

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-51-05

(UNFAIR LABOR PRACTICE)

OREGON AFSCME	)	
COUNCIL 75, LOCAL #3943,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
STATE OF OREGON, DEPARTMENT OF	)	AND ORDER
CORRECTIONS, SANTIAM	)	
CORRECTIONAL INSTITUTION,	)	
	)	
Respondent.	)	
_____	)	

On September 5, 2007, this Board heard oral argument on both parties' objections to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on June 28, 2006, following a hearing on May 24, 25, and June 5, 2006, in Salem, Oregon. The record closed with the submission of the parties' post-hearing briefs on September 5, 2006.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, 308 S.W. Dorion, Pendleton, Oregon 97801, represented Complainant.

Sally A. Carter, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

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On September 22, 2005, Oregon AFSCME Council 75, Local #3943 (Union), filed this complaint against the State of Oregon, Department of Corrections

(Department), Santiam Correctional Institution (SCI). The complaint, as amended on January 2, 2006, alleged that the Department violated ORS 243.672(1)(a), (b), and (c). The Department filed a timely answer on February 3, 2006.

The issues in this case are:

(1) Did Lieutenant Deborah Carr urge or pressure bargaining unit members to vote against Kari Wallace in an election for Union vice president? If so, did this conduct violate ORS 243.672(1)(b)?

(2) Did Department officials remove Wallace from the Department SCI Security Threat Group (STG) and refuse to deal with her as Union steward? If so, did this conduct violate ORS 243.672(1)(a) and (c)?

### RULINGS

1. In 2004 and 2005, Wallace represented a group of women in presenting complaints about working conditions at SCI. The Union contended, and the Department denied, that Department managers viewed Wallace and the women she represented as a clique of troublemakers, and referred to them as “the Group.” The Union sought to introduce into evidence Exhibit C-4, an offer of proof made by the Department in an arbitration concerning bargaining unit member Tamara Tourville’s discharge. The Department’s arbitral offer of proof stated that the Department wished to offer evidence that SCI employees Wallace, Tourville, Kathleen Hepner, Kimm Hollingsworth, Amy Edwards, and Kelly Bond were known as “the Group” and that they were responsible for creating friction and impairing morale at SCI. The Department objected to the introduction of the arbitral offer of proof at this hearing. The ALJ received the arbitral offer of proof into evidence over the Department’s objection. The Department did not argue the issue in its post-hearing brief or objections to the Recommended Order.

In his Recommended Order, the ALJ ruled that the offer was accepted as evidence that the Department had taken this position (*i.e.*, that the Department viewed these women as “the Group” and thought their actions were not in the best interests of the Department) in the arbitration. The ALJ properly admitted Exhibit C-4 for the purpose he identified.

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

## FINDINGS OF FACT

### **Parties**

1. The Department is a public employer. The Union is a labor organization representing a bargaining unit of approximately 60 Department strike-prohibited security employees working on three shifts. The bargaining unit includes corrections officers and sergeants, but not lieutenants. During the events at issue in this case, the parties had a collective bargaining agreement in effect from January 20, 2006 through June 30, 2007.

### **Individuals**

2. Frank Thompson has been the Superintendent of SCI and Mill Creek Correctional Facility (MCCF) since 2003. Thompson reports to the institutions' administrator, Joan Palmateer. Richard Ladeby has been the SCI institution security manager (ISM) since July 2005. He reports directly to Superintendent Thompson. Bill Carter was the ISM prior to Ladeby. John Nees has been a human resource manager for the Department, supporting SCI, MCCF, and Oregon State Correctional Institution (OSCI) since June 6, 2005.

3. Corrections Officer Wallace is a 14-year employee of the Department, and has worked at SCI for 11 or 12 years. Wallace has been a Union steward for ten years and Union vice president for three years. In her capacity as a Union steward, Wallace represents individuals in disciplinary investigations, predissmissal meetings, step two and step three grievances, and interest and contract arbitrations. She also participates in labor-management committee meetings on an occasional basis.

4. Corrections Officer Timothy Woolery, a 17-year Department employee, has been the president of the SCI Union local for ten years.

### **“The Group”**

5. In late 2004, female Corrections Officers Wallace, Hepner, and Edwards, Corporal Tourville, and Sergeant Hollingsworth filed a complaint with SCI alleging inappropriate and discriminatory behavior by male Corrections Officer John Doe.<sup>1</sup> As the Department investigated the complaint against Doe, Doe responded with comments which the Department construed as allegations against Wallace. The

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<sup>1</sup>“John Doe” is a pseudonym.

Department investigated the allegations about Wallace as well. In the first half of 2005, the Department also received, and investigated, allegations of misconduct by the other complaining women. Wallace represented several of these women in connection with the Department's investigations.

6. SCI employees and managers referred to Wallace, Tourville, Hepner, Edwards, and Hollingsworth as "the Group." They were also known as the "cronies." Many SCI employees and managers blamed "the Group" for creating friction and impairing morale at SCI.

7. After investigating Doe's conduct, the Department issued Doe a letter of expectations. The Department completed its investigation of Wallace and did not discipline Wallace or give her a letter of expectations. The Department investigated allegations about Hollingsworth four times; the Department disciplined Hollingsworth as a result of one of these investigations.

8. In May 2005, the Department began an investigation of Hepner regarding allegations that she had taped an inmate's mouth shut and had engaged in a rubber band fight. On September 4, Hepner was promoted to a position as corporal at OSCI and left the AFSCME bargaining unit. Hepner resigned from the Department in January 2006. The investigation was never completed.

9. In May 2005, the Department received an allegation that Edwards had an inappropriate interaction with an inmate. The Department began an investigation. The investigation was suspended when Edwards resigned from the Department on September 10, 2005, and was never completed.

10. In May 2005, new Corrections Officer Jane Roe<sup>2</sup> approached Thompson with allegations that Wallace had engaged in misconduct. Roe told Thompson that Wallace was referring fellow employees to a case reported on the website of this Board. The case mentioned the connection of then SCI ISM Carter to a sexual harassment matter at another Department institution. Thompson escorted Roe to the Department headquarters ("the Dome building") so that she could make a personal report to Institutions Administrator Palmateer. Thompson had never escorted a staff member to the Dome building for that purpose before.

11. On May 25, 2005, Wallace learned of Roe's allegations during a meeting with Palmateer on another matter. Palmateer suggested that Wallace discuss the matter with Thompson. Wallace did so, and Thompson said he had to speak with

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<sup>2</sup>"Jane Roe" is a pseudonym.

Palmateer before giving Wallace additional information. Thompson later told Wallace that there was no pending investigation of her.

12. On June 18, 2005, the Department received an allegation that Tourville had allowed a friend to enter the control center while Tourville was working there in early June. The Department began an investigation around June 25. The Department discharged Tourville on October 7, 2005. Tourville's grievance arbitration was concluded in April 2006, and she was ultimately reinstated.

13. On April 13, 2006, the Department filed an offer of proof in the Tourville arbitration. The Department's arbitral offer stated, in part:

“\* \* \* (1) The Grievant [Tourville] was part of a Group of friends [Wallace, Hepner, Hollingsworth, and Edwards] that created a tremendous amount of friction at SCI. (2) The general perception of the Group at SCI was negative. (3) The Group perceived animosity between men and women, and perceived that the majority male staff at SCI was targeting them. The Group seemed to ignore that women also reported Group members for problems. (4) Several Group members were under investigation for inappropriate relations with inmates. (5) All Group members had a history of friction with fellow employees. (6) The Group influenced the extent in which the Union inquired into the allegations against the Grievant and generated paperwork on behalf of the Grievant. (7) In addition, Group members intimidated Breedlove and Herron regarding the allegations. (8) The Group also described prior bad acts by Breedlove and Herron that were either not reported or reported and found without merit. (9) Finally, Group members generated BOLI complaints that alleged discrimination on the basis of gender and sexual orientation. These were disposed of by the investigator for insufficient evidence. It is DOC's position that all of these offers of proof draw into question the credibility of Grievant and her witnesses.”

