
- “8. Coordinates the security ID badge program; maintains after hours building access list and ID badge logs.
- “9. Administers the Smoke Alarm Program including intake, referrals, data entry and maintenance of forms and detectors.
- “10. Performs notary duties.
- “11. Assists with specialized bureau-specific recruitment programs.
- “12. Serves on and attends City and bureau committees and meetings; represents the bureau at meetings and media events; arranges tours of bureau facilities.”

58. The knowledge, skills and abilities required for the Administrative Assistant position are described as:

“Knowledge of:

- “1. Office administrative and management practices and procedures, including budgeting, recordkeeping, filing and purchasing practices and procedures.
- “2. Principles and practices of sound business communication; correct English usage, including spelling, grammar and punctuation.

- “3. City organization, rules, policies and procedures, including payroll and travel/training and expense reporting.
- “4. Basic functions of public agencies, including the role and responsibilities of a public governing board.
- “5. Rules and regulations for the conduct of public meetings.
- “6. Computer equipment and advanced uses of word processing, spreadsheet, graphics, database and other software.
- “7. City Council report guidelines and formats.
- “8. Research techniques, methods and procedures.
- “9. City human resources policies and labor contract provisions.

“Ability to:

- “1. Operate a computer and word processing software and other standard office equipment.
- “2. Take and transcribe dictation and/or type accurately at a speed necessary to meet the requirements of the position.
- “3. Manage multiple and rapidly changing priorities.
- “4. Organize, set priorities and exercise sound independent judgment within areas of responsibility.
- “5. Interpret, apply, explain and reach sound decisions in accordance with laws, regulations, rules and policies, including interpreting and making sound decisions on legal documents.
- “6. Organize, research and maintain complex and confidential office files.
- “7. Compose correspondence, prepare documents and make arrangements from brief instructions.
- “8. Communicate clearly and effectively orally and in writing.

- “9. Prepare clear, accurate and concise records and reports.
- “10. Maintain highly sensitive and confidential information.
- “11. Use a high degree of tact, discretion and diplomacy in dealing with sensitive situations and concerned and/or upset groups and individuals.
- “12. Coordinate and facilitate meetings and special events.
- “13. Establish and maintain highly effective working relationships with bureau managers, elected and appointed officials, staff, community and business leaders, customers, the media and others encountered in the course of work.

“Training and Experience:

“A typical way of obtaining the knowledge, skills and abilities outlined above is graduation from high school or G.E.D. equivalent; and five years of increasingly responsible office administrative or secretarial experience; or an equivalent combination of training and experience.”

59. The compensation for the Senior PASS position was \$17.95 per hour for the fiscal year 2008 to 2009. The compensation for the Administrative Assistant position was \$20.07 per hour for the fiscal year 2008 to 2009.

60. Some tasks performed by the Assistant Chiefs’ Senior PASSes and Administrative Assistants are specific to each branch, but most are performed by all three positions. Administrative Assistants perform many of the same duties as the Senior PASSes. Some of these duties are:

- screening and routing phone calls and visitors, and handling routine calls;
- sorting and routing mail, and responding to routine mail;
- drafting simple or routine correspondence, such as letters to the Oregon Liquor Control Commission concerning renewal applications;
- reviewing the Assistant Chief’s e-mail account as needed, such as when the Assistant Chief is away from the office;

- maintaining the Assistant Chiefs's calendar;
- coordinating a myriad of meetings such as staff meetings, meetings with City Commissioners, and meetings of planning and working groups, including tasks such as arranging times and locations for meetings, preparing agendas, gathering relevant information and documents and distributing them to participants, taking minutes, and performing follow-up tasks;
- participating in Citizen Advisory Group meetings, such as the Sexual Minority Roundtable, and working with community leaders to address their constituencies' concerns;
- coordinating Bureau court-related meetings, such as probable cause review meetings, with the court schedule;
- entering and tracking data in databases, such as the after-action report database (which Haman created when she was a Senior PASS);
- processing, routing, and tracking paperwork for oversight bodies such as the Performance Review Board and Use of Force Board (whose meetings were open to the employees whose conduct was at issue, as well as their union representatives);
- assisting Leslie Stevens, the Director of Professional Standards and Accountability, who joined the Bureau shortly before the changes at issue in this case;
- processing and tracking paperwork for Internal Affairs investigations;
- processing and compiling data for reporting processes, such as records of juvenile detentions, overtime reports, use of evidence funds (money used to purchase illicit substances for investigatory purposes), and inspection reports; and
- ordering supplies and requesting maintenance.

61. At the time of hearing, there were 37 employees in the Administrative Assistant classification working in eleven City Police Bureaus, including the three at issue here.

62. The Police Bureau Administrative Assistants sit at the same desks in the same location formerly used by the Senior PASSes. Like the Senior PASSes, each Administrative Assistant supports one Assistant Chief, and each Administrative Assistant reports directly to her Assistant Chief.

63. The primary practical difference between the Senior PASS and Administrative Assistant positions is that Administrative Assistants exercise a greater degree of independent judgment and discretion than the Senior PASSes. For example, Administrative Assistants manage and make decisions about the Assistant Chiefs' schedules; they decide who will meet with the Assistant Chiefs and what priorities will be given to certain items on the Chiefs' schedules.

64. The Assistant Chiefs are more satisfied with the work of the current Administrative Assistants than they were with the Senior PASSes.

Assistant Chiefs' Involvement in Collective Bargaining

65. The City Police Bureau of Human Resources is responsible for successor contract bargaining, negotiating interim agreements with labor unions, interpreting contract language, and managing the City's relationships with labor unions.

City HR Director Deckard is the City's chief spokesperson for collective bargaining. She designates members of her labor relations staff as her representatives for collective bargaining. In 2001, Deckard designated David Shaff, then City Labor Relations Manager, as her chief spokesperson for the DCTU and PPA contracts.

66. Deckard meets with the City Council in executive session to learn what she has authority to offer at the table. Then she meets with her designee to discuss her authority and plan the City's bargaining strategy. Her designee is in charge of bargaining at the table, but Deckard, and ultimately the City Council, must approve the result.

