

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-59-10

(UNFAIR LABOR PRACTICE)

TIGARD POLICE OFFICERS' ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
CITY OF TIGARD,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on October 7, 2011, following a hearing held on March 28, 2011, in Salem, Oregon. The record closed on May 9, 2011, following receipt of the parties' post-hearing briefs.

Daryl Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

Adam S. Collier, Bullard Smith Jernstedt & Wilson, Portland, Oregon, represented Respondent.

On November 15, 2010, the Tigard Police Officers' Association (Association) filed this unfair labor practice complaint against the City of Tigard (City). The complaint alleges that the City's decision to remove Officer Michael Ranum from his tactical negotiation team (TNT) assignment will have the natural and probable effect of chilling employees' exercise of their protected rights under ORS 243.662 in violation of ORS 243.672(1)(a).

The City filed a timely answer to the complaint. The issue is:

Did the City's decision to remove Officer Michael Ranum from his TNT assignment interfere with, restrain, or coerce employees in the exercise of rights guaranteed in ORS 243.662 in violation of ORS 243.672(1)(a), and if so, what is the appropriate remedy?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Association, a labor organization, is the exclusive representative of employees in the classifications of police officer, community service officer, property evidence specialist, police records specialist, and detective secretary in the Police Department (Department) at the City. Officer Glenn Scruggs has been the Association President since the late 1990s.

2. The City is a public employer.

3. Michael Ranum, a police officer, has worked for the Department for more than 20 years. During his employment, Ranum held several Association offices and served on the Association's Executive Board. At the time of the events relevant to the complaint, Ranum was the Association Secretary and an Executive Board member. Due to his long-term and broad experience in the Department, Ranum is one of three Executive Board members to whom employees often bring their questions.

Background

4. The Department has a variety of speciality assignments, including motorcycle, K-9, detectives, school resources officer, narcotics, gang enforcement, tactical negotiation team (TNT), commercial crimes unit, and transit police. During his employment, Ranum has worked in a number of these specialty assignments.

5. The parties' collective bargaining agreement, effective August 31, 2009 through June 30, 2011, included an article addressing specialty assignments. Article 30.3 provided that "[r]ecognizing the right of the City to transfer and assign as determined by the Chief, special assignment pay will be paid per an employee's current assignment * * *." Under this article, a bargaining unit employee was paid from three to five percent of the employee's base salary for a TNT assignment and two and one-half percent of the employee's base salary for a transit police assignment.

6. TNT is a multi-agency team that is overseen by the Washington County Sheriff's Office. TNT is a skilled tactical unit whose members respond to high-risk situations. Officers applying for TNT must pass a difficult assessment test and receive extensive specialized training.

7. Sometime in the 1980s, the City appointed Officer McCleanon to fill its first TNT assignment. In 1992, after Officer McCleanon left his employment, the City appointed then-Officer Art Morton to the TNT assignment. The City later removed Morton from the TNT assignment for an unspecified period of time and for an unspecified reason, but reassigned him to TNT in 1994 or 1995. Morton continued to serve in the TNT assignment after his promotion to sergeant in 2000. Department sergeants are non-bargaining unit positions.

8. In 2000, under Chief Ronald Goodpaster, the Department maintained a policy manual which included Department Directives. On December 12, 2000, Chief Goodpaster issued Directive 00-01, which established the criteria to be used by the Department in making specialty assignments and the duration of these assignments. In regard to the TNT assignment, the Directive stated that "[t]his position is up to a 5-year assignment, based on performance."

9. In January 2001, the Department created a second TNT assignment. Officer Ranum successfully tested for and was appointed to the assignment. When Ranum was assigned to TNT, he was not told it was a five-year assignment. Since Ranum's primary assignment was with the City, the TNT assignment was a secondary assignment. At the time of the events relevant to this complaint, Ranum was paid a five percent incentive for the TNT assignment.