14. Wallace actively represented herself, Hepner, Edwards, Tourville, and Hollingsworth throughout the Department investigation and disciplinary processes.

15. In June 2005, after the Tourville allegations were made, some members of “the Group” and some male employees had an informal, frank conversation about gender issues in the workplace. Someone other than the female employees

involved in the conversation reported it as possibly inappropriate to Department managers, creating the appearance that the female employees had set up the male employees.

16. In August 2005, Lieutenant Deborah Carr told Wallace that other managers had advised her to stay away from Wallace.<sup>3</sup>

### **Security Threat Group**

17. The SCI STG was a formal team of facility employees created to document and control gangs and gang activity in the prison.<sup>4</sup> SCI STG group members communicated frequently with the STGs of other institutions, because inmates frequently transferred between institutions or were initially processed by other institutions and transferred to SCI. The SCI STG team worked extensively with the STG team at MCCF. Corrections Office Daniel Mackey headed the MCCF STG team.

18. STG work was challenging. Team members had to stay abreast of often subtle and changing indications of gang existence, membership tests, and other aspects of gang behavior.

19. SCI management appointed the manager of the SCI STG team. Membership in the STG team was an assignment for which employees volunteered, subject to management approval. Department STG Manager Michael Beagan was the Department's coordinator for the various institution STG groups and was also president of the North West Gang Investigation Association (NWGIA).

20. Superintendent Thompson had an informal policy regarding volunteer assignments at the institution. Because SCI depended on the work of its volunteers, needed continuity of staff performing that work, and spent resources training volunteers to perform that work, Thompson did not permit employees to resign from

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<sup>3</sup>Wallace provided detailed, specific testimony regarding this conversation. Carr, on the other hand, testified that she did not remember telling Wallace she had been warned about her (Wallace). The testimony of a witness that he or she does not recall a particular event does not deny that the event occurred. *AFSCME Council 75, Local 3694 v Josephine County*, Case No. UP-26-06, 22 PECBR 61, 74 n 8 (2007) (*appeal pending*) We find it more likely than not that Carr made the statements regarding Wallace attributed to her.

<sup>4</sup>OAR 291-069-0010 provides for the creation of Department STGs to "maintain a departmental response to security threat group-related activity conducted by inmates," "maintain an information network to monitor and control security threat group-related activity," and to "provide procedures for the classification of inmates identified as security threat group affiliates "

these volunteer posts without management approval. In 2004, Wallace resigned from the SCI mentoring committee, shortly after she had attended some training for the committee. Thompson, at first, declined to accept the resignation. He reversed this decision after communicating with Palmateer about that decision.

21. In May 2005, Wallace had been assistant manager of the SCI STG for at least seven years. She attended her first training on STG issues in 1992. As assistant manager of the team, Wallace was in charge of the team when the manager was not available. She also did most of the daily work of the team, including assigning work to team members. Her particular expertise was in non-Caucasian gangs. Wallace's experience, training, and effort on the team were substantial assets to the work of the team and, therefore, the safety and security of SCI.

22. In 2004, Department Chief of Security Paula Allen, Department Assistant Director of Operations Stan Czerniak, and STG Manager Beagan complimented Wallace on her STG work. Although service on the SCI STG was voluntary, it was the work at SCI that Wallace enjoyed the most.

23. Wallace was also on the board of directors of the NWGIA, which, among other things, held trainings for corrections and law enforcement staff regarding gang issues. NWGIA trainings were a very important source of expertise for SCI employees.

24. Wallace had taken the lead in developing a pilot program to create a computer database of all known gang tattoos and gang-related misconduct. After another employee took over the project, the Department selected Wallace to promote the program at SCI.

25. Lieutenant Clark was STG manager during early 2005. Under his direction, the team operated on an egalitarian basis, with members contributing based on their ability and experience and not their rank. Thus, as assistant STG manager, Wallace would lead the team when the manager was unavailable, which meant she would provide advice and direction to sergeants on the team who officially outranked her. Staff members considered Wallace and Officer Mackey at MCCF to be the officers most knowledgeable about STG issues.

26. In May 2005, the other members of the SCI STG team were Officer Laura Skipper, Corporal Alvaro Romero, and Sergeant Hollingsworth. Skipper had less experience with STG issues than Wallace and Hollingsworth. Romero had been assigned to the STG a few weeks before to replace Corporal Redding, who was on rotation in another job for a year. Romero had received no formal training for his STG role

27. Because the SCI STG team members often worked different shifts, meetings of the entire team were rare. The team usually communicated through e-mails and conversations between individuals.

28. In May 2005, Hollingsworth had been on the team for approximately a year and a half. Her first formal training was to be at a NWGIA conference in May 2005. Hollingsworth was Wallace's best friend, and Wallace had taught Hollingsworth most of what Hollingsworth knew about STG issues. Hollingsworth specialized in knowledge of white supremacist gangs.

29. Clark decided to leave his position as the STG manager effective May 2005. At least two individuals applied to replace him. One of the potential replacements was Lieutenant Deborah Payne. Wallace had worked briefly with Payne on a few occasions, and had been impressed by her ability. Wallace communicated her support of Payne's candidacy to Department STG Manager Beagan, to pass on to Department Chief of Security Allen. Payne was selected for the position and began work as STG manager in April 2005. Clark remained on the STG team for 30 days to ease the transition.

30. After Payne's hiring, Superintendent Thompson met with Ladeby and Payne about the SCI STG. Thompson was concerned that there was not enough management level presence in the STG program. Thompson was specifically concerned about decisions and communications Wallace had made regarding STG issues with no manager involvement. Thompson instructed Payne to make sure that there was adequate management supervision of the STG program, and also told Payne to promote communication between the STG and the rest of the institution.

Payne wanted members of the STG team to cross-train, so that members who specialized in one type of gang, such as white supremacist gangs, would gain experience with other groups.

31. Payne planned to take a vacation from May 6 to May 14, 2005, and then attend a training on STG issues sponsored by the NWGIA from May 15 to May 19. Hollingsworth, Skipper, and Wallace were also scheduled to attend the NWGIA training.

32. At approximately 6:30 a.m. on May 4, 2005, Payne forwarded an e-mail to Hollingsworth from Department STG Manager Beagan regarding the documentation of STG inmates processed by the Coffee Creek Correctional Facility (CCCF) intake center. Payne added the following comment to the forwarded e-mail:

“Since I am currently on graveyard, I want you to this on [sic]. It is good experience/training that you need (along with Cpl Romero). It is pretty cut and dry on what Mike wants.

“\* \* \* \* \*

“Also, before I leave on vacation, I will be emailing OIC’s [officer in charge] to bring any STG issues to you. You will do fine, I have confidence in you.”

Because of her work assignment, Hollingsworth did not see this e-mail until the morning of May 5.

33. On May 3 or 4, between 6:50 and 7:00 a.m., Payne approached Hollingsworth and Romero, who had just begun their work day at the SCI control center.<sup>5</sup> Hollingsworth had not yet seen Payne’s May 4 e-mail. Payne told Hollingsworth that Hollingsworth was to “cover” for Payne during her vacation by making sure that all inmates coming to SCI from CCCF were checked for tattoos and other marks of gang involvement. Payne handed Hollingsworth an envelope with various inmate communications that could be gang-related, including some possibly relating to white supremacist, Hispanic, and Asian gangs. Hollingsworth told Payne that she dealt with the Caucasian gangs, and that Wallace dealt with the other gangs.

34. Based on this conversation with Payne, Hollingsworth understood that she was to take the lead on handling the incoming CCCF inmates in her capacity as a STG team member, but not to act as the leader of the team in other respects in Payne’s absence. Hollingsworth was aware that responsibility for the team as a whole in the absence of the team manager was Wallace’s role, based on Wallace’s assistant manager status, experience, and training. Hollingsworth believed she was completely unqualified to take over the position of assistant STG manager. Had Payne asked Hollingsworth to take on that role, even for a short time, Hollingsworth would have declined.