67. In the past, the Assistant Chiefs have not participated to a significant degree in contract negotiations. At the time of hearing, it was the City's intent to have the Assistant Chiefs participate more in the future. The Assistant Chief of Operations led a recent major precinct restructuring that affected Operations Branch employees.

68. Martinek had been asked to keep a list of bargaining issues and was expected to participate on a bargaining team in 2010. Assistant Chief O'Dea anticipates participating in 2010 bargaining and currently participates on the Labor Management Committee. Assistant Chief Smith has not been involved in past contract negotiations and does not plan to participate in future negotiations.

69. Hester has participated in the last three rounds of successor contract negotiations with DCTU; no Assistant Chiefs were involved in any of these negotiations.³

70. The Assistant Chief for Investigations oversees criminal investigations of Police Bureau employees, which may overlap with personnel investigations conducted by the Office of Professional Standards. The Assistant Chief for Investigations meets frequently with union representatives. Many of the Assistant Chiefs' duties are related to managing and implementing policy, and complying with provisions of the collective bargaining agreement.

Assistant Chiefs' Involvement in the Grievance Procedure

71. The Assistant Chiefs have no specified role in the grievance procedure under the PPA, PPCOA, or DCTU collective bargaining agreements except to the extent that, as employees' immediate supervisors, they may be involved in the first grievance step. In Hester's experience, the Assistant Chiefs have had minimal involvement with the grievance process.

Hester has never met directly with an Assistant Chief on grievance matters except on an informal, problem-solving basis. Generally, he works with HR. Even when he was a steward, he worked with either the Chief or the aggrieved employee's direct supervisor.

72. Assistant Chief Smith interacts with Union leadership to discuss issues such as the assignment of overtime on particular occasions or performance concerns about particular individuals.

Assistant Chief O'Dea is responsible for keeping track of grievances at the Police Bureau and has a binder with copies of active grievances. When a grievance is first received, a copy is placed in the binder and the grievance is sent to HR for processing. As the grievance progresses, copies of subsequent documents are also placed in the binder.

³In 1996, this Board held that the Chief of Police does not play a sufficient enough role in collective bargaining for any of the Chiefs' assistants to be considered confidential under PECBA. *City of Portland v. Portland Police Commanding Officers Association*, 16 PECBR 525, 536 (1996).

Assistant Chiefs' Administrative Assistants and Confidential Material

73. The Administrative Assistant to the Assistant Chief of the Investigations Branch provides support to the Office of Professional Standards Manager. This Administrative Assistant also handles preparation and administration of the Police Bureau City Performance Review Board/Use of Force Board, as well as disciplinary investigation records requests from the unions; in addition, this Administrative Assistant schedules disciplinary due process meetings.

74. The City considers much of the material handled by the Senior PASSes and Administrative Assistants to be confidential; these materials include personnel information and information relating to criminal investigations.

Assistant Chiefs' Administrative Assistants and Collective Bargaining

75. Administrative Assistant Erspamer has not participated in any collective bargaining activities, and has not been given any indication she will have any role in the 2010 contract renewal negotiations.

Administrative Assistant Haman has been asked to log "give-mes," side issues to the 2010 contract renewal negotiations on which the parties have reached agreement prior to the start of negotiations. There is only one such log for the entire Chiefs' office; it is not specific to the Assistant Chiefs. None of the materials gave any indication of management's strategy.

Administrative Assistant Mattys has never participated in contract renewal negotiations.

76. Neither Senior PASS Marquardt nor Senior PASS Pallori had any involvement in contract renewal negotiations.

Assistant Chiefs' Administrative Assistants and Grievances

77. Administrative Assistant Erspamer has not participated in any grievance activities, but has been told that in the future, she may be required to attend grievance meetings to take notes.

Administrative Assistant Haman has had no involvement with the grievance process. On occasion, Assistant Chief O'Dea has stepped out of meetings with Union representatives and asked Haman to copy some materials.

78. Senior PASS Pallori had no involvement in the grievance process.

Senior PASS Marquardt occasionally overheard discussion about disciplinary procedures but had no assigned duties relating to grievances.

79. Senior PASSes and Administrative Assistants have assisted with Performance Review Board meetings. Union representatives may also attend these meetings, as may the employee at issue.

80. Because of confidentiality concerns, Assistant Chief Martinak did not have his Senior PASS attend and take notes at his regular meetings with a personnel manager to discuss grievances and other labor relations matters.

CONCLUSIONS OF LAW

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

2. The City violated (1)(e) when it failed to bargain over the decision and impacts before removing the work of administrative support for the Assistant Chiefs from the Union bargaining unit.

Standard for Decision

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” A public employer generally violates its duty to bargain in good faith under ORS 243.672(1)(e) if it does not complete its bargaining obligation before making a change in the *status quo* concerning a subject that is mandatory for bargaining.

To determine whether an employer has made a unilateral change in violation of subsection (1)(e), we first identify the *status quo* and then determine if the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject of bargaining. If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation. If the employer failed to bargain to completion about the change at issue, we then consider any affirmative defenses the employer raised. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008).

The Union contends that the City unilaterally changed the *status quo* in violation of subsection (1)(e) by: (1) excluding from the bargaining unit the three Administrative

Assistant positions that supported Police Department Assistant Chiefs; (2) failing to bargain over the terms and conditions of these Administrative Assistants' employment; and (3) transferring Union bargaining unit work from the Senior PASSes to the Administrative Assistants who are not in the bargaining unit. We consider each of these contentions in turn.

City's Obligation to Bargain the Exclusion of Administrative Assistants from the Union Bargaining Unit

In this proceeding, the Union does not object to the City's reclassification of the Senior PASS positions as Administrative Assistants. (Union post-hearing brief, p. 50.) The Union contends, however, that the City's action in excluding these Administrative Assistant positions from the bargaining unit violated subsection (1)(e). We disagree.