10. Sometime in 2005, Sergeant (Sgt.) Morton left his TNT assignment. Effective December 25, 2005, Detective Zachary Scott successfully tested for and was assigned to TNT. When Scott was initially assigned to TNT, he was not told that TNT was a five-year rotating assignment and believed it was a permanent assignment based on performance. Some time before the events occurred upon which this complaint is based, Scott became aware of the policy which stated TNT was up to a five-year assignment. When Scott asked his supervisor about the five-year term, the supervisor told him not to be concerned.

11. On August 24, 2008, the City assigned Ranum to a specialty assignment as a transit police officer for a two-year term. Ranum received a two and one-half percent salary incentive for the transit assignment. Ranum also remained in his TNT assignment.

12. Sometime after Ranum was assigned to a transit police officer position, Ranum represented the Association during negotiations over extending the term of the transit assignment. During the negotiations, he and another transit officer met with then-Captain (Cpt.) Michael Bell and then-Chief Dickinson. Since there were three officers assigned to transit, the parties agreed to extend that assignment to three years, which allowed one officer to rotate out of the assignment each year and two experienced officers to remain and help train the newly-assigned officer.

13. After the parties agreed to extend the transit assignment to three years, Chief Dickinson told Ranum that he would tell Cpt. Bell that the terms of the employees who were currently assigned to transit should all be extended to three years. Sometime after the three-year term was agreed on, Officer Jarrod Prater was required to rotate out of his transit assignment after only serving two years.

14. In November 2009, Alan Orr became Chief of Police. Orr previously had served as the Department's Assistant Chief for six years and as a captain for two years. After he became Chief, Orr interviewed between 70 and 80 percent of the Department's employees about a variety of matters; two of the questions Orr asked each employee were why had the employee come to work at the Department and what kept the employee there. In response to these questions, fifty to sixty percent of employees interviewed mentioned either the ability to move in and out of specialty assignments or the fact that such assignments were not tied up by senior officers.

15. Soon after Orr became Chief, he made several changes in the Department's policy manual. Due to the number of changes, Association President Scruggs raised concerns about employees having time to review all of the policy revisions. Chief Orr and Assistant Chief Bell told Scruggs that employees would not be held responsible for minor policy changes until they had time to review them.

16. On March 18, 2010, Chief Orr issued Policy 1004, "Promotional Criteria & Specialty Assignments," which addressed the selection for and duration of speciality assignments. The policy, which applied only to sworn, non-supervisory assignments, provided that the duration of a TNT assignment was five years and the duration of a transit officer assignment was three years.

17. Policy manuals and updates are issued to all officers in electronic format. Officers are notified electronically when a new policy or update has been issued and are required to indicate their acceptance, which confirms that they have reviewed and understood the policy. Ranum did not recall seeing Policy 1004. He was unable to review the new policies while in the transit assignment because the transit office's computer system had problems accessing those policies.

Ranum's Removal From His TNT Assignment

18. The City conducts annual employee evaluations. In the Department, these evaluations are completed by an employee's direct supervisor, usually a sergeant. Since February 2010, the City has required all employees to complete an Employee Input Form as part of their annual evaluation. The Employee Input Form is included in the evaluation packet, which is forwarded up the chain of command to the lieutenant, captain, assistant chief, and chief. As part of the Department's evaluation process, the sergeant and/or lieutenant must complete a Response to Employee Input Form, which is provided to the employee and becomes part of the evaluation packet.

19. The Employee Input Form states that "[t]his input form will be of help to both you and your supervisor in reviewing your progress and in future planning. It provides an opportunity to compare your view with that of your supervisor on several issues." The employee is directed to submit the form to the employee's supervisor prior to their performance meeting so the employee and supervisor can discuss the employee's responses at that meeting.