35. Payne told Romero to search the inmates and make sure that all of their tattoos were recorded. This work was part of Wallace’s tattoo database project. Skipper was assigned to review and route the mail for the STG.

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<sup>5</sup>Payne and Hollingsworth dispute whether this conversation took place before (on May 3) or after (on May 4) Payne sent the May 4 e-mail. Resolution of this conflict is not material to our resolution of this case.

36. Payne talked briefly with Wallace about her upcoming absence shortly after her conversations with Hollingsworth and Romero. Payne told Wallace that she wanted to cross train staff, and also told Wallace that she wanted Hollingsworth to be the first to get information about STG-related matters during her (Payne's) absence. Payne did not tell Wallace how the duties she had assigned Romero and Hollingsworth affected Wallace's role as assistant STG manager.<sup>6</sup>

37. Shortly before midnight on May 4, Payne sent an e-mail to the lieutenants at SCI and MCCF in which she asked them to advise Hollingsworth and Mackey at MCCF about any STG matters. Copies of the e-mail were sent to Wallace, Romero, Skipper, Hollingsworth, and others.

38. Wallace read this e-mail prior to beginning her next shift at SCI on the morning of May 5. This e-mail was Wallace's first notice that she would not be filling her normal role as assistant STG manager during Payne's absence. Wallace was shocked and offended.

39. Hollingsworth had been too busy to check her e-mail because of her duties on May 4, and had not seen Payne's e-mail when she returned to work the morning of May 5. That morning, Wallace met Hollingsworth in the STG office and told her that she was offended that Hollingsworth had been left in charge of the STG instead of her. This was the first time Hollingsworth heard that she was expected to serve as assistant STG manager during Payne's absence. Hollingsworth then read Payne's e-mails of May 4 and 5, and contacted ISM Carter.

40. On May 5, 2005, Hollingsworth talked with ISM Carter. She told him that she was upset with Payne's decision regarding management of the STG team because she had little experience with STG issues. She also told Carter that she believed that management had pitted her against Wallace and that she did not appreciate it.

Payne telephoned Hollingsworth about an inmate matter a few hours after Hollingsworth's meeting with Carter. Payne told Hollingsworth that she had confidence in Hollingsworth's abilities. Hollingsworth responded that she did not feel comfortable

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<sup>6</sup>Payne insisted that she met with Wallace outside the control room a few minutes after her conversation with Hollingsworth and Romero. Wallace was adamant that she never spoke with Payne on May 3 or 4. We note that a Department investigation found that this conversation between Wallace and Payne occurred, and agree that there was a conversation. We find it more likely than not, however, that during this conversation, Payne did not clearly inform Wallace about the change in STG team duties. If Wallace had clearly understood Payne's plans to reassign certain STG duties, she would have immediately taken steps to investigate and vigorously object to the changes, as she did when she learned of them from Payne's late-evening, May 4 e-mail.

managing the STG because she had no training other than training that Wallace had given her. Hollingsworth also explained that she felt that she had been pitted against Wallace. Payne told Hollingsworth that if she was unwilling to do the STG work she would find someone else to do it. Hollingsworth told Payne “so be it then, I’m not willing to do this to Kari!” Hollingsworth said that if Payne was going to change the way the STG operated, she should tell the whole team about the changes. She asked that Payne meet with the team after she returned from vacation.<sup>7</sup>

41. Wallace called Corrections Officer Mackey at MCCF and asked his opinion of what Payne was doing. Mackey tried to explain Payne’s reasoning. He told Wallace that Payne probably wanted to structure the STG team on the basis of rank, and explained that Payne wanted Hollingsworth, as the highest ranking member of the team after Payne, to take more responsibility for the team.

42. On May 6, Wallace sent an e-mail to ISM Carter; copies of the e-mail were also sent to Superintendent Thompson, Ladeby (who became ISM manager in July 2005), and Institutions Administrator Palmateer. In her e-mail, Wallace summarized conversations with Mackey, Hollingsworth, and Carter. Wallace told Carter that she was offended and insulted by this “attack” and implied that she was considering resigning from the SCI STG team.

43. On May 6, 2005, Palmateer sent an e-mail to Carter and Payne about Wallace’s concerns. Palmateer asked that they talk with Wallace about “any re-structure that may or may not be occurring at SCI,” and also asked that Carter and Payne tell her (Palmateer) about any changes they planned to make in the SCI STG team.

44. On May 8, Wallace sent a lengthy e-mail to Payne, with copies to Carter, Ladeby, Thompson, Allen, and SCI Union Local President Woolery. Wallace forwarded a copy of the e-mail to Palmateer and Department Chief of Security Allen. In her e-mail, Wallace explained that she was “shocked and bewildered” by the poor treatment she had received. She accused Payne and the other managers of treating her with disrespect and making false accusations about her to other staff members.

45. On May 14, Payne responded to Wallace’s accusations in an e-mail to Carter. She stated, in part:

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<sup>7</sup>At hearing, and during the employer’s investigation, Hollingsworth said that Payne told her that Wallace was too close to the inmates and too comfortable in her position as assistant STG manager. Payne strongly denied making these statements to Hollingsworth. The statements attributed to Payne are serious allegations against a Department employee, and Wallace was particularly upset by it. We need not resolve the contradiction.

“I was not restructuring the STG team at SCI at this time. Both parties involved, Sgt. Hollingsworth and Officer Wallace were spoke [sic] to prior to my departure. I explained that I wanted Sgt. Hollingsworth to have some exposure with dealing with interviews of inmates and explained to CO Wallace that we needed to allow other STG team members to become more involved with STG issues. I stated that she [Hollingsworth] was not being appointed as STG assistant manager and asked Sgt. Hollingsworth [sic] if she was up to the task and she stated that she was, although she did request that I explain my intentions throughly [sic] with ‘Kari’ (CO Wallace), so she would not get upset.

“I spoke with CO Wallace of my intentions, and she stated that Sgt. Hollingsworth did not have the experience in dealing STG issues. Although I understand this, it does not discount her (Hollingsworth) years of experience with dealing with inmate issues or behavior. I explained that as a team member, CO Wallace could guide Sgt. Hollingsworth with any questions that she may have. She stated that she would. I also told CO Wallace that she was an important member of the team, her experience and knowledge is appreciated. I also explained to her the importance that we work as a team and support each other, and share training knowledge with each other and again stated that I was not making any changes to the STG team, and stressed that this was training/exposure issue.

“She [Wallace] did state her objections, stating that she was the STG Assistant Manager, I told her that I was not restructuring STG team at this time. I again explained that I wanted everybody to get a chance to step up to the plate, and other members would be getting special assignments as time went on. It was apparent that CO Wallace was not satisfied with my intentions/decision or explanation and it appeared that she only half-listened to my side of the conversation. Unfortunately there was not a direct witness to my conversation with CO Wallace, although it was conducted outside the Control Center at SCI, with both Sgt. Hollingsworth and Cpl Romero posted.

“Now, (5/5 afternoon) I did call Sgt. Hollingsworth at SCI from home. I spoke with her and she did tell me that CO Wallace threatened that my decision would put a strain on their friendship. At no time during this conversation did I state that I was restructuring the SCI STG team, and again stated that I was not appointing her (Sgt. Hollingsworth) to STG Assistant Manager. I did state that all team members will be actively involved in all aspects with STG at SCI. When I asked to speak with CO Wallace to again clarify my intentions, Sgt. Hollingworth [*sic*] requested not to because it may cause further damage to their personal friendship.