In *Florence Police Employees Association v. City of Florence*, Case No. UP-3-96, 16 PECBR 687 (1996), the union alleged that the city violated ORS 243.672(1)(a), (b), and (e) when it designated three employees as supervisors and treated them as excluded from the bargaining unit. We noted that the recognition clause in the parties' collective bargaining agreement excluded supervisory employees from the bargaining unit and concluded:

"The City determined that three employees were supervisors and began treating those employees as being excluded from the [bargaining] unit. The City did not violate ORS 243.672(1)(e) simply by doing so." *Id.* at 692.

The City's actions are analogous to those of the employer in *City of Florence*. It used the contractual reclassification process, a process the Union concedes is lawful, to remove the three positions at issue from the bargaining unit. We conclude, as we did in the *City of Florence*, the City's actions in doing so did not violate subsection (1)(e).

City's Obligation to Bargain About Administrative Assistants' Terms and Conditions of Employment

The Union contends the City was obligated to bargain about the working conditions of the Administrative Assistant positions that support the Police Bureau Assistant Chiefs. According to the Union, these positions are included in the Union bargaining unit under the terms of the contract recognition clause and the City must negotiate the terms and conditions of employment for these positions. The Union contends that the City's failure to bargain about the Administrative Assistants' working conditions violated subsection (1)(e). We begin our consideration of the City's claim by examining the recognition clause in the parties' contract.

We interpret the recognition clause in the parties' collective bargaining agreement in the same manner and using the same rules of construction we use to interpret any other provision in a contract. We attempt to determine the parties' intent by using a three-step analysis. We first examine the language at issue in the context of the entire document to determine if the language is ambiguous; if it is not, our analysis ends and we apply the language according to its plain meaning. If the provision is ambiguous, we look to external evidence to attempt to ascertain the parties' intent. If the provision remains unclear, we apply appropriate maxims of contract construction to interpret it. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005).

The recognition clause of the Union/City collective bargaining agreement states that "[t]he City recognizes the Unions as sole collective bargaining agent for all employees of the City in all classifications contained in Schedule A of this agreement * * * ." (Finding of Fact 26.) The classification, or position, of Administrative Assistant does not appear in Schedule A. Because this contract language is clear and unambiguous, we will enforce it according to its terms. *Association of Engineering Employees v. State of Oregon, Department of Transportation*, Case No. UC-25-09, 24 PECBR 258, 268 (2011); *Marion County Law Enforcement Association v. Marion County*, Case No. UC-37-02, 20 PECBR 398 (2003). Administrative Assistants are not included in the Union bargaining unit under the express terms of the collective bargaining agreement.

The Union argues, however, that when construing recognition clauses, this Board does not apply the same analytical framework it uses for other contract provisions. According to the Union, this Board looks beyond the plain text of a recognition clause to preserve the original composition of a bargaining unit. In support of this contention, it cites four unit clarification cases brought under OAR 115-025-0005(3)⁴—*Association of Oregon Corrections Employees v. Department of Corrections*, Case No. UC-36-97, 17 PECBR 730; *Marion County*, 20 PECBR 398; *Oregon AFSCME, Council 75 v. Union County*, Case No. UC-81-87, 10 PECBR 354 (1987); and *Clatskanie People's Utility District v. International Brotherhood of Electrical Workers, Local 125*, Case No. UC-34-93, 14 PECBR 880 (1993). These cases do not support the Union's argument. Contrary to the Union's assertion, they all stand for the proposition that language in the parties' recognition agreement determines employees' bargaining unit status.

⁴Unit clarification petitions filed under subsection (3) "present the question of whether the positions sought are included under the express terms of the certification or of the collective bargaining agreement." *AFSCME Local Union No. 3135 v. Housing Authority of Portland*, Case No. UC-7-93, 14 PECBR 304, 306 (1993); *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UC-26-09, 24 PECBR 273, 281-82 (2011).

In *Clatskanie People's Utility District*, we concluded that under the terms of the recognition clause in the parties' contract and a separate agreement the parties had entered, the positions at issue were included in the bargaining unit. 14 PECBR at 885. In *Marion County*, we held that sheriff's department employees who were transferred to a new department were no longer represented by the union. We based our conclusion on the "clear and unambiguous" language in the labor contract, which specified that the union represented sheriff's department employees. Because the employees at issue no longer worked in the sheriff's department, the union no longer represented them. *Marion County*, 20 PECBR at 402.

In both *Union County* and *Department of Corrections*, we held that the language of the contract recognition clause, and not employees' work locations or assignments, determined their bargaining unit status. The applicable contract in *Union County* identified the union as the representative of all public health department employees. When the county consolidated the public health department with another department and assigned the former public health department employees to work on "teams" with unrepresented employees, the county claimed the six former public health department employees were no longer represented. We held that five of the former public health department employees, who continued to do the same work as before, were still identifiable "as the public health employees included in the parties' recognition clause" and continued to be represented by the union. 10 PECBR at 361.

In *Department of Corrections*, employees at the Oregon State Penitentiary (OSP) were represented by both AFSCME and the Association of Oregon Corrections Employees (AOCE). The recognition clause in the AFSCME contract specified that AFSCME represented all classified employees at OSP, except for those represented by AOCE. The recognition clause in the AOCE contract specified that AOCE represented all classified employees at OSP, except for those represented by AFSCME. 17 PECBR at 742. We denied AOCE's petition to represent AFSCME-represented employees who transferred to work at OSP, explaining that "[p]hysical location, by itself, does not cause the relocated employees to be included under the express terms of the AOCE collective bargaining agreement." *Id.*

Our conclusion here is consistent with those reached in these four cases: language in the parties' recognition agreements determines whether employees are part of the bargaining unit. If the language in the recognition agreement is unambiguous, we will apply it without further consideration of extrinsic evidence. Here, the clear language in the recognition clause excludes Administrative Assistants from the bargaining unit. The City did not violate subsection (1)(e) by refusing to negotiate the terms and conditions of these non-bargaining unit positions. See *Eugene Education Association v. Eugene School*

District No. 4J, Case No. C-279, 1 PECBR 446, 451-452 (1975), *aff'd after remand*, 290 Or 217, 621 P2d 547 (1980) (an employer need not bargain over the working conditions of employees who are not in the bargaining unit).