20. In June 2010, Sgt. Tom Duncan evaluated Officer Ranum, rating him as either a successful or an exceptional employee in all categories. On June 16, Ranum filled out his Employee Input Form. Under the question asking what opportunities or experiences would further his career goal, Ranum responded "[l]eaving me in my current position." Under the section for "[o]ther comments/suggestions," Ranum wrote:

"I am currently assigned to the Transit Division and will eventually be forced to rotate out. I enjoy working with the transit unit and do a good job and would like to stay here. Tigard police currently have three officer slots and one sergeant slot in the transit unit. I have been a dedicated and loyal employee to the city of Tigard for over 20 years and will be repaid by having to rotate out and back into a patrol shift. I'm not one that has ever agreed with someone getting something just because they have seniority or any other reason except their performance but where is the loyalty from the city to an employee that has given over 20 years. We are a very young department and have a high turn over [*sic*] rate for a reason."

Ranum did not review or discuss the concerns he raised on the Employee Input Form with any Association officers or other bargaining unit employees before it was submitted. There is also no evidence the Association had taken a position on time limits in specialty assignments.

21. Also on June 16, Sgt. Duncan made the following response to Ranum's Employee Input Form:

"I agree with Officer Ranum's input and his desire to remain at the Transit Police Division. Officer Ranum is well liked and a very valuable officer, however with only a few positions and many potential applicants for those positions it makes it impossible to allow individuals to remain in those positions."

22. After preparing his response, Sgt. Duncan forwarded Ranum's evaluation packet to Lieutenant (Lt.) Mike Eskew for his review. Eskew had been promoted to lieutenant in December 2009. On approximately June 18, 2010, Eskew reviewed Officer Ranum's evaluation packet. Eskew was surprised at Ranum's comment on the Employee Input Form that he was being forced out of his transit assignment, because Ranum knew it was a rotating assignment when he applied for the position. Eskew did not believe Sgt. Duncan's response was adequate, and wrote his own response. Eskew's response stated:

"Mike, I have worked for the City of Tigard for over 14 years now and have watched you work one specialty assignment after another. Your response comes across as very selfish and I'm disappointed that you try to couch your personal agenda as some kind of department issue.

"I know that you are a top notch officer – but you can't expect that you will always get your way. We have other officers that want to work specialty assignments too – might even help some officers decide to stay with our agency if they get the kind of experience and opportunity that you have been afforded."

23. On approximately June 21, 2010, Cpt. Robert Rogers reviewed the information in Ranum's evaluation packet. It is Rogers' practice to review these packets from back to front. After he saw Lt. Eskew's response, he looked to see what Sgt. Duncan and Officer Ranum had written. He then checked the accuracy of Officer Ranum's pay. Rogers understood that Ranum was scheduled to be in the transit assignment for three years.

24. On either June 21 or 22, 2010, Cpt. Rogers took the evaluation packet to Assistant Chief Bell. Rogers told Bell he agreed with Lt. Eskew's response, but was concerned because of its tone, which he believed resulted from Eskew's inexperience as a lieutenant. Bell then checked the whiteboard and determined that Ranum was scheduled to rotate out of his transit assignment at the end of December 2010. Bell

noticed that Ranum's TNT assignment was not listed on the whiteboard and asked Rogers how long Ranum had been assigned to TNT. Rogers indicated that he did not know, but would find out. It was Ranum's comment on the Employee Input Form and Eskew's response that prompted them to look into how long Ranum had been assigned to TNT.

25. In reviewing past records, Cpt. Rogers discovered that Ranum had been assigned to TNT for nine and one-half years. He also determined that at the time Ranum was assigned to TNT, the policy in effect limited the duration of the assignment to five years. On approximately June 22, 2010, Rogers reported this information to Assistant Chief Bell, who asked Rogers what he was going to do. Rogers responded that there were several officers who wanted to be assigned to TNT and, now that they knew Ranum had been in the assignment past the time limit, they needed to address it. Bell agreed with Rogers' assessment. They decided that rather than removing Ranum immediately, they would wait until the end of his transit assignment to give Ranum six months to transition off the TNT team.