“As you recall I also spoke with you the same day about this issue, and again stated at no time in my email did I make Sgt. Hollingsworth a STG Assistant Manager, this email was for Sgt. Hollingworth [*sic*] to get exposure and for training purposes. \* \* \*”

46. From May 15 through May 19, 2005, Payne and Wallace attended a NWGIA gang conference. Wallace and Payne did not speak to one another during the conference. Based on the advice of other employees, Payne thought it best to leave Wallace alone. Wallace believed that it was Payne’s role as the manager and decision-maker to approach Wallace. At Payne’s request, Department STG Manager Beagan spoke to Wallace. He told Wallace that Payne had asked him to use his influence to get Wallace to “stop acting like this.” Wallace professed not to know what “this” meant.

47. On May 18, 2005, Thompson e-mailed Ladeby, directing him to set up a meeting with Ladeby, Payne, and Wallace. Thompson told Ladeby to “clearly articulate to Ms Wallace the direction that the STG program is designed to go and to reassure Ms Wallace that her knowledge and experience is of great value and will be used.”

48. On Friday, May 20, 2005, Wallace sent a short e-mail to all lieutenants at SCI and MCCF, and all SCI security staff, to announce that she was resigning as the SCI STG assistant manager.

49. By letter dated May 20, 2005, Hollingsworth resigned from the SCI STG team. Romero resigned from the team in May as well, because he had not been sent to the NWGIA training and had received no explanation for that decision.

50. On May 25, Wallace filed a formal complaint against Payne with Ladeby. After receipt of the complaint, Ladeby directed Payne not to communicate further with Wallace pending the processing of Wallace's complaint. Ladeby asked Payne for all documents she had relevant to Wallace's complaint. Payne replied that she had not documented her conversations with Wallace.

51. After completing its investigation of Wallace's complaint, the Department concluded that Payne had spoken to Wallace about staffing changes during Payne's vacation, but that she had not done so in a manner calculated to explain her intentions to Wallace. Thompson and Ladeby met with Payne and told her that she "should have communicated new directions of the STG team to all member [*sic*] in a meeting setting." The Department took corrective action and Payne submitted an e-mail or memorandum to her superiors in which she acknowledged that she should have handled the situation differently.

52. The Department did not object to Wallace's resignation from the SCI STG team.

### **Interference in Union election campaign**

53. In May 2005, Wallace learned that the Department planned to investigate a complaint made against her by Officer Kilbride.

54. An election for Union officers took place in the summer and fall of 2005, for terms to begin in October. Nominations for the election took place in July; the vote-by-mail ballots were counted on September 30, 2005. Wallace ran for the office of vice president; she was opposed by Sergeant Clyde Skipper and Officer Hosek.

55. On August 20, 2005, Corrections Officer Brent Robinett entered the employee break room at SCI and saw Corrections Officer Kilbride and Corporal Stephen Tissue sitting very close together and talking. Kilbride and Tissue's conversation stopped when Robinett entered the break room, and Robinett felt that his presence was unwelcome. Later that same day, when Robinett was talking with Lieutenant Carr, Robinett told Carr about Kilbride and Tissue's behavior in the break room and also told Carr that they made him uncomfortable. Robinett asked Carr to talk to Kilbride and Tissue, and Carr agreed to do so.

56. On August 21, 2005, Carr spoke with Tissue about the incident in the break room with Kilbride. Tissue explained that he had been talking with Kilbride in his capacity as Emergency Staff Service representative, a position in which he assisted staff with problems by referring them to available resources. Carr told Tissue that there were several investigations involving Kilbride, and that Tissue should talk with Kilbride

about issues that involved Wallace. Carr said that Wallace was taking retaliatory actions against Kilbride because of information that Kilbride “brought to light” in these investigations, that many staff issues resulted directly from Wallace’s Union involvement, and that Wallace was “evil.” Carr told Tissue to inform Kilbride that she was eligible to vote in the upcoming Union election, and to tell Kilbride that Skipper was the best candidate. Carr explained that she was going to talk to Kilbride, and that it was important that Tissue try to protect Kilbride from Wallace and other employees.<sup>8</sup>

Carr also spoke to Kilbride on August 21 about the incident in the break room involving Tissue; she warned Kilbride to be careful of how other employees perceived her behavior. Kilbride was annoyed about the complaint and told Carr that it probably was made “by just another one of those witches that won’t leave me alone.”

57. On August 24, 2005, Tissue wrote a memorandum to Wallace in which he described his August 21 conversation with Carr. Wallace then complained to Department managers about Carr’s statements about her. The Department investigated the matter and determined that there was no basis for concluding that either Tissue or

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<sup>8</sup>At the hearing, Carr testified that she never made any statements about Wallace when she talked with Tissue on August 21. We find Tissue’s account of that conversation to be more credible for the following reasons. In his memorandum to Wallace, written three days after his conversation with Carr, Tissue provided a detailed, specific account of his discussion with Carr that was consistent with his testimony at the hearing. Carr, on the other hand, wrote an account of her August 21 conversation with Tissue for Human Resources Manager Nees only after Wallace complained about her. In her memorandum to Nees, Carr contradicted her testimony at the hearing: she stated that she could not recall if she discussed Wallace with Tissue on August 21. The testimony of a witness that the witness cannot recall a particular event indicates a faulty memory but is not a denial that the event occurred. We note also that Tissue had little, if any, motive to lie about his conversation with Carr in an effort either to harm Carr or support Wallace and the Union. Tissue was not personal friends with Wallace; the two had only a professional, working relationship. Tissue held no position in the Union and was not a particularly ardent supporter of the Union. Nor is there any evidence in the record to suggest that Tissue disliked Carr and wished to damage her reputation.

Evidence in the record provides a number of reasons why Carr might be critical of Wallace and her relationship with Kilbride. Other employees had warned Carr about Wallace. Carr admitted that she was concerned about problems Kilbride apparently was having at work and discussed this matter with Tissue. It is probable that Kilbride and Wallace had a difficult relationship, since Kilbride complained about Wallace to Department managers in May 2005. It is equally probable that Carr was aware of problems between these two officers, since SCI is a small institution in which information and rumors are readily and quickly spread. Based on all these considerations, we conclude that Carr was concerned about what she perceived as Wallace’s role in creating difficulties for Kilbride. We find it more likely than not that Carr made the statements about Wallace on August 21 that are attributed to her.

Carr was lying, and that the problem may have arisen through a misinterpretation or miscommunication.

58. News of Tissue and Carr's August 21 conversation about Wallace spread quickly through the bargaining unit.

59. When the ballots were counted in the election for Union officers, Wallace was re-elected as Union vice president. Wallace received 17 votes, Skipper received 15 votes, and Hosek received 5 votes.<sup>9</sup>

60. On October 5, 2005, a bargaining unit member e-mailed Union President Woolery to ask how many votes each candidate had received and who was responsible for counting the votes. Other Union members e-mailed Woolery or talked with him and expressed concern regarding how the votes were counted. Union officials could not recall a similar request or controversy in any previous elections.

#### **Department responses to Wallace in her capacity as an Union representative**

61. In mid-2004, at two investigatory meetings in which Wallace represented bargaining unit members, then-ISM Carter told Wallace that her role at the meetings was to sit in silence. This decision was rescinded after Wallace and Woolery complained to Thompson and Palmateer.

62. ISMs who served before Ladeby and superintendents who served before Thompson routinely allowed Union officials to seek and receive information regarding pending investigations. The information did not generally include draft investigative reports or by-products of the investigation, but did include other evidence such as staff rosters for the period of the allegations. SCI officials would also routinely respond to Union requests for updates on the status of an investigation, and provide information such as the entity conducting the investigation (Human Resources, the Special Investigations Unit, or the State Police) and the date on which the investigation would probably be completed.

63. Superintendent Thompson and ISM Ladeby's approach was to formalize, in some respects, the process of supplying information to the Union and narrow the scope of information provided. They followed what they understood to be an unwritten policy of the Department not to provide any information about a pending

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<sup>9</sup>There was no evidence that Carr's statements affected any bargaining unit employee's vote. Although Carr was respected in the bargaining unit, some employees were offended that a management employee would seek to interfere with a Union election.

investigation other than a limited amount of information about the status of the investigation. They never announced this policy to the Union, but simply refused in each case to provide the information they believed would violate the unwritten policy.<sup>10</sup> Meanwhile, Union officials learned of investigations and their progress from the SCI employee and inmate rumor mill.