AFSCME argues, however, that the City has essentially taken three bargaining unit positions (the Senior PASSes) and given them new labels (Administrative Assistants) to exclude them from the bargaining unit. The record does not support this contention. The Administrative Assistant classification existed prior to the change at issue here. Administrative Assistants have job descriptions and responsibilities that differ from those of the Senior PASS positions; in addition, the Administrative Assistants have higher salaries. Although the Administrative Assistants replaced the Senior PASSes in the role of supporting the Assistant Chiefs, and therefore perform many of the same functions as the Senior PASS, we conclude that the reclassification represents a genuine upgrade.

City's Obligation to Bargain Transfer of Bargaining Unit Work to Administrative Assistants

The Union asserts that the City's reclassification of the Senior PASS positions in the Police Bureau resulted in a transfer of bargaining unit work because the Administrative Assistants now perform work formerly performed by the Senior PASSes. According to the Union, the City violated subsection (1)(e) by failing to complete its bargaining obligation about this change in working conditions.

The record shows that although the Senior PASS and Administrative Assistant positions differ, the Administrative Assistants perform nearly all of the duties formerly performed by the Senior PASSes. (Finding of Fact 60). Thus, the City took at least some of the work assigned to a bargaining unit position and transferred it to an unrepresented position when it approved the reclassification at issue.⁵ We move to the next step in our analysis where we determine if the City's actions in regard to the Administrative Assistant positions concern a mandatory subject of bargaining.

⁵"[T]he term contracting out includes a variety of forms used by an employer in divesting bargaining unit work. It may be by actual contractual arrangements with persons who are not in the bargaining unit, or by a transfer of work to other employees of the public employer who are not in the same bargaining unit." *Oregon School Employees Association v. Colton School District 53*, Case No. UP-85-87, 10 PECBR 811, 817 (citation omitted). *See also Milwaukie Police Employees Association v. Milwaukie Police Department*, Case Nos. UP-111-92/UP-19-93, 15 PECBR 1, 8 (1994). We apply the same analysis in all of these situations. *Washington County Police Officers' Association*, Case No. UP-15-08, 23 PECBR 449, 479 n 15 (2009).

The PECBA is similar to the National Labor Relations Act (NLRA) in structure, language, and purpose. *Elvin v. OPEU*, 313 Or 165, 175 n 7, 832 P2d 36 (1992). As a consequence, we interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year the PECBA was enacted. *Id.* at 177-178, 179; *Rogue River Education Association v. Rogue River School*, 244 Or App 181 (2011).

In *Salem Police Employees Union v. City of Salem*, Case No. UP-2-87, 9 PECBR 9378, 9385 (1987), we examined the NLRB's approach to contracting out cases prior to 1973:

"In *Westinghouse Electric Corp.*, 150 NLRB 1574, 58 LRRM 1257 (1965), the [National Labor Relations] Board indicated that an employer must bargain about a decision to subcontract if *any* of the following conditions are present: (1) The subcontracting plan involves a departure from previously established policies, (2) it changes conditions of employment for bargaining unit members, or (3) it results in significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for bargaining unit employees. On the other hand, the Board stated that bargaining is not required where *all* of the following tests are met: (1) The contracting out plan is motivated solely by economic considerations, (2) it comports with traditional methods by which the employer conducts business, (3) it does not vary significantly from previous subcontracting, (4) it has no adverse impact on employees in the bargaining unit, and (5) the union has an opportunity to bargain about changes in subcontracting practices during normal negotiations sessions." (Emphasis in original).⁶

The Supreme Court affirmed this Board's decision in *Salem Police* and quoted the statement above with approval. 308 Or 383, 392 n 6 (1989). This Board generally considers all relevant circumstances in determining if a particular instance of contracting out is mandatory for bargaining. An important consideration is the impact of the work transfer on bargaining unit members' working conditions. "If the employer's transfer of work traditionally performed by bargaining unit members has the potential to significantly and adversely affect bargaining unit members' working conditions, we will require the employer to bargain its transfer decision and the impacts of that decision." *Washington County Police Officers' Association*, Case No. UP-15-08, 23 PECBR 449, 478 (2009) (citing *Multnomah County Corrections Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 437 (2008)).

⁶We note that the list of conditions requiring bargaining is written in the disjunctive so that proof of any one of the conditions is sufficient. By contrast, the list of conditions that excuse bargaining is written in the conjunctive so that all conditions must be proved before an employer can act without first bargaining.

Here, the transfer had significant adverse impacts on the bargaining unit. The unit became smaller—it lost three jobs. In addition, two of the three Senior Pass positions were vacant at the time of the transfer, so bargaining unit members lost immediate opportunities for promotion. They also lost long-term promotional opportunities. The record shows that the Senior PASS position is a higher-level position in the Union bargaining unit with a commensurate salary, that the number of such positions is limited, and that the removal of the three positions at issue restricts promotional opportunities for bargaining unit members. The impact is especially pronounced within the Police Bureau where civilian employees have limited opportunities for advancement, and the Senior PASS positions were considered the top bargaining unit positions in the Bureau. Further, the incumbent in the third Senior PASS position lost her job—she applied and was rejected for the newly-created Administrative Assistant position.

We conclude that removing these positions from the bargaining unit, and replacing them with non-bargaining unit positions, significantly and adversely affects Union bargaining unit members. Accordingly, the City was obligated to bargain before it transferred traditional bargaining unit work outside of the bargaining unit. We move to the next step in our analysis where we determine if the City completed its bargaining obligation. We conclude it did not.

AFSCME and the City were parties to a collective bargaining agreement that was in effect from July 1, 2006 through June 30, 2010. The work transfers here occurred during the life of the agreement. When a public employer proposes changes in working conditions during the life of a collective bargaining agreement, parties must engage in an expedited bargaining process. ORS 243.698. Under ORS 243.698(2), an employer must give the exclusive representative 14 days notice of any proposed changes in working conditions that trigger an obligation to bargain, and under subsection (3), the union may demand bargaining within 14 days of receiving this notice. Mid-term bargaining generally cannot exceed 90 days. ORS 243.698(1).