26. Rogers also notified Bell that Detective Scott's five-year TNT term would be completed in December 2010, which meant both Ranum and Scott would be rotating off the TNT assignment at the same time. Rogers was concerned this could affect the City's reputation with the other TNT agencies for providing skilled officers and create a problem for the TNT team.

27. On either June 22 or June 23, 2010, Assistant Chief Bell notified Chief Orr that since Officer Ranum had been in the five-year TNT assignment for nine and one-half years, he and Cpt. Rogers had decided to remove Ranum from that assignment at the end of the year when Ranum's transit assignment was also finished.¹ Orr responded by asking how someone stayed in a five-year assignment for nine and one-half years. To be fair to Ranum, Orr asked Bell to look into what other agencies did and whether a five-year term was appropriate for a TNT assignment.

28. On June 23, 2010, Cpt. Rogers sent Officer Ranum an e-mail stating "I have some bad news for you about your T.N.T. position, and need to see you in person

¹Chief Orr could not remember if he was notified of Ranum's situation prior to the time Cpt. Rogers sent Ranum the e-mail about the TNT assignment on June 23. Although it is not critical to our decision, we find it more likely than not that Orr was notified just before or on June 23. Orr remembered learning about Ranum's situation sometime in June and being involved in the decision to remove Ranum from the assignment. He also had final authority to remove officers from such positions. Therefore, it is unlikely that Assistant Chief Bell or Cpt. Rogers would have acted without first notifying Orr.

today. I leave around 1600, please stop by and see me. If you can't make it, call me and let me know." The next day, Ranum called Rogers, who explained that Ranum was going to be removed from his TNT assignment at the end of the year because the TNT assignment had a five-year rotation, and he had been assigned to TNT for more than nine years.

29. Sometime after June 23, 2010, Cpt. Rogers, Assistant Chief Bell, and Chief Orr had further discussions about the appropriate term for the TNT assignment. Based on his prior experience at the City of Portland Police Department, Assistant Chief Bell told them it took approximately two years of training to become a fully operational member of the TNT team. Rogers reported that some agencies had five-year terms and some had longer, but none were longer than ten years. He suggested that the TNT assignment be extended to seven and one-half years. Based on these discussions, Chief Orr decided to increase the duration of the assignment to seven years, which allowed for a two-year training period and five years of solid service. The Department would also then have one trained officer remaining on TNT.

30. On October 7, 2010, Cpt. Jim de Sully, Detective Scott's direct supervisor, notified Scott that the Department had recently issued a policy revision which extended the TNT assignment duration from five to seven years and, as a result, Scott's assignment would be extended from December 25, 2010, until December 25, 2012.

31. From July until October 2010, Cpt. Rogers was on assignment away from the Department. Upon returning, Rogers determined that no one had sent Officer Ranum written notice that he would be rotating out of his assignments. On October 11, 2010, Rogers sent Ranum a memorandum, notifying him that since his transit assignment ended with the next rotation on January 2, 2011, he should bid for his shift and days off based on his seniority in the upcoming bidding process. The memorandum further notified Ranum that after the rotation, Ranum was no longer authorized to participate in TNT activities and Rogers would arrange a time for Ranum to return his TNT-assigned weapons and equipment. Rogers also thanked Ranum for the long service and assistance he had provided to the Department and the community while in his TNT assignment.

32. Some time after Ranum was notified his transit assignment was ending, he told Sgt. Duncan that he had not yet completed three years as a transit officer. Duncan conveyed this information to Lt. Eskew, who raised the issue with Assistant Chief Bell. Bell told Eskew that Ranum's transit assignment had been for two years. Eskew checked and found that the announcement that Ranum had been assigned under was for a two-

year rotation. Later, Duncan told Ranum that Eskew had talked to Assistant Chief Bell, but Eskew didn't think Bell was going to change his mind.