64. Thompson and Ladeby believed that it was more appropriate to respond to some Union inquiries informally in person or over the telephone, instead of by e-mail or letter. Ladeby would provide information orally to Woolery at labor-management meetings, and to Wallace in conversations as he saw her during his walks through the facility. Wallace and Woolery viewed this more informal type of response as a device to avoid a paper trail.

65. ISM Ladeby often spoke to Wallace in person during his travels through SCI, sitting and talking with her briefly about one issue or another.

66. Ladeby typically receives 100 to 150 e-mails per day, and, at the time of hearing, had approximately 1500 stored e-mails upon which he needed to take some action or otherwise respond.

67. Wallace frequently e-mailed Ladeby and Human Resources Manager Nees. Because of her experience and STG role, Wallace often e-mailed Ladeby regarding issues related to the functioning of the institution. She also sent frequent e-mails to Ladeby regarding Union concerns. Ladeby estimated that he received between three and four e-mails from Wallace each work day. Ladeby usually referred Wallace's operational e-mails to the lieutenant who was OIC.

68. In May 2005, while Wallace was representing Hepner, the Department scheduled an investigative interview during Hepner's swing shift. Wallace worked day shift, and then-ISM Carter refused to allow Wallace overtime for staying to represent Hepner. Other Union officials had been granted such permission in the past. Wallace and the Union ultimately secured a statement from Palmateer that continuing representation by a steward could be extended into overtime hours.

69. Woolery typically attended monthly labor-management meetings for the Union. Wallace rarely attended unless Woolery was unavailable because of institution staffing issues. At these meetings, Thompson and Ladeby would often share

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<sup>10</sup>In mid-2005, the Department began a pilot program in which more information about the status of an investigation at SCI and another institution was shared with the Union. Department officials provided that information to Woolery at labor-management meetings.

information with Woolery about cases and issues that Wallace was handling, and sometimes responded to Wallace's information requests.

70. Wallace and Woolery found that, with a few exceptions, the Department became more responsive to Wallace's information requests after Nees took over the responsibility for responding to them in June 2005.

71. On May 25, 2005, Wallace filed an official complaint against Payne in which she alleged that Payne had inappropriately removed her from her position as assistant manager of the STG team. The e-mail which accompanied the complaint form, stated, in relevant part:

"Attached is an official complaint I am filing on Lt. D. Payne, You already have the other documentation to validate my issues.

"1). Who gave such information to this Lt that would lead her to believe such things.

2). If us as line staff are held accountable for such actions as this, is this proper for a manager to be doing if she is to lead by example. We are unable to use our positions here to dictate things of such nature as this Lt. did."

72. Also on May 25, Wallace sent an e-mail to Thompson regarding an investigation into the complaint filed against her by Kilbride. The e-mail stated, in relevant part:

"I would like to get this going for I have information that I too would like to have brought forward, Let me know when a good time would be \* \* \* "

73. On June 18, 2005, Wallace, in her capacity as Union representative representing a corporal, sent Ladeby an e-mail in which she asked some questions about the allegations against the corporal and asked for specific information about the charges.

Also on June 18, 2005, Wallace, in her capacity as the Union representative for two bargaining unit members accused of misconduct, sent Ladeby an e-mail in which she requested information about the charges and an update on the status of the investigations.

74. On June 23, 2005, Wallace sent Thompson the following e-mail regarding a meeting she had with him as part of the investigation into the complaint she had filed against Payne:

“I am just trying to re-cap yesterdays [*sic*] meeting for my own recollection and record.

“\* \* \* \* \*

“1). Lt. Payne has sent you and/or others one or more emails making official statements that alleged certain conversations occurred which even included alleged responses made by either or both of Sgt. Hollingsworth and myself.

“2). From your conversation I gathered that she is standing by or otherwise reaffirming that the above matters took place and are accurate that she did indeed have conversations with both Sgt. Hollingsworth and myself at the control center?

“For discovery and proper investigation or refutation of these matters, I will need to have copies of all relevant emails and possibly summaries of verbal conversations related to this matter.

“If you have not do [*sic*] so already, I would like for you to direct Lt. Payne to submit a detailed memorandum regarding the entirety of this situation in as much chronological and sensible order as she is able to muster and provide me a copy of that document.

“I was a bit perplexed when you also asked me why I am not grieving this issue? What type of grievance did you expect or would you think proper in this matter?

“ I would be agreeable to submitting that form of complaint in addition to what I considered and informed you of in this meeting of following the procedures of filing a complaint per DOC Policy 20.6.1. If you or others have suggestions of improvements or different methods or subject matter with which to properly submit and resolve this matter \* \* \*.

“During the meeting, you stated that I made 3 different allegations.

“1 ) Slander

“2.) Defamation

“3.) False Accusations

“You then inquired which one is it?”

“You informed me that defamation and slander are two different things. I was wondering if you could better explain that for me and inform me why that would make any difference in submitting this complaint?”

“It is my understanding that with the information you provided me yesterday that I now can add an additional complaint of liable [*sic*] since there is now evidence of slanderous remarks in written form. Would you agree with that understanding or perhaps have a different view? Please share with me your thoughts on this as well.”

75. On June 26, 2005, Wallace sent Thompson the following e-mail:

“I am requesting any and all information memos, emails, documentation that has been initiated to the involvement of Cpl. Tourville being accused of bringing in a civilian into the control center, for investigated [*sic*] purpose to a possible grievance/complaint.”

76. Wallace received no response to the above e-mails from Thompson or Ladeby. Nees, however, answered some of her questions. On June 26, 2005, Union President Woolery e-mailed Thompson and Ladeby and asked them to respond to Wallace’s outstanding requests for information and questions. Woolery attached copies of Wallace’s May 25, June 18, June 23, and June 26 e-mails.

77. Neither Thompson nor Ladeby responded to Woolery regarding Wallace’s e-mails.

78. On August 26, 2005, Wallace e-mailed Nees to ask during what time period on June 4 the Department alleged that the incident regarding Tourville and the

SCI Control Center occurred. On August 29, after some confusion about what information Wallace sought, Nees responded that, "I should not discuss that."

79. On September 7, 2005, Wallace e-mailed Nees to ask why he had updated Woolery regarding the issues Wallace was working on, instead of responding directly to Wallace.

80. During August or September of 2005, Wallace raised some issues with Ladeby about employees injured off duty who sought an early return to work through light or modified duty. Ladeby discussed the issue with Wallace in person, and told her he did not know the Department's position on the issue.

81. On September 28, Department managers met with Human Resource officials and determined the Department's approach to the modified duty issue.

82. On September 29, 2005, Wallace e-mailed Ladeby to determine the status of the Department's decision on modified duty. Ladeby replied that he would soon meet with Thompson and Woolery to discuss the matter. Wallace responded, "Is there a reason why I am not included?" Ladeby replied, "I guess it would be up to Tim and John if they wish to have other union members attend this meeting also." Wallace replied, in part:

"I guess I figured that since I was the one who brought up this issue, and being the VP, I would have been at least given the respect of attending, and not be by passed."

83. On October 13, 2005, Wallace sent an e-mail to Nees, Thompson, and Ladeby in which she requested information regarding the Tourville grievance. Wallace asked for "[a]ll of Cpl. Tourville's performance evaluations starting at the beginning of her employment with the Department \* \* \*." On October 14, Nees responded, "Could you make your request in writing on letterhead?" Nees erroneously believed that a signed document was required to obtain material from a personnel file; he promptly corrected his procedure.