Here, the City notified AFSCME Representative Hester by letter dated June 23, 2008, that it was considering reclassification of the Assistant Chief Senior PASS positions. The City then made its final decision to reclassify on June 26. The City gave the Union no opportunity to bargain about the reclassification before it finalized its decision to make this change. *Federation of Parole and Probation Officers v. Corrections Division*, Case No. C-57-82, 7 PECBR 5648, 5654, *recons*, 7 PECBR 5664 (1983) (this Board generally requires employers to bargain *before* they decide to change working conditions). We move to the final step in our analysis and consider whether the City proved any of its defenses.

City Defenses to Failure to Bargain

The City admits that it never bargained about its decision to reclassify the Senior PASSES or the impact of the decision. The City contends that it had no obligation to do so, however, because: (1) the Union never demanded to bargain about the reclassification, and (2) the contract permits the City to take the actions it did.⁷

Concerning the Union's failure to demand bargaining, we note that such a demand would have been futile because the City acted so quickly. Three days after it sent the Union a letter announcing its plans to act, and just one day after the Union received the letter, the City reclassified the Senior PASS positions. A union is not required to demand to bargain after the employer has already made a unilateral change. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03, 20 PECBR 890, 901 (2005), *appeal pending*; *Lebanon Education Association*, 22 PECBR at 362-363 n 8; *International Association of Fire Fighters, Local 1489 v. City of Roseburg*, Case No. UP-9-87, 10 PECBR 504 (1988); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) (union need not demand to bargain when the employer presents a change in working conditions as a *fait accompli*) (citing cases). The City decided to act without giving the Union the statutorily required 14 days to demand bargaining. ORS 243.698(3). In addition, under the statute, the City could not implement the change until 90 days after it gave notice of the proposed change. ORS 243.698(4). Consequently, the City acted unlawfully when it finalized the decision to transfer the work without first bargaining, unless it establishes its "contract authorization" defense. We turn now to that defense.

The City contends that the contract authorized it to reclassify the Senior PASSES to positions outside of the bargaining unit. *See Association of Corrections Employees v. DOC*, 209 Or App 761, 149 P3d 319 (2006) (an employer acts lawfully when it makes changes in working conditions that are permitted by the parties' labor contract). We disagree.

Article 26.2 of the parties' agreement provides that "[b]efore requesting the reclassification of any position, * * * the Human Resources Director shall notify the Unions affected by the proposed reclassification, * * * and, discuss the effect thereof." The City ignored the provisions of Article 26.2 in several ways. First, it failed to notify the Union "before requesting the reclassification." Second, it failed to talk with the Union about the effects of the reclassification before requesting it. The chronology of

⁷The City asserts that the Assistant Chiefs were overburdened with administrative tasks and needed higher level assistance in this area so they could perform their core duties. The City did not, however, raise business necessity or emergency as a defense to its duty to bargain. *See Teamsters Local 57 v. Lower Umpqua Hospital*, Case No. UP-63-90, 12 PECBR 748, 762-766 (1991) (discussing the business necessity defense to a unilateral change).

events demonstrates these failures. On June 19, the Police Bureau submitted the P-4 form asking for the reclassification. (Finding of Fact 34.) On June 24, HR approved the application. (Finding of Fact 38.) The Union first received notice of the request for reclassification on June 25, after HR had already approved it. (Finding of Fact 39.) The next day, June 26, the Mayor approved the reclassification and it became final. (Finding of Fact 40.) The parties never discussed the reclassification before the Mayor approved it.

Thus, even if we assume for the sake of argument that the parties' contract permits the City, under some circumstances, to reclassify work out of the bargaining unit without first bargaining, those circumstances are absent here. The City has not met the contractual pre-conditions for a reclassification—it failed to notify the Union and discuss the effects of the reclassification *before* requesting it. The contract does not permit the City's unilateral actions here.

The City has failed to prove that its affirmative defenses justify its failure to complete its bargaining obligation about the decision and impacts of its decision to reclassify the Senior PASSes. The City violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* regarding the work performed by members of the bargaining unit.

2. The City did not violate ORS 243.672(1)(a) when it removed the three Senior PASS positions that supported the Assistant Chiefs from the Union bargaining unit and treated the new Administrative Assistant positions as outside of the bargaining unit.

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

In analyzing the “because of” prong of subsection (1)(a), we look at the reasons for the employer’s conduct; if the employer was motivated by a protected right to take the disputed action, we will find a violation of subsection (1)(a). *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). A union need not demonstrate that the employer acted with hostility or anti-union animus to prove a violation of the “because of” prong of subsection (1)(a); a complainant must only show that the employer took action because of an employee’s exercise of 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 the “in the exercise” portion of subsection (1)(a), the employer’s motive is irrelevant. We look at the effects of the employer’s conduct; if it has the natural and probable effect of chilling employees in their exercise of PECBA-protected rights, the employer violates the “in the exercise” prong of the statute. *Portland Assn. Teachers*, 171 Or App at 623-624. An “in the exercise” violation may be derivative or independent. An employer that violates the “because of” prong of subsection (1)(a) derivatively violates the “in the exercise” portion of the statute. An employer may also independently violate subsection (1)(a), typically by making threats that have the natural and probable effect of chilling employees from exercising protected rights. *Gresham-Barlow Education Association v. Gresham-Barlow School District*, Case No. UP-32-07, 23 PECBR 170, 192, *recons*, 23 PECBR 219 (2009), *AWOP*, 241 Or App 352, 250 P3d 38 (2011).

The Union contends that the City reclassified the Senior PASS positions at issue “for the purpose of removing them from the bargaining unit and eliminating the restrictions the collective bargaining agreement placed on selecting employees for those positions.” (Union post-hearing brief at p. 37). The Union contends that these City actions violated the “because of” prong of subsection (1)(a). We disagree.