33. Effective December 1, 2010, the Department revised Department Policy 1004, "Promotional Criteria & Specialty Assignments." In the revised policy, the duration of the TNT assignment was changed to seven years.

34. At the beginning of January 2011, Ranum was officially rotated out of his TNT and transit assignments.

35. Association President Scruggs has been part of many discussions with the City about applying rotations to specialty assignments. Scruggs knew that the TNT assignment was a five-year rotation, but had never raised an issue about Ranum being in the assignment longer than five years because of the negative impact it would have had on Ranum.

36. Performance evaluations have been an ongoing issue that employees have discussed with Association President Scruggs. Generally, employees have asked Scruggs if they should be concerned about what they write on their Employee Input Form. Most employees are concerned with the question that asks what an employee could do differently to perform better or be more productive. Scruggs has always told employees to be cautious about what they put on the forms.

37. Since Ranum was removed from his TNT assignment, Scruggs has received an increased number of questions about the Employee Input Form. Three bargaining unit members asked Scruggs about Ranum's situation in relation to filling out their Employee Input Form. These employees included a member of the Association's Executive Board, his wife, and another bargaining unit employee. All three employees were aware of Ranum's situation because they had been present at, or were told about, the Association Executive Board meeting at which the unfair labor practice complaint regarding Ranum's situation was discussed. The three employees asked Scruggs whether they should be honest in providing input on the Employee Input Form and raised concerns that they might not be given discretionary assignments or training based on their input.

38. On January 1, 2011, a Department police officer filled out an Employee Input Form as part of his annual evaluation. That officer advocated for a longer rotation to be able to use the investigative skills he had learned in his specialty assignment and "further and expanded specialty assignment opportunities in order to further my career goals."

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City's decision to remove Officer Ranum from his TNT assignment did not interfere with, restrain, or coerce employees in the exercise of rights guaranteed in ORS 243.662 in violation of ORS 243.672(1)(a).

DISCUSSION

Under ORS 243.672(1)(a), it is unlawful for a public employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” ORS 243.672(1)(a) prohibits two types of actions: (1) those that restrain, interfere, or coerce employees “because of” their exercise of rights guaranteed by ORS 243.662; and (2) and those that restrain, interfere, or coerce employees “in the exercise” of rights guaranteed by ORS 243.662; *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). The Association alleges that the City violated the “in the exercise” prong of ORS 243.672(1)(a) because the removal of Association leader Ranum from his TNT assignment after he raised concerns about working conditions on his Employee Input Form would tend to chill employees in the exercise of their PECBA-protected rights.

In analyzing an alleged “in the exercise” violation, our focus is on the consequences of the employer's actions. *Portland Assn. Teachers*, 171 Or App at 623. Neither the employer's motive nor the extent to which employees are actually interfered with, restrained, or coerced is relevant to our determination. *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). Instead, we seek to determine if, when viewed objectively, the natural and probable effect of the employer's conduct would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under ORS 243.662. *Portland Assn. Teachers*, 171 Or App at 624. Those guaranteed rights include “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.” ORS 243.662.

“In the exercise” violations fall into two general categories. *Malheur County*, 10 PECBR at 521. First, there are the claims that derive from a “because of” violation. In these cases, if we conclude that the employer took an unlawful action because of an employee's activities protected under the Public Employee Collective Bargaining Act (PECBA), we also find that the natural and probable effect of the employer's unlawful

act would be to chill other employees' exercise of their PECBA-protected rights. *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 79 (1995).