84. When Thompson first became superintendent at SCI, he believed it was appropriate to respond to the Union president regarding most Union matters because the president was on site and responsible for most Union business. In the spring of 2005, because of Union concerns about differing treatment of Wallace's requests, Thompson changed his position and directed Department managers to "respond more directly" to Wallace. After September 22, 2005, when this complaint was filed, Department managers began to provide Wallace with more information in response to her requests.

85. In November 2005, Wallace filed a tort claims notice against the Department, and a lawsuit in May 2006.

86. By the time of hearing, Wallace had become such a controversial figure that some bargaining unit members lost confidence in her representation. However, the number of members seeking her representation has increased since the filing of her tort claims notice and lawsuit.

### CONCLUSIONS OF LAW

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

2. The Department did not violate ORS 243.672(1)(a) or (c) by removing Wallace from her position as assistant manager of the Santiam Corrections Institution Security Threat Group.

The Union alleges that the Department removed Wallace from her position as SCI STG assistant manager in violation of ORS 243.672(1)(a) and (c). Under subsection (1)(a), it is 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.” ORS 243.662 guarantees public employees the right to “form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.”

Subsection (1)(a) prohibits two types of employer actions: those that interfere with, restrain, or coerce employees “because of” their exercise of protected rights, and those that interfere with, restrain, or coerce employees “in” their exercise of protected rights. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 181-82 (2007), *appeal pending*. Here, the Union alleges that the Department’s actions in relieving Wallace of her STG assistant manager duties in May 2005 violated both provisions of subsection (1)(a). We begin our analysis with the Union’s “because of” claim.

In determining whether an employer violated the “because of” portion of subsection (1)(a), we focus on the motive for the disputed action. Evidence of employer hostility or anti-union animus is not necessary to establish a claim under the “because of” prong of subsection (1)(a). A complainant need only show that the employer was motivated by the protected right to take action. *Milwaukie Police Employees Association*, 22 PECBR at 182 (citing *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 92 (2007), *appeal pending*; and *Amalgamated Transit Union v.*

*Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 788 n 8 (1998)).

There is no dispute that Wallace engaged in extensive Union activities that are protected under the Public Employee Collective Bargaining Act (PECBA). Wallace was Union vice president, an experienced steward, and an assertive and vocal advocate for bargaining unit members' rights. The Union alleges that Payne made a *de facto* demotion<sup>11</sup> of Wallace from her position as STG assistant manager by designating Hollingsworth (and not Wallace) as the person in charge of STG activities during Payne's absence. The Union contends that this action was taken because of Wallace's Union activities.

Assuming *arguendo* that the change Payne made in Wallace's duties in May 2005 was a *de facto* demotion for Wallace, the record contains virtually no evidence of a connection between Payne's actions and Wallace's Union activities. Although there is some proof that Department managers in general may have resented Wallace's involvement in the Union and membership in "the Group," there is nothing in the record to suggest that Payne, in particular, had any hostility toward the Union or toward Wallace because of Wallace's role as a Union activist.<sup>12</sup> In fact, Payne chose to re-assign Wallace's assistant STG manager duties to Hollingsworth, also a member of "the Group." Wallace and Payne apparently had a good relationship prior to May 2005, since Wallace actively supported Payne's appointment as STG manager. The Department offered some reasons for Payne's actions, such as the need of a para-military organization to assign duties to the next highest ranking member of the team after Payne and the

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<sup>11</sup>We do not find that the Department actually removed Wallace from her position as assistant STG manager. Payne directed Hollingsworth to supervise STG activities during intake procedures for inmates coming to SCI from another institution, and also told staff that they should contact Hollingsworth about STG matters during Payne's absence. When Wallace complained about Payne's actions to Superintendent Thompson and other Department managers, the Department investigated Wallace's complaint. Payne responded by vigorously denying that she had removed Wallace from her position as assistant manager of the STG team and insisting that she had only reassigned duties in order to give other STG team members more experience. Accordingly, we find that Payne's actions were, at most, a reassignment in which Payne took away from Wallace most of the important duties she had customarily performed as assistant STG manager.

<sup>12</sup>Although evidence of anti-union animus or hostility is not necessary to prove a violation of the "because of" portion of subsection (1)(a), proof of such animosity may suggest an unlawful motivation for an employer's actions. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 n 2 (2007) (citing *Campbell v. Portland Public Schools*, Case No. UP-46-92, 14 PECBR 574, 588 (1993))

desire to give STG team members experience with different types of gang-related issues.<sup>13</sup> The Union never challenged these reasons.

The record does not support the Union's contention that Wallace's *de facto* demotion from the position of STG assistant manager occurred "because of" Wallace's Union involvement.

Next, we consider whether Wallace's *de facto* demotion interfered with, restrained, or coerced employees "in" the exercise of PECBA-protected rights. In analyzing a claim under the "in" portion of subsection (1)(a), we decide if the natural and probable effect of the employer's actions would tend to interfere with, restrain, or coerce employees in their exercise of PECBA rights. *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 145 (2007). Our test is an objective one. If the employer's actions, when viewed objectively, have the natural and probable effect of deterring employees in their exercise of PECBA rights, we will find a violation of the "in" prong of subsection (1)(a). *AFSCME Council 75 v. Josephine County*, 22 PECBR at 93. Employees' subjective beliefs are not relevant to our analysis. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 776 (2004).

A violation of the "in" portion of subsection (1)(a) may be either derivative or independent. A derivative violation occurs when an employer violates the "because of" portion of subsection (1)(a), since the natural and probable effect of such a violation is to chill employees' exercise of PECBA-protected rights. An independent violation occurs when an employer independently violates the "in" portion of subsection (1)(e), usually by making threatening or coercive statements. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 (2007).

Since we have determined that the Department's *de facto* demotion of Wallace did not violate the "because of" portion of subsection (1)(a), we find no derivative violation of the "in" portion. Nor do we find that the Department's actions independently violated the "in" prong of subsection (1)(a). The natural and probable effect of lawful employer conduct, when analyzed objectively, would not be to interfere

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<sup>13</sup>Payne cited the desire to "cross-train" staff as one of the reasons why she assigned Hollingsworth the duties of assistant STG manager during her absence. We do not think an effective manager "cross-trains" an employee by assigning the employee new duties which the employee does not feel qualified to perform without any management support or training. While Payne's decision may have been unwise, however, we do not find it so irrational as to suggest some unlawful motive. *OSEA v. Cove School District*, 22 PECBR at 221.

with, restrain, or coerce employees in their exercise of PECBA rights. *OSEA v. Cove School District*, 22 PECBR at 222.<sup>14</sup>

Finally, we consider whether the Department's *de facto* demotion of Wallace violated ORS 243.672(1)(c), which makes it an unfair labor practice for an employer to "[d]iscriminate in regard to hiring, tenure or any terms or conditions of employment for the purpose of encouraging or discouraging membership in an employee organization." We have defined the word "membership" very broadly to protect a wide variety of union activities. *OSEA v. Cove School District*, 22 PECBR at 223. Our test for determining a violation of subsection (1)(c) is similar to the one we use in determining a violation of the "because of" prong of subsection (1)(a). An employer's conduct violates subsection (1)(c) if there is a causal connection between an employee's protected activity and the employer's action. *Id.* As noted above, in our analysis of the Union's subsection (1)(a) claim, we conclude that there is no causal link between the Department's *de facto* demotion of Wallace and Wallace's Union advocacy. Accordingly, we conclude that these Department actions did not violate subsection (1)(c).

In sum, the Union failed to demonstrate that the Department's *de facto* demotion of Wallace from her position as STG assistant manager violated either ORS 243.672(1)(a) or (c). We will dismiss these allegations of the complaint.