This Board must make a factual determination about the City’s motive. *Portland Assn. Teachers*, 171 Or App at 626. We have carefully examined the record and conclude that the City did not act because of the exercise of a protected right. It acted for a legitimate reason, an honest desire to provide a higher level of staff support to the Assistant Chiefs. Assistant Chief Martinek was previously the Chief of Police in Vancouver, Washington, and when he came to Portland, he determined that many of the City’s practices were inefficient. He specifically noted that Assistant Chiefs needed a higher level of staff support. He met with HR to discuss the needs for the position, and HR determined that the Administrative Assistant classification provided the best fit for the job as Martinek described it. That would require a reclassification of the position. The Senior PASS was one of the highest positions in the bargaining unit, so it is not surprising that the added duties and responsibilities would require a position outside of the bargaining unit. HR gave the project a priority because Martinek was overburdened with administrative work in addition to his normal duties. The Union does not dispute that there was a need to provide more support to Assistant Chiefs or that the Administrative Assistant classification was appropriate for the needs of the job. Reclassifying the Senior PASS position is a rational method to provide this additional level of support. The City acted for legitimate reasons and not because of protected union activity. Accordingly, we conclude that the City did not violate the “because of” prong of subsection (1)(a).

We have found no violation of the “because of” prong of subsection (1)(a) and therefore find no derivative violation of the “in the exercise” portion of the statute. We also conclude that the City did not commit an independent violation of the “in the exercise” prong of subsection (1)(a). The Union has not identified any action by the City that would have the natural and probable effect of discouraging other bargaining unit employees from engaging in PECBA-protected activity.⁸

Remedy

As its remedy, AFSCME asks this Board to issue a cease and desist order, require the City to post a notice of its wrongdoing, order the City to include the affected positions in the bargaining unit and to bargain in good faith concerning their terms and conditions of employment, order the City to make the affected employees and the Union whole, impose a civil penalty, and provide any further relief the Board deems just and equitable. AFSCME argues it is entitled to a restoration of the *status quo*, including a return of the positions at issue to the bargaining unit, and the promotion of Pallori to Administrative Assistant, pending good faith bargaining.

The statute requires us to order the City to cease and desist from its unlawful conduct. ORS 243.676(2)(b). We will do so. We will also order the City to bargain about the transfer of the positions under the procedures of ORS 243.698.

We will not order the City to return to the *status quo*. It has been several years since the transfer of duties, and after so much time, it would be unnecessarily disruptive to police operations to undo the transfers and require Senior PASSes to perform the duties which are no longer within their job description. We will not order that the positions be placed in the bargaining unit because the collective bargaining agreement specifically fails to include them. For these reasons, we also will not order that the City place Ms. Pallori in an Administrative Assistant position.

We will, however, order the City to make Ms. Pallori whole for lost wages and benefits she would have earned in the Senior PASS position from the date of this Order until the City completes its bargaining obligation under ORS 243.698, minus interim earnings.

⁸The parties dispute the confidential status of the Assistant Chiefs’ Administrative Assistants. We need not address that issue to resolve the (1)(e) and (1)(a) claims.

In addition, the Union lost dues and fair share payments from three employees when their duties were unlawfully transferred outside of the bargaining unit. We will order the City to make the Union whole for any dues and fair share payments the Union would have received if those positions had been filled and in the bargaining unit, from the date of the transfer until the parties complete negotiations, plus interest at nine percent per annum. The City may not seek or receive reimbursement for these payments from any current or former member of the Union bargaining unit. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 102-103 (2007), *aff'd*, 234 Or App 553 (2010).

We will not require the City to post a notice. This Board generally orders an employer to post a notice of its wrongdoing in situations where the violation of the PECBA:

“(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.” *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984).

Not all of these criteria need to be satisfied for us 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).

Here, only one of these criteria was satisfied: the City’s failure to bargain about the impacts of the reclassification decision adversely affected the Union’s ability to represent its members. None of the other *Fern Ridge* criteria were met. The City’s actions were neither calculated nor flagrant, did not result from “a continuing course of illegal conduct,” did not involve a large number of City personnel or affect a large number of bargaining unit members, and did not involve a strike, lockout, or discharge. Accordingly, the record does not provide sufficient justification for ordering the City to post a notice.

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

The Union argues that the City's conduct was repetitive because "the City had previously tried to exclude employees within the Chiefs' office from collective bargaining and was instructed by the Board that the Chiefs' office did not play a sufficient role in collective bargaining to warrant this." (Union post-hearing brief at 52, citing *City of Portland*, 16 PECBR at 535-537). "Instead of responding by exercising caution in this case, the City resorted to self-help that avoided Board input." (Union post-hearing brief at 52). 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 of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). The issues in the 1996 *City of Portland* case were whether the Police Bureau Public Information Officer, a sworn position in the PPCOA unit, should be redesignated out of the PPCOA unit or excluded from the unit as a confidential employee. Those issues are distinct from those in this case. We conclude that the City's actions in this case were not repetitive.

The Union also argues that the City's conduct was egregious because it interfered with protected rights and diminished the Union's bargaining unit. "Egregious" means "conspicuously bad and is synonymous with 'flagrant.'" *East County Bargaining Council v. David Douglas High School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354 (1987). Although we found that the City should have bargained with the Union before it transferred work out of the bargaining unit, the City's actions were not flagrant. It offered reasonable arguments for its position even though those arguments did not ultimately prevail. In addition, we rejected the Union's argument that the City was motivated by employees' exercise of protected rights when it reclassified the positions at issue. For these reasons, we conclude that the City's conduct was not egregious and do not award a civil penalty.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e) by refusing to bargain about the removal of work from the bargaining unit. The City will promptly commence negotiations about the transfer under the expedited procedure for bargaining set forth in ORS 243.698.

2. From the date of this Order until bargaining is complete, the City will make Ms. Pallori whole for lost wages and benefits she would have earned in the Senior PASS position, minus interim earnings.

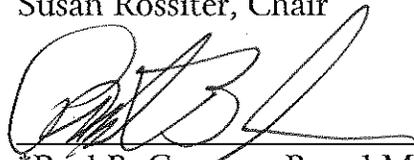
3. The City will make the Union whole for any dues and fair share payments the Union would have received if those positions had been filled and in the bargaining unit, from the date of the transfer until the parties complete negotiations, plus interest at nine percent per annum. The City may not seek or receive reimbursement for these payments from any current or former member of the Union bargaining unit.