The second category of "in the exercise" claims typically occur when an employer's representative makes coercive or threatening statements. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-04-06, 22 PECBR 323, 354 (2008); *Malheur County*, 10 PECBR at 521. The threat must be directed at protected activity; harsh language and "generic expressions of anger that may be made in the heat of a collective bargaining dispute" do not violate subsection (1)(a). *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 42, 259 P3d 932 (2011). An independent "in the exercise" violation may also occur when the employer's statements are not directly threatening or coercive, but have the natural and probable effect of chilling employees' exercise of protected rights. For example, in *Lebanon Community School District*, 22 PECBR at 357, we concluded that school district policies that essentially prohibited a teacher from discussing workplace concerns with anyone other than the superintendent or the teacher's supervising administrator violated the "in the exercise" prong of subsection (1)(a). The policies had the natural and probable effect of discouraging teachers from engaging in PECBA-protected activities such as discussing working conditions with a union representative. *Id.* In addition, an employer could violate the "in" prong of subsection (1)(a) by presenting an entirely lawful act in a way that leads other employees to believe the act was unlawfully based on protected activity. *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316, 331 n 13 (2009).²

Because finding an "in" violation under ORS 243.672(1)(a) is generally based on an employer's threat or implied threat of interference with employees' exercise of protected rights, "[i]n order for a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between the protected activity and the employer's actions or statements." *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95, 16 PECBR 397, 404 (1996). In *Tillamook County Emergency Communications District*, an employer's reorganization deprived some employees of certain contract rights. We concluded that the employer's actions did not violate subsection (1)(a) because no reasonable employee would be "naturally and probably chilled in the exercise of protected rights by a reorganization that was not implemented because of protected activity." *Id.* at 405. In *Lebanon Community School District*, 22 PECBR at 355-56, we held that a school principal's

²The example we gave in that case was of an employer who discharged a union activist for stealing, but warned "other employees that 'this is what happens when you support the union.'" 23 PECBR at 331 n 13.

discussion with a teacher about an e-mail the teacher sent to a school board member did not violate subsection (1)(a). We concluded that the teacher had not engaged in protected activity when she sent the e-mail; as a result, the principal's remarks would be unlikely to deter employees from engaging in protected activity.

Here, there is no relationship between Ranum's or other employees' PECBA-protected rights and the employer's removal of Ranum from his TNT assignment. The record is devoid of evidence linking Ranum's removal to his role as an Association leader. It is undisputed that Ranum was an active Association officer, and that his activities in this position are protected by the PECBA. The Association has not alleged that the City took the actions it did because of Ranum's role in the Association, however. Nor is there evidence that the City considered Ranum's role in the Association when it decided to remove him from the TNT assignment or that the City led others to believe that Ranum's role in the Association was a consideration in this decision.

Even were we to conclude that the City removed Ranum from his TNT position because of his comments on his Employee Input Form, we would not hold that the City's action violated the "in the exercise" prong of subsection (1)(a). Ranum did not engage in PECBA-protected activity when he filled out the form. Ranum's comments on his Employee Input Form constituted an individual protest against his upcoming transfer out of his transit assignment. Ranum did not act in the role of a union representative and did not make the comments on behalf of other employees. The comments were made on his annual evaluation, were intended to help Ranum and his supervisor evaluate his progress and plan for his future, and were related to his identified career goal of remaining in the transit position. In making his comments, Ranum provided a number of personal reasons why the City should leave him in the transit position, explaining that he enjoyed the work, did a good job, and had been a dedicated and loyal employee. Ranum also questioned the City's loyalty to him, as an employee who had worked at the Department for over 20 years, and opined that the Department's workforce was young and had "a high turn over [*sic*] rate for a reason."