3. The Department violated ORS 243.672(1)(b) when Lieutenant Deborah Carr told a bargaining unit member that Wallace was "evil" and that another bargaining unit member should vote for Wallace's opponent in an election for Union vice president.<sup>15</sup>

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<sup>14</sup>The fact that SCI employees may have been fearful of Union involvement after hearing what happened to Wallace does not affect our conclusion. An employer may, however, violate the "in" portion of subsection (1)(a) if the employer takes adverse action against an employee for legitimate, non-discriminatory reasons and then leads employees to mistakenly believe that the action was taken "because of" the employee's union activities. Under these circumstances, employees' fears about the consequences of union involvement might be objectively reasonable, and the employer's actions could violate the "in" portion of subsection (1)(a). *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 n 13 (1986).

<sup>15</sup>In its post-hearing brief, the Union contended that the Department violated subsections (1)(a), (b), and (c) when Department officials allegedly urged or pressured bargaining unit members to vote against Wallace. In its objections to the Recommended Order, the Department asserts that the Union's complaint alleges only that Department officials violated subsection (1)(b). We agree with the Department, for the following reasons.

The Union alleges that Payne’s August 21 conversation with Tissue—in which Carr called Wallace “evil,” criticized Wallace’s involvement in employee investigations, and told Tissue to tell another employee that the employee should vote for Wallace’s opponent in the upcoming Union election—violated ORS 243.672(1)(b). Under this statutory provision, it is an unfair labor practice for an employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” In order to prove a violation of subsection (1)(b), a union must demonstrate that the employer’s actions actually, directly, and adversely affected the labor organizations’s ability to serve as exclusive representative. *Klamath County Peace Officers Association v. Klamath County*, Case No. UP-18-97, 17 PECBR 515, 526 (1998), *reconsider* 17 PECBR 579 (1998); *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 351 (2003).

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Paragraphs 5 and 6 of the Union’s complaint, as amended, describe Carr’s August 21 conversation with Tissue, and allege that this discussion was an attempt to interfere with the Union election and the administration of the Union in violation of subsection (1)(b). Paragraphs 7 and 8 of the Union’s complaint describe other actions that the Department allegedly took in retaliation against Wallace, including removing Wallace from her position as assistant manager of the STG and refusing to deal with Wallace as a Union steward. Paragraph 10 of the complaint alleges that “[a]s a result of these and other actions,” the Department discriminated against Wallace in violation of subsections (1)(a) and (c). The Union’s complaint thus alleges that specific Department actions violated particular portions of the PECBA. A fair reading of the complaint indicates that the Union pled that Carr’s statements to Tissue about Wallace violated only subsection (1)(b).

The ALJ’s statements regarding the issues to be litigated at the hearing reinforce our understanding of the complaint. In a January 20, 2006 letter to the parties, the ALJ incorrectly identified the issues for hearing as follows: “Did Department officials retaliate against Kari Wallace for her Association activities by urging bargaining unit members to vote against her in an election for Association vice president, pressuring unit members to vote against her, refusing to deal with her as a steward, and removing her from the Department Security Threat Group? If so, did this conduct violate ORS 243.672(1)(a) and (c)?” At the hearing, the ALJ again incorrectly stated the issues to be litigated: whether Department officials violated subsections (1)(a), (b), and (c) when they retaliated against Wallace for her Union activities by urging and pressuring bargaining unit members to vote against her, by refusing to deal with her as a steward, and by removing her from the STG group. The Department objected to this statement, pointing out that “[i]n the complaint the union had certain things going towards the Subsection [*sic*] (b) [allegation], and then other things going towards the (a) and (c) [allegations].” The ALJ responded that “[t]he complaint stands as the definitive statement of the issues.” Based on the pleadings as clarified by the ALJ’s statements in the record, we will consider the Union’s allegation that Department officials urged or pressured bargaining unit members to vote against Wallace only as a violation of subsection (1)(b).

We have held, however, that certain employer statements to bargaining unit members are so inimical to the core values of the PECBA that they violate subsection (1)(b), even if there is no proof that these statements directly affected any union activity. For example, an employer violates subsection (1)(b) when, during a period of negotiations, the employer's representatives bypass the union's designated representatives and make new bargaining proposals directly to employees. We explained that such communications are unlawful, even though there may be no direct proof that the union lost support of its membership or suffered any other actual harm because of the employer's conduct. We have noted that this type of employer communication violates subsection (1)(b) because it undermines a labor organization's ability to fulfill its statutory duties to represent bargaining unit members in negotiations and undermines bargaining unit members' "willingness to rely on and and [sic] trust the Union to protect their interests." *AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, 39 (1999). See also *Blue Mountain Faculty Association v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 773 (2007); *Amalgamated Transit Union v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 576, *adhered to on reconsideration*, 16 PECBR 707 (1996); and *AFSCME Council 75 v. Oregon Health Sciences University*, Case No. UP-37-96, 17 PECBR 343, 363 (1997).<sup>16</sup>

Similarly, we have concluded that an employer interferes with the union's ability to effectively represent its members in violation of subsection (1)(b) when a supervisor disparages the union's role in negotiations, even with no proof of any direct adverse affect on the union. See *AFSCME Council 75, Local 2831 v. Lane County*, Case No. UP-93-89, 12 PECBR 152, 157 (1990) (supervisor's criticism of the union's demand to bargain about a contracting out proposal at a staff meeting violated subsection (1)(b)); and *911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00, 19 PECBR 871, 889 (2002) (director's letter to employees in which he expressed concern and disappointment over the union's desire to bargain about staff schedules and overtime violated subsection (1)(b)).

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<sup>16</sup>In *AFSCME Council No. 75 and Local Union No. 3669 v. Mid-Willamette Valley Senior Services Agency*, Case UP-12-91, 13 PECBR 180, 186 (1991); and *Teamsters Local 57 v. Lower Umpqua Hospital*, Case No. UP-63-90, 12 PECBR 748, 760 (1991), we found that an employer did not violate subsection (1)(b) when its representatives discussed existing negotiations proposals with bargaining unit members. Both cases involved employer comments about negotiations proposals already made to the union's designated bargaining representatives; the employer did not offer new proposals directly to bargaining unit members. We note that we found that the statements made by the employer's representatives in both of these cases violated former ORS 243 672(1)(i), *repealed by* Or Laws 1995, ch 286 § 2. That provision of the PECBA, which prohibited employers from directly contacting bargaining unit members about employment relations during a period of negotiations, was eliminated in the 1995 amendments to the PECBA.

We have also found that a county commissioner's conversation with a union president, in which the commissioner said that he wanted the bargaining unit to be represented by another union and would not negotiate with certain union staff members, violated subsection (1)(b). We rejected the county's contention that these statements were not unlawful because there was no proof of any actual interference with Oregon Public Employees Union (OPEU), the union representing county employees. We stated:

“OPEU, as the exclusive representative of County employees, is entitled to be free of interference in its existence by the County. \* \* \* In this case, the County is interfering not just with OPEU's finances and membership, but with its very existence as the employees' exclusive representative. \* \* \* When one of the three main decision-makers for the County says he wants the employees to get rid of OPEU and not let OPEU staff members participate in bargaining, that directly impacts OPEU by undermining the bargaining unit members' confidence in OPEU as exclusive representative.” *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310, 318 (1999) (footnote omitted).