4. The remainder of the complaint is dismissed.

DATED this 27 day of February 2012.



Susan Rossiter, Chair



*Paul B. Gamson, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Gamson, Specially Concurring

I completely agree with and join in this Order. I write separately to express my concerns about the development of the law concerning the contract defense the City raised here. As we discuss in the Order, the City defended against the Union's unilateral change claim on grounds that the contract specifically permits its actions. We analyzed the issue as the Court of Appeals has instructed us, *i.e.*, we applied the rules of contract construction to determine whether the contract permits the change. *Association of Corrections Employees v. DOC*, 209 Or App 761, 770, 149 P3d 319 (2006). In my view, however, the Court of Appeals has directed us to use the wrong standard. I call on the court, at its earliest opportunity, to re-examine and clarify how this Board should analyze the contract defense to a unilateral change.

I
A

I begin with some background. Over the years, the appellate courts have provided guidance on how we should interpret the PECBA. In a seminal case, the Oregon Supreme Court observed that the PECBA is modeled after the National Labor Relations

Act (NLRA) and is similar in structure, language, and purpose. *Elvin v. OPEU*, 313 Or 165, 175 n 7, 832 P2d 36 (1992). As a consequence, the Court instructed us to interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year the PECBA was enacted. *Id.* at 177-178, 179.

In *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 260 P3d 619 (2011), the Court of Appeals applied this directive. The issue in *Rogue River* was whether the 180-day statute of limitations for filing an unfair labor practice complaint begins to run when the unfair labor practice occurs, or instead when the injured party discovers it. This Board looked to the words of the controlling statute, ORS 243.672(3), which provides that a complaint must be filed “not later than 180 days following the *occurrence* of an unfair labor practice.” (Emphasis added.) This Board applied the plain language of the statute, as well as Supreme Court cases interpreting similar language in other statutes, and concluded that the time begins to run when the unfair labor practice occurs. 22 PECBR 577 (2008).

The Court of Appeals reversed. It acknowledged that the plain meaning of the statutory term “occurrence” describes “the happening of an event, not its eventual discovery,” 244 Or App at 186, but it nevertheless concluded that the statute includes a discovery rule. It reached this conclusion based on its survey of the pre-1973 caselaw interpreting a similar (but not identical) provision of the NLRA. The NLRA bars unfair labor practice complaints “occurring” more than six months before the charge is filed. The pre-1973 cases interpreting this provision include a discovery rule. The court held that the legislature intended the PECBA limitations period to function just like its federal counterpart and therefore included a discovery rule. 244 Or App at 189.

B

This brings us to the Court of Appeals’ decision concerning the contract defense to a unilateral change in working conditions. As will become evident, on this issue, the court ignored the analytical framework established in *Elvin* and *Rogue River*; specifically, the court failed to examine pre-1973 decisions under the NLRA.

In *Association of Oregon Corrections Employees v. DOC*, 209 Or App 761, 149 P3d 319 (2006) (hereinafter *AOCE I*), the employer announced its intention to change the employees’ days off as well as the hours when employees were to report to and leave work. The union demanded to bargain over the changes in working conditions and the employer refused.

This Board concluded that the refusal to bargain constituted bad faith, a violation of ORS 243.672(1)(e).⁹ 20 PECBR 890 (2005). We rejected the employer's defense that the parties' contract specifically permitted the change. The employer relied on general language in a management rights clause which gave the employer "all rights to direct the work of its employees, including, but not limited to, the right * * * to schedule work." We followed 30 years of Board caselaw under the PECBA which analyzes the contract defense under a "clear and unmistakable" waiver standard. We held that the phrase "to schedule work" is ambiguous. It might refer to scheduling employee work hours, but it might also refer to scheduling particular work tasks, such as taking out the garbage at 10 a.m. or preparing lunch at noon. This latter interpretation would not involve the hours of any particular employee. Because we found the language ambiguous, we held that it did not clearly and unmistakably permit the employer's actions.

The Court of Appeals reversed. It held that this Board erred in using the "clear and unmistakable" standard. It directed us instead to interpret the contract language, which includes resolving any ambiguities.

C

Notably, the Court of Appeals did not examine the pre-1973 cases interpreting the NLRA. Had it done so, it would have discovered that the "clear and unmistakable" standard was well-established long before the PECBA was adopted. The National Labor Relations Board (NLRB) first applied it more than 60 years ago in *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949). The employer there raised a management rights clause as a defense to a unilateral change. The NLRB rejected the defense, stating that it was "reluctant to deprive employees of any rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights." *Id.* at 1098. The Board has reaffirmed this standard many times since. *See Provena Hospitals*, 350 NLRB 808, 811 (2007) (the NLRB observes that "for more than 50 years," it has "consistently" applied the "clear and unmistakable" standard to analyze a contract defense to a unilateral change charge).

The federal appellate courts approved the "clear and unmistakable" standard before the PECBA was enacted. In *International Union, UAW v. NLRB*, 381 F2d 265 (DC Cir), *cert. denied*, 389 US 857 (1967), the parties' labor agreement provided that "the

⁹ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative."

The NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." 29 USC § 158(a)(5).

methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation.” The employer relied on this contract language to contract out bargaining unit work without first negotiating. The court rejected the defense. It held that the quoted contract language “is certainly not a ‘clear and unmistakable’ waiver of the union’s right to bargain where a change in methods amounts in fact to a contracting out.” 381 F2d at 267.

Similarly, in *Murphy Diesel Co. v. NLRB*, 454 F2d 303 (7th Cir 1971), the court reviewed an NLRB decision which held that the employer bargained in bad faith when it unilaterally changed work rules concerning absenteeism and tardiness. The parties’ agreement provided that “all management functions are reserved to the Company, subject to the other provisions” of the contract. No provision addressed absence or tardiness. The court held that the contract language did not clearly and unmistakably waive the union’s right to bargain over the new absenteeism and tardiness rules.