Under the PECBA, protected activity does not include an individual's complaints about working conditions and protest actions that are unrelated to a labor organization's activities. *Norris v. Oregon State Police Department*, Case No. C-128-77, 3 PECBR 1994, 2002 (1978) (an individual employee's declaration that "the Superintendent is an uneducated moron" is not protected activity, even though he was also was an active union member); *White v. Oakland School District No. 1*, Case No. C-128-78, 5 PECBR 2830, 2839-40, *AWOP*, 49 Or App 483, 621 P2d 682 (1980) (a teacher, who was part of a group that met with the superintendent to complain about a principal, did not engage in protected activity, absent evidence of the labor organization's

involvement);³ *Lucas v. Coos County Sheriff's Office*, Case No. UP-119-90, 13 PECBR 97, 102 (1991) (an employee's "one-man work-to-rule response" to the employer's decision to eliminate certain positions, in which no other employee participated and which the union did not sanction, was not protected activity); *Lane County Public Works Association, Local 626 and Bushek v. Lane County*, Case No. UP-36-90, 13 PECBR 187, 200-201, *recons den.*, 13 PECBR 233 (1991), *Order on Motion to Stay*, 13 PECBR 260 (1991), *aff'd*, 118 Or App 46, 846 P2d 414 (1993) (a union leader's angry conversation with another employee about the employee's selection for a job for which the union leader had also applied was not protected activity); and *Ridgeline Montessori Public Charter School*, 23 PECBR at 328 (an individual employee's threat to call a strike was a response to the employee's evaluation of the employee; the threat was unrelated to any type of union action, and was not protected activity).

The Association argues, however, that Ranum's comments constituted protected activity because he was an Association leader who raised work-related concerns about the effect of speciality assignment rotations on senior officers. In support of its position, the Association cites *Gresham-Barlow Education Association/OEA/NEA v. Gresham-Barlow School District No. 10J*, Case No. UP-32-07, 23 PECBR 170, *recons*, 23 PECBR 219 (2009), *AWOP*, 241 Or App 352, 250 P3d 38 (2011) and *Lebanon Community School District*, 22 PECBR at 352-53. According to the Association, both cases stand for the principle that an employee who discusses working conditions with employer representatives engages in protected activity that fulfills a fundamental purpose of the PECBA—to encourage peaceful resolution of disputes in the workplace. The Association's reliance on these cases is misplaced.

The facts in *Gresham-Barlow School District* and *Lebanon Community School District* are very different from those presented here. In *Lebanon Community School District*, 22 PECBR at 352, we held that the affected employee acted in her capacity as the union president when she discussed working conditions with a school board member. In *Gresham-Barlow School District*, 23 PECBR at 193-94, we concluded that two teachers, both active union leaders, engaged in protected activity when they raised concerns about compliance with the collective bargaining agreement at staff meetings, asserted that the employer needed to follow the requirements of the contract, and cautioned teachers to check with the union about any violations of their contractual rights.

³We also pointed out in *Oakland School District No. 1* that unlike the National Labor Relations Act, upon which the PECBA is modeled, "ORS 243.662 does not protect employees who engage in 'other concerted activities' than those which are connected to labor organizations." 5 PECBR at 2839. (Footnotes omitted.)

Here, although Ranum was a union leader, he was neither asserting contract rights nor acting for the Association. Instead, Ranum was focused on his personal agenda—to remain in the transit assignment. Even though his comments raised an issue that also affected other senior employees, he was trying to advance his personal interests and not advocating for other employees. His remarks were made on his own evaluation, and not in an Association communication to the employer. In fact, Ranum had not discussed his comments with other Association officers or bargaining unit members prior to making them. Therefore, even though Ranum was a known Association officer, a reasonable employee would not be chilled in the exercise of protected rights by the City’s decision to remove Ranum for reasons unrelated to protected activity. At most, Ranum’s removal may affect how employees complete their Employee Input Forms, an activity we have concluded is not PECBA-protected.⁴