Consistent with our conclusions in the above cases, we find that Carr's statements about Wallace seriously undermined the Union's ability to perform its duties as exclusive representative, even though these statements did not cause Wallace to lose the election. Carr's statements to Tissue—that Wallace was “evil” and that Tissue should tell another bargaining unit member to vote for Wallace's opponent—interfered with a core Union activity: the election of its officers.<sup>17</sup> Carr's comments were widely circulated

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<sup>17</sup>The context in which Carr made her remarks, as well as the nature of her comments, distinguish this case from those in which we have found that statements by an employer's representative did not violate subsection (1)(b). When a supervisor has a legitimate basis for discussing union-related matters with an employee, we have found no violation of subsection (1)(b). See *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444, 461-62 (2003) (an employer did not violate subsection (1)(b) when it questioned employees about conduct at a union Christmas party that may have violated County rules); and *Klamath County Peace Officers' Association v. Klamath County*, 17 PECBR at 527 (the employer did not violate subsection (1)(b) when it questioned union executive board members about their knowledge of possible improper activity, since the questions were part of a legitimate investigation into the activity). We have also found that a supervisor does not violate subsection (1)(b) when the supervisor makes mildly critical remarks about a union policy in the course of a casual conversation. See *Junction City Police Association v. Junction City*, Case Nos. UP-18-89, 11 PECBR 780, 790 (1989) (supervisor's comment to a union member—that it

among bargaining unit members and may have directly affected members' confidence in the election. Bargaining unit members might naturally have believed that Carr's remarks unfairly influenced other members' choices in the contest for vice president, and began to doubt the integrity of the process.<sup>18</sup>

In addition, Carr's statements not only undermine the Union's internal elections process, but also the Union's independence or perceived independence from the employer. Union members would be less willing to trust the Union to protect their interests against the employer if they believed the employer influenced internal Union elections. Autonomous unions further the purposes underlying the PECBA. One such purpose is to establish "greater equality of bargaining power between public employers and public employees." ORS 243.656(3). Maximum equality cannot be achieved when an employer interferes with union members' ability to freely select their officers. *See also* ORS 243.656(5) (public employees are entitled to representation by a labor union "of their own choice").

We conclude that Carr's statements to Tissue interfered with the Union's administration of its affairs in violation of subsection (1)(b).

4. Department officials did not refuse to deal with Wallace as a Union steward in violation of ORS 243.672(1)(a) and (c).

The Union alleges that the Department refused to deal with Wallace in her role as Union steward, and that these actions violated ORS 243.672(1)(a) and (c). According to the Union, the Department repeatedly responded to Woolery, and not to Wallace, in discussing Union matters and in responding to requests for information. We begin by determining whether these Department actions violate subsection (1)(a).

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seemed unfair that part-time union members paid full-time union dues—did not violate subsection (1)(b)). In contrast to the employers' actions in these cases, Carr had no legitimate reason to discuss the choice of candidates in a Union vice presidential race with a bargaining unit member. In addition, Carr's comments were more than just an the expression of opinion about union matters. Her remarks were intended to influence the vote of at least one bargaining unit member in the Union election. Accordingly, they directly interfered with an important Union activity—conducting an election that is fair and free from undue influence by the employer.

<sup>18</sup>The record shows that after the election, a bargaining unit member asked Union President Woolery how many votes each vice presidential candidate received and also how the votes were counted. Woolery, who has been Union president for ten years, does not recall ever receiving such a request. The request indicates a lack of confidence in the process for electing the vice president.

As noted above, an employer violates the “because of” portion of subsection (1)(a) when it is motivated by the exercise of PECBA-protected activity to take a disputed action. The Union alleges that Department managers refused to give Wallace information about investigations in which she was involved, and gave information about matters in which Wallace was involved to Union President Woolery, rather than to Wallace. According to the Union, these Department actions demonstrate a refusal to deal with Wallace that resulted from the Department’s dislike of Wallace’s role as a Union advocate. We disagree.

Unlike his predecessor, SCI Superintendent Thompson believed that it was not appropriate to give the Union details about ongoing investigations. Thompson’s policy about the amount and type of information provided to the Union during an investigation was one that he implemented for all Union leaders, and not just Wallace. Not unreasonably, Thompson also believed that it was appropriate and desirable to discuss Union-related concerns with the Union president. The Union apparently disagreed with this assumption, and thought that the Union steward involved in a particular matter was the person with whom management should communicate. The Union, however, did nothing to express clearly its position to SCI managers until September 2005, when Wallace questioned Thompson as to why he was not responding to some of her requests for information, and the Union filed this unfair labor practice complaint. Based on this record, we conclude that any Department failure to deal with Wallace was not caused by particular hostility toward Wallace’s exercise of PECBA-protected rights. Instead, we find that the Department’s actions were the result of a change in policy that Thompson implemented, Thompson’s belief that he should deal with the Union president on most Union-related matters, and the Union’s failure to explain clearly the Union steward’s role.

The Union cites a number of e-mails that Wallace sent Department managers in May and June 2005, and contends that the Department failed to respond to information requests contained in this correspondence. The Union alleges that this failure resulted from the Department’s dislike of Wallace’s involvement in protected activities.

It is often difficult to discern exactly what information Wallace sought in her May and June 2005 e-mails to Department managers. These e-mails contain a number of questions—some specific, some general, and some rhetorical. The correspondence appears to be as much assertions of Wallace’s position in regard to a number of disputed Department actions as requests for information. Accordingly, we conclude that any Department failure to respond to Wallace’s May and June 2005

e-mails resulted from confusion as to what Wallace wanted and not from any deliberate desire to ignore her role as Union representative.<sup>19</sup>

The Department did not refuse to deal with Wallace as Union steward or deny her requested information because it disliked or resented Wallace's protected activity. Accordingly, we conclude that, the Department's actions did not violate the "because of" portion of subsection (1)(a).

Since we have concluded that the Department's actions did not violate the "because of" portion of subsection (1)(a), we find no derivative "in" violation of this statutory provision. As we have noted above, an employer independently violates the "in" prong of subsection (1)(a) if the natural and probable effect of the employer's conduct, when analyzed objectively, is to deter employees from exercising rights guaranteed under the PECBA. When we find the employer's actions are lawful, as we do here, we also conclude that the natural and probable effect of such conduct is not to interfere with, restrain, or coerce employees in their exercise of protected activity.

Finally, we consider the Union's contention that the Department failed to deal with Wallace in her role as Union steward in violation of subsection (1)(c). As we have discussed above, we will find that an employer has violated subsection (1)(c) by discriminating against an employee for the purpose of "encouraging or discouraging membership in an employee organization" only when there is a causal connection between an employee's union activity and the employer's discriminatory action. We have concluded that the causal connection between Wallace's protected activity and any Department failure to deal with her as a Union steward is insufficient to show a violation of subsection (1)(a). Accordingly, we conclude the same causal connection is insufficient to demonstrate a violation of subsection (1)(c).<sup>20</sup>

The Union failed to demonstrate that the Department refused to deal with Wallace as a Union steward in violation of ORS 243.672(1)(a) or (c). We will dismiss these allegations of the complaint.

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<sup>19</sup>The Association has not alleged, and we make no finding, that the Department's failure to provide Wallace with requested information was a violation of the Department's duty to bargain in good faith under ORS 243.672(1)(e). See *OSEA v. Colton School District*, Case No. C-124-81, 6 PECBR 5027 (1982)

<sup>20</sup>The Union also put on evidence that then ISM Carter refused to allow Wallace to speak at two *Weingarten* meetings in mid-2004, and alleged that these actions violated subsections (1)(a) and (c). Because this action was filed on September 22, 2005, these events occurred more than 180 days before the date on which the unfair labor practice complaint was filed and are untimely under ORS 243.672(3)

Remedy

The Department violated subsection (1)(b) when Carr told bargaining unit member Tissue that Wallace was “evil,” and also told Tissue to tell another employee to vote for Wallace’s opponent in the upcoming election for Union vice president. We will order the Department to cease and desist from making such statements. ORS 243.676(2)(b).

The Union also requests a civil penalty. The Union’s request does not meet the pleading requirements of OAR 115-035-0075(2). Under this rule, a party must “include a statement as to why a civil penalty is appropriate in the case” along with a statement of the facts supporting the civil penalty request. The Union’s complaint, as amended, asks that we award a civil penalty but provides no statement explaining why such an award is justified and alleges no facts in support of its request. *Lane County Peace Officers Association v. Lane County Sheriff’s Office*, Case No. UP-32-02, 20 PECBR 444, 465 (2003). We will deny the request for a civil penalty.

ORDER

1. The Department shall cease and desist from making statements that interfere with the Union in its role as the exclusive representative of Department employees.
2. The remaining allegations of the complaint are dismissed.

DATED this 26<sup>th</sup> day of March 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.