In *AOCE I*, the Court of Appeals ignores this pre-1973 history. This seems contrary to the Supreme Court in *Elvin* and its own precedent that directs us to interpret the PECBA by considering the pre-1973 NLRA standards.

The Court of Appeals instead relies on a 2005 case out of the DC Circuit. *Enloe Medical Center v. NLRB*, 433 F3d 834 (DC Cir 2005). The legislature could not have relied on this 2005 case when it adopted the PECBA in 1973. In addition, the *Enloe* case appears to be an outlier—it is contrary to most other caselaw on the subject. The NLRB recently reviewed and rejected the approach exemplified in *Enloe* and *AOCE I*. In *Provena Hospitals*, 350 NLRB at 811 n 17, the NLRB explained:

“The difficulty with this view is that it assumes that determining *whether* a ‘matter is covered by the collective bargaining agreement’ is simply a matter of contract interpretation, which can be resolved independent of the existence of a statutory duty to bargain. In other words, the Board’s waiver standard properly takes the Act’s policies into account in determining *whether* a collective bargaining agreement covers a statutory subject of bargaining. Because a union’s statutory right to demand bargaining persists unless it is contractually relinquished, the issue is appropriately analyzed in terms of waiver.” (Emphasis in original.)

In my view, in light of the cases decided under the NLRA prior to the adoption of the PECBA, the Court of Appeals should reconsider its *AOCE I* decision regarding the contract defense to a unilateral change.

II

I find the Court of Appeals decision problematic for a second and independent reason. It appears that the Court of Appeals chose between two different theories, each supported by at least some caselaw. With respect, I believe that under the statute, it is up to this Board rather than the court to make such a choice.

Again, I begin with some background. *Springfield Education Assn. v. School District*, 290 Or 217, 621 P2d 547(1980) is one of the Court's leading cases on administrative law. It addresses the "[a]llocation between agencies and courts of responsibility for giving meaning to statutory terms * * *." *Id.* at 221. The Court determined that the allocation of responsibility depends on the nature of the statutory term to be interpreted. The Court divided all statutory terms into three categories, each giving a different level of authority to the agency and requiring a different standard of review by the courts.

The first category is "terms of precise meaning." Such terms require "only factfinding by the agency and judicial review for substantial evidence." 290 Or at 223. The Court gives examples: "21 years of age, male, 30 days, Class II farmland, rodent, Marion County." *Id.*

The second category contains "inexact terms." These "require agency interpretation and judicial review for consistency with legislative policy." 290 Or at 223.

The third category, and the one pertinent here, contains "terms of delegation." Such terms "require legislative policy determination by the agency and judicial review of whether that policy is within the delegation." 290 Or at 223. Delegative terms "express non-completed legislation which the agency is given authority to complete." *Id.* at 228. The Court cites examples as "'good cause', * * * 'unfair', 'undue', 'unreasonable', or 'public convenience and necessity.'" *Id.*

The statutory term at issue here is "bargain collectively in good faith." ORS 243.672(1)(e). This statutory term is delegative. *Olney School Dist. 11 v. Olney Education Assn.*, 145 Or App 578, 582, 931 P2d 804 (1997); *Lincoln Cty. Ed. Assn. v. Lincoln Cty. Sch. Dist.*, 187 Or App 92, 98-99, 67 P3d 951 (2003). In *Assoc. Of Oregon Corrections Employees v. DOC*, 213 Or App 648, 164 P3d 291, *rev'd en*, 343 Or 363 (2007) (hereinafter *AOCE II*), the court reaffirmed that the statutory term is delegative, and it then stated: "we defer—as we consistently have—to the board's methodology for determining whether parties have bargained in good faith." 213 Or App at 657.

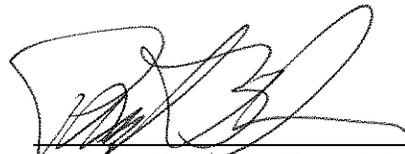
The court's statement in *AOCE II* that it consistently defers to this Board's methodology is not wholly accurate. As described above, the court in *AOCE I* substituted its judgment for that of the agency in determining whether the employer

bargained in bad faith. The Board there determined that the employer failed to bargain in good faith when it unilaterally implemented changes in working conditions without first bargaining with the union that represents the employees. We rejected the employer's defense that the parties' labor agreement allowed it to make the change. To analyze the defense, this Board asked whether the permission to act was clear and unmistakable. This is the analytical standard the Board had used for more than 30 years and which cases under the NLRA have used for more than 60 years. The court reversed and applied its own standard.

In my view, the Court of Appeals in *AOCE I* should not have overturned the analytical framework the Board used. Under *Springfield*, determining the proper analysis is a question delegated to this Board, and the court should have deferred to the Board's rational standard.¹⁰

III

My concerns do not involve the outcome of any particular case. Rather, I am concerned about the more basic question of how this Board should interpret and apply the PECBA. In my view, the Court of Appeals has been inconsistent. In *Elvin* and *Rogue River*, the courts said we should look to pre-1973 cases interpreting the NLRA; in *Springfield* and *AOCE II*, the courts said we have broad authority to interpret the phrase "bargain collectively in good faith," and courts should defer to this Board's interpretation. In *AOCE I*, without explanation, the Court of Appeals did not apply or even cite these lines of cases. I call on the Court of Appeals to clarify the proper standards so this Board can more faithfully and accurately interpret the requirements of the PECBA.



Paul B. Gamson, Board Member

¹⁰In my view, the "clear and unmistakable" standard furthers the purposes and policies of the PECBA. One recognition underlying the PECBA is that unresolved public sector workplace disputes can injure the public, the government body, and public employees. ORS 243.656(2). Requiring parties to bargain about a dispute unless the contract clearly and unmistakably resolves it furthers this policy. See *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 283, 751 P2d 770 (1988) (if negotiations are to be effective in resolving labor disputes, the scope of subjects mandatory for negotiations must be "broad enough to encompass all matters over which labor disputes are likely to arise."); *Provena Hospitals*, 350 NLRB at 811 n 17.