When we hold that an employer acted for lawful reasons, as we have here, we generally conclude that the employer’s lawful conduct, when viewed objectively, would not have the natural and probable effect of chilling employees in the exercise of their protected rights. *See Oregon School Employees Association v. Lebanon School District No. 16C*, Case No. UP-53-91, 13 PECBR 292, 299 (1991), citing to *Oregon School Employees Association v. Morrow School District No. 1*, Case No. UP-39-89, 12 PECBR 398, 407 n 7 (1990); *Coos County Sheriff’s Office*, 13 PECBR at 103-104. Only in limited circumstances have we held that an employer’s lawful actions violate the “in the exercise” prong of subsection (1)(a). In *Gresham-Barlow School District No. 10J*, 23 PECBR at 194-97, we concluded that the employer had mixed motives for transferring two teachers. Although the employer considered the teachers’ union activities in deciding to transfer them, the employer had other legitimate reasons for making the transfers. We concluded that the employer’s actions were not taken “because of” the teachers’ exercise of protected

⁴The Association argues that the Department’s stated reason for removing Ranum is a pretext. In support of this argument, it asserts that no one had ever been removed from a TNT assignment; that others believed it was not a term-limited appointment; that Ranum was treated differently than Detective Scott, who was not removed from his TNT assignment; and that Ranum was removed from his transit assignment early. We do not find the Association’s arguments persuasive.

Contrary to the Association’s assertion, Ranum was not the first officer to be removed from a TNT assignment; Officer Morton was removed from his TNT assignment for a period of time. The City’s treatment of Ranum and Detective Scott was based on enforcement of the same policy regarding the duration of the TNT assignment. In Scott’s case, application of the policy extended the length of his TNT assignment; in Ranum’s case, it led to his removal. It is unclear why the City permitted Ranum to remain in his TNT assignment for as long as it did. Regardless of the City’s failure to enforce the term-limit policy in regard to Ranum in the past, Chief Orr clearly intended (and enacted policies to require) that *all* special assignments have limited terms. We find nothing pretextual about the City’s actions.

activities. We held, however, that the transfers would have the natural and probable effect of deterring bargaining unit members from exercising their protected rights. In *Tri-County Metropolitan Transit District*, 17 PECBR 780, we concluded that an employer's decision to discharge an employee it had previously decided to suspend was not made "because of" the employee's union activity. We held that the employer's disciplinary decision violated the "in the exercise" portion of subsection (1)(a) because the employer decided to discharge the employee while the employee was utilizing the grievance procedure to challenge the suspension. We concluded that, given the timing of the employer's action, "any reasonable employee—knowing that a prior grievant's challenge of a suspension led to the grievant's termination—would certainly hesitate to challenge any form of discipline through the grievance procedure." *Id.* at 789. (Footnote omitted.)

The facts of this case can readily be distinguished from those in *Gresham-Barlow School District* and *Tri-County Metropolitan Transit District*. The City's reasons for its actions are entirely lawful. It removed Ranum from his assignment because he had worked nine and one-half years in a five-year assignment. The City never considered Ranum's union activities in making this decision. The City's decision to look into the length of Ranum's TNT assignment did not arise when Ranum was pursuing a grievance or engaged in any other type of other protected activity. Therefore, we conclude that the natural and probable consequences of the City's lawful conduct, when viewed objectively, would not tend to interfere with, restrain, or coerce employees in the exercise of their protected rights in violation of ORS 243.672(1)(a). We will dismiss the complaint.

ORDER

The complaint is dismissed.

DATED this 25 day of June 2012.



Susan Rossiter, Chair

*Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Gamson, Concurring

I agree with the outcome but not with my colleagues' process and reasoning. My colleagues significantly, and in my view unnecessarily, rewrote large portions of the ALJ's Recommended Order even though neither party objected to it. They added a significant amount of new text, and they removed several pages of the ALJ's reasoning that were well-written, correct,⁵ and directly responsive to the parties' arguments.

Our docket is crowded and our decisions are unacceptably slow. In my view, there are better uses of our time than rewriting Recommended Orders that do not require it.



*Paul B. Gamson, Board Member

⁵My colleagues made one necessary correction. They removed a single word—"inevitably"—from the ALJ's statement of the test we use to determine if there is a violation of the "in the exercise" prong of ORS 243.672(1)(a).